

Strict Liability for Building Works



Two recent cases highlight the tendency of the courts locally to impose strict liability for offences in relation to building works. This article by J.A. McInnis asks whether the courts are too hasty in their findings.

It is the leading principle in the criminal law that a person may not be convicted of a crime unless the prosecution has proved two things beyond a reasonable doubt. First, that he caused an event or is responsible for a state of affairs that is forbidden; second, that he had a defined state of mind in relation to causing the event or the existence of the state of the affairs. The law refers to the first as the *actus reus* and to the second as the *mens rea*. I will refer to them as the ‘act’ and the ‘intention’. Absence of either the act or the intention normally leads the prosecution’s case to fail. However, while this is the leading principle in the criminal law it is not without exception. The most important of the exceptions, and the one that has come up in two recent cases lately, is that of strict liability.

Strict Liability

Strict liability offences do not require proof of intention of every element of a crime for the crime to occur. The fact is that an offence can be said to be strict liability if no intention has to be proved for only one element of the crime. Normally the element is significant, but this does not mean that intention does not have to be proved for the other elements. This is a rule of law and it comes

from one of the most important cases on this subject: *Gammon (Hong Kong) Ltd v A-G Hong Kong* [1985] AC 1 which, as it happens, was decided by the Privy Council on appeal from Hong Kong. In the *Gammon* case Lord Scarman referring to the Buildings Ordinance said: “Each provision clearly requires a degree of *mens rea*, but each is silent whether it is required in respect of all the facts which together constitute the offence’. It is for this reason that liability is described as strict only and not total or absolute. However, it is also this fact which seems to have been lost in two recent cases in Hong Kong.

The Two Cases

In *R v Anwell Building Construction Co Ltd and Ors* (unrep Mag App No 590 of 1996) convictions were imposed on the defendants under section 40(2B)(a) of the Buildings Ordinance while in *R v New Best Restaurant Ltd* (unrep Mag App No 448 of 1996) convictions were imposed under sections 14(1), 40(1) and (5). In both cases the convictions were imposed on the defendants as “persons directly concerned” with building works within the meaning of those sections. In *Anwell* timber formwork and rebar collapsed from a

building under construction and damaged some motorcars below while in New Best demolition was undertaken without consent of the Building Authority. Both cases cited and relied upon the Gammon case to hold that these sections created strict liability offences. However, in Anwell the Gammon case was relied on not to overcome proof of intention but to support an inference that the defendants caused the collapse; that is, the act or the first two points mentioned above that the prosecution must prove for a conviction. Conversely, in New Best the court focused on the offence in its social context and not its statutory context or wording.

Too Hasty

The convictions in the recent cases may have been justified. But, in reading both cases, it seems that the court was too hasty in making its findings. While it is true that the Gammon case generally construed the Buildings Ordinance, the holdings of the court in Gammon pertain to different sections of the Ordinance from those construed in Anwell and New Best. In fact, the justices in Gammon made the point several times that they were dealing only with two subsections in detail and, even with respect to those two, Lord Scarman said:

“it does not follow that, if one sub-section should create an offence of strict liability, the other must also do so”. As a result, it was only after long analysis that the Privy Council was able to conclude, “that to the extent indicated the offences charged against the appellants are of strict liability”.

A Postscript

In short strict liability offences are rare. They are also generally unpopular. The fact that they have been found in previous cases under certain sections of the Buildings Ordinance does not mean that all offences under the Ordinance are also strict liability. Relief from proof of one element under one section should not relieve the prosecution from its normal obligation for proof of all other elements to constitute a crime. The reasons for this are numerous and obvious. These reasons are underscored by the fact that building alone is not a crime and moreover something which should be encouraged rather than discouraged.

J.A. McInnis teaches law at the Faculty of Law at the University of Hong Kong and is the author of Hong Kong Construction Law.

AAC

If You Are a Frequent Traveller, This Is For You

THE HONG KONG & MACAU AIRLINE TIMETABLE, PUBLISHED SINCE 1978 IS THE ONLY COMPREHENSIVE FLIGHT-SCHEDULE FOR HONG KONG & MACAU. UPDATED EVERY MONTH AND AVAILABLE AT ALL MAJOR BOOK STORES PRICE: HK\$ 30.00 PER ISSUE / HK\$ 240.00 (12 ISSUES)

Pocket-sized Flight Schedule comes in an easy to use format including essential travel information such as:

- Local and regional airline reservation contact numbers and addresses
- All airline departure and arrival schedules for Hong Kong & Macau
- Hotel Listings in Hong Kong, Macau and across the region
- International weather guide
- International public holidays
- Car rental & Courier companies
- IDD Codes
- Currency Conversion.....and more

FOR A FREE COPY FAX THIS FORM TO 28511933, 25819531

Name..... Company.....
 Title..... Address.....
 Telephone..... Fax..... E-mail.....
 Trips abroad in the past 12 months..... Class: First/Business/Economy

FOR FURTHER DETAILS PLEASE CONTACT Ms BECKY CHAU OR Ms BETTY YEUNG
 THOMSON PRESS HONG KONG LTD.
 ROOM 203 HOLLYWOOD CENTRE, 233 HOLLYWOOD ROAD, HONG KONG.
TEL: (852) 2815 9111 / 28516963 FAX: (852) 2851 1933 / 2581 9531