REGULATORY OFFENCES

Driving under the influence — Interpretation of the Road Traffic Act 1961-1964, s. 47(1)

The recent decision of the Full Court of the Supreme Court of South Australia in *August* v. *Fingleton*,[1] is important not only because of the conclusions reached as to the scope and operation of the offence of driving under the influence of alcohol or a drug, but also because of the view taken of the High Court decision in *Proudman* v. *Dayman*,[2] the most influential Australian decision on the application of the doctrine of strict responsibility to regulatory offences.[3]

While driving his car, the appellant, a diabetic, suffered an unexpected and apparently sudden attack of hypoglycaemia.[4] As a result he lapsed into a semi-comatose state rendering him incapable of exercising effective control of the vehicle within the meaning of the Road Traffic Act 1961-1964, s. 47(1).[5] The attack had been caused by the over-action of the dose of insulin the appellant had given himself earlier that day. However, the attack was also attributable to some other factor such as emotional stress or physical exertion, for the dose of insulin had been normal and the appellant had not changed his diet. He was convicted by a magistrate of driving whilst so much under the influence of alcohol or a drug as to be incapable of exercising effective control and he appealed to

1. [1964] S.A.S.R. 22.
2. (1941) 67 C.L.R. 536.
3. For a detailed examination of this decision and its implications see generally Howard: *Strict Responsibility* (1963). The term 'regulatory offence' embraces those classes of summary offences where proof of *mens rea* is usually not required. See Howard, *op. cit.*, 1, n.3.
4. Hypoglycaemia is a condition produced by a deficiency of sugar in the bloodstream due to the presence of excess insulin in the body. A normal dose of insulin may produce this condition in a diabetic when he changes his diet, exerts himself physically, is under emotional stress, or is suffering from minor infections, such as a cold. Some diabetics are so unstable that it is impossible to find a normal dose which will prevent attacks of hypoglycaemia occurring. Attacks of hypoglycaemia can occur with little or no warning.
   Hyperglycaemia, as opposed to hypoglycaemia, is the condition where sugar accumulates in the bloodstream as a result of insufficient insulin. The symptoms are apparently similar to those of hypoglycaemia.
   The above facts are taken from the judgment.
5. The relevant part of this section provides as follows:
   (1) A person shall not—
      (a) drive a vehicle; or
      (b) attempt to put a vehicle in motion, while he is so much under the influence of intoxicating liquor or a drug as to be incapable of exercising effective control of the vehicle.
   For an outline of the corresponding provisions in other Australian States see Wiseman and Vickery: *Motor and Traffic Law* (2nd ed. 1960), 310-312.

the Supreme Court against this conviction on the following grounds. Firstly, that *mens rea* was an element of the offence or that at least it was a defence to show a non-negligent unawareness of the fact that he was so much under the influence of alcohol or a drug as to be incapable of exercising effective control.[6] Secondly, that the prosecution had not established beyond a reasonable doubt that the incapacity to exercise effective control was due to the influence of a drug.

The Full Court rejected the contention that *mens rea* was an element of the offence. Although the Privy Council in *Lim Chin Aik* v. *The Queen*[7] seemed inclined to favour *mens rea* as the basis of liability in regulatory offences, the Court held that the approach adopted in that case was similar to the approach of the High Court in *Proudman* v. *Dayman.*[8] The following extract from *O'Sullivan* v. *Harford,*[9] an earlier decision of the Full Court, was cited to illustrate what this latter approach was:

> Speaking generally an act is not a crime unless the actor knows that he is doing the act which is prohibited, but, in the case of a statutory offence, it is for Parliament to frame the terms of the prohibition and 'where there is an absolute prohibition of the doing of the act, *scienter* forms no part of the offence, and the absence of it affords no defence' (*Reynolds* v. *G. & H. Austin & Sons Ltd.*;[10] *R.* v. *Prince*[11]). In any case in which the statute requires motive, knowledge or the like to be proved the prosecution must fail if it is not proved (*Bank of New South Wales* v. *Piper*[12]). But there is the intermediate case in which affirmative evidence of the *mens rea* is not required, but its absence is a defence, *i.e.*, if the accused can show an honest and reasonable belief in facts which, if proved, would make the act charged innocent (*ibid; Maher* v. *Musson;*[13] *Proudman* v. *Dayman*[14]).
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> In the present case it is not suggested that the prohibition . . . is absolute . . . but the difficulty that arises is that which must arise when the offence consists of doing an act 'wilfully' or 'knowingly', and the prohibition is in two limbs

6. Since the appellant's actions were not rendered completely automatic, sane automatism could not have been pleaded. For a discussion of this defence in relation to offences of strict responsibility see Howard: *Strict Responsibility* (1963), 199-201. Cf., *e.g., H.M. Advocate* v. *Cunningham* [1964] Crim. L.R. 475.
7. [1963] A.C. 160.
8. (1941) 67 C.L.R. 536.
9. [1956] S.A.S.R. 109, 114.
10. [1951] 2 K.B. 135, 145.
11. (1875) L.R. 2 C.C.R. 154, 171.
12. [1897] A.C. 383 (P.C.), 389.
13. (1934) 52 C.L.R. 100, 104.
14. (1941) 67 C.L.R. 536, 538, 540.

> leaving it uncertain whether the word, which imports *scienter,* applies to both. We have considered all the cases, that we can find, in which that question has been or might have been raised . . . but we think that all that they show is that there is no clear principle which can be invoked for the solution of the problem. The answer must depend upon the form of the enactment, and the purpose it is intended to serve.[15]

Applying this approach the Court held that the purpose of section 47(1) indicated that *mens rea* was not an element of the offence:

> The act of driving a motor vehicle on a public highway is one that involves a grave risk to life and limb as well as to the property of other people, unless it is done with the appropriate degree of care and skill. The purpose of the rules laid down by the Road Traffic Act is to keep this risk down to the, more or less, irreducible minimum. It follows that in prohibiting such things as driving without due care (see *R.* v. *Coventry*[16]), or to the danger of the public (see *Hill* v. *Baxter*[17]) or by persons incapable of exercising effective control of the vehicle, the legislature is not concerned with the moral quality of the act, but with the risk of injury to others.[18]

Furthermore if *mens rea* were an element of the offence the provision 'would be reduced to absurdity' for it would not apply to cases where a driver is, for example, too drunk to realize he is incapable of exercising effective control.

Influenced by this view of the purpose of section 47(1) the Court did not discover in the form of the provision any legislative intention to punish only *mens rea.* Instead, following *Armstrong* v. *Clark per* Lynskey J.,[19] the Court held that all the prosecution need establish to obtain a conviction is (1) that the accused was either driving or attempting to drive a motor vehicle, and (2) that he was so much under the influence of alcohol or a drug as to be incapable of exercising effective control of that vehicle.

The Court therefore concluded that not only is *mens rea* not an element of the offence of driving under the influence, but also that the offence is one of strict responsibility. The contention in the second limb of the appellant's first ground of appeal that negligence ('the half-way house between *mens rea* and strict responsibility'[20])

15. [1956] S.A.S.R. 109, 114.
16. (1938) 59 C.L.R. 633, 637.
17. (1957) 42 Cr.App.R. 51.
18. [1964] S.A.S.R. 22, 25.
19. [1957] 2 Q.B. 391, 395. The Court also relied on *Ainsworth* v. *O'Sullivan* [1955] S.A.S.R. 323. With respect, it would seem that the issue involved in that case was the interpretation of a provision corresponding to section 47(2) and not whether the doctrine of strict responsibility was applicable.
20. Glanville Williams: *Criminal Law* (2nd ed. 1961), 262.

is the basis of liability under section 47(1) was not expressly considered in the judgment.

The appellant's second ground of appeal was also rejected. The Court was satisfied that although there may have been some other factor rendering him more susceptible to an attack of hypoglycaemia than he might otherwise have been, he was so much under the influence of a drug, insulin, as to be incapable of exercising effective control.

The Court was able to distinguish *Watmore* v. *Jenkins*,[21] a decision of the Divisional Court in England, relied on by the appellant. In that case, a diabetic suffering from infective hepatitis was prescribed an increased dose of insulin to counteract that condition. While he was driving the condition of his liver improved and he suffered an attack of hypoglycaemia as a result of the excess insulin in his body. It was held, dismissing a prosecutor's appeal against an acquittal on a charge of driving whilst unfit to do so through drink or drugs, that in view of the special facts of the case the justices were entitled 'to entertain a reasonable doubt whether the injected insulin was more than a predisposing or historical cause comprised in a situation or state of equilibrium upon which the reduction of cortezone [through the improvement of the liver condition] operated as the effective cause of the hypoglycaemic episode'.[22]

The two main grounds for distinguishing this decision are to be found in the following passage:

> In the first place, it seems to us that although the words of the enactment—'whilst so much under the influence as to be incapable'—do, admittedly, import causation, they do not import the 'effective cause', in the sense which that expression was used in actions for negligence prior to the Wrongs Act Amendment Act 1951 . . . the words of the enactment are satisfied, if it is proved that alcohol or a drug, as the case may be, was a 'continuing and contributing cause' of the incapacity. In the present case, all the doctors are agreed that the hypoglycaemic episode would not have occurred, if the appellant had not taken the insulin, and there is no evidence of any *novus actus interveniens*.[23]

The first ground appears to be that the wording 'so much under the influence of alcohol or a drug' in section 47(1) imports a

21. [1962] 2 Q.B. 572. The Court also doubted whether it would have reached the same conclusion as the Divisional Court had it decided *Watmore* v. *Jenkins*.
22. [1962] 2 Q.B. 572, 585.
23. [1964] S.A.S.R. 22, 27.

different test of causation from the wording 'unfit to drive through drugs' in the English provision construed in *Watmore* v. *Jenkins*. The second ground appears to be that the improvement of the respondent's liver in *Watmore* v. *Jenkins* was a *'novus actus interveniens'* whereas the unknown factor which contributed to the attack of hypoglycaemia in the instant case was not. This point of distinction is consistent with the axiomatic statement made in both cases that the question of causation is always one of fact.

The conviction of the appellant on the charge of driving under the influence was therefore upheld.[24] As the Court did not regard the offence as 'trifling' within the meaning of section 47(4) it did not alter the statutory period of disqualification of three months imposed by the magistrate. However the order for the payment of costs made by the magistrate was discharged.

Strict Responsibility and the Defence of Reasonable Mistake of Fact

Perhaps the most important point decided in the instant case is that the approach towards the doctrine of strict responsibility adopted by the Privy Council in *Lim Chin Aik* v. *The Queen*[25] is similar to that adopted by the High Court in *Proudman* v. *Dayman*[26] a decision often regarded as the turning-point in a trend, apparent in numerous Australian decisions, towards the recognition of negligence as the basis of liability in regulatory offences.[27]

With respect, the similarity is not clear. In *Proudman* v. *Dayman* it was held by Dixon J. (as he then was) that in the construction of modern statutory offences there is a presumption that an honest and reasonable mistake of fact will be a ground of exculpation.[28] It is clear from subsequent cases[29] that where this presumption

24. An appeal against a conviction on a charge of driving without due care and attention under the Road Traffic Act 1961-1964, s. 45, however, was allowed.
25. [1963] A.C. 160.
26. (1941) 67 C.L.R. 536.
27. For a full discussion see Howard: *Strict Responsibility* (1963). Cf. *Norcock* v. *Bowey* (15 February 1966), a decision of Chamberlain J. of the South Australian Supreme Court (as yet unreported). With respect, however, there no reference was made to several relevant authorities, *e.g.*, *Lenzi* v. *Miller* [1965] S.A.S.R. 1; *Dowling* v. *Bowie* (1952) 86 C.L.R. 136.
28. (1941) 67 C.L.R. 536, 538. The objection may be raised that the other two members of the High Court in *Proudman* v. *Dayman*, Rich A.C.J. and McTiernan J., did not share these views. McTiernan J. favoured imposing strict responsibility, and it is not clear from the judgment of Rich A.C.J. whether he agreed with Dixon J. or not. However, in view of the eminence of Dixon J. perhaps this objection has little force. See Howard: *Strict Responsibility* (1963), 85-87.
29. *Dowling* v. *Bowie* (1952) 86 C.L.R. 136, *per* Dixon C.J.; *Belling* v. *O'Sullivan* [1950] S.A.S.R. 43; *Lenzi* v. *Miller* [1965] S.A.S.R. 1; *Tanner* v. *Smart* [1965] S.A.S.R. 44.

applies an accused will only be exculpated if the Court considers that the mistake of fact was, as a matter of law, reasonable. For this reason it is arguable that the purpose of raising the defence is to establish facts from which the Court can infer that the accused was not negligent. If it were merely to negative an implied *mens rea*, as was stated in *O'Sullivan* v. *Harford*,[30] the requirement of reasonableness would be of evidentiary significance only.[31]

In *Lim Chin Aik* v. *The Queen*, however, the only reference to the concept of negligence by the Privy Council appears in the following qualification the Board made to the rule of interpretation that the purpose of an enactment may indicate a legislative intention to impose strict responsibility:

> But it is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim. This principle has been expressed and applied in *Reynolds* v. *G. H. Austin & Sons Ltd.*,[32] and *James & Sons Ltd.* v. *Smee; Green* v. *Burnett*.[33] Their Lordships prefer it to the alternative view that strict liability follows simply from the nature of the subject-matter and that persons whose conduct is beyond any sort of criticism can be dealt with by the imposition of a nominal penalty. This latter view can perhaps be supported to some extent by the *dicta* of Kennedy L.J. in *Hobbs* v. *Winchester Corporation*[34] and of Donovan J. in *R.* v. *St. Margaret's Trust Ltd.*[35] But though a nominal penalty may be appropriate in an individual case where exceptional lenience is called for, their Lordships cannot, with respect, suppose that it is envisaged by the legislature as a way of dealing with offenders generally. Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, their Lordships consider that, even where the statute is

30. [1956] S.A.S.R. 109, 114.
31. See, *e.g.*, *Thomas* v. *The King* (1937) 59 C.L.R. 279, 299, *per* Dixon J. See also Howard: *Strict Responsibility* (1963), 99-105.
32. [1951] 2 K.B. 135.
33. [1955] 1 Q.B. 78.
34. [1910] 2 K.B. 471.
35. [1958] 2 All E.R. 289.

> dealing with a grave social evil, strict liability is not likely to be intended.[36]

The essence of this qualification appears to be as follows. If the imposition of strict responsibility would result in the conviction of a class of persons whose conduct is not negligent, then although the legislature may have contemplated the punishment of those who are negligent but who do not possess *mens rea,* the offence should be construed as one requiring proof of *mens rea.* With respect, it is doubtful whether this application of the concept of negligence adds anything but additional confusion to the existing body of English law.[37] Whatever the effect of the decision is, however, it is quite clear that the Privy Council did not regard negligence as an appropriate basis of liability in regulatory offences.

It would seem therefore that the approach of Dixon J. in *Proudman* v. *Dayman* may be essentially different from that of the Privy Council in *Lim Chin Aik*'s case. However, it could be argued that in one respect that two approaches are similar. In *Proudman* v. *Dayman* Dixon J. apparently contemplated that the presumption would not apply to certain offences:

> But other considerations arise where in matters of police, of health, of safety or the like the legislature adopts penal measures in order to cast on the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced. In such cases there is less ground, either in reason or in actual probability, for presuming an intention that the general rule should apply making honest and reasonable mistake a ground of exoneration, and the presumption is but a weak one.[38]

It is difficult, however, to assess the weight to be attached to this statement for the offence construed in *Proudman* v. *Dayman* undoubtedly related to 'matters of police . . . or safety'. In any event, later in his judgment Dixon J. said: '. . . unless from the words, context, subject-matter, or general nature of the enactment some reason to the contrary appears, you are to treat honest and reasonable mistake as a ground of exculpation, even from a summary offence'.[39] As it is arguable that no reason usually exists for rejecting negligence as a basis of liability in favour of strict responsibility[40]

36. [1963] A.C. 160, 175.
37. Whenever strict liability is imposed consistency necessitates the conviction of a 'class' of persons whose conduct is not negligent. See, *e.g., Norcock* v. *Bowey* (*supra* n. 27), and note *Patel* v. *Comptroller of Customs* [1965] 3 W.L.R. 1221 (P.C.), 1226, 1227.
38. (1941) 67 C.L.R. 536, 540.
39. *Id.* at 540.
40. See Howard: *Strict Responsibility* (1963), chap. 1; also Howard: 'Not Proven', 1 *Adelaide Law Review,* 269. Cf. *Norcock* v. *Bowey* (*supra* n. 27).

it would seem that the similarity between the approach of Dixon J. and that of the Privy Council in *Lim Chin Aik's* case may be minimal.

It is submitted that in view of the cogent arguments which may be advanced against the doctrine of strict responsibility[41] the approach of Dixon J. in *Proudman* v. *Dayman* is preferable to that of the Privy Council in *Lim Chin Aik* v. *The Queen* and the Full Court in *O'Sullivan* v. *Harford* and the instant case. For this reason it is submitted, with respect, that in subsequent cases, no shackle of precedent[42] should prevent the escape of an accused who can establish that he made a mistake of fact which was reasonable.

Strict Responsibility and Driving under the Influence

In the instant case the Court, as a result of equating the approach of the High Court in *Proudman* v. *Dayman* with that of the Privy Council in *Lim Chin Aik* v. *The Queen*, concluded that section 47(1) imposed strict responsibility. With respect, the wisdom of this conclusion may be questioned on several grounds. Firstly, it has not been proved that strict liability is a more effective means of keeping, for example, the road toll to the irreducible minimum than liability based on negligence.[43] In view of this it seems undesirable to convict those whose conduct is not negligent especially since the penalties prescribed by section 47(1) are severe.[44] Secondly, since no reference is usually made in criminal statutes to the requisite mental element, it is arguable that the neutral wording of section 47(1) does not indicate a legislative intention to impose strict liability.[45]

This latter view is supported by the harshness of the results strict liability produces under section 47(1). For example, a diabetic who suffers a sudden unexpected attack of hypoglycaemia, or a person who consumes a small quantity of alcohol which has a sudden unexpected deleterious reaction on, for example, a stomach complaint, will be convicted, disqualified from driving, fined, and, in the

41. See *supra* n. 40.
42. *Lim Chin Aik* v. *The Queen*, being a decision of the Privy Council on appeal from Singapore, is presumably binding on courts in this jurisdiction. See *Corbett* v. *Social Security Commission* [1962] N.Z.L.R. 878, where the New Zealand Court of Appeal seems to have regarded itself as bound by *Robinson* v. *South Australia* [1931] A.C. 704, a decision of the Privy Council on appeal from South Australia. The authority of *Lim Chin Aik's* case, however, is considerably weakened by the apparent failure of the Privy Council to consider the contribution made by the High Court of Australia in this field.
43. See Howard: *Strict Responsibility* (1963), 24-26.
44. Cf. section 47(4), and see n. 46 *infra*.
45. See Howard: *Strict Responsibility* (1963), 9-12.

case of a second offence, imprisoned.[46] The effect of the instant decision, therefore, may be to dissuade from driving many diabetics and many persons who consume even a small quantity of alcohol or drugs quite insufficient in itself to produce an incapacity to exercise effective control.[47] It is questionable, despite the increasing road toll and the problem of motor-vehicle insurance, whether section 47(1) was intended to operate in this way.

However, if the defence of reasonable mistake of fact were available the above objections would have no force. Nor would section 47(1) be 'reduced to absurdity' for the driver who is too drunk to realise he is incapable of exercising effective control could not establish the defence either because he did not make any conscious mistake of fact[48] or because his mistake would be considered unreasonable. Furthermore, no unreasonable demand would be made of the prosecution, for to establish the defence both the persuasive and evidentiary burdens of proof lie on the accused.[49]

It is submitted that in view of the almost universal reliance on alcohol as a palliative and the increasing use of drugs, whether in a socially approved form such as sedatives, tranquillisers or insulin, or in a less socially approved form such as pep-pills, poppy seeds or lysergic acid, it is important that the apparent uncertainty as to the basis of liability under section 47(1) be settled, one way or the other. It may be desirable, in view of the conflicting authorities, for the legislature to enact the appropriate amendment to this provision.

Finally, it may be noted that in the instant case the result may possibly have been the same if the defence of reasonable mistake of fact had been available to the appellant. Even if he had in fact

46. Only rarely would the provisions of the Justices Act 1921-1960, s. 75 (2), (4), (7) (S.A.), apply.

47. One further possible effect of the decision may be to encourage diabetic drivers to reduce their normal dose of insulin so as to lessen the chance of suffering an attack of hypoglycaemia, for the diabetic who suffers an attack of hyperglycaemia while driving can be convicted only of a less serious offence than driving under the influence. See *infra,* 406, 407.

48. One requirement of the defence of reasonable mistake of fact is that the accused must make a conscious mistake of fact; see, *e.g., Proudman* v. *Dayman.* It may be noted, therefore, that this defence differs from the defence the appellant in the second limb of his first ground of appeal contended was available under section 47 (1). This contention may have been based on *dicta* of Napier C.J. in *Thomas* v. *O'Sullivan* [1951] S.A.S.R. 149, 151. However, for the view that a conscious mistake of fact may not be an inflexible requirement of the defence of reasonable mistake of fact see Howard: *Strict Responsibility* (1963), 88-96.

49. This is not clear from the judgment of Dixon J. in *Proudman* v. *Dayman.* However, see now *Lenzi* v. *Miller* [1965] S.A.S.R. 1, 16, *per* Bright J.; *Tanner* v. *Smart* [1965] S.A.S.R. 44; but cf. *Norcock* v. *Bowey* (*supra* n. 27).

made a conscious mistake in believing either that he was not under the influence of alcohol or a drug or that he was capable of exercising effective control, it would have been open to the Court to hold that he had been negligent in making such a mistake.

Interpretation of 'Influence'

In distinguishing *Watmore* v. *Jenkins*,[50] the Court held that the wording 'so much under the influence' in section 47(1) imported a different test of causation from the wording 'unfit to drive through drugs' in the corresponding English provision. However, the nature of this different test is not clear. The 'continuing and contributing cause' test is, with respect, unhelpful for it is arguable that it would be satisfied even if the cause were merely a factual as opposed to a 'legal' cause. The later reference to the notion of *'novus actus interveniens'* makes it clear, however, that something more than proof of factual causation is required. As the Court did not require the alcohol or drug to be the 'effective cause' of the incapacity to exercise effective control perhaps it had in mind the distinction between 'a substantial cause' and 'the substantial cause', a distinction drawn in some decisions on the offence of causing death by dangerous driving.[51]

Whatever the test is, however, it is clear that a person in the position of the appellant in the instant case, or a person who consumes, for example, 20 ozs. of beer which reacts on a defective liver condition to produce an incapacity to exercise effective control will come within section 47(1).[52] Although this type of case may not have been contemplated by the legislature,[53] perhaps the main reason why the operation of the provision may be too wide is not the above interpretation of the word 'influence' but the exclusion of the defence of reasonable mistake of fact.

Interpretation of 'Drug'

In the present case the question whether insulin is a 'drug' within the meaning of section 47(1) apparently was not raised. Although there is clear authority that it is,[54] it would seem that the case of the diabetic driver was not considered by the legislature when

50. [1962] 2 Q.B. 572. See *supra* 400, 401.
51. *E.g., Gould* [1963] 2 All E.R. 847; *Curphey* (1957) 41 Cr.App.R. 78.
52. See *Wickens* (1958) 42 Cr.App.R. 236, an authority relied on in the instant case.
53. See *Ainsworth* v. *O'Sullivan* [1955] S.A.S.R. 323, 325.
54. *Armstrong* v. *Clark* [1957] 2 Q.B. 391; *Thomas* v. *O'Sullivan* [1951] S.A.S.R. 149.

enacting section 47(1) for this provision applies only to a diabetic who suffers an attack of hypoglycaemia. The diabetic who suffers an attack of hyperglycaemia,[55] a condition which apparently may be equally dangerous to other road-users, can be convicted only of the lesser offences of driving without due care and attention or driving recklessly or in a manner dangerous to the public, prescribed by the Road Traffic Act 1961-1964, ss. 45, 46, respectively.

It is submitted therefore that a separate offence relating to diabetic drivers be enacted. As in the case of the offence of driving under the influence, in the interest of certainty it may be desirable that the legislature should indicate whether or not this offence is one of strict responsibility.

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TRUSTS

Tracing the profits of trust money in a mixed fund

In *Scott* v. *Scott*[1] the High Court was presented with an opportunity to discuss an area of the law which, although the subject of academic speculation, has never been directly considered in an authoritative case. The issue raised was the availability of a proprietary remedy to a beneficiary when a trustee has, by investment of trust funds mingled with his own, acquired property which has increased in value. The existence of a proprietary remedy enabling the beneficiary to participate in that increased value has long been settled in America, but only recognised with respect to severable property in English and Australian law. Certain fundamental principles of equity would, however, appear to be relevant, and on reference to these the extent of the High Court's decision seems to be justifiable neither by the reasoning advanced nor the exigencies of the facts.

The original action in the Supreme Court of Victoria[2] was brought against the executrix of the estate of a deceased trustee, W. H. Scott.

55. See *supra* n. 4.

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1. *Scott* v. *Scott* (1964) 109 C.L.R. 649; [1964] A.L.R. 946. A single judgment was delivered by a Court composed of McTiernan, Taylor and Owen JJ.
2. *Scott* v. *Scott* [1964] V.R. 300.