Strict liability and recklessness

B (a minor) v. *DPP* [2000] AC 428 (HL), [2000] 2 WLR 452, [2000] 1 All ER 833, [2000] 2 Cr App R 65, [2000] Crim LR 403, noted (2000) 11 King's College LJ 261-65 (K. Campbell).

During a bus journey B, a boy aged 15, persistently requested a 13-year-old girl to perform oral sex. He was charged with inciting a girl under 14 to commit an act of gross indecency contrary to s. 1(1) of the Indecency with Children Act 1960. B claimed that he had honestly believed that the girl was over 14. Nonetheless, he altered his plea to guilty after the Youth Court justices ruled that the offence was one of strict liability in respect of the victim's age, and that therefore his state of mind concerning her age was irrelevant. B appealed ultimately to the House of Lords, arguing that since the Children Act 1960 did not specify a mens rea requirement, the common law presumption that mens rea was necessary should apply: and that, since he had thought the girl was over 14, he lacked the intent or recklessness presumptively required. The Crown argued that the offence was one of strict liability following *Prince* (1875) LR 2 CCR 154 [S&S § 6.1(i)], and that subsequent legislation had confirmed this approach; especially since an express exception had been created in s. 6(3) of the 1960 Act whereby belief as to age could provide a defence in limited circumstances.

In an important decision, the House of Lords allowed B's appeal. It ruled that the common-law presumption of mens rea applied to s. 1(1) of the 1960 Act:

> "In these circumstances the starting point for a court is the established common law presumption that a mental element, traditionally labelled mens rea, is an essential ingredient unless Parliament has indicated a contrary intention either expressly or by necessary implication. The common law presumes that, unless Parliament indicated otherwise, the appropriate mental element is an unexpressed ingredient of every statutory offence." (Lord Nicholls)

Specifically, the decision is authority that the common-law presumption of mens rea is not overridden in the context of the particular offence in s. 1(1). (B's honest belief therefore meant he lacked mens rea and must be acquitted.) More generally, the significance of the decision is that:

1. It endorses, resoundingly, the approach taken in *Sweet* v. *Parsley* [1970] AC 132 (HL) [discussed in S&S § 6.1(i)-(ii)] when determining what mens rea, if any, is required in a statutory offence where the statute is silent on that issue. The starting point is a strong presumption that mens rea is required. The presumption is only to be overridden if there is a *necessary implication* that Parliament intended the offence to be strict. This requirement is fulfilled only if such a reading is "compellingly clear" (Lord Nicholls, with whom Lord Irvine agreed), "sufficiently clear" (Lord Steyn) or "necessary" (Lord Hutton, whose speech Lord Steyn also endorsed; also Lord Mackay).

2. Where the presumption of mens rea is not rebutted, this means that intention or recklessness is required as to the relevant actus reus elements. Hence a mistake, at least of the sort B made, has no special status but, rather, has the same effect as the purported mistake in *Morgan* [1976] AC 182: it means simply that the defendant lacks mens rea.

3. Correspondingly, there is no logical space left for the old independent general defence of "reasonable mistake" found in *Tolson* (1889) 23 QBD 132. [See S&S § 18.1(iv).] Either the defendant has mens rea or he does not.

4. Although the point is not discussed formally, it seems clear that the standard of recklessness required under the common law presumption is *Cunningham* recklessness.

> Nonetheless, the case modifies the *Cunningham* test where the recklessness is in respect of circumstances. As Lord Nicholls put it (at 841; see also 836), "the necessary mental element ... is the absence of a genuine belief by the accused that the victim was 14 years of age or above." This is a *negative* test of subjective recklessness: D will be held reckless about a circumstantial element of the offence unless he had a positive belief that the circumstance was lacking. It is not required that D actually foresaw the risk that the girl was aged below 14 years. Rather, it is sufficient that D lacked a belief that she was over that age. This seems to confirm the preferred view of the law on recklessness about circumstances, discussed in *Simester and Sullivan*, § 5.2(iii) (see, in particular, the second alternative discussed there).

None of this means the end of strict liability. Although the starting point in offences silent on the matter is that every such offence is presumed to involve mens rea, that presumption can be overridden. A good example of this is *DPP v K* [2001] Crim LR 134:

> In that case K, aged 26, indecently assaulted V contrary to s. 14 of the Sexual Offences Act 1956. V was aged 14, and by s. 14(2) of the 1956 Act a girl under the age of 16 cannot in law consent to an indecent assault. However, K believed that V was aged 16, because she had told him so.

The Court of Appeal refused to overrule the existing authority that liability is strict as to age in the offence of indecent assault, notwithstanding the decision of the House in *B* v. *DPP*. The two decisions are not contradictory. In *K*, the Court of Appeal rightly started with a presumption that the offence in s. 14 required mens rea as to all elements, but was led by various factors (in particular, the statutory history) to conclude that the presumption was overridden in respect of age where the victim was under 16, and that Parliament had intended that particular element of the offence to be one of strict liability. The sorts of factors that might rebut the presumption of mens rea are discussed in *Simester and Sullivan* at § 6.1(ii).