

## THE GOLDEN THREAD — SOMEWHAT FRAYED

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For more than fifty years *Woolmington v DPP*<sup>1</sup> has been a dominant authority in criminal law and practice. Its principle was declared by Viscount Sankey LC in a grand and famous passage:<sup>2</sup>

Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception . . . No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

The historical accuracy of this may not be sustainable,<sup>3</sup> and the broad sweep of the language is occasionally countered by reference to the more particular point on which the actual decision turned — that the prosecution must prove the “malicious intent” which is an ingredient of murder at common law.<sup>4</sup> Nevertheless, there have been few judicial statements of principle which rival it in importance or influence, and it is not in doubt that it is of general application in the criminal law. It is, moreover, a rule which requires proof of guilt, not merely proof of the offence charged. That is, not only must the prosecution prove against the accused both the physical and mental ingredients of the alleged offence, but it is also established that, with the exception of insanity, it suffices for common law defences, or codified versions of them, that there is evidence which leaves the tribunal of fact in reasonable doubt.<sup>5</sup> A general direction on the onus of proof is likely to be inadequate unless it is explicitly stated that the rule extends to an available defence.<sup>6</sup>

On the other hand, the possibility of a defence which does not negate an ingredient of the offence charged need not, and should not, be considered unless there is evidence capable of supporting such a finding — evidence which is capable of leaving a reasonable jury in reasonable doubt as to whether all the requirements of the defence were satisfied<sup>7</sup> — and

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1 [1935] AC 462.

2 Ibid 481-482.

3 *Jayasena v R* [1970] AC 618, 624-625; Adams, “Onus of Proof in Criminal Cases” in *Essays on Criminal Law in New Zealand* (ed R S Clark 1971) 70-71.

4 *R v Hunt* [1987] AC 352, 369, per Lord Griffiths; cf *Millar v Ministry of Transport* (1986) 2 CRNZ 216, 224, per Cooke P and Richardson J.

5 *Eg R v Kahu* [1947] NZLR 368 (provocation); *Salaca v R* [1967] NZLR 421, 422 (compulsion); *R v Kerr* [1976] 1 NZLR 335, 340 (self-defence); and see J C Smith, *The Presumption of Innocence* (The MacDermott Lecture 1987) 4-6.

6 *R v Abraham* [1973] 3 All ER 694; *R v Robinson* unreported, CA 295/86, 25 March 1987.

7 *R v Nepia* [1983] NZLR 754.

the same is true of at least some particular reasons for supposing that an ingredient of the offence was absent.<sup>8</sup> It is generally accepted that the imposition of such an "evidential burden" in relation to defences and particular issues is sensible and involves no departure from the *Woolmington* principle,<sup>9</sup> but placing the persuasive burden on the defendant is quite another matter.

### *The Exceptions to Woolmington*

There are three important classes of case where D has the persuasive burden. Two of these will be mentioned briefly here, and then the third will be considered in detail.

First, when legislation creating an offence does not in terms require a mental element or fault the court may conclude that it is not appropriate to apply the ordinary rule that mens rea or a guilty mind is an essential ingredient. This is the likely conclusion in the case of a "public welfare regulatory offence", but in many such cases it will also be held that total absence of fault is a defence. In these cases the Court of Appeal has held that in New Zealand, D has the persuasive burden of proving this newly recognised common law defence, on the balance of probabilities, this being justified on the basis that it is more consistent with the object of the legislation than the *Woolmington* rule, and D will usually be more able than the prosecution to adduce evidence on the issue.<sup>10</sup> It has also been suggested that this is not in conflict with *Woolmington* because that case was concerned with "criminal offences in the true sense" rather than regulatory offences which attract the defence of absence of fault.<sup>11</sup> This requires substantial modification of the language used by Viscount Sankey,<sup>12</sup> but it seems to be thought that reversal of the burden of proof is necessary if a significant reduction in the number of absolute offences is to be achieved.

Second, it is not uncommon for legislation to expressly provide that a defence succeeds only if it is "proved", or that the "burden of proof" is upon D. The courts always accept that in such cases it is sufficient if the tribunal of fact is satisfied of the relevant matters on the balance of probabilities but, although the contrary has been argued,<sup>13</sup> use of the language of "proof" has been held to be inconsistent with a mere evidential burden which can be discharged by pointing to evidence which, while it

8 Eg *R v Burr* [1969] NZLR 736, 748 (automatism); *R v Kamipeli* [1975] 2 NZLR 610, 619 (intoxication); *Millar v MOT*, supra n 4 at 224, 234 (ignorance or mistake); and see Cross, *The Golden Thread of the English Criminal Law* (The Rede Lecture 1976) 12-13.

9 *Sweet v Parsley* [1970] AC 132, 164, per Lord Diplock.

10 *Civil Aviation Dept v MacKenzie* [1983] NZLR 78; *Millar v MOT*, supra n 4.

11 *R v City of Sault Ste Marie* (1978) 85 DLR (3d) 161, 174-175; *Civil Aviation Dept v MacKenzie*, ibid at 84.

12 *Woolmington v DPP* [1935] AC 462, 481 ("No matter what the charge or where the trial . . ."); and see Viscount Simon LC in *Mancini v DPP* [1942] AC 1, 11 ("The rule is of general application in all charges under the criminal law"); cf *Sweet v Parsley* [1970] AC 132, 157-158, per Lord Pearce.

13 Eg Nigel Bridge, "Presumptions and Burdens" (1949) 12 MLR 273, 285-286.

may not persuade, raises a reasonable doubt.<sup>14</sup> In New Zealand, the terms of section 23 of the Crimes Act 1961 allow the defence of insanity to be included in this class of case.

Third, when legislation provides a defence to a particular offence it may be found that D has the burden of proving the defence (on the balance of probabilities) even though the legislation does not expressly so provide. This was confirmed by the House of Lords in *R v Hunt*<sup>15</sup> where it was held that whether there is a "statutory exception" to the rule that the prosecution has the burden of proving the guilt of the accused depends on the true construction of the legislation, which may create such an exception expressly or by implication. If, on the true construction of the legislation, the provision in question describes an essential ingredient of the offence then, at least in the absence of a clear indication to the contrary, the prosecution has the burden of proving it beyond reasonable doubt, but if it provides a defence, or an "exception to what would otherwise be unlawful", then, in the absence of a clear indication to the contrary, D has the burden of proving it. The same principles apply in summary proceedings (where they are established by statute) and to trials on indictment (where they are provided by the common law), and the burden which may be imposed on D by implication is the persuasive burden, not a mere evidential burden, although it will be discharged by proof on the balance of probabilities. This burden lies upon D even though the prosecution may have adduced no evidence to exclude the defence in question.

Pursuant to *Hunt* there may often be a "statutory exception" to the *Woolmington* rule even though the legislation says nothing about the burden of proof, but the principle is rather uncertain in its application, particularly as their Lordships accept that in the vital exercise of construction the court is not confined to the language and form of the legislation but may (and, at least in some cases, should) have regard to "practical considerations", or "matters of policy".<sup>16</sup> Before considering this in more detail it is necessary to outline the law as it had developed before *Woolmington*.

### *The Common Law Background*

During the seventeenth and eighteenth centuries a rule of pleading became established, to the effect that an indictment or information should negative any exonerating provision contained in the body of the statutory definition of an offence (such a provision being commonly called an "exception"), but need not negative an exonerating provision which was distinct from the definition of the offence, as for example when it was contained in a later clause (these being commonly called "provisos").<sup>17</sup>

14 *Jayasena v R* [1970] AC 618, 624; *R v Hunt*, supra n 4 at 385; cf *R v Roulston* [1976] 2 NZLR 645, 648.

15 [1987] AC 352, supra n 4.

16 Ibid 374, per Lord Griffiths, 382, per Lord Ackner.

17 Eg 2 Hale PC (1800 ed) 170-171; *Jones v Axen* (1696) 1 Ld Raym 119, 120, 91 ER 976; *R v Ford* (1723) 1 Stra 555, 93 ER 696; *R v Jarvis* (1756) 1 East 643, 645n; *R v Hall* (1786) 1 TR 320, 322, 99 ER 1117, 1119; *R v Pratten* (1796) 6 TR 559, 101 ER 702.

Although there appears to be an absence of authority, it may well be that it was originally assumed that the pleading rule also determined the burden of proof.<sup>18</sup> Indeed, in the mid-nineteenth century the Court of Common Pleas held that when a publican was charged with supplying liquor on a Sunday morning the prosecutor had the burden of proving that the case was not within an exception in favour of travellers, and the reason given was that it was contained in the clause creating the prohibition.<sup>19</sup> By this time, however, it had already been held that in some instances the burden of proof might lie on D in relation to exceptions, even though as a matter of pleading the prosecutor was required to negative them. For the criminal law the leading case was *R v Turner*<sup>20</sup> where D was prosecuted for a statutory offence, the definition of which contained some ten qualifications, or "exceptions". The court did not doubt that it was necessary for the charge to negative these exceptions (which it did) but held that it was for D to prove that he came within one of them. Lord Ellenborough CJ held this to be justified by common sense, it being easy for D to prove any exception which might apply but almost impossible for the prosecutor to disprove them all, while Bayley J suggested that there was a general rule that "if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it, and not he who avers it".

In a number of later decisions the courts, without the aid of any statutory provision as to onus, imposed on D the burden of proving a statutory exception.<sup>21</sup> These were cases where the exception consisted of the possession of some specific authorisation or qualification, such as a licence, permit or insurance, although the judgments do not clearly define the scope of the principle, and it is apparent from *Turner* that it was not strictly confined to cases of that kind. Nevertheless, the instances where the burden of proof was clearly placed on D appear to have all been cases involving a negative averment of facts which were regarded as "peculiarly" within his knowledge, or which would at least be easy for D to prove if they existed.<sup>22</sup>

18 Adams, *Criminal Onus and Exculpations* (1968) para 13 (hereinafter referred to as Adams).

19 *Taylor v Humphries* (1864) 17 CBNS 539, 144 ER 216; followed in *Davis v Scrace* (1869) LR 4 CP 172, where, at 176, Montagu Smith J also suggested that because D remained obliged to serve travellers their exclusion was part of the "substance of the enactment"; it was even held that the prosecutor must prove that D knew the exception did not apply: *Copley v Burton* (1870) LR 5 CP 489. These were strong decisions where the court gave a narrow meaning to the concept of an "exception" in legislation concerning the burden of proof: Adams, para 59; cf *Joe Quick v Cox* (1902) 21 NZLR 584, 590.

20 (1816) 5 M & S 206, 105 ER 1027; such a rule had previously been applied in certain civil actions for statutory penalties: *Spiers v Parker* (1786) 1 TR 141, 99 ER 1019; *Jeffs v Ballard* (1799) 1 Bos & Pul 467, 126 ER 1014; in *R v Stone* (1801) 1 East 639 the court had been equally divided on the question decided in *Turner*.

21 *Apothecaries Co v Bentley* (1824) 1 C & P 538, 171 ER 1307; *R v Scott* (1921) 86 JP 69; *Williams v Russell* (1933) 149 LT 190.

22 Cf Zuckerman, "The Third Exception to the Woolmington Rule" (1976) 92 LQR 402, 410-413; Adams, op cit, paras 35-44.

Where, however, the absence of an individual's consent was essential for guilt, a matter which should normally be easy for the prosecutor to prove, the burden of proof remained with the prosecution,<sup>23</sup> and this was also the general rule when an offence was so defined that proof of its ingredients (as opposed to the negation of a defence) involved proving a negative averment or omission, even though it might be a difficult burden to discharge.<sup>24</sup> In such cases the comparative ease or difficulty the parties could expect to experience in proving relevant facts was generally regarded as affecting only the weight of the evidence needed, so that comparatively slight evidence might suffice to discharge the prosecutor's onus.<sup>25</sup> At the beginning of this century there was also some suggestion that in relation to both pleading and proof the onus would remain on the prosecution in relation to "exceptions" but not "provisos",<sup>26</sup> but in relation to the burden of proof this was inconsistent with *Turner* and the cases which followed it, and this formal distinction has since been held to provide an inadequate basis for resolving this question.<sup>27</sup>

The authorities thus support the existence before *Woolmington* of a common law principle placing the burden of proof on D in relation to at least some statutory defences or exceptions, but it seems to have been a principle of uncertain, and possibly limited, scope. The position was complicated, however, by the enactment of statutory provisions applicable only to summary proceedings.

### *The Statutory Rule in Summary Proceedings*

In New Zealand, section 67(8) of the Summary Proceedings Act 1957 provides that:

Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany the description of the offence in the enactment creating the offence, may be proved by the defendant, but, subject to the provisions of section seventeen of this Act, need not be negated in the information, and whether or not it is so negated, no proof in relation to the matter shall be required on the part of the informant.

Section 17 requires that the information contain sufficient particulars to fairly inform D of "the substance of the offence" charged.

Section 67(8) derives from legislation in England, where there have been similar provisions since the establishment of the modern system of summary proceedings by the Summary Jurisdiction Act 1848 (Jervis's Act). In England the equivalent section (presently section 101 of the Magistrates'

23 *R v Rogers* (1811) 2 Campb 654, 170 ER 1283; *R v May* [1912] 3 KB 572; *R v Bradley* (1910) 4 Cr App R 225.

24 *Over v Harwood* [1900] 1 QB 803; cf *Bridger v Whitehead* (1838) 8 A & E 571, 112 ER 955.

25 *R v Burdett* (1820) 4 B & Ald 95, 140, 106 ER 873, 890; in one exceptional case where the offence was so defined that it might have been a practical impossibility to prove it, it was held that D had the burden of disproving a negative averment even though it was an ingredient of the offence: *Higgins v Ward* (1873) LR 8 QB 521; Adams, op cit, paras 37 and 44.

26 *R v James* [1902] 1 KB 540, 545; *R v Audley* [1907] 1 KB 383, 386-387.

27 *R v Oliver* [1944] KB 68, 73; *R v Edwards* [1975] QB 27, 37-38.

Courts Act 1980) now differs from section 67(8) in explicitly providing that "the burden of proving" an exception "shall be on" D, but there is no doubt that in New Zealand as well as in England the statutory rule places the persuasive burden of proof on D. Suggestions that such provisions could be interpreted as imposing only an evidential burden<sup>28</sup> are hardly consistent with the language of proof employed in the statutes,<sup>29</sup> and New Zealand authority holds that section 67(8) requires D to prove an exception or the like on the balance of probabilities.<sup>30</sup>

Since 1848 there have been two significant changes in the terms of these provisions.<sup>31</sup> First, whereas the original section applied to "any exemption, exception, proviso, or condition", this formula was later changed to "any exception, exemption, proviso, excuse or qualification". Second, the original version referred to such exceptions and the like without further amplification, but subsequently it was expressly provided that the statutory rule applied to an exception etc "whether it does or does not accompany the description of the offence in the enactment creating the offence". These amendments were effected in England in 1879 (although similar changes had been made in statutes of limited application in 1871 and 1872), although they were not introduced in New Zealand until 1957. Their effect was considered by Lord Pearson in *Nimmo v Alexander Cowan & Sons Ltd*.<sup>32</sup>

Lord Pearson thought that exceptions, exemptions and provisos could usually be easily recognised by reference to the forms of expression and grammar used in the statute; and while acknowledging that "qualification" might cover any adjective or adverb, he thought it should probably be confined to "some qualification, such as a licence, for doing what would otherwise be unlawful". In *McFarlane Laboratories Ltd v Department of Health*<sup>33</sup> Barker J concluded that "qualification" is to be construed ejusdem generis with "exception, exemption, proviso and excuse".

More importantly, Lord Pearson thought that the introduction of "excuse or qualification", and the express provision that it is immaterial whether or not it accompanies the description of the offence, revealed "an intention to widen the provision and to direct attention to the substance and effect rather than the form of the enactment". The meaning of this will be returned to, but there seems to be no doubt that the minimum intended effect was to overrule the decisions in the sale of liquor cases which had narrowly interpreted the 1848 provision as being inapplicable to exceptions contained in the definition of the offence.<sup>34</sup>

28 Eg Glanville Williams, *Criminal Law, The General Part* (2nd ed) 899; cf *Hall v Dunlop* [1959] NZLR 1031, 1036.

29 See the authorities cited in n 14 supra.

30 *Stewart v Police* [1961] NZLR 680, 682; *Akehurst v Inspector of Quarries* [1964] NZLR 621; *Civil Aviation Dept v MacKenzie* [1982] 2 NZLR 238, 242 (HC), [1983] NZLR 78 (CA), 86 per McMullin J; but in the case of complex or qualified exceptions it may be found that if D establishes the exculpatory elements the prosecution then has the burden of proving facts which negate it: Adams, op cit, paras 18 and 85.

31 For a more detailed account see Adams, op cit, paras 58-63.

32 [1968] AC 107, 135-136.

33 [1978] 1 NZLR 861, 879.

34 See the cases cited in n 19 supra; and see *Roberts v Humphreys* (1873) LR 8 QB 483, 489.

The revised statutory provision is plainly inconsistent with the old distinction between exceptions and provisos. But the changes in this legislation applicable only in summary proceedings contained the seeds of confusion, for read literally it now placed the burden of proof on D in relation to *every* exception or excuse. The courts had not purported to lay down a common law principle to the same effect, but it was the common law which had to be applied (and still must be applied) in proceedings on indictment. As has been seen, in *R v Turner*<sup>35</sup> and later cases, the courts, in cases not governed by any statutory provision as to onus, had imposed the burden of proof on D in relation to *some* exceptions, but it had not been suggested that this was always the rule, and the cases were at least consistent with it being confined to negative averments where proof would either be very difficult for the prosecution, or at least should be easy for an innocent accused. The way was thus open for the argument that there are different rules according to whether D is tried summarily (and therefore subject to the statutory provision), or on indictment (when the common law applies), an argument seemingly supported by the sweeping terms of the judgment in *Woolmington*.

#### *The Common Law Reviewed — Retreat from Woolmington*

There is little doubt that *Woolmington* effected an important change in the law governing the proof of murder, and probably the proof of mens rea in crime generally. It may also be that previously the courts had commonly required D to prove any true defence, whether common law or statutory,<sup>36</sup> and if that was so the decision resulted in a further change in that subsequently it was applied to common law defences (except insanity). Moreover, in restating the rule in *Mancini v DPP*<sup>37</sup> Viscount Simon LC employed emphatic language: "The rule is of general application in all charges under the criminal law. The only exceptions arise . . . in the defence of insanity and in offences where onus of proof is specially dealt with by statute."

These considerations encouraged Sir Francis Adams to the view that after *Woolmington* a statute should be held to place the persuasive burden on D only if it does so "specifically", by using words which expressly indicate this (for example, by requiring that something be "proved", or "shown", or that the court be "satisfied" of it, or, perhaps, that it be "made to appear"). He therefore concluded that, although section 67(8) of the Summary Proceedings Act 1957 places the persuasive burden on D, the mere existence of an exception or proviso to a statutory offence should impose no more than an evidential burden in trials on indictment. While accepting that this probably represented a change in the law, consequent upon *Woolmington*, he thought it a desirable change, which could be partly explained by the relatively recent appreciation of the distinction between

35 Supra n 20; and see supra nn 20-27.

36 *Jayasena v R* [1970] AC 618, 624-625; J C Smith, supra n 5 at 3-6.

37 [1942] AC 1, 11.

persuasive and merely evidential burdens.<sup>38</sup> The House of Lords, however, has now rejected this thesis.

In *R v Hunt*<sup>39</sup> Lord Griffiths used three arguments to justify rejecting a submission that for a statutory exception to *Woolmington* there must be express words placing the burden of proof on D.

First, in neither *Woolmington* nor *Mancini* was the House required to consider the nature and scope of statutory exceptions. This point provides a sufficient reason for holding that neither of these judgments settles the question, but Lord Griffiths associated it with an unconvincing explanation of *Woolmington* which is calculated to minimise its real authority. He reasoned that the House was there concerned to correct a "special rule" which had arisen in relation to murder which placed on D the burden of proving accident, provocation and self-defence, a rule which "in effect relieved the prosecution of the burden of proving an essential element in the crime of murder, namely the malicious intent, and placed the burden on the accused to disprove it".<sup>40</sup> The conception of the mens rea of murder in terms of "malicious intent" can hardly be applied in New Zealand, and is not now generally employed at common law,<sup>41</sup> and this narrow view of Viscount Sankey's speech ignores the generality of the language which he deliberately used, and its subsequent application throughout the criminal law (although Lord Griffiths accepted that it is "well settled" that D has an evidential burden only in relation to common law defences).

Second, Lord Griffiths said that before *Woolmington* there had been "a number of cases in which in trials on indictment" the courts had held D to have the burden of proving a statutory defence although the statute did not expressly so provide, and he thought that it could not have been intended to cast doubt on "these long-standing decisions" without the benefit of argument on the question.<sup>42</sup> Of the three cases cited only one in fact concerned a trial on indictment (and this was merely the ruling of a judge at first instance),<sup>43</sup> the other two being respectively an appeal from a conviction by justices on an information,<sup>44</sup> and an action in debt for statutory penalties.<sup>45</sup> Nevertheless, these cases do show that during the nineteenth century the courts, applying common law principles, sometimes held that D had the burden of proving statutory exceptions and, although the scope of this rule remained uncertain, it presumably applied to trials on indictment. But it may well be that the same approach was taken to common law defences until the impact of *Woolmington* was felt, in which case there seems to be little reason for presuming that the rather obscure

38 Adams, *op cit*, paras 2-9, 45-51.

39 *Supra* n 4.

40 *Ibid* 369; and see 364-365, per Lord Templeman.

41 Cf *Hyam v DPP* [1975] AC 55, 66, per Lord Hailsham; *R v Moloney* [1985] AC 905, 920, per Lord Bridge.

42 *Supra* n 4 at 369.

43 *R v Scott* (1921) 86 JP 69, per Swift J who, incidentally, was later the author of what was held to be the misdirection in *Woolmington*.

44 *R v Turner*, *supra* n 20; both the scope and correctness of this decision have long been regarded as debatable: cf Cockle, *Leading Cases in the Law of Evidence* (1907) 90.

45 *Apothecaries Co v Bentley*, *supra* n 21.



rule for statutory defences was unaffected by what was, on any view, a major restatement of fundamental principle.

Third, in enunciating the modern common law rule Lord Griffiths placed significant reliance on the statutory rule which has applied to summary proceedings since 1848. Here his Lordship implicitly acknowledges the uncertainty of the common law in the nineteenth century, and indeed cites the cases in Common Pleas where the prosecutor was held to have the burden in relation to exceptions contained in the clause defining the offence, noting that these apparently prompted the amendment in 1879. While accepting that it involved a degree of speculation, Lord Griffiths thought that in enacting the rule for summary cases it was probable that Parliament intended to apply the rule it believed the judges had evolved for trials on indictment (although the need for amendment suggests that any such belief may have been mistaken). In any event he concluded that the common law should now be held to have evolved so that "whatever may have been its genesis" the "modern rule" is the same as the statutory one.<sup>46</sup> It was thought that it would be absurd if the rule applicable to jury trials was different from that applicable to summary proceedings, especially in view of the large number of offences triable either way.<sup>47</sup>

This is a striking example of a related but not directly applicable statutory provision being held to have a decisive effect on the evolution and content of uncertain common law. In itself there is nothing wrong with this, and no doubt as a general rule the courts should seek to achieve "harmony with the approach and sense of values" adopted by Parliament.<sup>48</sup> When, however, this results in a rule adverse to the accused, and which derogates from a cardinal principle, it should be supported by compelling reasoning. It may be doubted whether such a test is met in *Hunt*. It is questionable whether it is necessarily absurd that in the "less leisurely and less formal atmosphere of the summary jurisdiction" the prosecutor should have a lesser burden than in trials on indictment,<sup>49</sup> and where the trial is by jury the nature and inexperience of the tribunal of fact might provide some justification for a rule that evidence raising a reasonable doubt suffices for acquittal, even if actual persuasion is needed in summary proceedings. To allow acquittal only if a jury is actually persuaded<sup>50</sup> in favour of a defence increases the chance of disagreement, a risk which does not arise when there is trial by judge alone, and it may be that a lay jury is more likely than a professional judge or experienced justices to be left in a state of uncertainty by evidence which, while not conclusive, supports a defence. If this is so it does not seem unreasonable that the law should allow an

46 Supra n 4 at 373-374 approving the like conclusion of the Court of Appeal in *R v Edwards* [1975] QB 27, as well as a number of earlier decisions where the courts had ignored *Woolmington* in holding D to have the burden of proving statutory exceptions: eg *R v Oliver* [1944] KB 68; *R v Ewens* [1967] 1 QB 322.

47 Ibid 372-373, per Lord Griffiths, 385-386, per Lord Ackner; cf Cross, supra n 8 at 17.

48 *R v Uljee* [1982] 1 NZLR 561, 569, per Cooke J.

49 Adams, op cit, para 125, although there the contrast is made between a civil action and a summary prosecution.

50 Cf *Murray v Murray* (1960) 33 ALJR 521, 524, per Dixon CJ; *Robertson v Police* [1957] NZLR 1193.

acquittal in such a case, even if it requires actual persuasion or satisfaction when trial is by judge alone.<sup>51</sup>

Conversely, the rule in *Hunt* (and in section 67(8)) is anomalous in that, with the exception of insanity and (in the regulatory context) absence of fault, it remains the law that for defences recognised at common law it suffices that there is evidence which raises a reasonable doubt. It also produces its own absurdity in making redundant numerous instances where Parliament has expressly stipulated that D has the burden of proving particular defences. Moreover, *Hunt* requires significant modification to the plain meaning of the terms of section 67(8), and establishes a principle which is inherently uncertain in its application.

### *The Distinction Between Ingredients of Offences and Defences*

Pursuant to *Hunt*, in any case where there is no express provision as to onus and the position is regarded as arguable, the court must construe the legislation to determine whether Parliament intended to place the burden of proof upon D. There is no difference in the rule to be applied in indictable and summary proceedings, and the question may equally be described as being whether on its true construction the statutory provision is concerned with the definition of ingredients of the offence (which the prosecution must prove), or provides a defence, or an exception or the like within the meaning of section 67(8) of the Summary Proceedings Act 1957.<sup>52</sup>

The first objection to this kind of rule is that the distinction between ingredients of an offence and a defence is one of mere form or words: there is no difference in substance or meaning between a prohibition defined as extending to certain conduct only and a prohibition defined in wider terms but made subject to qualifications which exempt everything except the conduct described in the first case.<sup>53</sup> For example, legislation proscribing assault might be so drafted that the actus reus consists of the threat or application of "unlawful" force to another, or the actus reus might be described as the threat or application of force to another, an exception then being provided for cases where there is consent or some other "lawful excuse". In the first case the absence of consent, or other facts making the act lawful, appears as an ingredient of the offence (which the prosecutor will have to prove),<sup>54</sup> but in the second, consent or other lawful excuse appears to be a defence (which under *Hunt*, D might have the burden of

51 It may also be speculated that Parliament intended to provide a special rule for summary cases, having regard to the fact that in 1848 most of the relevant offences would be of a minor or regulatory kind: Healy, "Proof and Policy: No Golden Threads" [1987] Crim LR 355, 360.

52 *R v Hunt*, supra n 4 at 374, 376-377, per Lord Griffiths, 382, 385-386, per Lord Ackner.

53 Julius Stone, "Burden of Proof and the Judicial Process" (1944) 60 LQR 262, 280; Zuckerman, "The Third Exception to the Woolmington Rule" (1976) 92 LQR 402, 414-415; Glanville Williams, "Offences and Defences" (1982) 2 LS 233.

54 Cf the definition of assault at common law: *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439, 444; *A-G's Reference (No 6 of 1980)* [1981] QB 715; *R v Kimber* [1983] 1 WLR 1118.

proving).<sup>55</sup> But the difference between the cases is one of form or drafting only, which provides at best a flimsy basis for drawing distinctions on matters of substance, such as the distribution of the burden of proof.<sup>55a</sup>

Although it is clear that the scope of liability does not vary according to whether the offence or defence model is employed, the courts have met this objection by insisting that the distinction does not depend on form alone. In *Nimmo v Alexander Cowan & Sons Ltd*<sup>56</sup> Lord Pearson concluded that the court should consider the "substance and effect" of the legislation, as well as its form, while other judges have sought to identify the "substance", "essence" or "gist" of the offence, or, following an oft-quoted dictum of an Irish judge, have posed the question whether the statute creates what is a "prima facie offence" which is made innocent if specified exceptions apply, or whether an act which is "prima facie innocent" is made an offence when done under certain conditions.<sup>57</sup> In Australia it is said that "considerations of substance and not of form" support a distinction between provisions where exceptions and the like qualify the ambit of the "general rule of liability" and those which assume the existence of facts required by that rule but which provide for exceptions which depend on "additional facts of a special kind".<sup>58</sup>

Abstract tests of this kind are ultimately unhelpful. For example, on a charge of driving without a licence or insurance it is for D to prove that he was licensed or insured,<sup>59</sup> but there seems to be nothing apart from the form of the legislation which might justify regarding mere driving as a "prima facie offence", or the "general rule of liability" (and the information would have to negative the relevant exception in order to "fairly inform" D of "the substance" of the alleged offence, as required by section 17 of the Summary Proceedings Act 1957).<sup>60</sup> Nor is it easy to identify what considerations of "substance" might explain the distinction between cases in Victoria which have held that absence of consent is of the essence of the

55 Cf the statutory definitions of assault in New Zealand: s2 of the Crimes Act 1961 and s2 of the Summary Offences Act 1981; but although these do not include the element of unlawfulness, defences available at common law (such as consent and self-defence) will not be subject to the rule reversing the burden of proof.

55a But see *Solomon Beckford v R* [1988] AC 130, where the Privy Council reasoned that the prosecution has the burden of disproving self-defence because such a circumstance negates the unlawfulness which is an "essential element" of all crimes of violence, and for the same reason an honest but unreasonable belief in the need for self-defence may excuse D because it negates the necessary "intent" to act "unlawfully"; cf *R v Robinson*, supra n 6, where it was thought misleading to describe self-defence as a "defence" because it means D acts "within the law".

56 [1968] AC 107, 135; cf *Barritt v Baker* [1948] VLR 491, 495.

57 *R (Sheahan) v Cork JJ* [1907] 2 IR 5, 11, per Gibson J; cf *Akehurst v Inspector of Quarries*, supra n 30 at 625; *Coddington v Larsen* [1962] NZLR 512, 514-515.

58 *Dowling v Bowie* (1952) 86 CLR 136, 140, per Dixon CJ; *Vines v Djordjevitich* (1955) 91 CLR 512, 519; cf *Nimmo v Alexander Cowan & Sons Ltd*, supra n 32 at 117, per Lord Reid.

59 *John v Humphreys* [1955] 1 All ER 793; *Buchanan v Moore* [1963] NI 194; *Peck v De-Saint-Aromain* [1972] VR 230.

60 Cf *R (Sheahan) v Cork JJ*, supra n 57 at 11, per Gibson J: "A prohibition of selling bread except by weight would not authorise a complaint for selling bread simpliciter. A summons in that form would not show an offence."

offence of taking a vehicle without the owner's consent,<sup>61</sup> but that consent is a defence to defacing a building without the owner's consent;<sup>62</sup> or the distinction between decisions in Queensland holding that absence of a licence is an ingredient of an offence of slaughtering animals in a place "other than" a licensed works,<sup>63</sup> but that the existence of a permit is an exception to the prohibition of processions "unless" a permit has been issued.<sup>64</sup>

Tests or formulae of the kind outlined above do not resolve particular cases because analytically every qualification to the description of an offence is "of the essence" of the offence, and "no criterion can distinguish what is logically indistinguishable".<sup>65</sup> Indeed, one Australian judge has come to the rather despairing conclusion that:<sup>66</sup>

I think judges are inclined eventually to assert that a case falls on one side of the line or the other without really being able to assign reasons for their view.

On the other hand, particularly since the demise of the technical distinction between provisos and exceptions, even the form of the legislation does not always provide a reliable guide. In the first place, there have been a number of cases where legislation has been drafted in a way which seemingly provides for a distinct exception or defence but, without any overt consideration of statutory provisions equivalent to section 67(8), or the principle now affirmed in *Hunt*, it has been held that the prosecution has the burden of proof. For example, in more than one context English courts have held that D has only an evidential burden where offences have been defined as doing or omitting various acts "without reasonable excuse", or "without lawful authority or excuse",<sup>67</sup> or even when conduct is first defined as an offence but a later provision specifies that the Act does not apply, or that no offence is committed, in certain circumstances.<sup>68</sup> Presumably at least some of these decisions are now open to question,

61 *Donoghue v Terry* [1939] VR 165.

62 *Brooks v Donegan* [1953] VR 90; but *quaere* whether a requirement of private consent ever suffices for implied reversal of the burden of proof: see *supra* n 23.

63 *Youngberry v Heatherington, ex p Youngberry* [1977] Qd R 15; cf *Phillips v Cassar* [1979] 2 NSWLR 430, 434.

64 *Coleman v Heywood, ex p Coleman* [1978] Qd R 411; see also *Choveaux v Hunt, ex p Hunt* [1962] Qd R 140; *O'Leary v Matthews* (1979) 42 FLR 114, 118, 123; *Lynch v Attwood* [1983] 3 NSWLR 1, 6-7.

65 *McFarlane Laboratories Ltd v Dept of Health*, *supra* n 33 at 880, per Barker J.

66 *Francis v Flood* [1978] 1 NSWLR 113, 119, per Sheppard J; cf *Adams, op cit*, paras 90-93.

67 Eg Obstructing a highway: *Nagy v Weston* [1965] 1 All ER 78, 80; *Hirst and Agu v Chief Constable of Yorkshire* [1987] Crim LR 330; contrast *Gatland v MPC* [1968] 2 QB 279; failing to provide a blood or urine sample: *R v Clarke* [1969] 1 WLR 1109, 1113; *R v Dolan* (1969) 53 Cr App R 556; *Mallows v Harris* [1979] RTR 404; criminal damage or threats; *Jaggard v Dickinson* [1981] QB 527; *R v Cousins* [1982] QB 526. But contrast *Stewart v Police*, *supra* n 30, and *R v Burney* [1958] NZLR 745, 752-753. In Australia the somewhat arbitrary suggestion has been made that normally a defence is indicated by "except" or "unless", but not by "without"; *Peck v v De-Sainte-Aromain*, *supra* n 59; *Roddy v Perry (No 2)* (1958) 58 SR (NSW) 41, 48; *Phillips v Cassar* [1979] 2 NSWLR 430, 434; cf *Choveaux v Hunt* [1962] Qd R 145.

68 *R v Burke* (1978) 67 Cr App R220, 223; *R v MacPherson* [1977] RTR 157; contrast *Civil Aviation Dept v MacKenzie* [1982] 2 NZLR 238, 242 per Casey J.

although in *Hunt* Lord Griffiths recognised the possibility of distinguishing such cases as being instances where on the true construction of the particular statute the prosecution had the burden of proof.<sup>69</sup>

Cases also arise where the form of the legislation might be thought to be quite ambiguous on this question. An instance may be where the description of the offence contains an ingredient for which there is a separate definition, which includes exceptions or qualifications. In such cases Australian courts have sometimes held that all the elements of the definition, both positive and negative, are ingredients of the offence. For example, in *Barritt v Baker*<sup>70</sup> D was charged with betting in a street, the statute providing a special and broad definition of "street". Fullagar J understandably held that it was an essential ingredient of the offence that the transaction occurred in a "street" as defined, so that the prosecution had to prove this, but as the definition excluded racecourses (which were also defined) this meant that the prosecution had to prove that it did not occur at such a place. In such a case the way the offence is described may be thought to support the conclusion, but orthodox principles of construction require the enactment to be read as a whole, and if the definition clause is read as part of the description of the offence the negative provisions may readily, and perhaps more properly, be seen as exceptions.<sup>71</sup> These Australian cases might now, however, receive support from the decision of the House of Lords in *Westminster City Council v Croyalgrange Ltd.*<sup>72</sup> In that case a statutory schedule in one paragraph (para 6) prohibited the use of premises as a sex establishment, unless one of a number of exceptions applied. Another paragraph (para 20(1)(a)) made it an offence to "knowingly" contravene the prohibition in paragraph 6. The issue for the House of Lords was whether the requirement of knowledge extended to the fact that the use was not within one of the exemptions, and it disposed of the case by holding that it did.<sup>73</sup> As part of its argument, however, the prosecution had submitted that the equivalent of section 67(8) placed the burden of proof on D in relation to the exemptions, but it was held that this was not the case, Lord Bridge roundly dismissing the argument as "quite misconceived" because "the exceptions and exemptions [in the schedule] qualify the prohibition created by para 6, not the offence created by para 20(1)(a)".<sup>74</sup> This seems to be false in that the scope of the offence depended on the scope of the prohibition, so that any qualification of the latter was a qualification of the former, but it is consistent with the idea that negative provisions in a definition section should be regarded (at least as a general rule) as ingredients of the offence.<sup>75</sup>

69 *R v Hunt*, supra n 4 at 373.

70 [1948] VLR 691; cf *Dowling v Bowie* (1952) 86 CLR 136; *Roddy v Perry (No 2)*, supra n 67; *R v Garrett-Thomas* [1974] 1 NSWLR 702; *Ringstead v Butler* [1978] 1 NSWLR 754; contrast *McLachlan v Rendall* [1952] VLR 501, and *Bannister v Bowen* (1985) 65 ACTR 3.

71 Adams, op cit, para 94.

72 [1986] 2 All ER 353.

73 As to this, see ante n 8.

74 Supra n 72 at 357.

75 It appears to be otherwise if the "definition" section describes all the ingredients of the offence: cf *Nimmo v Alexander Cowan & Sons Ltd*, supra n 32.

Finally, there have been cases where as a matter of form a provision appears to describe an ingredient of the offence, but the courts have concluded that in truth it creates a defence. First, the mere fact that the description of an offence is expressed to be "subject to" later qualifications, and to that extent incorporates them as part of the definition of the offence, does not mean they are not to be classified as defences.<sup>76</sup> Second, even when the ambit of an offence is circumscribed by a qualification expressed in positive terms, by words which are part and parcel of the description of the offence, it might nevertheless be held that the qualification does not affect the ingredients of the offence, but creates a defence. In *Nimmo v Alexander Cowan & Sons Ltd*<sup>77</sup> the House of Lords, in a civil case, had to construe a statute which made it an offence for an employer to be in breach of a provision requiring that every place of work "shall, so far as is reasonably practicable, be made and kept safe for any person working there". Notwithstanding that the qualification was "woven into the verb" defining the offence it was held that it created a defence, so that D had the burden of proving that everything practicable had been done to provide safe conditions.<sup>78</sup>

It is apparent that while the "substance" or "essence" of an offence is liable to be elusive, the form of the legislation has not always provided clear guidance either. Sir Francis Adams, although favouring the view that after *Woolmington* the persuasive burden shifted to D only when legislation expressly contemplated this, deprecated attempts to formulate tests calculated to restrict the application of provisions such as section 67(8), which he thought inevitably promote arbitrary distinctions and uncertainty. In most cases he thought the wording of the legislation makes the position clear (as, for example, when the qualification is introduced by a term such as "except", "unless", "without", or "provided that"), and when this might not be so he suggested that section 67(8) should apply whenever specified conduct is proscribed and there is something in the definition of the offence "which, either in form or effect, may fairly be regarded as raising a severable issue . . . success upon which would exonerate the defendant".<sup>79</sup> This amounts to a literal interpretation of the broad terms of section 67(8). In *Hunt*, however, the House of Lords has held that the common law now provides a rule which is the same as that contained in section 67(8), but it is a rule which is not so clear-cut as that favoured by Adams.

76 *R v Hunt* [1986] QB 125, 135, per Robert Goff LJ; *R v Edwards* [1975] QB 27, 33-34; *R v James* [1902] 1 KB 540; *Southwell's Case* (1595) Poph 93, 79 ER 1204; Adams, op cit, para 24; contrast *Caratti v Commissioner of Police* [1974] WAR 73.

77 Supra n 32.

78 In New Zealand the same conclusion had been reached by Richmond J in respect of a summary prosecution in *Akehurst v Inspector of Quarries*, supra n 30; cf *Miller v Dudley JJ* (1898) 46 WR 606, where it was held that the equivalent of s 67 (8) did not apply to an offence of permitting prostitutes to remain on licensed premises "longer than is necessary for . . . reasonable refreshment".

79 Adams, op cit, paras 73-76, 130.

### *The Rule of Construction in Hunt*

*Hunt* confirms that in determining the burden of proof the court should have regard to the form of the legislation and, at least when this does not clearly resolve the question, certain other considerations as well.<sup>80</sup> After concluding that the Legislature may place a persuasive burden on D by implication, Lord Griffiths said that “particularly difficult problems of construction” arise when “what might be regarded as a matter of defence appears in a clause creating the offence rather than in some subsequent proviso from which it may more readily be inferred that it was intended to provide for a separate defence which a defendant must set up and prove if he wishes to avail himself of it”.<sup>81</sup> *Nimmo v Alexander Cowan & Sons Ltd*<sup>82</sup> is cited as an illustration of this, and as authority establishing that “if the linguistic construction of the statute” does not clearly indicate who has the burden of proof, “the court should look to other considerations to determine the intention of Parliament such as the mischief at which the Act was aimed and practical considerations affecting the burden of proof . . . .”<sup>83</sup>

The passing reference to the mischief aimed at is reminiscent of tests which require the court to identify the “substance” or “essence” of an offence, and seems unlikely to be helpful; in almost all cases the mischief will be more readily suppressed if D is required to prove any ground of exculpation. Lord Griffiths makes it clear, however, that he regards “practical considerations” as the really important ones, and in particular identifies “the ease or difficulty that the respective parties would encounter in discharging the burden” as being of “great importance”, because “Parliament can never lightly be taken to have intended to impose an onerous duty on a defendant to prove his innocence in a criminal case, and a court should be very slow to draw any such inference from the language of a statute”.<sup>84</sup> This explained the difference between two earlier decisions which some have regarded as being in conflict. In *R v Oliver*<sup>85</sup> D was prosecuted for selling rationed goods (sugar) “except under and in accordance with the terms of a licence”, and was held to have the burden of proving the appropriate licence, but in *R v Putland and Sorrell*<sup>86</sup> when D was prosecuted for acquiring rationed goods (silk stockings) “without surrendering . . . coupons” it was held that the prosecution had the burden of proving non-surrender of the appropriate coupons. Both decisions may be accepted as correct exercises in statutory construction because in *Oliver* it would have been easy for D to prove his licence, if he had one, whereas in *Putland*

80 Cf *McFarlane Laboratories Ltd v Dept of Health*, supra n 33 at 877-880; C R Williams, “Placing the Burden of Proof” in *Well and Truly Tried* (Campbell and Waller eds) 271, 291-296.

81 *R v Hunt*, supra n 4 at 374.

82 Supra n 32.

83 Supra n 4 at 374, per Lord Griffiths; and see 382, per Lord Ackner.

84 Ibid.

85 [1944] KB 68.

86 [1946] 1 All ER 85.

and *Sorrell* an innocent purchaser might have extreme difficulty in later proving surrender of the required coupons.<sup>87</sup>

The emphasis on the importance of the comparative ease or difficulty the parties would be expected to encounter in proving relevant facts is welcome. It recognises that the courts should seek to minimise the risk of wrongful convictions, and provides a rational basis for determining the distribution of the burden of proof, which does not require the court to arbitrarily identify some elements of an offence as representing the "substance" or "essence" of it. On the other hand, no attempt is made to establish the practical necessity for any general principle which allows implied reversal of the burden of proof, and the rule of construction endorsed by the House of Lords involves a significant degree of uncertainty.

A convenient starting point for an attempt to assess the likely impact of *Hunt* in practice is the treatment of the judgment of the Court of Appeal in *R v Edwards*.<sup>88</sup> It was there held that on a charge of selling liquor without a licence, D, on the application of common law principles, had the persuasive burden of proving a licence. The court rejected an argument that in the absence of an express statutory provision as to onus such a conclusion was possible only if an exception depended on facts which were "peculiarly within the accused's own knowledge" (which was not the case because there existed a district register of licences). In the course of the judgment of the court, Lawton LJ concluded that there was an exception to the rule that the prosecution must prove the offence charged, although it was limited to<sup>89</sup>

offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with a licence or permission of specified authorities.

In *Hunt* the House of Lords approved the decision in *Edwards*, but Lord Griffiths noted that it was difficult to fit *Nimmo* into the formula suggested by Lawton LJ. As each case must depend on the construction of the particular legislation he preferred to adopt the formula "as an excellent guide to construction rather than as an exception to a rule", although he thought that it would be "exceedingly rare" for a statute to be found to impliedly impose the burden of proof on D when the case did not come within it.<sup>90</sup>

The approval of the decision in *Edwards*, and the adoption of "the excellent guide to construction", makes it clear that the burden of proof will sometimes be impliedly placed on D even though the relevant provision is an exception enacted in the clause creating the offence, rather than a subsequent proviso, and even though the facts are not "peculiarly within"

87 Cf Glanville Williams, *Criminal Law, The General Part*, supra n 28 at 902; in *R v Edwards* [1975] QB 27, 38-39, the Court of Appeal thought this an insufficiently substantial distinction. It is noteworthy that there is no suggestion that anything turned on some supposed distinction between "except" and "without"; cf supra n 67.

88 [1975] QB 27.

89 Ibid, 39-40; cf *Civil Aviation Dept v MacKenzie*, supra n 10 at 96, per McMullin J.

90 Supra n 4 at 375; and see 386, per Lord Ackner.



D's knowledge. More particularly, as in the past, and regardless of whether the activity is thought to be *prima facie* wrongful, this will almost always be the rule when the defence consists of the possession of a licence or similar permit or qualification, which should be easy for a holder to prove but the absence of which might or might not be easy for the prosecution to prove.<sup>91</sup> On the other hand, absence of private consent, when this is necessary for guilt, should remain something the prosecution is required to prove, for it will usually be easy for the prosecution to adduce evidence of its absence, while even when consent was present it is likely to be difficult for D to convincingly establish it.

It is also clear that there may be cases where the form of the enactment is at least consistent with a qualification being read as affecting the ambit or ingredients of the offence, but practical or policy considerations will govern the decision as to who has the burden of proof. *Nimmo v Alexander Cowan & Sons Ltd*<sup>92</sup> is an example of a case where a possibly ambiguous provision was held to create a defence which D was required to prove, largely because D was better able to know and prove what had and could be done to promote safety. This may be contrasted with the actual decision in *R v Hunt*.<sup>93</sup>

D had been charged with possession of a controlled drug, namely a powder containing morphine. Pursuant to section 5 of the Misuse of Drugs Act 1971 (UK) it is an offence to possess a controlled drug (that is, any substance specified in Schedule 2 of the Act, which includes morphine), but this is expressly subject to section 5(4) (which provides that in certain circumstances it is a defence to prove that D intended to destroy the drug or deliver it to lawful custody), section 28 (pursuant to which it is a defence to prove that D was reasonably ignorant that the substance was a controlled drug), and also any regulations made under section 7. Section 7 authorises two kinds of regulation: regulations "for the purpose of making it lawful for persons to do things which . . . it would otherwise be unlawful for them to do", and regulations which "except" specified controlled drugs from the prohibition in section 5. Under the first of these powers, regulations have been made authorising possession of controlled drugs by certain persons (for example, constables, customs officers and pharmacists in the course of their duties), and under the second regulations have been made providing that section 5 "shall not have effect in relation to" a list of controlled drugs. One item on this list consists of certain compounds containing not more than 0.2% of morphine.

91 *Eg Apothecaries Co v Bentley*, supra n 21 (practising as an apothecary without a licence); *Turner v Johnston* (1886) 55 LT (NS) 265 (supplying seamen without a licence); *R v Scott* (1921) 86 JP 69 (supplying drugs without a licence); *Williams v Russell* (1933) 149 LT 190 (using a vehicle without insurance); *AG v Duff* [1941] IR 406 (importing without a licence); *R v Oliver* [1944] KB 68 (selling rationed goods without a licence); *John v Humphreys* [1955] 1 All ER 793 (driving without a licence); *Buchanan v Moore* [1963] NI 194 (driving without insurance); *R v Ewens* [1967] 1 QB 322 (possession of drugs without a prescription); *Robertson v Bannister* [1973] RTR 109 (offering services without permission of airport authority); *Guyl v Bright* (1986) Cr App R 260 (operating unlicensed vehicle).

92 Supra n 32.

93 Supra n 4.

The evidence was that D had been found with a powder containing morphine mixed with other substances, but it did not disclose the percentage of morphine. On the assumption that this was consistent with the powder being a "compound" excepted by the regulations,<sup>94</sup> the House of Lords concluded that D had no case to answer. It was accepted that the regulations authorising possession by specified classes of persons created special defences which D was required to prove (although, in contrast to section 5(4) and section 28, the regulations did not expressly so provide), but it was held that on the true construction of the legislation regulations which "except" specified controlled drugs do not create a true defence (or "exception") but are concerned with redefining the ingredients of the offence, which the prosecution has the burden of proving. The evidence, however, merely disclosed facts which might or might not constitute an offence.

Notwithstanding the use of the word "except", their Lordships found support in the form and wording of the Act and regulations, particularly in view of the fact that such regulations could entirely remove the statutory prohibitions from specified scheduled drugs (this having been done in respect of one particular substance). The majority, however, accepted that this was not conclusive, but found that in this case practical considerations pointed to the same conclusion. In most cases the prosecution can readily prove the relevant facts by evidence of an analysis of the substance, and even when this is not possible the necessary evidence that it was a controlled drug will often support an inference that it was not within the "exceptions"; conversely, after surrender or destruction of the substance an innocent accused might face real or insurmountable difficulty in proving that it was.<sup>95</sup> Nevertheless, Lord Griffiths felt the question of construction was "obviously one of real difficulty", and added the makeweight that in relation to a statute dealing with serious crime any ambiguity should be resolved in favour of D.<sup>96</sup>

*Hunt* is thus a case where it was held that both the form of the legislation and practical considerations supported the decision that the prosecution bore the burden of proof. Given the importance that Lord Griffiths attributed to them, it appears to be clear that practical considerations may also result in legislation being construed as imposing the burden of proof on the prosecution even in relation to what in form appears to be an exception or defence, even, it seems, if it is expressed as a "proviso".<sup>97</sup> For

94 Ibid, 378, where Lord MacKay raises a doubt as to this.

95 Ibid, 376-378, per Lord Griffiths, 380-384, per Lord Ackner; Lord Templeman confined his concurring speech to the form of the legislation. *Quaere* whether a regulation purporting to place the onus on D would be ultra vires, or whether the court would take it into account in divining the supposed intention of Parliament: *Pharmaceutical Society of Great Britain v Storkwain Ltd* [1986] 2 All ER 635, 639-640.

96 Cf *McFarlane Laboratories Ltd v Dept of Health*, supra n 33 at 880 where, in a regulatory context, having found that the form and "substance" of the Act indicated that the prosecution had the burden of proof, Barker J added that the contrary view would be "too severe a derogation of the individual's rights"; but he may well have had in mind the difficulty D could have had in discharging the burden.

97 Lord Griffiths merely says that in such a case "it may more readily be inferred" that D has the burden of proof: supra n 4 at 374.

example, as has been mentioned, in England this has commonly been held to be the case when specified conduct is proscribed subject to the qualification that D acts "without reasonable excuse", or "without lawful authority or excuse".<sup>98</sup> The courts have declined to attempt to exhaustively define such phrases but they may allow defences based on innocent motive, official authorisation, circumstances in the nature of necessity, or ignorance or mistake.<sup>99</sup> Such matters might not be at all easy for D to establish, in which case Lord Griffiths' speech suggests that the courts should be "very slow" to infer that D was intended to have the burden of proof. Indeed he goes so far as to assert that in "all the cases" where this has been done it has been a burden which can be "easily discharged".<sup>100</sup> This would suggest that as a general rule the burden of proof is not implicitly imposed on D in relation to such general grounds of exculpation as reasonable or lawful excuse. That would be an important qualification to the principle endorsed in *Hunt* and stipulated by section 67(8), especially if the courts were to follow Australian authority which holds that such formulae cover general defences (such as compulsion or self-defence) which would be available even if the statute was silent as to excuses, but in relation to which D would normally have an evidential burden only.<sup>101</sup>

It is, however, far from certain that any such general principle will be recognised. The question is not discussed in the earlier cases which might support such a principle, and one case where, unusually, D was held to have the burden of proving "lawful authority or excuse" is cited with approval by Lord Ackner in *Hunt*.<sup>102</sup> Recognition of such a principle might be thought to be inconsistent with the primary rule that each case depends on the construction of the particular legislation, and it may not be easy to reconcile with *Nimmo v Alexander Cowan & Sons Ltd*.<sup>103</sup>

One leading commentator has concluded from *Hunt* that henceforth there will seldom be cases where the burden of proof will be impliedly imposed on D unless the exception consists of possession of something in the nature of a licence, or membership of a specified class. Proof of

98 See the authorities cited in n 67 *supra*.

99 Card, "Authority and Excuse as Defences to Crime" [1969] Crim LR 359, 415.

100 *Supra* n 4 at 374; *sed quare*, for as with the formula in *Edwards*, it is difficult to fit *Nimmo's* case into this proposition.

101 *R v Tawill* [1974] VR 84, 88; *R v Dehir* (1981) 5 A Crim R 137 (NSW); cf *R v Cousins* [1982] QB 526, 530; but the better view seems to be that general defences available under a Penal Code or at common law are not subsumed by "reasonable excuse": *Subramaniam v Public Prosecutor* [1955] 1 WLR 965, 968-969; this seems certainly to be the case in relation to knowledge implicitly required by the terms of a statute or, perhaps, by the common law: *R v He Kaw Teh* (1985) 157 CLR 532, 541, per Gibbs CJ; *Sambasivam v Public Prosecutor* [1950] AC 458; *Wong Pooh Yin v Public Prosecutor* [1955] AC 43; in *R v Burney* [1958] NZLR 745, 753, there is possible confusion where the court requires the prosecution to prove negligence but also treats ignorance not caused by negligence as a "lawful excuse", although such ignorance would seem to negate the fault the prosecution must prove.

102 *Supra* n 4 at 385, citing *Gatland v MPC* [1968] 2 QB 279; and see *Stewart v Police*, *supra* n 30; but in *Westminster City Council v Croyalgrange Ltd* [1986] 2 AZ11 ER 353, 356, Lord Bridge assumes the prosecution has the burden of excluding reasonable excuse when the offence was defined as being committed if D "without reasonable excuse knowingly contravenes" conditions of a licence.

103 *Supra* n 32.

other exceptions will often involve an "onerous" duty, or one not "easily discharged", and Lord Griffiths says that the courts must resist the inference that D was intended to have such a burden.<sup>104</sup> But this seems over-optimistic. It is far from clear how much impact practical considerations will be permitted to have when as a matter of form, or "linguistic construction", the statute is thought to describe a defence. Moreover, opinions may well differ as to what is an "onerous" duty, and a court might be much less inclined to an answer favourable to D if the resultant burden on the prosecution is thought to be "particularly difficult or burdensome".<sup>105</sup> Thus, in Australia there have been recent decisions where legislation has been construed as impliedly imposing the persuasive burden on D, pursuant to a general principle that this is the appropriate conclusion when facts supporting a statutory exception will be peculiarly within D's knowledge, even though the relevant facts may not be easy to prove (for example, reasonable mistake or a suicide pact), and even though the statutes dealt with serious criminal offences.<sup>106</sup>

Finally, there is some doubt as to the position when the charge implicitly requires proof that D knew the facts essential to the defence. In *Westminster City Council v Croyalgrange Ltd*<sup>107</sup> the offence was defined as "knowingly" using premises contrary to a prohibition in another section, which was subject to certain exemptions (for example, where there was an appropriate licence). The House of Lords interpreted this as requiring a prosecution to prove that none of the exceptions in fact applied and, on the plain meaning of the terms of the legislation, that D knew this. Here there was an express requirement of knowledge which, on a literal interpretation of the Act, extended to the exceptions (and would have done so even if they were regarded as exceptions within section 67(8)). In such a case it will presumably be the general rule that the prosecution must prove such knowledge and, although in theory the burden might lie upon D to establish the actual application of an exception (should that be relied upon), such a requirement of proof of "knowledge" might well point to the burden being on the prosecution in respect of that as well.

In some other cases there is an implicit requirement of knowledge or advertence, as when D is alleged to have aided and abetted, conspired to commit, or, perhaps, to have permitted an offence. The terms of section 67(8) do not suggest a distinction between principals and accessories and the like, and if the offence is subject to exceptions which a principal has the burden of proving it seems likely that an alleged accessory will have the same burden (even though it might be more difficult for him to discharge). Even so there is a question as to what mens rea must be proved

104 Zuckerman (1987) 104 LQR 170; A11 ER Rev 1986, pp 148-151.

105 Cp *R v Hunt*, supra n 4 at 383, per Lord Ackner; and if a number of exceptions are provided in the same clause the burden will be the same for each, although the ease with which they may be proved might be variable: cf ibid at 377, per Lord Griffiths.

106 *R v Douglas* [1985] VR 721 FC; *R v Sciretta* [1977] VR 139; and in New Zealand in the regulatory context the reversal of the burden of proving absence of fault has been justified by reference to the better means of knowledge of D, but it has not been suggested that it is other than an onerous burden.

107 Supra n 102.

by the prosecution. If D is alleged to have aided and abetted, or to have conspired to commit, an offence of strict liability it must be proved that he at least adverted to the essential matters which constituted the offence, even though this is not required of an actual offender;<sup>108</sup> and when an offence requires a particular intent which the statute provides is to be presumed, it does not follow that an alleged accessory is to be presumed to have had the required mens rea, it remaining necessary for the prosecution to prove that he in fact intended to assist the offence alleged.<sup>109</sup> Although a true "exception" is conceived as providing a defence rather than as a negative ingredient of the offence it is arguable that in principle the mens rea required of an accessory or conspirator should extend to all the facts essential to the guilt of the principal. If that were so D should be acquitted if there is evidence raising a reasonable doubt on the issue, and this should at least include evidence that D believed in the availability, or likely availability, of some relevant exception.<sup>110</sup> But if the statute is construed as providing an exception which D is required to prove it will doubtless follow that in the case of a principal offender the same will apply to a mistaken belief in the exception, if this is held to be a defence,<sup>111</sup> and in relation to accessories and conspirators such little authority as there is leaves the position doubtful.<sup>112</sup>

### Conclusion

It is submitted that there are two main objections to the principle adopted in *Hunt* and in section 67(8) of the Summary Proceedings Act 1957. It is excessively uncertain in its application and it constitutes an unnecessary derogation from the presumption of innocence.

As to uncertainty, legislation continues to employ a variety of modes of expression when introducing qualifications to the definition of offences, and the courts have understandably failed to devise a satisfactory test for distinguishing between ingredients of offences and "exceptions", or defences. The position is not improved by the conclusion that the determination of this and the distribution of the burden of proof depends in each case on the construction of the particular legislation, which may be governed by practical or policy considerations as well as the form of the enactment. It would no doubt be a harmless qualification to *Woolmington* if in practice D was only required to prove that he had some required licence or the like, or belonged to a specified class, but the speeches in *Hunt* hardly suggest that that will be the position. It is not possible to predict with confidence what grounds of exculpation the courts might

108 *Eg Churchill v Walton* [1967] 2 AC 224.

109 *R v Samuels* [1985] 1 NZLR 350.

110 Note (1985) 9 Crim LJ 376; a requirement that D actually contemplate the likely absence of all exceptions would seem to be too demanding.

111 *Roberts v Humphreys* (1873) LR 8 QB 483, 489.

112 Adams, *op cit*, paras 110-116; a dictum of Bramwell B in *In re Smith* (1858) 27 LJM 186, 189, might imply that D has the burden in relation to the actual application of an exception, and also mens rea; and in *AG v Duff* [1941] IR 406 and *R v Golding* [1973] WAR 5, accessories were required to prove licences or permits; in *R v Coles* [1984] 1 NSWLR 726, 735-736, evidence of a series of offences was held to be evidence from which conspiracy could be inferred unless D proved a statutory exception.

regard as difficult to prove, nor how readily such considerations will outweigh the form of legislation when it seems to provide for a defence.

As to the need for the rule, no one suggests that the prosecution should be required to adduce evidence rebutting theoretically possible exceptions in order that there be a case to answer, but it does not follow that the persuasive burden of proof must be thrown on to D. In most cases evidence establishing the conduct the prosecution is required to prove will also support an inference that possible exceptions were not applicable, and this has been recognised by the courts in cases where the prosecution has been held to have the burden of excluding what might have been thought to be exceptions.<sup>113</sup> Even when it may be doubtful whether such an inference can be legitimately drawn it should be sufficient if D is required to discharge an evidential burden only, this having been accepted in relation to common law defences (except insanity), and other grounds of exculpation, such as mistake and automatism, where the facts may be "peculiarly within" D's knowledge.

In *R v Hunt*<sup>114</sup> Lord Griffiths thought that to hold that the burden impliedly imposed on D in relation to statutory exceptions is a mere evidential burden would involve such a "fundamental change" that it should be left to Parliament. This might be thought to give insufficient recognition to the change already wrought by *Woolmington*, and conceals the obscurity of the common law relating to proof of statutory exceptions. Lord Ackner, on the other hand, reasoned that in these cases Parliament imposes the burden on D "by necessary implication", and that it follows that it must be the same burden as is imposed when it expressly provides that it is for D to prove an excuse.<sup>115</sup> But although Parliament often (no doubt, too often) expressly places the persuasive burden on D, it is sometimes content to use language which imposes only an evidential burden.<sup>116</sup> It is not easy to see how the possibility can be excluded that this is all that is done when a "necessary implication" is relied upon.<sup>117</sup> Moreover, the hypothesis that in these cases D is required to prove an excuse because Parliament has by necessary implication revealed that this is its intention involves an obvious fiction, it being acknowledged that the language may present a question of construction of real difficulty, which the court may resolve by reference to practical or policy considerations.

Sir Rupert Cross objected that the acceptance of the implied reversal of the burden of proof constitutes "a further erosion . . . of what must surely be the citizen's most fundamental right, the right not to be convicted of a crime until he has been proved guilty of it beyond reasonable "doubt".<sup>118</sup> The historical justification of the principle enunciated in *Hunt*

113 *Eg R v Hunt*, supra n 4 at 377-378, per Lord Griffiths; 382, per Lord Ackner; *Westminster City Council v Croxallgrange Ltd*, supra n 102 at 358-359, per Lord Bridge; 359, per Lord Brightman; cf *R v Putland and Sorrell* [1946] 1 All ER 85; *R v Ewens* [1967] 1 QB 322.

114 Supra n 4 at 376.

115 Ibid, 379-380, 385.

116 *Eg Machirus v Police* [1983] NZLR 764, 767; Crimes Act 1961, s 178(2) (infanticide).

117 Healy, supra n 51 at 361.

118 Cross, supra n 8 at 18.

is doubtful and it, and the rule in section 67(8) of the Summary Proceedings Act 1957, introduces uncertainty and an unnecessary risk of injustice. Legislation is needed to remove the persuasive burdens which are imposed on the accused by the present law, and this should be accompanied by a review of the excessively common legislative practice of expressly imposing such burdens. As things stand, both the courts and Parliament have succeeded in too many attempts to whittle down the rule that the prosecution must prove the guilt of the accused.