Whatever Happened to . . . *R. v. Sault Ste. Marie*: the Due Diligence Defence

Peter Bowal and Lindsey Iss

> There is an increasing and impressive stream of authority which holds that where an offence does not require full *mens rea*, it is nevertheless a good defence for the defendant to prove that he was not negligent.
>
> – *R. v. Sault Ste. Marie*, per Dickson J. at page 1313

Introduction

In 1985, shortly after he became Chief Justice of Canada, Brian Dickson was speaking to a large group of law students at the University of Alberta. The last question he was asked was "what was your favourite judicial decision that you were involved in?"

The Chief Justice paused. The audience sat quietly, enthralled about what case, if any, he would pick from his already prolific 12-year career on Canada's top court. Most assumed he would name one of the seminal interpretive *Charter of Rights* cases and principles to which he made major contributions.

"My favourite case was *Sault Ste. Marie*," he replied confidently. "That case is a good example of creating doctrine to serve important legal purposes. This article describes the decision in the case of *R. v. Sault Ste. Marie* [1978] 2 SCR 1299 and its impact on Canadian law.

Proof of Criminal or Regulatory Guilt

To obtain conviction on a crime, the Crown must, by its own evidence, prove full mental intention (*mens rea*) beyond a reasonable doubt. That is a high standard of proof, one that is justified by the serious consequences that flow from criminal conviction.

Prior to 1978 in Canada, persons accused of public welfare regulatory offences such as liquor law offences, pollution, misleading advertising, traffic infractions and securities offences, were convicted if the Crown prosecutor could merely prove the accused did the offence.

Prior to 1978 in Canada, persons accused of public welfare regulatory offences such as liquor law offences, pollution, misleading advertising, traffic infractions and securities offences, were convicted if the Crown prosecutor could merely prove the accused did the offence. No intention at all needed to be proven for these many less serious municipal, provincial or federal regulatory offences. This *absolute liability* rendered it almost impossible for someone to defend against such charges. If the offence had occurred, one was judged guilty, even though one did not intend to do it or had acted reasonably to prevent the offence from occurring.

Mr. Justice Dickson, writing for a unanimous Supreme Court of Canada in *R. v. Sault Ste. Marie* pointed out that treating all these public welfare offences with the same absolute liability served to punish the innocent and add nothing to deterrence. He wrote at para 1311:

> There is no evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of a breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others?

He went on to judicially adopt a middle ("half way") category of intent for some of the more business-related regulatory offences such as pollution. This category is known as the *strict liability* offence, and it gives rise to the *due diligence* defence.

Persons charged with many such regulatory offences are not now automatically guilty under absolute liability principles. They can take the stand at trial to convince the judge of their innocence on the basis of what they did to prevent the offence from taking place. This new middle category of strict liability allows the courts to protect the public from harm without the harsh punishment of absolute liability on one hand and without burdening the Crown to prove guilt beyond a reasonable doubt that accused intended to commit the offence.

Facts of the Sault Ste. Marie Case

The Ontario city of Sault Ste. Marie hired Cherokee Disposal as a contractor to dispose of the city's waste. Cherokee Disposal's disposal site bordered Cannon Creek, which ran into Root River. This site had fresh water springs that flowed into the creek. Cherokee Disposal submerged the springs and disposed the municipal waste. Some of this waste seeped through the artificial barrier into the groundwater, polluting the creek and eventually the Root River. The Root River also flows into the St. Mary's River which in turn empties into the eastern end of Lake Superior. Surface water intake in Lake Superior supplies about half of the municipal water to the 75,000 residents of Sault Ste. Marie.

Justice Dickson defined and inserted the category of strict liability as a halfway point between full *mens rea* and absolute liability.

The pollution of Cannon Creek and Root River led to charges against both the City and Cherokee Disposal, under s. 32(1) the *Ontario Water Resources Commissions Act*:

> … every municipality or person that discharges, or deposits, or causes, or permits the discharge of deposits of any material of any kind into any water course, or any shore or bank thereof, or in any place that may impair the quality of water, is guilty of an offence…

The trial judge found that the City had nothing to do with the actual operations. Cherokee Disposal was an independent contractor and its employees were not city employees.

Supreme Court of Canada Decision and Impact

Justice Dickson (as he then was) defined and inserted the category of strict liability as a halfway point between full *mens rea* and absolute liability. He recognized different standards of proof according to three categories of offences (pp 1325-26):

There are compelling grounds for the recognition of three categories of offences rather than the tradition two:

1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness must be proved by the prosecution either as an inference from the nature of the act committed or by additional evidence.
2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care, this involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonable believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all the reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.
3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

4. Offences which are criminal in the true sense fall in the first category. Public welfare offences would *prima facie* be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as "wilfully," "with intent," "knowingly," or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.

Public welfare regulatory offences are strict liability offences. After proof that the offence occurred, the burden shifts to the accused to show that reasonable care was taken to prevent the wrongful act. In a prosecution for an environmental offence, for example, the Crown would demonstrate that the accused discharged a harmful substance into the river. The accused may then show that this was a mistake or that many precautions were in place to prevent this from happening. The accused faces a negligence-type standard of proving reasonable and prudent actions in the circumstances, even though the offence still occurred. This "due diligence" defence is today written in to most regulatory offence legislation.

The corporate manager may show what reasonable steps were taken to prevent the offence. What is reasonable will depend upon the circumstances of the case, including that manager's role in the corporation and in the offence.

This middle category strikes a fair compromise to both the accused and the Crown on behalf of society. The Crown does not have to prove fault and mental intention beyond a reasonable doubt. The accused can explain what happened and escape liability where one's actions were reasonable.

The Requirement of *Mens Rea* According to Type of Offence

Full *Mens Rea*	Strict Liability	Absolute Liability
proof of a guilty act committed with full intention beyond a reasonable doubt	- *prima facie* proof of commission of the offence - due diligence defence	- commission of offence proved - *mens rea* assumed; no defence on basis of lack of intention
CRIMINAL CODE CRIMES	WIDE RANGE OF REGULATORY OFFENCES	

The City of Sault Ste. Marie 35 Years Later

This "due diligence" defence is today written in to most regulatory offence legislation.

Water pollution concerns in St. Mary's River were not identified until 1985, seven years after the Supreme Court decision. Sault Ste. Marie is a border town – with cities of the same name in Michigan and Ontario. The pollution had originated from various industrial sources. Environment Canada and the Ontario Ministry of the Environment, the U.S. Environmental Protection Agency and the Michigan Department of Environmental Quality all signed a Letter of Commitment toward ecological restoration of this area. A three-stage remediation plan was created on the Canadian side. The city has committed to keep its water clean through continuous surveillance and maintenance, something that started with this pollution prosecution 35 years ago.

Peter Bowal is a Professor of Law and Lindsey Iss is a B.Comm. student at the Haskayne School of Business, University of Calgary, in Calgary, Alberta.