The Doctrine of Wilful Blindness

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The following paper examines a recent development in the evolution of mens rea. *The author traces the history of the doctrine of wilful blindness and how it has been interpreted by the courts since its beginnings in forgery cases during the early nineteenth century through* R. *v.* Sault Ste. Marie *(1978).*

Where knowledge is required as a requisite element of a criminal offence general principle dictates that proof of such knowledge rests with the Crown. It is equally settled law that the Crown need not prove knowledge by direct evidence. In the vast majority of criminal cases direct evidence of knowledge or lack of it is unavailable. Since knowledge is a state of mind it must be found, failing an admission by the accused of that state of mind, in the same way as intent, by proper inferences from facts proved.[1]

Traditionally the Courts have refrained from invoking civil tests of responsibility in criminal cases requiring proof of knowledge. If the defendant did not know, he cannot be convicted, however negligent he may have been in not obtaining knowledge.[2] Devlin J. has succinctly stated the principle as follows: "The case of merely neglecting to make inquiries is not knowledge at all — it comes within the legal conception of constructive knowledge, a conception which, generally speaking, has no place in the criminal law."[3]

Thus, as Judge Graburn noted, there is a particular school of thought that actual knowledge must be proven beyond a reasonable doubt to be brought home to the accused.[4] However, adherents of this position do recognize what Glanville Williams calls "one strictly limited exception" — the doctrine of wilful blindness:

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[1] *R.* v. *Kelly,* [1967] 1 C.C.C. 215, at 222 (B.C.C.A.) *per* Bull J.A.

[2] G. Williams, *Criminal Law,* 2nd ed. (London: Stevens & Sons, 1961), at 157.

[3] *Roper* v. *Taylor's Ltd.,* [1951] 2 T.L.R. 284, at 289 (K.B.) *per* Devlin, J.

[4] L. Graburn, "Burdens of Proof and Presumptions" in *Studies in Canadian Criminal Evidence,* R. Salhany and R. Carter, eds. (Toronto: Butterworths, 1972), at 64. Granville Williams, *supra,* footnote 2, at 157 stated: "Knowledge, then, means either personal knowledge or (in the licence cases) imputed knowledge. In either event there is someone with actual knowledge."

> Men readily regard their suspicions as unworthy of them when it is to their advantage to do so. To meet this, the rule is that if a party has his suspicions aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge. Lord Sumner said: [*The Zamora,* [1921] 1 A.C. 801, 812] 'There are two senses in which a man is said not to know something because he does not want to know it. A thing may be troublesome to learn, and the knowledge of it, when acquired, may be uninteresting or distasteful. To refuse to know any more about the subject or anything at all is then a wilful but a real ignorance. On the other hand, a man is said not to know because he does not want to know, where the substance of the thing is borne in upon his mind with a conviction that full details or precise proofs may be dangerous, because they may embarrass his denials or compromise his protests. In such a case he flatters himself that where ignorance is safe, 'tis folly to be wise, but there he is wrong, for he has been put upon notice and his further ignorance, even though actual and complete, is a mere affectation and disguise.'[5]

Lord Sumner's definition has required some refinement. Williams suggested that the phrase "even though actual and complete" may be misleading when read in conjunction with the preceeding words "where the substance of the thing is borne in upon his mind." He concluded that the doctrine of wilful blindness comes into play when there is a suspicion which the accused deliberately omits to turn into certain knowledge.[6] In *Roper* v. *Taylor Ltd.,* Devlin J. called it "knowledge of the second degree" which, in his opinion, was actual knowledge in the eyes of the law.[7] Lord Hewart C.J., in *Evans* v. *Dell,* found wilful blindness when "the respondent deliberately refrained from making inquiries the result of which he might not care to have."[8]

The *American Model Penal Code* has defined the doctrine of wilful blindness as follows: "When knowledge of the existence of a particular fact is an element of an offence, such knowledge is established if a person is aware of a *substantial probability* of its existence, unless he actually believes that it does not exist."[9] (emphasis added) In the alternative, Williams stated:

> Before the doctrine of wilful blindness applies, there must be realisation that the fact in question is probable, or, at least, 'possible above the average.' This is illustrated by the cases on receiving. On a charge of receiving it is sufficient that the accused believed the goods were stolen, [*R.* v. *White,* [1859] 175 E.R. 898] i.e., believed they were probably stolen; and even thought he thinks there is some possibility of being wrong, his omission to enquire in the face of his knowledge of probability would, it is submitted, be accounted knowledge. On the other hand, realisation of possi-

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[5]Williams, *supra,* footnote 2, at 157-158.

[6]*Ibid.*, at 158.

[7]*Supra,* footnote 3, at 288.

[8]*Evans* v. *Dell,* [1937] 1 All E.R. 349, at 353 (K.B.) *per* Lord Hewart, C.J.

[9]*Model Penal Code,* s. 2.02 (7) (T.1). No. 4, p. 14, at 129-30.

> bility would not be accounted knowledge, for there is almost always the bare possibility that the goods one buys have been stolen at some time in the past. There must have been something actually to put the accused on enquiry. Hence in *Harvard* [*R.* v. *Harvard* (1914), 11 Cr. App. R. 2], another receiving case, it was held to be wrong to direct the jury that if a man is reckless and does not care, he is just as guilty as if he received the property, knowing at the time that there was something wrong with it. Recklessness and 'not caring' are not quite the same thing as wilful blindness; such words express the latter doctrine rather too widely. Similarly, suspicion is not sufficient if the defendant could not make up his mind positively [*R.* v. *Court*, [1954] Crim. L.R. 662]; though it will be wilful blindness if, having the suspicion, he failed to make further enquiries because he wished to enrich himself even at the risk of participating in the fruits of crime.[10]

In England, the doctrine of wilful blindness had its beginnings in early 19th century forgery cases.[11] The notion that wilful blindness is equivalent to knowledge is a fairly recent development in this country.[12] In the first half of this century the doctrine of wilful blindness was restricted almost exclusively to cases involving possession of stolen goods. However, in the past ten years use of the doctrine has expanded rapidly. Courts began to apply the doctrine of wilful blindness to cases involving possession and importation of narcotics. Recently they have used this rule in cases ranging from misleading advertising to offences against the environment.

Most of the early possession cases were decided on the basis of the doctrine of recent possession.[13] Although the courts refrained from using such phrases as "wilfully blind" or "wilful blindness", the language of the decisions clearly demonstrates recognition of the principle. The Supreme Court of Canada decision, *Lopatinsky* v. *The King* has been cited as an

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[10]*Supra*, footnote 2, at 158-159.

[11]*R.* v. *Giles* (1827), 168 E.R. 1227. See also *R.* v. *Forbes* (1835), 173 E.R. 93; *R.* v. *Parish* (1837), 173 E.R. 413; *R.* v. *Beard* (1837), 173 E.R. 434. Williams also cited a case in which the doctrine of wilful blindness was invoked in a case involving a charge of obtaining by false pretences: *R.* v. *Butcher* (1858), 169 E.R. 1145.

[12]The topic has generated little academic comment: "The only reference appears to be in the 5th edition of Tremeear and two comments in the Criminal Law Quarterly in Volumes 3 and 4. Tremeear, at 25, under the topic heading: "Knowledge As Element of the Offence" contains this passage: "Knowledge will be presumed if the accused could, by proper enquiry, have ascertained the true facts." The late learned editor of Tremeear, A. B. Harvey, Q.C., ascribes his authority for the proposition to *Baldwin et al.* [(1934), 24 Can. Abr. 306], a case involving the issuance of a liquor license contrary to law.

In the Criminal Law Quarterly in Volume 3, at 305, and Volume 4, at 245, in a section entitled *From the Editor's Note Book*, C. C. Savage, Q.C. commented on the objective *vis-à-vis* subjective test of criminal liability. These comments were provoked by the decision of the House of Lords in *Director of Public Prosecutions* v. *Smith* [[1960] 3 All E.R. 161 (H. of L.)] and are not concerned with the doctrine generally, and clearly do not purport to be commentaries on the general applicability of the doctrine of wilful blindness as it applies to the whole structure of the criminal law." Graburn, *supra*, footnote 4, at 66.

[13]See N. Primrose, *Fantastic Facets of the Doctrine of Recent Possession*, (1959) 1 Crim. L. Q. 394; R. M. W. Chitty, Q.C., *Recent Possession*, (1959) 2 Crim. L. Q. 196; J. D. Morton, *Burdens of Proof and the Doctrine of Recent Possession*, (1959) 2 Crim. L. Q. 183.

example.[14] Lopatinsky was charged with retaining in his possession, knowing them to have been stolen, sixteen tires, the property of the Government of Canada. Several of the stolen tires were found in the home of the accused. Evidence indicated that Lopatinsky had received and retained them for the purpose of effecting a sale. Affirming conviction, Estey J. stated:

> Under these circumstances, the disposition of the tires at approximately one-half of their market value is significant. It was this fact, or it together with the other circumstances that caused Congdon to take the serial numbers of these tires and before concluding the purchase to communicate with the police and ascertain if these tires were listed as stolen.
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> Throughout the evidence of both Taylor and Congdon there is no suggestion that any explanation was offered on the part of the accused as to the circumstances under which he was in possession of these tires which had been stolen but two or three days prior thereto.
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> The evidence of guilty knowledge in this as in so many cases is not directly deposed to. The unexplained fact of recent possession is evidence thereof: *R.* v. *Schama* (1914), 11 Cr. App. R. 45; Wills on Circumstantial Evidence, 7th ed., p. 93; Taylor on Evidence, 12th ed., vol 1, s. 140.
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> In this case, however, the Crown had not relied upon the mere fact of recent possession but has adduced evidence of conduct upon the part of the accused, both with respect to his reception and disposition of the tires and as to the sale of a portion thereof. These facts were all adduced in evidence and no explanation tendered in regard thereto. As disclosed in this record they admit of no doubt as to the guilt of the accused.[15]

More explicit statements adhering to the doctrine of wilful blindness are found in subsequent decisions. For example, in *R.* v. *Chimirri*[16] the appellant was charged with unlawfully receiving a large quantity of stolen cigarettes and tobacco from three employees of a large supermarket. The goods which were the subject-matter of the charge were found in the possession of the appellant at his home. The thieves had told Chimirri that they were permitted by their employer to acquire goods at wholesale prices. Chimirri denied all knowledge of the fact that the merchandise was stolen and as an explanation of his purchases stated that he believed the story of the supermarket employees. In previous transactions, the appellant had purchased large quantities of perishable goods at approximately one-half the general retail price of the articles. In the Ontario Court of Appeal Aylesworth J.A. stated:

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[14] *Lopatinsky* v. *The King* (1948), 91 C.C.C. 289 (S.C.C.).

Judge Graburn commented: "It may be asserted that the doctrine of recent possession may, if the court or jury see fit to adopt it, and in the absence of an explanation which might reasonably be true, impart knowledge of the illegal character of the goods involved to an accused in a receiving case. However, quite apart from the doctrine of recent possession, wilful blindness as 'secondary' knowledge has been adopted by the Canadian courts. Merely because a person pays a ridiculously low price in the purchase of stolen goods would not constitute actual knowledge of their stolen character to the purchaser. Clearly the vendor may be in need of ready cash, or may have an abundance of items for himself, and many other factors could cause him to sell the goods at a ludicrously low price. But the courts have consistently held that purchasing goods at a low price is a significant factor in inferring guilty knowledge." Graburn, *supra*, footnote 4, at 67.

[16] *Lopatinsky* v. *The King*, *supra*, at 292-293 *per* Estey, J.

> Little need be said concerning the rejection by the trial Judge of the appellant's explanation. Large quantities of the store's merchandise had been purchased in a course of dealing between the thieves and the appellant extending over several months and at one-half the retail price. The youth of the thieves and the quantities of perishable food offered for sale by them at one time *were facts in themselves such as to arouse suspicion in an honest man and put him on inquiry.* No inquiries in fact had ever been made by the appellant from the store management. No explanation of how he came to be in possession of the articles seized by the police had ever been attempted by him before his trial. All these facts amply justify the conclusion reached by the trial Judge that appellant's belated explanation could not reasonably be true.[17] (emphasis added)

Similar approaches have been taken in other provinces. In *R.* v. *Cooper,*[18] a decision of the Nova Scotia Supreme Court, the appellant was charged with possession of a number of stolen electrical appliances. He was found in possession of goods stolen by one Covin. Cooper insisted that he thought Covin was selling the goods to him at wholesale prices. In fact, the prices paid for the goods were substantially less than their wholesale value. The Court applied the doctrine of recent possession and dismissed Cooper's appeal. Following the Supreme Court of Canada decision, *Ungaro* v. *The King,*[19] the Court held that because the trial Judge found the appellant's explanation of his possession of the stolen goods to be false, it was unnecessary for him to consider whether this explanation might reasonably be true. However, MacQuarrie J. added the following comments:

> The appellant must have known that the price accepted by Covin for each appliance (slightly more in total than one-half the Westinghouse wholesale price to dealers) was a very strong indication that the appliances had been obtained illegally . . . . . This fact alone, the price paid by the accused and accepted by Covin, must have convinced the accused that there was something wrong . . . . . The Crown's case against the appellant was not limited to proof of recent possession. The whole of the evidence as to the price that was paid, including the evidence of the appellant, is inconsistent with the appellant's

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[16] *R.* v. *Chimirri* (1954), 107 C.C.C. 342 (Ont. C.A.).

[17] *Ibid.*, at 345-346 *per* Aylesworth, J.A.

[18] *R.* v. *Cooper,* [1964] 1 C.C.C. 353 (N.S.S.C.).

[19] *Ungaro* v. *The King,* [1950] S.C.R. 430. At 431 Rinfret, C.J.C. stated: "I do not understand Chief Justice Duff's statement in *Richler* v. *The King,* [1939] 4 D.L.R. 281 at p. 282 . . . as meaning that if the trial Judge does not believe the accused it is, nevertheless, his duty to apply his mind to a consideration as to whether the explanation given by the accused might reasonably be true. If the trial Judge does not believe the accused the result is that no explanation at all is left, and the case would have to be decided on the well-known principle that possession of recently stolen property is circumstantial evidence of guilt."

In *Richler* v. *The King,* at 282-283 Duff, C.J.C. said: "The question, therefore, to which it was the duty of the learned trial Judge to apply his mind was not whether he was convinced that the explanation given was the true explanation, but whether the explanation might reasonably be true; or, to put it in other words, whether the Crown had discharged the onus of satisfying the learned trial Judge beyond a reasonable doubt that the explanation of the accused could not be accepted as a reasonable one and that he was guilty."

> denial of guilty knowledge, and together with the rest of the evidence admits of no doubt (as the learned trial Judge has found) as to the guilt of the accused.[20]

In *R.* v. *McRitchie,*[21] the Alberta Court of Appeal also based its decision primarily on the doctrine of recent possession. The appellant had received a pair of stolen binoculars from a person whom he knew was a convicted thief. It was uncertain upon the evidence that he had ever been told that the goods were stolen, and McRitchie vehemently denied such knowledge. He held the goods for two or three weeks and returned them to the thief upon request. No money changed hands during these transactions. The appeal was dismissed. Johnson J.A. stated:

> In the present case, the binoculars were received through the instrumentality of Sabit, a convicted thief, under circumstances which cried out for an explanation of their origin. Under those circumstances, a simple denial of any knowledge that they were stolen is not an adequate explanation. Such a denial, in the circumstances of this case, is not sufficient to enable the Court to determine that a statement that he did not know they were stolen could or could not reasonably be true.[22]

In his dissenting judgment, Clinton J. Ford J.A. also adopted the wilful blindness theme:

> It may appear clear enough that the accused should, or might have had a suspicion that the binoculars were stolen, but that is not enough to warrant the conclusion that he well knew that they were . . . . . I cannot but draw the conclusion that the reasons for judgment indicate that the circumstances under which the binoculars were received and the explanation of the accused were not considered as to whether a reasonable explanation, that is, as an explanation that might reasonably be true, had been given, so as to be ground for reasonable doubt that he well knew they were stolen. That this was the question to be decided is quite clear from the judgment of Kerwin J., now C.J.C., delivered by Estey J. in *Ungaro* v. *The King* . . . . . The question not having been considered by the learned trial Judge it is necessary for this Court to deal with it; and I would hold that under the circumstances the explanation of the accused may reasonably be true.[23]

Thus, in most circumstances, mere denial of knowledge will not afford an effective defence to a charge of possession of stolen goods. Similarly, it may not be sufficient to merely inquire if the goods are stolen. In *R.* v. *Pomeroy,*[24] the appellant purchased a number of tires at considerably less than the wholesale price. During the course of the

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[20] *Supra,* footnote 18, at 361-364 *per* MacQuarrie, J.

[21] *R.* v. *McRitchie* (1956), 116 C.C.C. 73 (Alta. C.A.).

[22] *Ibid.,* at 81 *per* Johnson J.A. at 81; "I am not prepared to say that under certain circumstances such a denial might not be a sufficient explanation which the Court could hold to be one which reasonably might be true."

[23] *Supra,* footnote 21, at 77-79 *per* Clinton J. Ford, J.A.

[24] *R.* v. *Pomeroy* (1936), 67 CCC. 71 (B.C.C.A.).

negotiations Pomeroy twice asked if the goods were stolen and on both occasions he was assured by the seller that they were not. His appeal from conviction was heard by the British Columbia Court of Appeal. Three of the Judges limited their comments to the question of proper evidence of identification of the stolen tires. The fourth Judge, McPhillips J.D., spoke to the issue of Pomeroy's inquiry in his dissenting judgment:

> I see no evidence to indicate in any way that the accused was aware of the fact that the tires had been stolen. I see nothing reasonably to put him upon inquiry other than the inquiry he made. he asked, "They are not stolen tires, are they?" And he is given the assurance that they were not stolen. What more could he do? He could refuse to buy the tires no doubt. Some men are more careless than others, but that does not necessarily make them criminals. There is nothing to indicate a criminal intent.[25]

The Court split and Pomeroy's appeal from conviction was dismissed.

The clearest recognition of the doctrine of wilful blindness in a possession case — again, without using those exact words, comes from the decision of *R.* v. *Marabella.*[26] The accused purchased a considerable amount of stolen copper at a very low price. Marabella was charged with possession of stolen goods. At his trial, evidence established that he asked the seller where he had purchased the copper. When he was told, "Never mind, if you do not want to buy it, we will take it to Hamilton", no further inquiries were made. Counsel argued that while it may have been reckless on the part of the accused not to make further inquiries, there was no duty on him to do so. In convicting the accused, Fuller Co. Ct. J. stated:

> In view of the fact that there was some argument on the point as to whether the accused was merely reckless and was not bound to pursue his inquiry as to the source of the goods further, I probably should express my views of this point . . .
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> Assuming for the purpose of argument that the question was, in fact, asked in good faith, the answer at best, was evasive. Having regard to the surrounding circumstances such as the type of the goods, some new and valuable, the fact that the goods were at a private house being sold by a private individual as scrap, I do not think the circumstances were such that this accused was entitled to stop where he indicates he did. In my opinion, on these facts, he deliberately refrained from asking for further information to avoid obtaining knowledge which would be dangerous to him, namely, that the goods were stolen. Certainly, the surrounding circumstances together with the evasive answer indicated quite strongly that the goods were improperly come by and that further enquiry would disclose this.
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> On the facts in this case, I do not think that this accused was entitled to refrain from making further enquiries and thus avoid being told that the goods were stolen.

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[25] *Ibid.*, at 72-73 *per* McPhillips, J.A.

[26] *R.* v. *Marabella* (1956), 117 C.C.C. 78 (Ont. Co. Ct.).

> As I understand the law, if a party has his suspicions aroused but then deliberately omits to make further enquiry because he wishes to remain in ignorance, he is deemed to have knowledge and on the facts, this accused is in this position in this case.[27]

The apparent overlap between the doctrine of recent possession and the doctrine of wilful blindness has caused a considerable amount of confusion. This is best demonstrated by reference to the Supreme Court of Canada decision in *Graham* v. *The Queen.*[28] In that case, the appellant was convicted of having in his possession stolen Government of Canada bonds. His explanation was that he had received the bonds from a man named Moore whom he had met in a bar in the City of Detroit. Moore said that he was unable to enter Canada and cash the bonds himself because of problems he was having with the immigration officials. Graham, for a fee of ten per cent, agreed to cash the bonds at a Windsor, Ontario bank. He was arrested after cashing several of these bonds in Canada. The sole theory of the defence was that the accused had offered an explanation of his possession of the bonds which might reasonably be true. The Supreme Court, in a unanimous decision, dismissed the appeal:

> The error assigned by counsel for the appellant is that the learned trial Judge did actually find that the explanation given by the accused might reasonably be true but that, *in spite of this, he proceeded to convict because the accused should have known that the bonds were stolen. If this were so, the appeal would succeed because an approach such as this would place an onus on the accused of offering an exculpatory explanation going beyond the bounds laid down by the authorities.* I am, however, satisfied that the reasons for judgment of the learned trial Judge are not open to this construction. While there are certain expressions in the reasons which might indicate that he thought there were elements of probability in the story told by the accused, on a weighing of the story as a whole and after a consideration of it, step by step, he rejected it decisively in the following conclusion: "The explanation that the accused has given on the stand by his actions and all that he has done all through these transactions, could not reasonably be true, and the explanation could not be believed by anyone, and there is nothing before me whereby I could possibly believe it, and that being the case, all I can do is find the accused guilty as charged."
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> It was also argued for the appellant that the learned trial Judge erred in law in that he directed himself that if he disbelieved the explanation of the accused he was bound to convict. In my opinion the learned Judge did not so direct himself. He appears on a consideration of all the evidence to have reached the conclusion that it was inconsistent with any rational explanation other than the guilt of the accused. He clearly reached and stated the conclusion that the appellant "could not possibly not have known" that the bonds were stolen.[29] (emphasis added)

The crux of the matter is whether or not the doctrine of wilful blindness rests upon the application of an objective test. Professor

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[27] *Ibid.*, at 84-85 *per* Fuller, Co. Ct. J.

[28] *Graham* v. *The Queen* (1959), 124 C.C.C. 314 (S.C.C.).

[29] *Ibid.*, at 315-316 (S.C.C.) *per* Judson, J.

Stuart has recently noted the general erosion of subjective *mens rea* in our criminal law.[30] This concern was echoed by Glanville Williams:

> The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of wilful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge.[31]

The possession of stolen goods cases do not provide an answer to the subjective - objective controversy. His Honour Judge Graburn explained:

> It appears that the line separating the tortious theory of liability and the doctrine of wilful blindness is exceedingly tenuous in view of the judgments in *The Zamora, Baldwin et al., Pomeroy, McRitchie, Marabella, Lopatinsky, Cooper* and *Chimirri.* There was no reference to these cases at all by the Supreme Court of Canada in *Graham.*
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> It may be that in receiving cases because of the doctrine of recent possession and its resultant consequences, the explanation that might reasonably be true, the doctrine of wilful blindness is somewhat circumscribed and has a unique application. It is difficult to reconcile wilful blindness with explanations that might reasonably be true. The *Ungaro* rule has, it is submitted, been strained by the courts to incredible lengths. The true meaning of *Ungaro,* namely, has the Crown proven knowledge beyond a reasonable doubt, has been demolished by some courts . . . . .
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> It is accordingly submitted that the sole reason for the circumscription of the doctrine of wilful blindness as indicated in the *Graham* case with reference to possession arises out of a misconception of the decisive ratio of *Ungaro* and the fantastic lengths to which the courts have gone in extending the misconception of the *Ungaro* rule.[32]

Accordingly, it is appropriate to turn to another line of cases which discussed the concept of wilful blindness apart from any conflict with the doctrine of recent possession. The majority of these cases involve the possession and importation of narcotics. As early as 1947, in the case of *R.* v. *Ryan,*[33] a decision of the Nova Scotia Supreme Court, the doctrine began to make its appearance in drug related cases. Ryan worked as a druggist's clerk in Halifax. Part of his duties included making up boxes of drugs for the use of troops on sea-going ships. When he was found

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[30]D. R. Stuart, *Criminal Law and Procedure,* (1977) 9 Ottawa L.R. 568, at 580-591.

[31]*Supra,* footnote 2, at 159.

[32]Graburn, *supra,* footnote 4, at 70-71. The reader should note that in *Graham* the Supreme Court of Canada did not cite *Ungaro* and did not use the phrase "wilful blindness".

[33]*R.* v. *Ryan* (1947), 90 C.C.C. 98 (N.S.S.C.).

at home with prohibited drugs in his possession he stated that he had taken them home for safe-keeping and fully intended to return them to his office. At trial, the jury returned a verdict of "guilty without criminal intent" and upon questioning from the bench indicated that it was their opinion that possession of the prohibited narcotics was a result of carelessness. Mr. Justice Doull construed the verdict to be a verdict of "guilty".

In dismissing the appeal, Graham J. stated:

> The argument made to this Court was, that the verdict should have been held to be "not guilty", because it negatived criminal intent. The jury explained the matters which they thought negatived criminal intent, and their explanation was part of the verdict.
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> Section 4(1) (d) of the *Opium and Narcotic Drug Act*, 1929 (Can.), 49 has been before the Courts of Canada many times, and it is established that nothing more than proof of possession is necessary to constitute an offence under it . . . . .
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> That being so, since the accused swore that he had possession, and the jury found accordingly, the fact that he had no intention of "converting" the drugs "to his own use or selling them" was immaterial. Neither did the later part of the explanatory findings, — i.e., "It was more through carelessness than anything else that he had it in his possession for that length of time" affect the verdict of guilt. That implied knowledge and confirmed the finding of possession.[34]

Of course, it can be argued that this decision does not, in fact, recognize a doctrine of wilful blindness in Canadian criminal jurisprudence. First, as in so many of the cases, the phrase "wilful blindness" was not used by the Court. Second, the Court held that "carelessness" implies knowledge. This is crucial in view of the distinction Williams drew between wilful blindness and recklessness and "not caring".[35]

In 1968, the British Columbia Court of Appeal was presented with an excellent opportunity to discuss the doctrine of wilful blindness in the case of *R.* v. *Boyer*.[36] Boyer, along with two other young men, was charged with importing marijuana into Canada. At trial, the appellant was convicted and the minimum sentence of seven years imprisonment was imposed upon him.

The accused had borrowed a friend's car and driven to the United States. A routine search at the border upon his return to Canada produced twelve packages of marijuana entwined in the springs of the back seat. The appellant argued that he had no knowledge of any packages under the back seat and therefore obviously knew nothing of

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[34]*Ibid.*, at 99-100 *per* Graham, J.

[35]*Supra*, footnote 2, at 159.

[36]*R.* v. *Boyer*, [1969] 1 C.C.C. 106 (B.C.C.A.).

what they contained.[37] Without resort to the doctrine of wilful blindness, the Court adopted familiar language in allowing the appeal and directing a new trial:

> I see nothing in s. 5 of the *Narcotic Control Act* to exclude the principle of *mens rea.*
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> In some cases the very commission of the acts constituting the offence charged carries with it an inference of guilty intention. In the case of bar, however, the mere bringing of marijuana into Canada hidden in the borrowed car does not of itself prove guilty intention. *There must be something more than this, some evidence proving directly or from which it may properly be inferred that the appellant was aware or ought to have been aware, or, as a responsible person, had some reason to suspect that marijuana might be present in the car.* I have support for what I have said in the judgment of Cartwright J. in *Beaver* v. *The Queen,* 118 C.C.C. 129, 26 C.R. 193, [1957] S.C.R. 531. Although the judgment dealt with unlawful possession of a narcotic, in my view the principles enunciated apply with equal force to cases of unlawful importation into Canada of a narcotic.[38] (emphasis added)

Two years later, in the well known case of *R.* v. *Blondin,*[39] the same Court specifically adopted the phrase "wilful blindness" in reaching its decision. Blondin had imported hashish into Canada in a scuba tank. He contended successfully at trial that he did not know the substance was hashish and therefore could not be convicted. During questioning Blondin stated that he knew there was something in the tank and that it was illegal. The British Columbia Court of Appeal allowed the appeal by the Crown and directed a new trial. The reference by Robertson, J.A. to "*mens rea* in its widest sense" has been subjected to considerable

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[37] *Ibid.*, at 128 *per* Robertson, J.A. At 125 the comments of Tysoe, J.A. suggested a different interpretation of the facts: "Being of the view that the jury, properly instructed and acting reasonably, could infer on the totality of the evidence that there was guilty knowledge and intention on the part of the appellant, I would not direct that a verdict of acquittal be entered. As I propose to order a new trial, I shall not discuss the portions of the evidence that persuade me to this view."

[38] *Ibid.*, at 120-121 *per* Tysoe, J.A. At 130 Robertson, J.A. presented a more limited interpretation of the *Beaver* decision: "*Beaver* v. *The Queen* . . . (that is to say, the majority judgment of Rand, Locke and Cartwright, J.J.) decided that one who was charged with being in possession of a drug under s. 4(1) (d) . . . of the *Opium and Narcotic Drug Act* . . . could not be convicted unless it was proved that he had knowledge that the substance in his possession was a forbidden substance. This, it was made clear, was so because of the doctrine of *mens rea,* the application of which to cases under the Act had not been excluded by the legislation. The reasoning there must apply equally to offences under the *Narcotic Control Act, supra.* For example, a necessary ingredient of the offence of possession under s. 3 is knowledge on the part of the accused that he had a substance in his possession and that the substance was a narcotic; and a necessary ingredient of the offence of importing under s. 5 is knowledge on the part of the accused that he was importing a substance into Canada and that the substance was a narcotic."

[39] *R.* v. *Blondin* (1970), 2 C.C.C. (2d) 118 (B.C.C.A.).

juridical and academic analysis.[40] Unfortunately, little attention has been focused on the comments immediately following:

> These reasons will, I fear, dispose of this case inadequately if I do not indicate how I think the jury could properly have found *mens rea* in the circumstances of this case. They could have done so if they found that Blondin had been paid to smuggle a substance illegally into Canada and either was reckless about what it was or wilfully shut his eyes to what it was, inferring therefrom that he suspected that it might be a narcotic. It follows that the learned Judge ought to have told the jury that they might convict if they found that Blondin brought the substance into Canada from Japan and knew that it was a narcotic. *He should also have instructed the jury that they might convict if they found that he had brought the substance into Canada illegally and had either been reckless about what it was or wilfully shut his eyes to what it was, and then drew the inference that he suspected that it might be a narcotic.*[41] (emphasis added)

Discussion of this case is generally limited to the proposition that to support a charge of importing narcotics into Canada, the Crown need not prove that the accused knew that the substance he is importing is hashish,

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[40]"Basing my opinion upon what I understood to be the principle enunciated in the several passages I have quoted, I am of the respectful opinion that the learned trial Judge erred when he instructed the jury that, in order to find Blondin guilty, they must find that he knew that the substance in the tank was cannabis resin. It would be sufficient to find, in relation to a narcotic, *mens rea* in its widest sense.

It remains to decide whether the Judge could properly instruct the jury that, if they were satisfied beyond a reasonable doubt that Blondin knew that it was illegal to import the substance in the tank, they might find him guilty, even though he did not know that the substance was a narcotic. I am not prepared to so hold. An essential ingredient of the offence is the importation of a narcotic and I do not consider that *mens rea qua* that offence is proven by an intention to commit an offence which, so far as Blondin's admitted knowledge went, might have been one against the *Customs Act*, R.S.C. 1952, c. 58." *Ibid.*, at 131 *per* Robertson, J.A.

See *R.* v. *Kundeus* (1976), 32 C.R.N.S. 129 (S.C.C.); J. M. Weiler, *Regina* v. *Kundeus: The Saga of Two Ships Passing in the Night*, (1976) 14 Osgoode Hall L.J. 457 and the case comment on *R.* v. *Kundeus* by E. Oscapella, at (1976), 8 Ottawa, L.R. 91.

[41]*R.* v. *Blondin*, *supra*, at 131-132 *per* Robertson, J.A. The two remaining judges who heard the appeal also recognized the doctrine of wilful blindness. Davey, C.J.B.C. at 120: "In the circumstances of this case, I think the learned trial Judge ought to have instructed the jury that they should convict if they found beyond a reasonable doubt that Blondin brought the substance into Canada knowing that it was a narcotic, or being reckless about its nature, or wilfully shutting his eyes to what it was."

McFarlane, J.A. at 122-123: "I accordingly agree that it would be correct to instruct a jury that the existence of that knowledge may be inferred as a fact, with due regard to all the circumstances, if the jury finds that the accused has recklessly or wilfully shut his eyes or refrained from inquiry as to the nature of the substance he imports."

The Court adopted the language of Lord Reid in *Warner* v. *Metropolitan Police Commissioner*, [1962] 2 A.C. 256, at 279-280 (H.L.): "The object of this legislation is to penalise possession of certain drugs. So if *mens rea* has not been excluded what would be required would be the knowledge of the accused that he had prohibited drugs in his possession: it would be no defence, though it would be a mitigation, that he did not intend that they should be used improperly. And it is commonplace that, if the accused had a suspicion but deliberately shut his eyes, the court or jury is well entitled to hold him guilty. Further it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession. That would not lead to an unreasonable result. In a case like this Parliament, if consulted, might think it right to transfer the onus of proof so that an accused would have to prove that he neither knew nor had any reason to suspect that he had a prohibited drug in his possession. But I am unable to find sufficient grounds for imputing to Parliament an intention to deprive the accused of all right to show that he had no knowledge or reason to suspect that any prohibited drug was in his premises or in a container which was in his possession."

but only must be aware that the substance is an illegal narcotic.[42] Clearly the decision also provides the Crown with an alternative mode of proving knowledge through the application of the doctrine of wilful blindness. A broad application is prevented by the suggestion that an accused's suspicion must be directed toward the presence of an illegal narcotic as opposed to other materials, prohibited or otherwise.[43]

The doctrine has been applied in a number of drug cases following the decision of *Blondin*. In *R.* v. *Overvold*[44] the accused was found in possession of a pipe-stem which contained traces of *Cannabis* resin. Although the decision rested, in part, on the application of the maxim *de minimus non curat lex* the comments of de Weerdt, J.M.C. are well worth noting since they appear to establish an objective test for the determination of wilful blindness:

> Taking into account that the defendant knew what the pipe-stem was part of and had been used for, was he then so wilfully blind to the possibility of it bearing traces of a prohibited narcotic that he should be treated as having had the requisite knowledge of its presence, so as to warrant conviction upon this charge. Counsel have both referred to the recent decision of the British Columbia Court of Appeal in *R.* v. *Blondin* . . . . .
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> The facts in that case were that the defendant knew he was carrying a narcotic, but did not know it was cannabis resin. In the case now before me, can it be said that the defendant knew, in the legal sense, that he was carrying a narcotic? If he is to be fixed with that knowledge, then there is no problem as held in the *Blondin* case, over what kind of narcotic it was . . . . .
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> If there was any "mistake of fact" defence open to the defendant here, it rested not upon what kind of prohibited substance he thought he may have had, but on whether he "knew" he had such a substance at all, i.e., "knew" in the expanded sense mentioned by Davey, C.J.B.C. But that kind of knowledge, I think it should be said, is not to be considered in such a wide sense as to attribute *mens rea* in relation to a narcotic merely on the basis of actual knowledge that the substance is, say, contraband. I do not read the reasons of the Court in the *Blondin* case as going so far, and I do not feel that it is for

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[42]Weiler, *supra*, footnote 40, at 464. In a comment on the *Kundeus* decision, Prof. Stuart, *supra*, footnote 30, at 582-583 stated: "The majority judgment carefully avoids passing on the specific ruling of the British Columbia Court of Appeal in *Blondin* that mere knowledge (in the extended sense) of illegality will not suffice to secure a conviction and that what is required is knowledge or wilful blindness of the fact that the substance is a narcotic. The significance of this is ambiguous since the ruling seems to be implicit in the approval of the cited passage from *Blondin*.

In conclusion it seems, on the basis of *Beaver*, *Blondin* and the majority judgment in *Kundeus*, that, in a drug prosecution under either the *Narcotics Control Act* or the *Food and Drug Act*, the prosecution must prove knowledge or wilful blindness in respect of the fact that the substance possessed was a prohibited drug and that it is immaterial under which statute the drug is proscribed or what the penalty might be. It is arguable that a requirement of knowledge or wilful blindness as to the precise drug possessed might lead to too many acquittals, but perhaps the answer to this contention lies, as Laskin, C.J.C. indicated, in legislation to provide for a conviction for the lesser offence. It is unfortunate that the majority of *Kundeus* did not explore the implications of their judgment for *mens rea* generally."

[43]". . .it would be wrong to instruct the jury that proof of knowledge that the substance was one which it would be unlawful to import is itself sufficient to support a conviction. The offence of smuggling goods which may be imported lawfully on disclosure and payment of customs duty is, for this purpose, I think, essentially different from that of importing a narcotic which Parliament has declared to be a serious offence." *Supra*, footnote 39, at 121 *per* McFarlane, J.A.

[44]*R.* v. *Overvold* (1972), 9 C.C.C. (2d) 517 (N.W.T. Mag. Ct.).

> me to stretch things further than the higher Courts have so far seen fit to go. What the Court said, in my understanding, is that failing actual knowledge that he had the alleged narcotic, the accused may be convicted if he was merely reckless or wilfully shut his eyes to what "it" was, i.e., to its character as a narcotic substance which he knew he had in his actual possession or control . . . . .
>
> There is nothing before me, in my judgment, from which I could, or at least should, infer that the defendant at the time even suspected that the pipe-stem . . . contained any kind of prohibited drug whatsoever. . . . . *If there was any reason to suspect the presence of more than an infinitesimal trace of such a substance, the defendant might indeed have suspected its nature; but it was not reasonable for him, as an average sort of man, to suspect the actual presence of a substantial or measurable amount of any such substance in the circumstances,* or to believe that a tiny microscopic trace could or would be prohibited under penal sanction pursuant to the laws of Canada.[45] (emphasis added)

Two recent decisions from the Ontario Court of Appeal offer little guidance. In *R.* v. *Duffy*[46] the Court heard an appeal from conviction on a charge of importing a narcotic. The appellant had taken delivery of a shipment of *Cannabis* resin. In the charge to the jury the trial judge stated:

> You cannot find a man guilty of importing a narcotic into Canada if he doesn't know he is importing it, *or has no good reason to know that he is importing it,* and the gist or really the crux of this case here is whether, in fact, *the accused knew or ought to have known* from the circumstances of which he was fully aware that he was taking part in an importation of a narcotic . . . . . if you feel that from the evidence of the Crown you can draw a conclusive inference that *he knew or must have known* that he was involved in the importation of this narcotic, and you have no reasonable doubt about it, then it is open to you to find him guilty.[47] (emphasis added)

The Ontario Court of Appeal allowed the appeal and ordered a new trial. In reaching their decision they cited no case authority and did not allude to the doctrine of wilful blindness. The Court took exception to the use of such phrases as "ought to have known" or "must have known". Schroeder, J.A. stated:

> What the Crown must prove beyond a reasonable doubt is that the accused man had actual knowledge that what he was importing was not necessarily cannabis resin as charged, but that he was importing a narcotic or other drug

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[45] *Ibid.*, at 522-524 *per* de Weerdt, J.M.C. The case of *R.* v. *S.* (1974), 17 C.C.C. (2d) 181 (Man. Prov. Ct.) also involved a pipe containing traces of cannabis resin. At 186 Johnston Prov. Ct. J. stated: "If one has possession of a substance, the specific nature of which is known to that person, it is no defence to state merely that the person was not aware that the substance was considered a narcotic by law. Rather, the questions to be asked in such cases are: Is there sufficient facts before the Court to draw a reasonable inference that the person had actual knowledge of the presence of cannabis resin in the pipe? If the answer to that question is no, then, is there evidence to indicate that the person suspected the presence of cannabis resin in the pipe and was "wilfully blind" to it?"

[46] *R.* v. *Duffy* (1973), 11 C.C.C. (2d) 519 (Ont. C.A.).

[47] *Ibid.*, at 519-520 *per* Schroeder, J.

> the importation of which is prohibited by the provisions of the *Narcotic Control Act*. It is not sufficient to prove that he "ought to have known" or that he "must have known" that fact.[48]

In 1978, the Ontario Court of Appeal was presented with a factual situation tailor-made for the application of the doctrine of wilful blindness. In *R.* v. *Aiello*[49] the Crown successfully appealed the accused's acquittal on a charge of possession of heroin for the purpose of trafficking. At trial police testified that the accused was seen to come out of a restaurant washroom where they knew heroin had been cached. The accused was arrested and the heroin was found on his person. Aiello testified that a man named Jim offered him money to pick up the package. He initially suspected the package contained jewellery but when he saw it he, in his own words, "figured it had to be some kind of drug". Martin J.A. stated:

> We are all of the view that the learned trial Judge fell into a serious error in instructing the jury that the Crown, in order to establish possession, was required to prove beyond a reasonable doubt that the respondent knew that the package contained heroin. We are also of the view that the trial Judge erred in failing to direct the jury that the knowledge on the part of the respondent necessary to constitute the offence, need not be proved by direct evidence but could be inferred from all the surrounding circumstances.
>
> In our view, the trial Judge should have directed the jury that if they were satisfied beyond a reasonable doubt that the respondent assumed control of the package, knowing that it contained a drug, the trafficking in which was prohibited, or was wilfully blind to it being such a drug or was reckless as to whether it was such a prohibited drug, then the knowledge necessary to constitute the offence was established. The trial Judge in our view should have further directed the jury that it was not necessary for the prosecution to prove the required knowledge by direct evidence, but that it could be inferred from the surrounding circumstances, such as, for example, the finding of the drug on the accused's person in his trouser pant leg, his evidence that he figured that it must be a drug, the circumstances in which, and the place where he had picked up the package.[50]

The Court cited no case authority in reaching their decision. They also failed to instruct on the question of which test subsequent courts should use to determine the issue of knowledge in cases applying the doctrine of wilful blindness, *i.e.*, objective, subjective, or a combination thereof. Phrases such as "ought to have known" or "must have known" will be frowned upon by appellate courts. However, decisions such as *Boyer*[51] and *Overvold*[52] suggest that terminology such as "ought to have

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[48] *Ibid.*, at 520 *per* Schroeder, J.

[49] *R.* v. *Aiello* (1978), 38 C.C.C. (2d) 485 (Ont. C.A.).

[50] *Ibid.*, at 488 *per* Martin, J.A.

[51] *Supra*, footnote 36.

[52] *Supra*, footnote 44.

been aware" or "ought to have suspected" will be acceptable. Failure by the Courts to elaborate on this rather tenuous distinction is clearly unsatisfactory.

As indicated earlier, the Courts have now started to apply the doctrine of wilful blindness in a number of new areas. For example, in *R.* v. *McFall et al.*[53] the British Columbia Court of Appeal adopted the doctrine of wilful blindness in relation to a charge of knowingly without lawful justification or excuse having possession of obscene films for the purpose of exposing them to public view. The films, which were owned by the accused, were shown in cubicles at the back of a book store. Signs had been posted reading: "Restricted to persons over 18" and "Sex-exciting movies". The provincial censor testified that he had approved the films and classified them as restricted. However, following a *voir dire*, the trial judge ruled that he could not give in evidence the basis for his decision. In his charge, the trial Judge refused to instruct the jury that the approval of the censor could be a lawful justification or excuse. Rather, he told them this evidence went only to the question of knowledge by the accused that the film was obscene.

The appeal was allowed and a new trial was ordered. The majority found the fact that the provincial censor had approved a film did not constitute a lawful justification or excuse. Robertson J.A. dissented on this point.[54] The censor's approval did not mean that the film was not obscene; it was merely evidence which the jury could consider in reaching its conclusion on the issue of obscenity. The trial judge erred in excluding the censor's evidence as to the criteria used in judging the film. This evidence was relevant to, and some evidence of, the standard of the community with respect to the acceptability of the films.

The Court also held that the Crown had established the requisite knowledge "if it shows that the accused had knowledge, not that the film was obscene in the legal sense, but that they had knowledge of its nature, that is that it was a film of which a dominant characteristic was the exploitation of sex."[55] The Court considered several factors, including the posted signs and the accused's knowledge of the censor's classification, and found there was sufficient evidence of knowledge upon which a jury could act. The Court went on to state that even if there was no actual

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[53]*R.* v. *McFall et al.* (1975), 26 C.C.C. (2d) 181 (B.C.C.A.).

[54]*Ibid.*, *per* Taggart, J., Carrothers, J.A. concurring. At 185-186 Robertson, J.A. stated: "in my opinion it is for the jury in each case to find whether any circumstance of the situation which is itself lawful, when viewed with all the other circumstances, constitutes in their opinion (or judgment) an excuse for what the accused did .... It follows from what I have said that the approval of the film classification director does not as a matter of law constitute a lawful excuse, but that it is open to the jury to find as a fact that it does."

[55]*Supra*, footnote 53, at 194 *per* Taggart, J.A.

knowledge the doctrine of wilful blindness would apply in the circumstances:

> It seems to me that, even if one accepts (without deciding) Dr. Williams' contention that "a court can properly find wilful blindness only where it can almost be said that the defendant actually knew," in the case at bar the Crown has advanced sufficient proof to satisfy that requirement.[56]

A series of three cases from the Ontario Court of Appeal suggest a movement toward the position taken by Glanville Williams. These decisions, which do not involve drug charges, specifically rejected the use of an objective test in the application of the doctrine of wilful blindness. The most important of these decisions may well be *R.* v. *Currie.*[57] A stranger had approached Currie in a hotel and asked him to cash a cheque at a nearby bank. Currie was to be paid five dollars for this service. He took the cheque, which was stolen, cashed it and gave the proceeds to this unknown man. Currie's appeal from conviction was allowed:

> . . . the trial Judge's reasons for judgment is not free from ambiguity and is reasonably open to the conclusion that the learned trial Judge was of the view that the doctrine of wilful blindness applied because the accused should have been suspicious in all the circumstances of the forged endorsement on the cheque when he received it and should have made further inquiry.
>
> This was a misconception on the part of the trial Judge as to the doctrine of wilful blindness, which he purported to apply . . . . . *The fact that a person ought to have known that certain facts existed, while it may, for some purposes in civil proceedings, be equivalent to actual knowledge, does not constitute knowledge for the purpose of criminal liability, and does not by itself form a basis for the application of the doctrine of wilful blindness.*[58] (emphasis added)

Professor Stuart categorized this decision as an implied extension of *mens rea* to recklessness. He stated:

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[56]*Ibid.*, at 198 *per* Taggart, J. The Court also quoted extensively from *Blondin* and cited *R.* v. *Lee* (1971), 3 C.C.C. (2d) 306 (B.C.S.C.). In that case the Court considered an appeal by way of stated case from a conviction for selling a publication containing obscene matter. The appellant, a Chinese grover, sold a pocket book which was found to be obscene. The appellant could not read english. At 308, Munroe J. stated: "The object of s. 150 (2) (a) is to penalize the sale of obscene written matter and if the appellant had a suspicion that the book in question was obscene but deliberately shut his eyes to what it was, the Court is well entitled to hold him guilty:

[57]*R.* v. *Currie* (1957), 23 C.C.C. (2d) 292 (Ont. C.A.). In a recent decision involving a charge of fraud, the Ontario Court of Appeal has specifically adopted the majority position in *Currie.* See *R.* v. *Stone* (1978), 40 C.C.C. (2d) 241 (Ont. C.A.).

[58]*Ibid.*, at 295-296 *per* Martin, J.A. In his dissent Gale, C.J.P. stated at 293: "I need not go into the circumstances of the case because it is my judgment that, although not expressinghimself in his judgment as clearly as he might have, the Judge made sufficient findings to support the decision that the appellant was guilty on the ground of wilful blindness.

I base my conclusion on the finding of the Judge that the appellant "deliberately or knowingly" neglected to make the inquiries which he ought to have made. Such a finding plainly suggests that the Judge decided that the appellant was in fact suspicious of the authenticity of the cheque, for otherwise he could not have "deliberately" failed to make the necessary inquiries."

> . . . it is encouraging to note that the majority of the Ontario Court of Appeal rejected a purely objective approach in *Regina* v. *Currie* . . . . . A passage from Granville Williams concerning the doctrine of wilful blindness was quoted with approval, but no reference was made to that author's double-barrelled concept of recklessness which requires not only subjective foresight of the risk, but also unjustified assumption or creation of it, a matter which must be determined objectively. It would seem that this limited objective aspect is necessarily inherent in any otherwise subjective test of recklessness.[59]

On this point, while most commentators would prefer an objective-subjective fusion as opposed to an objective-constructive knowledge test, it may be premature to equate the doctrine of wilful blindness with the rather confused current state of recklessness. At the risk of being overly repetitive one must bear in mind the caution expressed by Glanville Williams: "Recklessness and 'not caring' are not quite the same thing as wilful blindness; such words express the latter doctrine rather too widely."[60]

The fact situation in *Currie* is remarkably similar to that of *Graham* v. *The Queen*[61] although the charge in the latter case was possession of stolen property while in the former the charge was uttering a forged document. The Ontario Court of Appeal found it unnecessary to cite either *Graham* or the doctrine of recent possession. The singular case authority relied on by the Court was its decision in *R.* v. *F. W. Woolworth Co. Ltd.*,[62] an appeal by way of stated case from a conviction for misleading advertising contrary to Section 36 of the *Combines Investigation Act.*[63] The accused agreed to allow one Healey to demonstrate and sell "Auto Magic" pens in their store. Under the oral agreement the store received thirty per cent of the sales. There was no discussion with respect to Healey being an employee of Woolworth and the parties understood that Healey was in business for himself. Further, there was no discussion of Healey being a representative or agent of the accused. Healey and his employee, McPhee, made several misleading representations while selling this product. The Ontario Court of Appeal quashed the conviction. The Court held that Woolworth was not vicariously liable for the acts of Healey and McPhee. They also found that Woolworth was not a party to the offence.

At trial, the Court found that "Woolworth knew, or ought to have known, by informing itself as to what was said by Mr. McPhee". Kelly J.A. clearly rejected the use of constructive knowledge in criminal cases:

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[59]*Supra*, footnote 30, at 577-578. See *supra*, footnote 2, at 159-172.

[60]*Supra*, footnote 2, at 159.

[61]*Graham* v. *The Queen* (1959), 124 C.C.C. 314 (S.C.C.).

[62]*R.* v. *F. W. Woolworth Co. Ltd.* (1974), 18 C.C.C. (2d) 23 (Ont. C.A.).

[63]*Combines Investigation Act*, R.S.C. 1970, c. C-23.

> Devlin J., in *Roper* v. *Taylor's* . . . described three degrees of knowledge — first, actual knowledge; second, the situation where the person to whom the knowledge is imputed deliberately refrains from making inquiries, the result of which he might not care to have, and third, constructive knowledge often described as the words "ought to have known" meaning that the person had in effect the means of knowledge . . .
>
> Since there is no foundation for the conclusion that Fawcett deliberately refrained from making inquiries as to McPhee's conduct in making sales, the finding of the trial Court was one of constructive knowledge which in criminal law is not knowledge at all.[64]

The Ontario Court of Appeal has recently considered the doctrine of wilful blindness in relation to a charge for an offence against the environment. In *R.* v. *City of Sault Ste. Marie*[65] the accused was charged that it "unlawfully did discharge or caused to be discharged or permitted to be discharged or deposited material" in a manner which might impair the quality of water contrary to Section 32(1) of the *Ontario Water Resources Act.*[66] The municipality had entered into an agreement with a private company for the disposal of the city's garbage. Part of the agreement stated that if the company failed to perform any of its obligations the city engineer could, on twenty-four hours notice, enter the disposal site and perform at the company's expense any such obligations. The agreement also stated that the company was required to perform the disposal operations to the satisfaction of the city engineer and the medical officer of health. At trial, the Court found that the engineer and the medical officer made only casual inspections. Rather than order the removal of accumulated refuse on the banks of a river these officials simply ordered that no more dumping take place in that area.

The trial Judge found that the municipality had "permitted" the deposit of the material. He also held that the offence was one of strict liability. On appeal, the Divisional Court quashed the conviction on the basis that the information was multifarious. In the result, the Ontario Court of Appeal ordered a new trial. The Court held proof of knowledge was required. Accordingly, the trial Judge erred in convicting the accused without considering whether the requisite *mens rea* had been established. The conviction could only be upheld if the findings of fact were sufficient to establish either actual knowledge or wilful blindness on the part of the accused:

> After carefully reviewing the findings of the learned trial Judge, I do not consider that they are sufficient to establish actual knowledge on the part of the City that the garbage and refuse . . . was of sufficient quantity that if it remained where it was, it might result in the contamination of the nearby stream. . . . .

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[64] *Supra*, footnote 62, at 30 *per* Kelly, J.A.

[65] *R.* v. *Sault Ste. Marie* (1976), 30 C.C.C. (2d) 257 (Ont. C.A.). The Supreme Court of Canada decision, reported at (1978), 40 C.C.C. (2d) 353 did not consider the doctrine of wilful blindness.

[66] *Ontario Water Resources Act*, R.S.O. 1970, c. 332.

> Knowledge that the addition of further garbage to the existing accumulation might result in contamination is not knowledge that the existing accumulation poses a danger.
>
> As to the matter of wilful blindness, I do not question the finding of the trial Judge that the City was casual in its inspections and so the dumping that occurred in May in the prohibited area was undetected. Having regard to the onus of proof in this type of case, this finding was more consistent with negligence than with wilful blindness in deliberately refraining from making inspections. *In the absence of proof of actual knowledge, wilful blindness must be established in order to sustain a conviction. Neglecting to make such inspections as a reasonable and prudent person would make is quite insufficient; it is only tantamount to constructive knowledge which in criminal law is not knowledge at all.*[67] (emphasis added)

The preceeding discussion has sought to demonstrate that the doctrine of wilful blindness is firmly entrenched in Canadian criminal law. It is clear that the Courts will not hesitate to advance the doctrine in new and varied areas. It is equally unclear which test they will use to determine the presence or absence of wilful blindness. Wilful blindness may require a totally unique approach to the issue of knowledge or it may be seen as nothing more than an extension of the concept of recklessness. On the other hand, the applicable test may very well be dependent upon the nature of the charge. Ultimately the answer lies with the Supreme Court of Canada. The Court's apparent inability to unravel the mysteries of *mens rea* has been well documented.[68] It is not unduly harsh to suggest that the Supreme Court's analysis of the doctrine of wilful blindness is awaited with guarded optimism and a certain amount of apprehension.

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[67] *Supra*, footnote 65, at 283-284 *per* Brooke, J.A., Howland, J.A. concurring. In his dissent, Lacourciere, J.A. stated at 299: "In my view, the inescapable inference to be drawn from the findings of fact of the learned trial Judge is that, in the relevant period of time, the City had knowledge of the potential impairment of the creek and river waters and failed to exercise its clear power of control."

[68] See P. Weiler, *The Supreme Court of Canada and The Doctrines of Mens Rea*, (1971) 49 Can. Bar Rev. 280; D. R. Stuart, *The Need to Codify Clear, Realistic and Honest Measures of Mens Rea and Negligence*, (1973) 15 Crim. L. Q. 160.