GRAEME JOHN COTTERILL

KILBRIDE REVISITED: TIFAGA v DEPARTMENT OF LABOUR

SUBMITTED FOR THE L.L.B.(HONOURS) DEGREE AT THE VICTORIA UNIVERSITY OF WELLINGTON.

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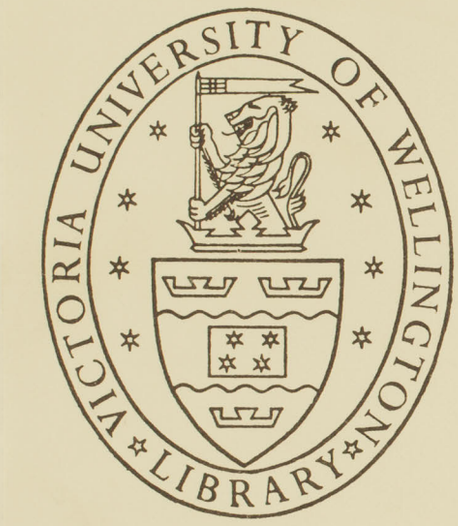
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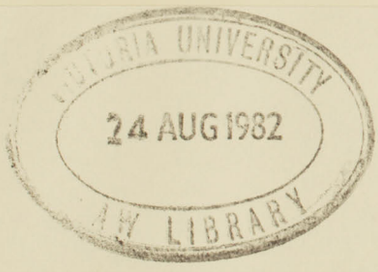
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1. INTRODUCTION

1.1: BACKGROUND:

It has been nineteen years since Woodhouse J. gave his judgment in Kilbride v Lake[1] in the Supreme Court of New Zealand. Since then it has attracted much comment and analysis, both favourable and unfavourable, within New Zealand and in other countries.[2]

It has been considered in three New Zealand cases before this present case; namely Police v Taylor[3], Helleman v Collector of Customs[4] and Andrew and Andrew v Transport Dept[5], but Kilbride was not followed in any of them, nor was Woodhouse J.'s judgement approved or disapproved. Kilbride v Lake has been mentioned in passing in Barr v Civil Aviation Dept.[6] (only in the arguments of counsel) and in Waimak Ltd v Transport Dept.[7]

So it can be seen that before Tifaga v Dept of Labour[8] was recently decided, there had been no case which had followed Kilbride, nor was there a case which had any evaluative statement of that case. Therefore, when the decision of Roper J. in the Christchurch Supreme Court[9] was appealed to the Court of Appeal it gave that Court (consisting of Richmond P. Richardson J. and Woodhouse J, the originator of Kilbride) its first opportunity to evaluate the validity and scope of Woodhouse J.'s decision in Kilbride.

1.2; THE FACTS:

The case was heard and decided on the 29th May and 21st November, 1980 respectively. The facts were not in dispute at any stage of the proceedings. The appellant, Tifaga, had entered New Zealand in 1974 with a temporary entry permit issued under S.14 of the Immigration Act 1964. The permit was extended from time to time and on the final occasion it was extended to 10th August 1979.

S.14(b) gave the Minister the right to revoke the permit at any time and this the Minister did on 28th July, 1979, as the appellant was about to be released from a six months' sentence of imprisonment. S.14(6) further provided that it was an offence not to leave New Zealand within such time as the Minister prescribed. The Minister had prescribed that Tifaga must leave New Zealand within 21 days of the revocation of the entry permit and this he failed to do.

Tifaga had only $10 cash when he received the recovation notice on the eve of his release from prison. He had no luck obtaining a job and sought a

tax refund but had only $70 cash available on the expiry of the 21 day period. The cost of the airfare to Western Samoa was $330. Through his solicitor he asked for an extension of his permit until he had sufficient funds or alternatively that his airfare by paid by the immigration authorities. Both requests were denied.

1.3; THE APPEAL

Tifaga based his appeal on the argument that his failure to leave New Zealand was involuntary, and relied on Kilbride v Lake to support this. The appellant had been convicted by Mr Bradford S.M. in the Christchurch Magistrate's Court and had unsuccessfully appealed to the Supreme Court.[10]

The Court of Appeal unanimously dismissed the appeal but all three judges delivered separate judgements, Richmond P. giving a short judgement, agreeing in principle with the judgement of Richardson J.

Woodhouse J. applied the same reasoning he had adopted in Kilbride v Lake to the Tifaga situation and upheld his reasoning in the former case as a valid form of analysis.[11] He also clarified and explained that particular reasoning.

In Kilbride the defendant was charged with operating a motor vehicle without displaying a current warrant of fitness; the Court accepted that there had been a proper warrant in position when the defendant left the car but that it had unexplainedly disappeared during his absence. The defendant did not remove the warrant but had failed immediately to replace it, because he was not in the vicinity at the time the warrant disappeared.

Woodhouse J. in Tifaga, repeated his finding in Kilbride that, whether the offence was one of strict liability or not , the defendant must be shown to have 'caused' the offence in the sense that the actus reus cannot have 'occurred fortuitously or as the result of the acts and omissions of somebody else over whom he had no control and for whom he had no responsibility.[12]

He emphasised that in Kilbride he found that the actus reus was not within the 'conduct, knowledge or control' of the defendant and therefore that the chain of causation was broken[13]. He explained that when the offence is in the form of an omission (as in Kilbride[14]), tests of causation are difficult to apply and Woodhouse J.s solution in Kilbride, as explained in

Tifaga, would be to decide whether causation and thus responsibility lies in a 'just and acceptable test which in terms of causation, volition, opportunity, will enable the occurence to be linked with the defendant'[15]. Because the omission in Kilbride could not be attributed to the defendant in terms mentioned above, Woodhouse J. held in that case that the defendant had been incorrectly convicted.[16]

Considering the facts before him in Tifaga, Woodhouse J. held that there was no difficulty in finding that Tifaga had caused the omission (not leaving New Zealand by the time proscribed), and that his financial difficulties could not be regarded as an intervening cause interrupting the chain of causation because the position the defendant found himself in was caused by his own failure in his responsibility to ensure at all times that he had the means to leave New Zealand.[17]

Richardson J. first of all made it clear that the alternative options (suggested by counsel for the respondent) of obtaining a loan or working his passage on a boat had no'basis in reality' and were not real options available to the appellant.[18] He stated that it was common ground that the offence was one of strict liability.[19]

The learned Judge further stated that there were differing approaches and forms of analysis to the type of defence upheld in Kilbride, and that the important consideration is to determine what factors must be present to find a defendant guilty (having regard to the particular statute creating the offence.)[20] Richardson J. found that the questions of 'freedom of choice' inevitability', 'impossibility' etc did not have to be decided in Kilbride but that the facts of Tifaga differed substantially from those in Kilbride and the learned Judge preferred to consider the defence raised as one of 'impossibility of compliance', although he considered this as one of the several possible approaches to the question.[21]

This particular defence is one of common law, but it must be remembered that by virtue of S.20 Crimes Act 1961 this defence can only apply where not inconsistent with the particular statute.[22] Richardson J. went on to consider a series of cases which outlined the scope of the impossibility defence.[23] and concluded that: 'The principle of impossibility proceeds from the premise that the legislature is not be assumed to have intended to punish for failure to perform the impossible.'[24]

However the learned Judge concluded that the scope of the defence would not protect a person from criminal responsibility if the impossible situation that person found him/herself in arose through the fault of the defendant him/herself.[25] Applying this principle to the present facts of Tifaga, Richardson J. held that the defence of impossibility was open to a defendant charged under S.14 (6) Immigration Act but that in this case the defendant was the 'author of his own misfortunes' because a temporary permit holder should at all times ensure he has sufficient funds to leave the country if required to do so.[26]

Richmond P. also preferred to consider the defence raised as one of impossibility as such was discussed by Richardson J. but for the same reasons as the latter Judge held that the defence must fail.[27]

It is therefore to be seen that all three Judges dismissed the appeal for what are substantially the same reasons but that Woodhouse J. approached the issue in question from a significantly different angle than that which Richmond P. and Richardson J. adopted.

Several aspects of interest to the criminal law are raised by this case. I shall in particular take a close look at:

A. Woodhouse J.'s form of analysis.
B. The scope and limitations of the impossibility/inevitability defence.
C. Whether, and to what extent, involuntariness, impossibility/inevitability, and lack of causation are defences to strict liability offences.
D. To what extent Tifaga reflects recent judicial trends.

2. THE WOODHOUSE ANALYSIS

2.1; DIFFICULTIES CAUSED BY KILBRIDE v LAKE:

Woodhouse J.'s form of analysis in Kilbride v Lake has caused difficulties amongst some observers in its interpretation.

It is common ground that whether or not mens rea was a constituent part of the particular statutory offence in Kilbride was irrelevant to Woodhouse J.'s decision as the defence he outlined was not one involving denial of mens rea but one denying an actus reus attributable to the defendant. This is stated without doubt in the judgement in Kilbride,[28] and reiterated by Woodhouse J. in Tifaga.[29]

However, this was not understood in Police v Taylor[30], where Turner J. concluded that the important question in Kilbride was whether mens rea was a necessary element of the offence or not. This was, with respect, clearly wrong, as the Kilbride decision revolved around the question of whether the defendant was responsible for the actus reus of the offence.

Kilbride was not applied in Andrew and Andrew v Transport Dept[31] where the defendant company was convicted of operating a motor vehicle in such a manner as to emit an excessive amount of smoke, an offence in its wording strikingly similar to that in Kilbride. The commission of the offence was unbeknown to the driver and caused by an unexpected mechanical failure, but McCarthy J. held that the appellant company operated a vehicle in the forbidden condition and that was an end to the matter.[32] Woodhouse J. could have said exactly the same of the Kilbride situation.

Kilbride was not applied in another case, Kelleman v Collector of Customs.[33]

There, Captain Helleman appealed against a conviction for being the master of a ship found with a secret place adapted for smuggling purposes, contrary to S.216 Customs Act 1913. The appellant had no knowledge of the hideaway and the Court accepted that only a 24 hour a day vigil could have prevented the occurence of the offence.[34]

Hardie Boys J. held that the defence invoked in Kilbride did not apply because Helleman was responsible for the actus reus as he had caused the ship to enter New Zealand territorial waters. Exactly the same could have been said of Kilbride. i.e. that he caused the car to be on the road.

However, Helleman was perhaps distinguishable from Kilbride in that the statue breached/the former read;

"If any ship comes or is found...within the territorial waters of New Zealand having...any secret or disguised place adapted for the purpose of concealing goods, or having any...device adapted for the purpose of smuggling..., the master...of that ship shall be...liable to a penalty of five hundred pounds.'

The Helleman decision may have rested on the grounds that the words 'comes or is found' may mean that all a defendant has to do to attract liability is cause a ship to come or be found in New Zealand waters, even if the defendant has no knowledge of any smuggling hideaways.

If this interpretation is accepted, Helleman may have been distinguished from Kilbride on the basis of differing statutory language.

The above three cases show the difficulties New Zealand Courts have had interpreting Woodhouse J.'s decision in Kilbride.

Academic difficulty has been caused by Kilbride because Woodhouse J. referred to a variety of reasons for not attributing criminal responsibility to the defendant for the disappearance of the warrant. Amongst them: that there was no causal relationship to the offence; that the conduct was involuntary; that there was no other course open to the accused; that there was a break in the chain of causation; that the omission was outside the conduct, knowledge and control of the defendant. The difficulty academic writers have experienced is in interpreting how these various factors

interrelate. Are they different stages or one or more tests? Are they all different defences or different names for the same defence? Is any one or more of them more important or precedent to any of the others?

This difficulty is well outlined by the way various commentators have made their interpretations of the decision. Sir Francis Adams stated that the substance of the decision was;

'...that the prosecution failed because there was no proof of any voluntary act or omisssion on the part of the defendant to which the absence of the warrant could be attributed...'[34A]

Thus seemingly saying that there was a single defence.

Budd and Lynch, however, thought that;

'...Woodhouse J. produced two distinct (although sometimes blurred) reasons for the acquittal of Kilbride. The first of these was that, as some independent and intervening event caused the removal of the warrant from the windscreen, Kilbride did not cause the crime...The second reason for the acquittal of Kilbride was that Kilbride was acting, or omitting to act, involuntarily as to the warrant coming away from the windscreen'[35]

R.S. Clark seemed to think there were three separate defences;

'There is always a danger of reading too much into a Judge's words but it is submitted that despite some confusion in Woodhouse J.'s language it is possible to isolate at least three types of situation in which the defendant is not responsible for the actus reus: the situation where the actus reus is "accidental" in the sense that the defendant has not "caused" the proscribed state of affairs; the situation where although the defendant's body in a sense "caused" the state of affairs he is said not to be responsible because he was acting "unconsciously" or "involuntary" or "in a state of automatism"; finally there is the situation where, as Woodhouse J. described it, "there was no other course open to him".'[36]

Thus can be seen the difficulties that have arisen in the interpretation of the judgement, with three different writers interpreting it in three different ways.

2.2; THE EXPLANATION GIVEN IN TIFAGA:

Now that Woodhouse J. has had the chance to explain his Kilbride analysis, I submit my own interpretation of it, with the obvious advantage of the Tifaga judgement before me.

The basis of the judgement in Kilbride is the question of causation - was the offence within the 'conduct, knowledge or control' of the defendant or did it occur independent of him? Although the question is easily answered in most cases of straightforward prohibited acts e.g. robbery, assault, it presents difficulties where the prohibited event has occurred by reason of an omission.

It could theoretically be said that everybody has caused the particular omission. For example, if the offence is failure to provide a child with the necessities of life, it would be logically correct to say that every member of the community has failed to provide such necessities. By common sense, it is obvious that everyone is not guilty of an offence.

To overcome this difficulty in determining whether a defendant caused the offence through an omission, Woodhouse J. held that the offence must be linked to the defendant in terms of volition, opportunity, voluntariness etc.[37] Thus voluntariness, as it is used in Kilbride, is the means for testing whether the defendant caused the offence where difficulties arise in determining this question in offences that involve omissions.

This is borne out in Woodhouse J.s judgement in Tifaga where he explains his Kilbride reasoning:

"When the actus reus is produced by the commission of an act it will usually be a straightforward matter to recognise whether or not the defendant charged with the offence really was the actor. But it is different where the event has occurred by reason of an omission to do something. It can fairly be said that everybody has omitted to do that particular thing so that individual responsibility, if it exists, must depend upon some just and acceptable test which in terms of causation, volition, opportunity, will enable the occurence to be linked with the defendant... the (omission) could not be attributed to the defendant (in Kilbride) in terms of causation, volition, opportunity or otherwise that I held that there was no proof of an offence by him whatever might be said of the presence of the vehicle on the road after the warrant of fitness had disappeared from it. This part of the

analysis in the judgement led me to refer to conscious volition or opportunity of choice as an essential basis for testing responsibility for acts or omissions; and in order to decide whether there could be a causal relationship between the defendant and the occurence of the proscribed situation in that case.'[38]

2.3; THE UNIQUENESS OF THE ANALYSIS:

Thus Woodhouse J. has taken the unusual step of fusing previously distinct concepts into one test, where the concepts of 'volition, opportunity or otherwise' are used as a basis for testing causation for omissions. Nowhere have I been able to find a judicial precedent of any kind for this approach, nor any academic reference to it at all, including those authorities referred to by Woodhouse J. in Kilbride and Tifaga. It is, as far as I am aware, a form of analysis that is unique and a creation of the learned Judge.

As far as the causation issue is concerned, the usual approach in the case of ommissions is that a person is held responsible for a situation where that situation has been contributed to by that person's omissions[39] but I have been unable to find any widely accepted method by which the Courts will apply this to a fact situation. As pointed out by Ryu, the modern approach to causation is ultimately one of legal policy rather than one of a single 'science of philosophy'.[40]

The concepts of 'volition, opportunity or otherwise' or 'conscious volition or opportunity of choice used by Woodhouse J. as a basis for testing causation are very vague in their meaning. In Kilbride, Woodhouse J. used the word 'involuntary' but preferred to use the words 'volition, opportunity or otherwise' in Tifaga and was careful not to refer to involuntariness.

The reason behind this is probably that the term 'involuntariness' is used to mean different things in different contexts. The terms 'voluntary' and'involuntary' are noted to be of extremely vague repute.[41] To overcome any difficulty in interpreting what was meant by 'involuntariness', Woodhouse J. carefully avoided its use in Tifaga.

In Ryan v R.[42], an involuntary act was described as an "unwilled act"[43]. Russell prefers to define a volunatry act as one that is conscious and uncompelled.[44] Hart describes voluntary conduct as "the expression of an act

of will' or the result of muscular contractions caused by a desire for those same contractions.[45] This is very similar to Prevezer's comment that; 'A person's action can be said to be involuntary when his will does not govern the movement of his limbs'[46]

Whichever of these interpretations is favoured, it is clear that neither of them corresponds to what Woodhouse J. meant in Kilbride when he was referring to involuntariness. There were no unconscious or compelled acts in Kilbride, nor was there any question of any bodily movements uncontrolled by the will.

2.4; IMPOSSIBILITY DISGUISED?

It is submitted that when Woodhouse J. referred to involuntariness in his judgement in Kilbride, he was in fact considering what amounts to the defence of impossibility. In Kilbride, Woodhouse J. said;

'...a person cannot be made criminally responsible for an act or omission unless it was done or omitted in circumstances where there was some other course open to him. If this condition is absent, any act or omission must be involuntary, or unconscious or unrelated to the forbidden event in any causal sense regarded by the law as involving responsibility.'[47]

'Some other choice open to him' is merely another way of stating the impossibility defence and it is the opinion of the writer that impossibility is in fact what Woodhouse J. is referring to when he mentions involuntariness. In Tifaga the learned Judge uses the words 'conscious volition or opportunity of choice,'[48] clearly indicating that he has impossibility in mind.

It would seem, therefore, that Woodhouse J. is including impossibility within the meaning of 'involuntariness'. This is not the most common approach but several writers have also defined impossibility as being within the notion of involuntariness.[49]

2.5; VIABILITY OF THE WOODHOUSE ANALYSIS:

Woodhouse J.'s analysis, as stated, is a novel one in an area which has received much judicial attention. However, this should not detract from an evaluation of its soundness as legal reasoning.

When Woodhouse J. applies his analysis to the Tifaga situation he makes it clear that there is no doubt that Tifaga caused the forbidden omission i.e. the failure to leave New Zealand. I respectfully submit that this is a correct application of the Woodhouse analysis. In terms of opportunity ofchoice the appellant had that opportunity and therefore, according to the analysis, he caused the commission of the offence. Any lack of opportunity of choice was caused by his own failure to keep adequate funds to enable him to leave the country.

It is well established that the impossibility defence fails where the impossibility has been brought about by the defendant's own fault.[50] Woodhouse J.s decision in Tifaga engrafts the same principle upon his form of analysis. Therefore, the position the appellant found himself in was produced by his own fault, there was thus an opportunity of choice and, following the next logical step in the analysis, this means that the appellant has caused his own failure to leave New Zealand.

The other Court of Appeal Judges preferred to look at the case in a more 'traditional' manner, i.e. in terms of an impossibility defence. The result of both analyses is the same, and for much the same reason that Tifaga contributed to his own misfortunes. The only real difference, it is submitted, is that, according to the Woodhouse approach, a successful plea of impossibility (although he doesn't call it that) means that the defendant hasn't caused the actus reus whereas under the more traditional approach it means that there is a successful impossibility defence.

As explained, it is the writer's opinion that the reasoning in Kilbride amounted to a consideration of the impossibility defence, although Woodhouse J. used different nomenclature. His analysis is not restricted to that field, however, but extends to automatism (as he points out in Tifaga)[51], and involuntariness. If either of these defences is successfully raised, then, according to the analysis, the defendant has not caused the offence.

It is submitted that, if the Woodhouse approach is applied correctly, the same result will be achieved as if the more accepted traditional approach is taken i.e. a traditional defence of impossibility (or involuntariness etc). However due to the difficulty, both in language and analysis, that the Woodhouse approach takes, it is likely to be misinterpreted, misapplied, or misused for unintended purposes by future Courts, lawyers and writers, although it does represent a unique approach to the problem of causation in

respect of omissions.

2.6; REASONS FOR WOODHOUSE J.'S ANALYSIS:

One must therefore ask why Woodhouse J. has chosen this hitherto unheard form of analysis when his fellow Judges in Tifaga saw no problem in applying a more well-known impossibility analysis.

It is possible that Woodhouse J. felt that he could not invoke the concept of impossibility in Kilbride because the offence in that case was an act (operating a motor vehicle) coupled with an omission (failing to display a warrant of fitness). It has been tentatively suggested by Smith and Hogan that the defence applies / to omission offences only.[52] Woodhouse J. may have seen this as a barrier to applying the impossibility defence to offences consisting of act coupled with an omission and developed his alternative analysis to circumvent this problem.

However, it is unlikely that this is what prevented Woodhouse J. from invoking impossibility. There is no good reason why the impossibility defence should not apply as equally to acts as omissions, as I will show later. Furthermore, Tifaga was involved with a pure omission offence but Woodhouse J. applied his analysis to that case in the same way he had in Kilbride, although this may have possibly been done partly because to do otherwise would be seen as a retreat from the Kilbride analysis, which Woodhouse J. probably didn't want.

Whatever his reasons for doing so, Woodhouse J. shied away from the impossibility analysis. He may have doubted the acceptability of this defence; it is a defence of rare application which seems to have been inconsistently applied throughout its history.[53] Alternatively Woodhouse J. may have preferred to think of impossibility as a tool for testing causation (which is how it is used in his analysis), rather than as a general defence.

2.7; CONCLUSIONS:

According to the Woodhouse analysis, 'conscious volition or opportunity of choice,'is the basis for testing causation of omissions. From the language used it seems that Woodhouse J. had impossibility in mind when enunciating this test. It is not clear whether 'conscious volition or opportunity of choice' was intended to be the sole test for causation or not. There may well be situations where a defendant has not caused an omission but nevertheless had conscious volition and opportunity of choice. There is no indication from Kilbride or Woodhouse J.'s judgement in Tifaga what the result would be in such a situation.

3. IMPOSSIBIILITY/INEVITABILITY

3.1; HISTORY:

Both Richmond P. and Richardson J. preferred to consider the defence raised by the appellant as one of impossibility or inevitability[54], rather than attempt any treatment of Tifaga along the lines of the Woodhouse approach in Kilbride.

Impossibility defences are not common - in fact it has been described as the 'rare defence'[55]. Its application has been virtually confined to offences consisting of omissions. It is a general proposition of law that where a legal duty to act is imposed, non-compliance with that duty will not be an offence where it is physically impossible to comply.[56] This is based on the common sense notion that there is little point in punishing a person for omitting to do something which there was no possibility of that person doing.

Although the impossibility defence has its roots in two nineteenth century cases,[57] its main basis comes from Burns v Bidder[58] and the cases reviewed within, especially Leicester v Pearson[59]. In the Burns case, a motorist argued that he failed to give way to a pedestrian because of a latent brake defect. The Appeal Court held that such a failure would amount to a valid defence because the occurrence of the forbidden offence was 'outside his possible or reasonable control and in respect of which he was in no way at fault.'[60]

In Leicester v Pearson, an appellate Court upheld a dismissal of information concerning another fialure to give way to a pedestrian because "...what happened was inevitable or was due to some circumstance over which the driver had no reasonable or possible control...'[61] In that case the defendant failed to give way as he didn't see the pedstrian due to a combination of lack of lighting, poor visibility and bad road conditions.

In another pedestrian crossing case, London Passenger Transport Board v Upson, Lord Uthwatt held that the defence of impossibility would apply if it is 'impossible in any rational sense to comply with (the statute)'[62].

3.2: INEVITABILITY AND IMPOSSIBILITY:

The impossibility defence was considered and discussed at length by Richmond J. (as he was then) in Police v Geedon.[63] He was of the opinion that the concept of impossibility as accepted in Burns v Bidder was the

same as the concept of inevitability discussed in Leicester v Pearson. As Richmond J. remarked; "that which is "inevitable" is also impossible to avoid'[64]. This close relationship between impossibility and inevitability was accepted by Richardson J. in Tifaga, and as he observed, the difference between the two is 'more apparent than real'.[65]

It would seem then, that the difference between 'inevitability' and 'impossibility' is merely one of semantics. Both Richmond P. and Richardson J. are prepared to accept this and treat them as the same defence.

3.3; IMPOSSIBILITY AND ACTS:

I mentioned earlier that the application of the impossibility defence has been virtually confined to omission offences.[66] Although the defence applies more easily to this type of offence there is no reason why it cannot also apply to offences consisting solely of acts. An example is a butcher who sells contaminated meat where s/he has no practical way of knowing or finding out that the meat is unsound. If we will allow a driver to escape conviction where s/he fails to give way because of a latent brake defect, there is no reason why that reasoning should not be extended to our unfortunate butcher.

The impossibility defence should apply equally to acts as it does to omissions.

3.4; THE IMPOSSIBILITY STANDARD:

How high a standard of conduct does an accused have to fulfil before s/he can avail him/herself of the impossibility defence?

It is certain that impossibility does not refer to lack of any choice whatsoever, but to lack of any 'practical choice' as Richmond P. puts it.[67] Thus, if Kilbride is looked at in terms of impossibility, it could be suggested that it was not impossible for the defendant to avoid committing the offence because it was physically possible for him to guard and supervise the warrant of fitness or hire someone else to do so during his absence. However, such a suggestion is ridiculous because it would not be a viable practical choice.

Similarly, in Leicester v Pearson the defendant could have stopped his car at the pedestrian crossing, got out and checked the crossing before driving on, but such a suggestion has no practical basis.

It can be seen then, that a defence will lie where it is impossible, for all practical intents and purposes, for the defendant to avoid the commission of the offence.

It is to be noted that the standard required is, however, very high. Leicester v Pearson was decided on 'very special' facts and the defence was held to be applicable to a 'limited sphere'.[68]

In Weiss v Green[69], the defendant was convicted of selling wine over 20 per cent proof spirit, albeit unwittingly. Her defence to the strict liability offence was that she had taken all precautions to ensure her suppliers supplied her with wine of the correct percentage proof spirit, was not accepted on appeal as it was held to be possible for her to sample each barrel of wine before sale, even though such a course would involve considerable difficulty and cost.

Similarly, in Hobbs v Winchester Corp.[70] it was held that a butcher must, if necessary, employ an analyst to ensure no unsound meat is sold.

Although in the last two mentioned cases impossibility was not pleaded, the Courts had the opportunity to allow a defence along the lines of impossibility. These two illustrations help to show that the standard expected to fulfil the defence is high indeed. The rarity of cases where an impossibility defence has been successfully argued further shows this.

Indeed the defence has been described as one of 'total absence of fault': Richmond P. described it in this way in Tifaga[71]. If someone is totally absent from fault, that person must have done everything that could practically be expected to avoid committing the offence; it must have been practically impossibly to avoid the commission of the offence.

'Total absence of fault' or 'impossibility' implies a standard higher than that of criminal negligence - to fulful the defence the defendant must be as free as practically possible from any type of fault.

3.5: THE TWO-STAGE TEST:

Consonant with this high standard is the cardinal principal that an impossibility defence must fail where the impossibility arises through or is contributed to by any fault or failing attributable to the defendant, even where such fault has occurred previous to the prohibited omission.

This principle is accepted by the Courts[72] and commentators[73] and is unhesistantly adopted by Richardson J. in Tifaga.[74]

The effect of this principle is to create a two-stage test for impossibility. The first, 'at the time' stage involves looking at whether or not it was practically possible for the defendant to avoid committing the offence at the time it was committed. If it is found that it was impossible 'at the time' in this first stage, then the second stage involves looking at the conduct of the defendant leading up to the commission of the offence to determine if the defendant caused or contributed to the impossible position s/he found her/himself in. If the defendant did cause to contribute to his/her own predicament then the second stage is not satisfied and the defence must fail.

Looking at the facts of Tifaga, it is clear that the first stage is satisfied. At the time of the offence (i.e. the expiry of the 21 days following the permit revocation when Tifaga was still in New Zealand) it was impossible for Tifaga to leave the country because he had no money with which to do it. Thus, at the time of the offence, it was practically impossible to avoid the breach of S.14(6) of the Immigration Act.

However, in the opinion of Richmond P. and Richardson J. of the Court of Appeal, Tifaga did not fulfil the necessary standard for the second stage of the defence. The Court held that it was incumbent upon Tifaga to keep a fund available to cover the cost of an airfare back to Western Samoa as he should have known that he could be given short notice to leave New Zealand at any time.

When he found himself in the position of not being able to comply with the notice to leave he sought work without success. He asked for an extension of permit until he could afford to pay for the airfare or alternatively that the Immigration authorities pay his trip but both requests were declined.[75] These efforts were not enough to fulfil the required standard, according to the Court of Appeal, and the conviction was upheld. It is submitted with respect that as such the decision was correctly decided in terms of the principles of impossibility.

3.6; HOW HIGH IS THE STANDARD?

A problem raised by the Tifaga case is exactly how high the standard should be to fulfil the impossibility defence. This problem is compounded by two factors; the rarity of cases in which the defence has been considered and the inconsistency of its application by the Courts [76].

As explained in 3.4 the standard for the first 'at the time' stage of the impossibility test is high. But exactly how high this standard is has not been determined, and neither of the Court of Appeal Judges attempts an answer.

How high is the standard of the second stage of the defence? Must a defendant fulfil the high standard of the first stage and similarly fulfil an equally high standard for the second 'prior conduct' stage of the defence? Or is the standard required relaxed somewhat for the second stage?

It is clear that the impossibility defence is negated by the fault of failing of the defendant, but how high is the defendant expected to act to avoid placing him/herself in an impossible situation? In Tifaga, Richardson J. indicated that an impossibility defence would lie if the appellant had been robbed while on his way to the airline office to buy his ticket or had been hospitalised or in prison throughout the term of the notice. But what would happen if the appellant was hospitalised due to his own negligence or in circumstances in which he might have been able to avoid hospitalisation? What if the appellant had enough money to cover his airfare, had invested it, and the investment had collapsed? Would the appellant be able to avail himself of the impossibility defence?

These questions must remain unanswered. In Tifaga, Richardson J. held that the impossibility defence will not be upheld where an accused has not used 'due diligence' to avoid the impossible situation, [77] but it is unclear exactly what is meant by 'due diligence'. Does it mean ordinary negligence or a higher standard is required for the second stage of the test?

Although Tifaga raises the problem of what standard is required for each of the two stages of the impossibility defence, the case leaves us without any answers to these questions.

3.7: THE EFFECTS OF DUAL ANALYSIS:

It is significant that neither Richmond P.; nor Richardson J., passed any adverse comment whatsoever upon the Woodhouse decision in Kilbride. Indeed, Richardson J., who delivered the leading judgement of the impossibility approach in Tifaga, saw that there were alternative approaches so that both his and that of Woodhouse J. were equally viable.[78] The effect, then, of the Tifaga decisions seems to be that there are alternative defences in this area of law; the impossibility defence and the Kilbride defence. It is to be noted that counsel for the appellant argued the defence along the lines of Kilbride, but it was considered in terms of impossibility by Roper J. in the Supreme Court and by Richmond P. and Richardson J. in the Court of Appeal.

Of the two forms of analysis, the Richardson impossibility approach is more likely to prevail and be used before future courts. It has the weight of precedent and does not present the difficulties in interpretation and use, not mention the novelty, that exists in the Woodhouse analysis. It is of note that no other Judge, either in Tifaga, Taylor,[79] Andrew and Andrew[80] or Helleman[81] has followed the Woodhouse approach, although the facts of those cases gave ample opportunity to do so.

However, despite the fact that one of the alternative approaches is likely to prevail, there still are two possible alternatives. Counsels for defence may, in future cases, have to make a choice as to which line of reasoning they will follow and this must depend on several factors, not the least important being which Court and Judge/s will be hearing the case. This must lead to some difficulty, especially if the two lines of reasoning become confused or misinterpreted. This possibility of confusion is the necessary price of the Court of Appeal's flexible approach to the analysis of this sort of situation.

4. DEFENCES TO STRICT LIABILITY OFFENCES

4.1: APPLICATION OF DEFENCES:

The following defences (involuntariness, impossibility and lack of causation) are of particular interest in the context of strict liability offences. In most mens rea situations the defences are of limited application because if they are applicable it is more likely that a defence of absence of mens rea will be pleaded e.g. if a defendant committed an offence where it was impossible to avoid committing it then it is highly likely that the defendant did not intend to commit it and thus there would be no mens rea.

The following defences are of greater application to offences of strict liability as absence of mens rea cannot be pleaded, therefore alternative defences will be sought.

4.2: INVOLUNTARINESS:

Involuntariness is a valid defence to offences of strict liability. Hill v Baxter[82] was concerned with failing to observe a 'Halt' sign, an offence of strict liability. Involuntariness, or more precisely automatism, was held to be a valid defence if it could be proved. This has not, to my knowledge, been criticised by any Court but has been accepted as authority. This has also been accepted by all writers and commentators[83], except for Budd and Lynch in their article 'Voluntariness, Causation and Strict Liability'.[84]

The question remains, should a defendant be able to rely on such a defence when charged with an offence of strict liability? This must depend on what one considers to be the justification or rationale behind offences of a strict liability nature. Much has been written on this topic and I do not propose to go into any detailed discussion of the rationale behind strict liability.

I will examine the two main justifications forwarded in support of strict liability:

1. Firstly, it is argued that a high standard of care is required on the part of those who partake in certain activities that directly affect social interests and the public welfare. The threat of a strict liability punishment encourages such people to perform up to the standard that the public interest requires.[85]

If this justification is accepted then it is submitted that convicting people for their involuntary actions does not advance in any way the public interest as those people would be in no position to prevent their involuntary actions and thereby prevent the offence.

Take, for instance, a driver who exceeds the speed limit because of involuntary movements due to an attack by a swarm of bees. Assuming the driver had no practical way of knowing or preventing the attack, then punishing that driver could in no way prevent future occurrence of that offence. It in no way encourages other drivers to avoid committing the offence themselves, as they have no opportunity of preventing involuntary acts. The punishment is of no benefit to the public interest.

Budd and Lynch have criticised the use of involuntariness as a defence to strict liability offences in their article looking at the Kilbride decision.[86] They felt that convicting those in an involuntary state would help prevent the social harm the particular statute is aimed at. They thought that such convictions would encourage research into the causes, diagnoses and cures of involuntary states.

It is submitted that this is expecting too much of the reasonable man. It is clearly ridiculous to require an ordinary person to conduct research into the causes, diagnoses and cures of automatism. The law can only encourage research or business, reorganisation that is within the practical power of the person to perform, and to expect more cannot be a practical way of reducing the social harm the particular legislation is aimed at.

2. A second justification sometimes forwarded in support of strict liability is that of ease of judicial administration; strict liability saves the Court's time because a defendant cannot raise a plea of lack of fault and it furthermore prevents false pleas of this kine.

Thus the task of the prosecution is made much easier; it does not have to

prove the persuasive burden of proving mens rea beyond all reasonable doubt. In this way, strict liability is justified, it is said, because the desirability of convicting those guilty parties who might otherwise plead a defence justifies the conviction of some who might be innocent.

If this justification is accepted it is true that the reasoning would extend to a plea of involuntariness. But this second justification is losing any popularity it once might have had.[87]

Firstly, any such plea is likely to be heard in mitigation of penalty anyway, so the matters involved would still have to be heard by the Court; thus saving no judicial time.

Secondly, it is abhorrent to many legal theorists that guilt be imposed on a possibly 'innocent' defendant for the purpose of easing the Court's work or to avoid difficulties otherwise experienced by the prosecution in overcoming the presumption of innocence. Many do not favour convicting possibly innocent defendants for the purposes of ensuring conviction of those who are guilty, even where the crime is of a minor or regulatory nature.

Thus, this second justification sometimes forwarded on behalf of strict liability has attracted much criticism because it has been seen as infringing the principle of presumption of innocence.

As shown earlier,[88] in terms of the first of the rationales given for strict liability offences, there is no reason why the defence of involuntariness should not also apply to such offences, and there are doubts as to the soundness of the second justification.

The concept of 'involuntariness' was carefully avoided by Woodhouse J in Tifaga, although it featured as part of his reasoning in the Kilbride decision. There was nothing in either decision to suggest that the fact that the offence was one of strict liability in any way affected the application of the principles of voluntariness to the facts.

Involuntariness is, and should be, a defence to offences of a strict liability nature.

4.3: IMPOSSIBILITY:

It is well established that impossibility is also a defence to a strict liability charge. Both Leicester v Pearson[89] and Burns v Bidder[90], which are cited as authorities involving the application of the law of impossibility, were cases concerned with strict liability offences. In both, there was no mention that the impossibility defence was in any way affected by the fact that the offence was one of strict liability. The Tifaga case, being one of strict liability[91], confirms this principle that the defence holds true for such offences.

The reasons underlying this principle are essentially the same as those behind the application of the involuntariness defence to strict liability offences. If the principle rationale behind strict liability is accepted as being that of ensuring measures are taken to prevent the occurrence of an offence, then punishing those for whom it is impossible to avoid committing the offence can in no way be in the public interest, not prevent future occurrences of the offence.

Impossibility can be thought of as 'total absence of fault'. If a person has fulfilled the requirements of the impossibility defence s/he has conformed to the highest standard of performance that could be practically expected of that person. To expect him/her to perform to any higher standard is to expect him/her to perform what is impossible for that person to do. Such people are in no position to prevent the occurrence of the offence and punishing them does not advance the public interest.

Therefore, impossibility should be, and is, a defence to strict liability offences. This position is clearly supported by Richardson J and Richmond P in Tifaga. Neither gave any indication that the defence of impossibility is in any way affected by the fact that the offence is strict in nature; the defence applies equally to either mens rea or strict liability offences. However, the defence will be of particular interest in the area of the latter type of offence, because if an impossibility defence lies, so also, usually, will a plea of lack of mens rea.

The impossibility defence is one of common law that evolves from the

presumption that Parliament did not intend to punish those for whom it was impossible to comply with the law. Such a presumption applies to strict liability statutes as well, but it is theoretically possible that the presumption might be rebutted by the wording of the statute, i.e. a strict interpretation of the statute might show Parliament's intention to exclude the impossibility defence.

For this reason, both Richardson J in Tifaga and Richmond J (as he was then) in Police v Creedon[92], looked at the wording of the relevant provision to see if the defence is so excluded[93]. However, it is extremely unlikely that the legislature would ever word a statute in a way that could be interpreted as intending to punish those for whom compliance with the law was impossible.

In strict liability offences, the lack of knowledge of relevant circumstances is no defence to the charge, as this amounts to a denial of mens rea, which is irrelevant in terms of strict liability offences. The position may be different if the lack of knowledge of relevant circumstances means that there was no practical opportunity to avoid the offence. If that was the case, a defendant, although not being able to plead lack of mens rea, could instead plead impossibility, the impossibility being due to lack of knowledge.

For instance, take the facts of Kilbride. The actus reus in that case was committed because the defendant had no knowledge of the disappearance of the warrant of fitness. It was because of this lack of knowledge that it was impossible for the defendant to avoid the commission of the offence. Thus, impossibility could have been pleaded.

Therefore, although as a general rule lack of knowledge is no defence to a strict liability offence, because it concerns a question of mens rea, which is irrelevant, there is an exception where such lack of knowledge amounts to a defence of impossibility.

4.4: LACK OF CAUSATION:

In both Kilbride and Tifaga Woodhouse J asserts that before a defendant can be convicted of any offence, the defendant must be shown to

be responsible for or produce the physical ingredient of the offence.[94] As explained,[95] in Tifaga the learned Judge went on to say that the test of such causation was 'conscious volition or opportunity of choice'.

This presents the question whether lack of causation should be a defence to an offence that is strict in nature. Although Woodhouse J seems to accept that it is, this is qualified by the use of what is essentially the impossibility defence as a means of testing causation.[96]

It is submitted that lack of causation on the part of the defendant should not be, of itself, a defence to strict liability offences, because to do so would seriously threaten the operation of strict liability. The purpose behind imposing strict liability is to impose a high standard of care upon those who partake in certain activities that directly affect social interests and the public welfare. There may be cases where a defendant did not directly cause a strict liability offence but was nevertheless in a position to take measures to prevent its occurrence. To impose liability on that person would ensure a high standard of performance which would be in the public interest.

For instance, take the example of a butcher who sells contaminated meat. The statute concerned prohibits selling contaminated meat and punishes a butcher for doing so because this encourages a higher standard of care and thus helps protect the public from being sold unfit meat.

Is the purpose of the statute advanced by convicting our butcher? This must depend on the circumstances under which the meat became contaminated. I will look at four fact situations:

1. Suppose the meat became infected because the butcher negligently failed to disinfect his/her hands before handling the meat. There is no problem here; the defendant butcher is the cause of the offence and it is possible for the offence to be avoided. To punish the butcher will encourage all butchers to perform their trade up to the standard the public interest requires.

2. Suppose our butcher disinfects his/her hands, but just before touching

the meat, some disinfectant-resistant bacteria contaminates his/her hands, and thus the meat is infected. Our butcher is unaware of this and there was no practical way s/he could have been aware. The butcher has caused the offence but an impossibility defence would lie. As discussed, convicting a person in circumstances where the defence could not practically be avoided does not aid the purpose of a strict liability statute.

3. Suppose our butcher leaves meat on the counter for a client. Another customer comes into the shop and touches the meat, contaminating it, while the butcher is not there.

Here, the butcher did not cause the contamination; the meat became unsound when touched by the customer. However, our butcher was in a position to prevent the contamination; s/he could have supervised the meat to make sure it was not touched and infected or have kept the meat in a place where it would not be touched.

The purpose underlying the statute would be advanced by a conviction in this case - it would encourage butchers to better supervise their operations to ensure no unfit meat is sold. Therefore, the butcher should be convicted despite the fact that s/he did not cause the offence, lack of causation should not be a defence.

4. Situation 3 would be different if the butcher had taken all practical steps to prevent contamination e.g. the meat had been properly stored but a customer or stranger had, unbeknown to the butcher, jumped over the counter, sneaked into the storage compartment and touched and infected the meat. In this example, our butcher would be acquitted, not because s/he did not cause the offence but because it was practically impossible to avoid the offence (options such as hiring a permanent guard for the meat or never opening the shop are not considered practical possibilities).

The above examples show that while no purpose is served in convicting those who cannot practically avoid an offence, the purposes of a strict liability offence are served by convicting those whose only defence is lack of causation. This is because such convictions would encourage the defendants to act to prevent the occurrence of an offence where they are in

a position to do so. Where they are not in a position to prevent the offence, another defence e.g. impossibility, will lie.

It is therefore submitted that lack of causation should not, of itself, be a defence to an offence of strict liability. Although comments of Woodhouse J in Kilbride may indicate that the learned Judge would allow lack of causation as a defence to all strict liability offences, a careful reading of his judgment in Tifaga qualifies this. As explained earlier,[97] the basis on which Woodhouse J would test causation for omissions is by 'conscious volition or opportunity of choice' or, in other words, impossibility.

Therefore Woodhouse J would not allow a lack of causation defence in all cases but only where there is no 'conscious volition or opportunity of choice', or, in other words, where an impossibility defence lies.

5. THE TIFAGA CASE AND THE JUDICIAL TREND AGAINST STRICT LIABILITY

5.1: THE JUDICIAL TREND:

The concept of strict liability is not one of common law but one that has developed from the interpretation of the enactments of the legislature. If a statute is interpreted to impose strict liability then mens rea is not required for at least one element of the actus reus.

The concept of strict liability has in recent times lost a lot of judicial popularity it might have once enjoyed. In modern judicial decisions it is clear that there exists a trend against the imposition of strict liability. A number of important landmark decisions have unequivocably shown a general judicial disrelish for this type of liability.

R v Lim Chim Aik[98] established the presumption of mens rea as an integral part of the interpretation of criminal statutes. According to the Lim Chim Aik principle, it is presumed that Parliament did not intend to impose strict liability and this presumption is only overcome if the statute, expressly or impliedly, imposes strict liability. This principle was unhesitantly adopted into New Zealand law in R v Strawbridge.[99]

Even where the presumption is overcome, it may well be that strict liability is not imposed. A middle class of offence, the 'half-way house' offence, was incorporated into New Zealand by R v Strawbridge. The basis of this type of offence is that the prosecution will only have to prove that the defendant had the necessary mens rea if the defendant raises absence of mens rea as a defence. Thus the evidentiary burden of raising the defence lies with the defendant, whereas the persuasive burden of proving mens rea beyond a reasonable doubt still lies with the prosecution once lack of mens rea is pleaded as a defence.

In addition, a half-way house offence may or may not include negligence as a form of mens rea applicable to the offence. If negligence is included, then the defendant will be convicted if s/he has not fulfilled the reasonable person standard. Whether or not negligence is included as a form of mens rea applicable to the half-way house offence will depend on the judicial interpretation of the intention of the legislature.

Thus can be seen the trend against strict liability. There is a strong presumption against strict liability and even when this is overcome it may well be that the Courts may interpret the statute as imposing a half-way house rather than imposing liability of a strict nature.

5.2: DEFENCES TO STRICT LIABILITY:

Associated with the trend against strict liability is an apparent widening of the number and scope of acceptable defences to both strict liability and half-way house offences. We have already seen how involuntariness and impossibility are two such accepted defences.

An important New Zealand decision in this area is Police v Creedon.[100] That case involved a failure to give way at a 'Give Way' intersection, where the driver's view of approaching traffic was obscured. The Court of Appeal unanimously held (although expressing their reasoning in differing terms) that a high standard of care was a defence to that half-way house offence.

In an Australian case, Proudman v Dayman,[101] it was held that the defendant had a good defence if he could show an 'honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent'. It is noteworthy that this judgment was cited with approval by the House of Lords in Sweet v Paisley.[102]

Another House of Lords decision, Alphacell Ltd v Woodward,[103] showed that certain of the learned Judges foresaw the possibility of certain defences to strict liability offences. That case involved an overflow of pollution into a river. Although most of the discussion centred around the issue of whether the appellant company caused the prohibited pollution, Viscount Dilhorne thought that an inadvertant and unintentional act without negligence might be a defence to the strict liability offence.[104] Lord Cross of Chelsea thought that the appellants could have had a defence if the overflow had been 'brought about by some other event which could fairly be regarded as beyond their ability to foresee or control'.[105]

Although the bounds of these defences are narrow, they show a willingness on behalf of some of the learned Judges in the House of Lords

to accept the possibility of defences to strict liability statutes.

R v City of Sault Ste Marie[106] is a leading Canadian decision in this area. That case involved the offence of causing or permitting pollution of a creek. As well as unequivocably stating the Canadian Supreme Court's dislike of statutes not requiring mens rea, the Court also held that it was a valid defence to a strict liability offence for the accused to show that s/he took all reasonable care.

The above cases are illustrations of how the Courts have gradually established and formulated valid defences to strict liability and half-way house offences. This can be seen as part of the trend against strict liability; the more and wider the acceptable defences to strict liability, the less wide becomes the operation of such liability.

5.3: A GENERAL DEFENCE?

The cases illustrated could be interpreted as a movement towards a general defence to strict liability offences, which I shall label 'absence of fault'. The essence of the above cases seems to be that a good defence will lie where the defendant can show that s/he has exercised the standard of care that the situation demanded. Of course, this standard of care will vary from very high to less demanding, depending on the type of offence, surrounding circumstances, intention of the legislature etc. Nevertheless, each of the above Courts, in its own particular language, could be interpreted as saying that if the defendant exercises that standard of care required by the particular situation, then an 'absence of fault' defence will lie.

5.4: THE TIFAGA POSITION:

How do Kilbride and Tifaga fit in with this trend against strict liability and towards a general defence of 'absence of fault'?

Firstly, Tifaga definitely establishes impossibility as a good defence to strict liability, the subject of impossibility/total absence of fault was dealt with in Creedon and in Ministry of Transport v Burnetts Motors Ltd[107] but neither Court of Appeal decision went as far as Tifaga in unequivocably establishing impossibility as a general defence to all offences, subject to contrary wording of a statute. Thus Tifaga is an important step in clearly establishing impossibility as an acceptable defence and thereby limiting the scope of strict liability.

It is also significant that Richmond P described impossibility as 'total absence of fault'. How does this concept of 'total absence of fault' compare with the idea of 'absence of fault' seemingly apparent in the judgments of other New Zealand and overseas Courts?

The judgments of Richmond P and Richardson J in Tifaga must be seen as part of the judicial trend against strict liability. A general defence of 'total absence of fault' is clearly established, but the scope of this defence does not extend as far as the 'absence of fault' defence described above. In particular, the Tifaga defence (as I shall term the defence formulated by Richmond P and Richardson J) does not extend as far as the defence formulated in Proudman v Dayman or Sault Ste Marie.

It is clear that the Tifaga defence requires a very high standard of care to be fulfilled. The defendant must be free from all possible fault; s/he must do all that is practically possible to avoid committing the offence.

Therefore, Tifaga does not go as far as some other cases in moving towards a general defence to offences of a strict nature. It is, however, part of a general trend against strict liability upon which future decisions may be built. The breach is now opened and future Courts in New Zealand may widen the grounds on which a valid defence to a strict offence may stand. This is for future New Zealand Courts to decide. In the meantime Tifaga will stand as authority for total absence of fault being a defence to strict liability statute.

The Woodhouse analysis in Tifaga and Kilbride is a new avenue of defence to offences that are strict in nature. As such, it also is part of a trend against strict liability. How useful or popular the Woodhouse defence turns out to be is also in the hands of New Zealand Courts but it is the opinion of the writer that this form of analysis is conceptually too novel and too difficult to achieve any wide importance or utilisation.

6. SUMMARY

I have looked in detail at the Tifaga case and its importance in New Zealand criminal law. It will become an important case because:

1. It provided Woodhouse J with an opportunity to explain his difficult and controversial decision in Kilbride. This he did, explaining that 'conscious volition or opportunity of choice' were means of testing causation of omissions. As such his reasoning is novel, and for this reason (along with its difficulty) unlikely to be utilised very often. However, it still remains as a possible weapon in the armoury of a defence counsel.

2. It clearly establishes impossibility as a defence of general application, even to strict liability offences, provided that it is not excluded by the wording of the statute. Tifaga clears up any existing confusion existing between impossibility and inevitably, declaring them to be different names for the same offence. It also emphasises that impossibility will not be a defence where the impossible situation has been caused or contributed to by the defendant him/herself. This therefore entails a two stage test for the defence.

   What Tifaga does leave open is what standard of behaviour is needed to fulfill the stages of the test and therefore satisfy the requirements of the impossibility defence.

3. Tifaga can be seen as part of a trend against strict liability as it firmly establishes a good defence to such offences. Although the judgments do not necessarily show a readiness to follow other Courts in their search for a general 'absence of fault' defence to strict liability, Tifaga may become a foundation upon which future breakdown of the ambit of strict liability can be achieved.

7. NOTES

1. [1962] NZLR 590
2. See in particular; Smith and Hogan, 'Criminal Law; Cases and Materials', 2nd ed (1969) 59; Hart 'Acts of Will and Responsibility', 90 of 'Punishment and Responsibility'; Burns, 'Casebook in the Law of Crimes', 36-9; Howard, 'Strict Responsibility', 205-7. Cited in the following articles; Sir F.B. Adams, 'Voluntariness in Crime: A Critical Examination of Kilbride v Lake', (1969-72) 2 Otago LR 426; Budd and Lynch, 'Voluntariness, Causation and Strict Liability', [1978] Crim LR 74; Sim, 'The Involuntary Actus Reus', (1962) 25 MLR 74; Kilbride, 'Actus Reus of an Offence', (1963)1 NZLR 139; Burns, 'Status Offences - Some Recent Developments in New Zealand and Australia', (1968) 42 ALJ 52; Clark, 'The Defence of Impossibility and Offences of Strict Liability', 11 Crim LQ 154, 155 (n. 4); Keene, 'The Problem of Automatism', (1968)1AULR 15, 11; Randerson, 'Status Offences', (1968) 1 AULR 37; Patient, 'Some Remarks About the Element of Voluntariness in Offences of Absolute Liability', (1968) Crim LR 23, 32 (n.21); Clark, 'Defences to Offences of Strict Liability', LLM research paper, VUW, 20, 53.
3. (1965) NZLR 87
4. (1966) NZLR 705
5. (1968) NZLR 692
6. (1965) NZLR 503
7. (1971) NZLR 699
8. (1980) 2 NZLR 235
9. Unreported, Christchurch, M152/79 (12 July 1979)
10. Idem
11. Op. cit., 239
12. Ibid, 237
13. Idem
14. Or an act coupled with an omission
15. Ibid, 238
16. Idem
17. Ibid, 239
18. Ibid, 240
19. Ibid, 241
20. Idem
21. Ibid, 242
22. Idem

23. Ibid, 243-4
24. Ibid, 245
25. Ibid, 244
26. Ibid, 245
27. Ibid, 236
28. Op. cit., 592-3
29. Op. cit., 236
30. Op. cit.
31. Op. cit.
32. Ibid, 694
33. Op. cit.
34. Ibid, 706

34A Op. cit., 429

35. Op. cit., 74-5
36. Op. cit., 238
37. Tifaga, op. cit., 238
38. Idem
39. Burns, op. cit., para 3-08
40. Ryu, 'Causation in Criminal Law', 106 U Pa L Rev 773, 785
41. Adams, op. cit., 432
42. (1967) 40 ALJR 488
43. Although it was suggested that this might not be a very helpful criterion for distinguishing between involuntary and voluntary acts in; 'Responsibility for Involuntary Acts', 41 ALJ 497, 499
44. 'Russell on Crime' (12th ed), 64
45. Op. cit., 115
46. 'Automatism and Involuntary Conduct', (1958) Crim LR 361, 363
47. Ibid, 593
48. Ibid, 238
49. See, for instance, Patient, op. cit.
50. See the authority and comments cited by Richardson J in Tifaga, op. cit. 244
51. Ibid, 239
52. Criminal Law (4th ed), 211
53. Smith and Hogan, op. cit. (n.52), 210-1
54. Tifaga, op. cit., 236, 242
55. Gibney, 'The Rare Defence - Impossibility', (1963) Crim LR 490

56. Glanville Williams, 'Criminal Law: The General Part', para 240
57. R v Bamber (1843) 5 QB 279; 114 ER, 236 and Burns v Nowell (1880) 5 QBD 444 (CA)
58. (1967) 2 QB 227
59. (1952) 2 QB 668
60. Op. cit., 227
61. Op. cit., 672
62. (1949) AC 155, 173; (1949) 1 All ER 60, 70
63. (1976) 1 NZLR 571, 576
64. Ibid, 581
65. Tifaga, op. cit., 243
66. 3.1
67. Tifaga, op cit, 236
68. Op. cit., 240-1
69. (1907) 26 NZLR 942
70. (1910) 2 KB 471, 484
71. Op. cit., 236
72. Supra, n. 50
73. Supra, n. 50
74. Op. cit., 244-5
75. Ibid, 240
76. Supra, n. 53
77. Op. cit., 245, 246
78. Ibid, 242
79. Op.cit.,
80. Op. cit.
81. Op. cit.
82. (1958) 1 QB 277
83. See, for instance, Patient, op. cit.
84. (1978) Crim LR 74
85. Pound, 'The Spirit of the Common Law', 52
86. Op. cit., 76 (n.6)
87. R v City of Saint Ste Marie (1978) 85 DLR (3d) 161
88. 4.2
89. Op. cit.
90. Op. cit.
91. Op. cit. 241
92. Op. cit.
93. Creedon, op. cit, 582; Tifaga, op. cit., 245

94. Kilbride, op. cit., 592; Tifaga, op. cit., 237-8
95. 2.2
96. 2.4
97. 2.2
98. (1963) AC 160; (1963) 1 All ER 223
99. (1970) NZLR 909
100. Op. cit.
101. (1941) 67 CLR 536
102. (1969) 1 All ER 347
103. (1972) AC 824; (1972) 2 All ER 475
104. Ibid, 840; 483
105. Ibid, 847; 489
106. Op. cit.
107. (1980) 1 NZLR 51

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