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THE RIGHT TO BE PRESUMED INNOCENT - AN ANALYSIS OF THE POTENTIAL EFFECT OF SECTION 25(C), NEW ZEALAND BILL OF RIGHTS ACT 1990, ON RULES AND PROVISIONS REVERSING BURDENS OF PROOF

LLB (HONS) RESEARCH PAPER
BILL OF RIGHTS (LAWS 537)

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1993

CONTENTS

ABSTRACT

This paper examines the meaning and possible effects on New Zealand law of section 25(c) of the Bill of Rights. Section 25(c) provides for the right to the presumption of innocence. In particular, this paper concentrates on the effect of the right to the presumption of innocence on provisions and rules of law which reverse the standard onus of proof by placing a burden on an accused person.

The right to the presumption of innocence is widely acknowledged, but its precise effect varies in different jurisdictions. The first part of the paper sets out the meaning of the right to the presumption of innocence, and the approach to its application, that it is urged should be adopted by New Zealand courts. Part II comprises brief overviews of the different approaches adopted in other jurisdictions. This is not intended to be a comprehensive study of the right in each jurisdiction, but should inform the reader of the general effect the right has, and how the right is applied.

The final part of this paper sets out examples of how the right to the presumption of innocence can be used to argue that specific situations in New Zealand in which a burden is placed on an accused, infringe section 25(c) of the Bill of Rights.

The paper is intended to make readers aware of the manner in which this section can be used, and of the important role it can, and should, play in shaping New Zealand law in future.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 21,500 words.

THE RIGHT TO THE PRESUMPTION OF INNOCENCE

AN ANALYSIS OF THE POTENTIAL EFFECT OF SECTION 25(c), NEW ZEALAND BILL OF RIGHTS ACT 1990 ON RULES AND PROVISIONS REVERSING BURDENS OF PROOF

INTRODUCTION

The right to be presumed innocent is a widely recognised principle in western legal systems, which has been described as "fundamental to the protection of human rights".[1] "The presumption of innocence" is a trite phrase that is deceptive in its simplicity. In fact the practical effects of this widely acclaimed right are far from universally agreed upon.

Prior to the enactment of the New Zealand Bill of Rights Act 1990 ("Bill of Rights"), Lord Sankey's famous dictum from ***DPP v Woolmington*** represented the position at common law in New Zealand:[2]

> 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 right to be presumed innocent has now been given statutory force in section 25(c) of the Bill of Rights.

Despite Lord Sankey's renowned pronouncement, it has been noted by many commentators[3] that this norm of criminal law has become subject to an increasing

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1 United Nations Human Rights Committee, General Comment 13(21) on Article 14(2) of the International Covenant on Civil and Political Rights: (1989) CCPR/C/21/Rev.1.

2 [1935] AC 426, 481-482.

3 Public Issues Committee, Auckland District Law Society, "The Presumption of Innocence" 27/5/86, 4; G. Orchard, "The Golden Thread - Somewhat Frayed" (1988) 6 Otago Law Review, 615, 637.

number of exceptions, to the point where one English commentator has been driven to observe:[4]

> ... the golden thread has become tarnished. [The] law now so frequently imposes on a defendant the burden of proving a particular defence that it cannot be asserted with confidence whether the hallowed presumption of innocence or the disowned presumption of guilt is the dominant principle - which in reality is the rule and which the exception...

In this paper the right to be presumed innocent is examined to discover whether the inclusion of that right in the Bill of Rights will affect provisions and rules which reverse an onus of proof in the laws of New Zealand. In order to ascertain the answer to this question, it is first necessary to determine what the right means, when it applies, and when and if it is permissible to limit the right.

This paper sets out an approach to the meaning and application of the right that it is recommended should be adopted by New Zealand courts; and also provides an overview of the varying approaches taken in a number of other jurisdictions.

A vital point that underlies this paper is the fact that the Bill of Rights is an Act to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights (the "Covenant") and that section 25(c) is designed to give effect to Article 14(2) of the Covenant. Accordingly the meaning and approach adopted by New Zealand courts cannot result in less protection to an accused than he or she is entitled to under the Covenant.

The paper is divided into three principal parts. In the first part I discuss the approach that should be adopted by New Zealand courts when they come to determine the effect of this section on New Zealand law. I begin by setting out an analytical framework upon which individual questions about breach of the presumption of innocence should be answered. Having done this I go on to discuss when and how the right to the presumption of innocence should be applied. The discussion in this part provides an informed background for analysis of the varying approaches to the right that have been adopted in other jurisdictions. Part II includes overviews of the approaches adopted by the Human Rights Committee, the

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[4] J A Ashworth, "A Threadbare Principle" [1978] Criminal Law Review 385.

European Commission and European Court of Human Rights, the House of Lords and Privy Council, the Supreme Court of Canada, and the United States Supreme Court. I note that the approaches adopted differ, and that New Zealand courts must decide between conflicting approaches. This part of the paper concludes with a discussion of the reasons the approach advocated in Part I should be adopted by New Zealand courts when determining the meaning and application of section 25(c) of the Bill of Rights.

Part III of this paper is devoted to an examination of the different methods by which a burden of proof is placed on an accused, namely:

(a) when a statute expressly provides that the accused must prove a particular matter;

(b) when a "blanket" reversal of onus clause operates to reverse the onus of proving a particular matter;

(c) when a rule of common law reverses the onus of proof; and

(d) when an offence is categorised as a strict liability offence.

It will be argued that whenever a statute expressly reverses a legal burden of proof, the limit which this places on the right to be presumed innocent must be justifiable under section 5 of the Bill of Rights. It is contended that in many cases the limit will not be justifiable, and accordingly the Bill of Rights will be breached. Despite this, the New Zealand Courts must continue to apply such a statute, given that section 4 of the Bill of Rights does not permit a statute to be impliedly repealed by reason only that it conflicts with the Bill of Rights. It is suggested that the Courts should declare such provisions to be in breach of the Bill of Rights.

In relation to "blanket" reversal of onus provisions, section 67(8) of the Summary Proceedings Act is examined. It is concluded that this provision offends the right to be presumed innocent, and that this is not a justified limit pursuant to section 5. Accordingly it is urged that the provision be repealed.

In relation to common law reversals of onus, the decision in ***R v Hunt***[5] is discussed. In that case the House of Lords held that the burden of proving an exception,

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[5] [1987] 1 AC 352.

exemption, proviso, excuse or qualification, in relation to an indictable offence, is on the accused. It is contended that this English common law rule cannot be adopted in New Zealand in view of section 25(c) of the Bill of Rights.

In the final section under Part III the rationale of strict liability "public welfare" offences is examined. It will be submitted that the common law category of "strict liability" offences must be amended so that the burden placed on the accused is an evidential burden only in relation to all offences which carry a "penal" sanction. Such an amendment to this category of offence would not result in the "half way house" being abolished; the only alteration being to the burden of proof relating to the defence of total absence of fault. It will be contended that such an amendment is the only way in which the common law relating to strict liability offences can comply with the Bill of Rights provision that an accused is entitled to be presumed innocent until proved guilty.

In ***M v Police***[6] the Court of Appeal opined that section 25(c) of the Bill of Rights was merely a statutory enactment of the common law position. This paper will show that the right is far more than that. Because the right is now laid down in a statute, it must take precedence over common law rules. The provision is capable of being used as a powerful weapon by those who are disturbed by the increasing trend of removing the burden of proof from the Crown, and placing a burden of proving innocence on the accused.

I. RECOMMENDED APPROACH TO THE RIGHT TO THE PRESUMPTION OF INNOCENCE

Introduction to Part I

The right to the presumption of innocence in the Bill of Rights can potentially affect many aspects of the way suspects are treated in the judicial process.[7] This paper is concerned with only one aspect: namely, what types of burden placed on an

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6 (Unreported) CA 104/93, 24/3/93.

7 For example, the right to bail and issues of name suppression.

accused, at different stages of his or her trial, limit the accused's right to be presumed innocent. This is a complex issue and numerous different answers have been suggested by courts and academics. The approach adopted in this paper is to begin by asking what the right must mean; and then to look at the effect of placing different burdens on an accused at different stages of his or her trial in light of the right to see whether the those burdens limit the right. This analysis is undertaken in Part A, and leads to certain conclusions as to when the right will be infringed. However the complexity of the issue does not end once we have determined when the right is infringed - it is necessary to go further to determine when the right applies and when, and if, it is permissible to place limits on the right. This issue is addressed in Part B.

One preliminary definitional matter must be addressed before entering into discussion of the meaning of the right to be presumed innocent; that is the meanings accorded in this paper to an "evidential" burden and a "legal" burden. An evidential burden places a requirement on a person to put forward some evidence relating to an issue, in order to make that issue a "live" issue in the proceedings. It does not impose any burden of proving that matter. A legal burden is a persuasive burden of proof, and means a person must convince the court or jury of the truth of the matter in question to a set standard (generally, the prosecution must prove matters to the standard of "beyond reasonable doubt" and the defence to the standard of "on the balance of probabilities").

A. *Meaning of the Right to the Presumption of Innocence*

1. *Two possible views as to the extent of the right*

Section 25(c) of the Bill of Rights provides that a person charged with an offence has "the right to be presumed innocent until proved guilty according to law." This provision is capable of two quite different interpretations:[8]

[8] See Mahoney R "The Presumption of Innocence: A New Era", Canadian Bar Review, Vol 67, March 1988, 1,18-19.

(1) The first view is that the right means an accused must be presumed innocent until the prosecution have *prima facie* proved all essential elements of the offence. Once the prosecution have achieved this, the right to the presumption of innocence has been accorded and is extinguished. On this view, the imposition of a requirement that the accused prove his or her innocence at a later stage of proceedings (such as a requirement that the accused bears the legal burden of proving a defence) does not infringe s25(c).

(2) The alternative view is that the right to the presumption of innocence applies at **all** stages of proceedings and is not extinguished until all evidence has been presented and a verdict entered. On this interpretation, once the prosecution have led *prima facie* evidence of all elements of the crime, the presumption of innocence goes into limbo. At this stage there arises an evidential onus on the accused to raise as a live issue a reasonable doubt as to the existence of any element of the crime, or as to the availability of a defence. If the accused does this, the presumption of innocence is once again triggered and operates to place a burden on the prosecution to disprove the defence case beyond reasonable doubt.

2. *Preferred view*

It is submitted that the second interpretation set out above is the correct view. The wording of section 25(c) requires that the presumption exist until the accused is "proved guilty". Proof of guilt does not occur until all evidence has been heard and a verdict entered, because an accused who is acquitted on the basis of the existence of a defence (eg self-defence or duress), is not guilty.[9]

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[9] T. A. Cromwell "Proving Guilt: The Presumption of Innocence and the Canadian Charter of Rights and Freedoms" in W H Charles, T A Cromwell & K B Jobson ***Evidence and the Charter of Rights and Freedoms*** (Butterworths, Toronto, 1989) 125, 186.

The latter view gains support from Mr Justice Tarnopolsky, who has identified 3 main features of the right to be presumed innocent in the Canadian Charter of Rights and Freedoms:[10]

> (1) the state may not interfere with a person until it has established its authority to do so;
> (2) the burden of proof remains on the prosecution ***throughout the trial***;
> (3) the standard of proof is beyond reasonable doubt.
> (Emphasis added)

In line with these two different possible interpretations of the right, two distinct methods for analysing when the right has been breached can be identified in case law and academic writings:[11]

(1) The right is breached whenever either an evidential or a legal burden is transferred to the accused which relates to an essential part of the offence. Conversely, transferring either type of burden in relation to some "extraneous matter" is unobjectionable.[12]

(2) The right is breached whenever a legal burden is placed on the accused - be it in relation to a part of the offence, or to a defence. Conversely, placing an evidential burden on the accused can never breach the right to be presumed innocent. This view has influential support - notably, Cross on Evidence and Glanville Williams.[13]

It is submitted that neither of these modes of analysis provide a completely satisfactory answer: only a combination of both can fully protect the right to the presumption of innocence. To understand this it is necessary to examine what the right must mean.

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[10] Tarnopolsky, "The New Canadian Charter of Rights and Freedoms as Compared and Contrasted with the American Bill of Rights", 5 Human Rights Quarterly (1983) 227,242; as quoted in J B Elkind & A Shaw, ***A Standard for Justice*** (Auckland, Oxford University Press, 1986) 103.

[11] T.A. Cromwell, above n9, 156-157.

[12] Above n9, 157.

[13] Above n9, 156, fn 138 and 139.

The General Comment of the Human Rights Committee relating to the right to the presumption of innocence under the Covenant makes it clear that the right places the burden of proving the accused's guilt on the prosecution.[14] The simplest method of conceptualising the effect of this in practice is to focus on two particular consequences which must necessarily flow from the right.

Lamer J, speaking for the Court in the Canadian Supreme Court decision in ***R v Dubois***, identified these two components of the right:[15]

> Section 11(d) imposes upon the Crown the burden of proving the accused's guilt beyond a reasonable doubt ***as well as*** that of making out the case against the accused before he or she need respond, either by testifying or calling other evidence. (Emphasis added)

This finding illustrates that the right to be presumed innocent encompasses something more than the prosecution bearing the burden of proving guilt beyond reasonable doubt at the end of the trial; it also involves the prosecution proving all elements of the offence before an accused need respond.

It is submitted that this must be correct. The right to be presumed innocent must entail the prosecution proving an accused's guilt beyond reasonable doubt at the end of the trial. A line of Canadian cases have reasoned that if the effect of a provision or rule is that at the end of the trial an accused may be convicted despite the existence of a reasonable doubt, then the right to be presumed innocent has been offended.[16] However the right must comprise more than this - it must also place a duty on the prosecution to prove all essential elements of the charge

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14 Above n1.

15 (1985) 22 CCC (3d) 513, 531.

16 ***R v Whyte*** (1988) 42 CCC (3d) 97; ***R v Holmes*** (1988) 41 CCC (3d) 497; ***R v Keegstra*** (1988) 43 CCC (3d) 150; ***R v Schwartz*** (1988) 45 CCC (3d) 97.

before an accused need respond in any way. T.A. Cromwell illustrates this point by way of a compelling *reductio ad absurdum* argument:[17]

> Suppose that a provision places an evidential burden on each element of an offence on the accused and that the prosecutor adduces no evidence. If the provision follows the normal pattern in the *Criminal Code* of providing that X, Y and Z are, in the absence of evidence to the contrary, to be taken as proved, the accused must call evidence to the contrary or face certain conviction. Assuming that the accused calls no evidence, the trier must be instructed to convict even though the prosecutor has adduced no evidence that any one of the essential elements does, in fact, exist. As Martin J.A. said in ***Oakes*** and repeated in the context of the evidential burden in issue in ***Boyle***:
>
> > To require a jury to convict an accused on the basis of a purely arbitrary assumption that an essential ingredient which is the essence of the offence exists ... must surely reduce the right to the presumption of innocence to a mere shadow, and make a cardinal principle of the criminal law wholly illusory and fanciful.

Neither of the two approaches outlined above for determining when the right to be presumed innocent is breached, effectively protects both facets of the right identified by Lamer J. It is only by analysing each stage of a trial (ie the proving of essential elements of the offence by the Crown, and the raising of defences); together with each type of burden that can be placed on an accused (ie legal and evidential burdens), in light of the two components of the right, that a satisfactory framework for deciding when the right is breached can be constructed.

3. *Analysis of when the right to the presumption of innocence is limited*

(a) *Legal Burdens*

It is submitted that the placement of a legal burden of proof on an accused to prove any fact or circumstance always conflicts with the right to the presumption of innocence. In the words of Lamer J in ***R v Vaillancourt***:[18]

> Any provision creating an offence which allows for the conviction of an accused notwithstanding the existence of a reasonable doubt on any

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[17] Above n9, 159.

[18] (1987) 39 CCC (3d) 118, 135.

> essential element infringes [the right to natural justice and the right to be presumed innocent].

Whenever a legal burden is placed on an accused, the possibility exists for the accused to be convicted despite the existence of a reasonable doubt. This would occur when an accused managed to raise a reasonable doubt as to the existence of the matter in question, but was unable to prove that matter on the balance of probabilities. This result is equally true whether applied to elements of the offence or matters of defence. It is submitted that the possibility of conviction despite the existence of a reasonable doubt as to guilt, clearly conflicts with the right to be presumed innocent until proved guilty.

(b) ***Evidential burdens***

In relation to the placement of an *evidential* burden, however, it is submitted that this will only breach the right to be presumed innocent where the evidential onus is to disprove an essential element of the offence, prior to the Crown *prima facie* proving that essential element. I examine below the different situations in which an evidential burden can be placed on an accused in light of the right to be presumed innocent:

(i) ***Evidential burden to raise a defence***

An evidential burden on an accused to raise as a live issue facts that indicate the existence of a defence does not infringe the right to be presumed innocent. That is because placing an evidential burden to do this on an accused neither removes from the Crown the burden of proving guilt beyond reasonable doubt at the end of the trial; nor impinges on the right of the accused to have a case made out against him or her before he or she need respond. This result accords with

common sense and with practice in all common law countries - a practice which has not been questioned by the Human Rights committee in relation to the right to be presumed innocent in the Covenant.

If the accused did not bear the evidential burden of raising a defence as a live issue, the prosecution would be forced to not only prove all elements of an offence, but also to positively disprove every conceivable defence, even though there may be no evidence to show any particular defence was an issue in the case.[19]

(An objection that can be taken to this view is that it leaves it open to the legislature to redefine crimes in order to place evidential burdens on the accused. For example, Parliament could describe the offence of murder as "any killing of a person", and provide a defence of "lack of intent". The conclusion that an evidential burden on the accused to raise a defence does not offend the right to be presumed innocent, means the onus on the accused to raise as a live issue his or her lack of intent under this hypothetical section, could not be challenged under section 25(c). While the analysis outlined above clearly does lead

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[19] For an alternative view - namely that even an evidential onus on an accused to raise a defence breaches the right to the presumption of innocence - see T A Cromwell, above n9, 188-189. Cromwell states that "placing evidential burdens upon an accused in the context of presumptions requires conviction even in the absence of evidence on an essential element. ... any evidential burden on the accused may authorise a conviction in the absence of evidence of *guilt*." [p189]. It is submitted that this analysis goes unnecessarily far: it involves defining the right to the presumption of innocence as requiring the prosecution to prove beyond reasonable doubt each and every element that could lead to an accused being not guilty. This is not the case: what is required is that the prosecution prove the guilt of the accused beyond reasonable doubt. Although absence of provocation is undoubtedly an essential element of the crime of murder, the fact that the prosecution do not prove absence of provocation in every murder trial does not mean the prosecution are contravening the accused's right to be presumed innocent in the many cases where the accused has not raised provocation as an issue. The prosecution have (presumably) proved the accused's guilt in those cases *beyond reasonable doubt*. In other words, if the defence have not raised provocation as an issue, it would be *unreasonable* to doubt the accused's guilt on the basis that she might have been provoked.

to this result, it is submitted that were such a re-definition of the crime of murder introduced, the appropriate attack would not be under the right to be presumed innocent, but under section 27 - the right to natural justice.[20] It is notable that the Canadian courts have grappled with this issue and concluded that the essential elements of a crime are not only those which can be discerned from reading Parliament's enactment of the crime - there are also essential elements imposed by virtue of the right to natural justice.[21])

(ii) ***Evidential burden to disprove an essential element of the offence <u>after</u> prima facie proof by the prosecution***

The placement of an evidential burden on an accused to raise as a live issue the non-existence of some essential element of the offence *after* the prosecution have apparently proved the existence of that element, does not infringe the right to the presumption of innocence, because once the prosecution have *prima facie* proved all elements of the offence, the right to the presumption of innocence abates (see p? above). As with an evidential burden to raise a defence, this burden neither displaces the prosecution's duty to prove the guilt of the accused beyond reasonable doubt at the end of the trial; nor the prosecution's duty to put forward a case before an accused need respond.

(iii) ***Evidential burden to disprove essential element of the offence <u>before</u> prima facie proof by the prosecution***

It is submitted that to place an evidential burden on an accused to negative some essential part of the offence *before*

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20 See R Mahoney, above n8, fn42; T. A. Cromwell, above n9, 186.

21 ***R v Vaillancourt*** above n18.

the prosecution have prima facie proved that element beyond reasonable doubt, is contrary to the right to be presumed innocent.[22] This emerged clearly in ***R v Downey***:[23]

> [T]here is implicit in the right to be presumed innocent an obligation on the Crown to make out a case against the accused before he or she need respond, either by testifying or by calling other evidence.

To allow an evidential burden to be placed on an accused in this case would be to allow the prosecution to use the accused's failure to negative a part of the offence as part of the case against him or her. This violates the aspect of the presumption of innocence identified by Lamer J above, that the Crown bear the burden of "making out the case against the accused before he or she need respond."[24]

4. ***Summary of reversals which will infringe the right to presumption of innocence under the above interpretation***

In summary, all instances in which a *legal* onus is purported to be placed on an accused infringe the right to the presumption of innocence. An *evidential* onus, on the other hand, generally will not infringe the Bill of Rights. The only exception to this general rule is where the onus is to raise as a live issue the non-existence of an essential element of the offence before the prosecution have *prima facie* proved that element.

Set out below is a table summarising these conclusions:

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22 I. Weiser "The Presumption of Innocence in Section 11(d) of the Charter and Persuasive and Evidential Burdens" (1989) 31 Criminal Law Quarterly 318, 336.

23 (1992) 72 CCC (3d) 1, 9; see also ***R v Boyle*** (1983) 35 CR (3d) 34, 55.

24 Above n15.

<table>
<tr><th></th><th>Evidential burden on accused</th><th>Legal burden on accused</th></tr>
<tr><td>Re a defence</td><td>Does not limit the right to the presumption of innocence.</td><td rowspan="3">Whenever a legal burden is placed on an accused the right to the presumption of innocence is limited; the legal burden could lead to conviction despite the existence of a reasonable doubt.</td></tr>
<tr><td rowspan="2">Re an essential element of the offence</td><td>*After prima facie proof by prosecution*: Does not limit the right to the presumption of innocence.</td></tr>
<tr><td>***Before** prima facie proof by prosecution*: Does limit the right to the presumption of innocence.</td></tr>
</table>

B. ***Application of the Right***

The framework described above provides a logical basis for deciding what the right means in practice, and accordingly when it is infringed. However, this is not the end of the inquiry. It is plain that the right is one that is subject to limitations - whether they be viewed as limits that are implicit in the right itself, or limits that are justifiable pursuant to general limitations criteria. Accordingly, New Zealand courts must also decide upon a method for deciding the issue of the application of the right.

There are two principal approaches that can be identified to the application of the right to be presumed innocent. The first approach is that applied by the Human Rights Committee, the European Commission and European Court of Human Rights, and also by the American Courts. That is, the right is not one which should be subject to limitation on the ground that the limitation in question is reasonable and justifiable in a free and democratic society (the

usual criteria in general limitations clauses). The right is, however, subject to implied limits that are inherent in the nature of the right itself. The practical effect of this reasoning, is that there are situations where a reversal of onus will be permissible, because the right to be presumed innocent does not apply in the particular circumstances.

The second approach is that which has been developed in the Canadian Courts. Namely, the right always applies and it will be breached in the situations outlined in Part A above. However, it is permissible to limit the right on the grounds set out in general limitations provisions, such as Section 1 of the Canadian Charter, or Section 5 of the Bill of Rights. Section 5 of the Bill of Rights provides:

> **Justified limitations** - Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Accordingly, depending upon the approach adopted to the application of the right, the issue when a reverse onus clause appears to violate the right to be presumed innocent will be either: "does the right to the presumption of innocence apply to this reverse onus clause?"; or "is the limit this reverse onus clause places on the right to the presumption of innocence a justifiable limit?".

For the reasons set out in paragraph G of Part II below, it is submitted that New Zealand Courts should adopt the latter approach.

C. *Distinctions that are irrelevant when applying the right to the presumption of innocence*

Before moving on to discuss the approaches adopted in other jurisdictions to the right to the presumption of innocence, it is necessary to lay a foundation for the discussion by analysing some of the distinctions which have been noted in case law and academic writings. It is submitted that these distinctions are not only unhelpful, but they do not bear scrutiny when

a "rights centred approach"[25] is adopted in relation to the right to the presumption of innocence.

1. ***"presumption"/"reversal of onus" distinction***

A "reverse onus provision" explicitly reverses the burden of proving a particular matter. A common formula employed in reverse onus clauses is "proof of which shall be upon him." When the legal burden of proving a particular matter is explicitly placed upon an accused, the right to be presumed innocent is limited. Many "presumptions" have precisely the same effect, but the analysis of presumptions is more complicated. Statutory presumptions are provisions which employ phrases such as "X shall be presumed unless the accused [shows/proves] otherwise." In analysing the effect of presumptions on the right to be presumed innocent, it is necessary to divide presumptions into two basic types:

(a) those where the presumption involves presuming one fact exists (the "presumed fact"), upon proof of another fact (the "basic fact"). An example of this would be: "Where a person is in the driver's seat of a vehicle it shall be presumed that he or she has care and control of that vehicle.";

(b) those where the presumption is not based on proof of any basic fact. An example of this would be the presumption of sanity.

The latter type of presumption - those which do not rely on a basic fact - simply operate to reverse the burden of proof in relation to the matter in question. They are no different at all from a reversal of onus provision.[26]

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[25] ***R v Goodwin*** [1993] 2 NZLR 153, 193-194.

[26] Above n9, 130.

The former type of presumption - those which state proof of one fact is equivalent to proof of another - must be further subdivided into two categories for the purposes of discussing the right to be presumed innocent:

(a) The first category comprises those presumptions where the basic fact **does** prove the presumed fact beyond reasonable doubt ("basic fact proves presumed fact provisions"). While it may appear completely unnecessary for this sort of presumption to be enacted,[27] they do exist.[28] In this situation, where the presumption requires the accused to merely submit evidence to contradict the presumed fact, no issue of the presumption of innocence arises, because quite apart from the statutory presumption the accused would be required to put forward evidence tending to disprove the presumed fact. However, where this type of presumption requires the accused to "prove" otherwise, a legal burden is transferred to the accused which does have the effect of limiting the right to the presumption of innocence.

(b) The second category comprises those presumptions based on basic facts, where the basic fact **does not** lead inexorably to the presumed fact, eg "A person who is habitually in the company of a prostitute ... shall be presumed to be knowingly living on the earnings of prostitution." This type of presumption operates either to reverse the burden of proof, or to place an evidential

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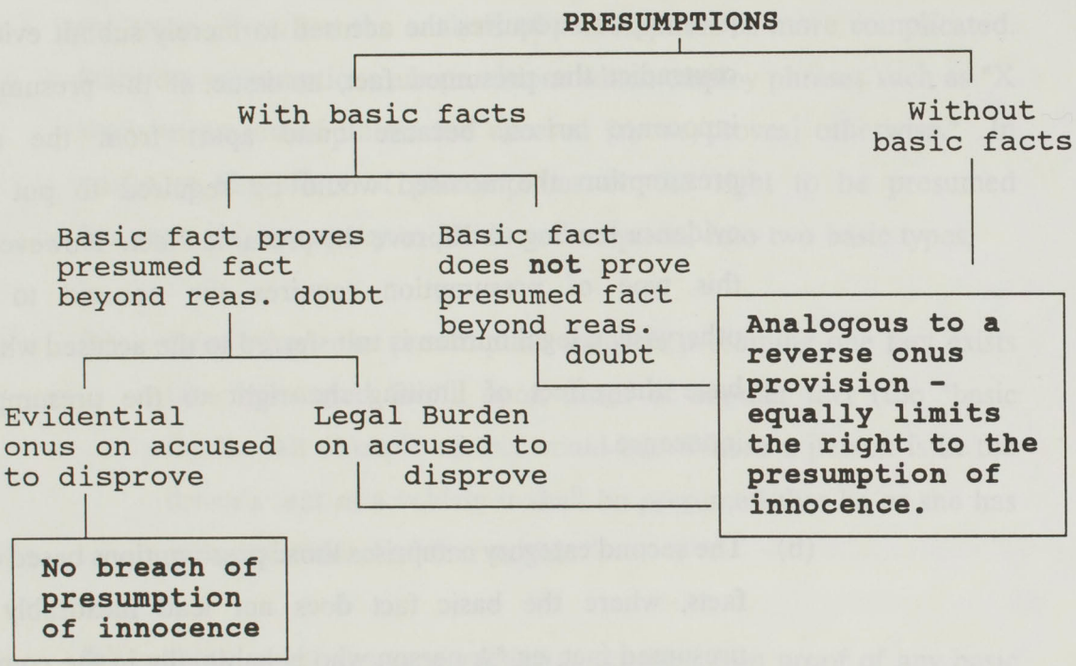
[27] R J Delisle ***When do Evidential Burdens Violate Section 11(d)?*** (1992) 13 CR (4th) 161,164.

[28] A good example of such a provision arose in the case of ***R v Crooks*** (1988) 6 WCB (2d) 131. The case involved a provision that in prosecutions for certain offences under the Act, production of a return, certificate, statement or answer required under the Act "purporting to have been filed or delivered by or on behalf of the person charged with the offence" would be, in the absence of evidence to the contrary, proof that such return, certificate, statement or answer was filed or delivered by, or on behalf of, that person. This provision clearly states that a particular basic fact is *prima facie* proof of a presumed fact, in circumstances where it would be patently unreasonable to assume anything other than the presumed fact, upon proof of the basic fact in question.

burden on an accused prior to the Crown having proved the essential elements of their case beyond reasonable doubt. Either way, there is a limit on a person's right to be presumed innocent.[29]

The above conclusions in relation to when presumptions do and do not limit the right to be presumed innocent can be summarised in chart form as follows:



It will be seen from the above that, with the exception of "basic fact proves presumed fact" provisions placing an evidential burden on an accused, "presumptions" operate in exactly the same way as "reverse onus provisions". Having noted that no presumption of innocence issue arises with "basic fact proves presumed fact" provisions placing an evidential onus on an accused, from this point on it is proposed to

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[29] See ***R v Whyte*** above n16 - a provision substituting proof of a particular matter for proof of an element of the offence will offend the presumption of innocence unless "the existence of the substituted fact leads inexorably to the conclusion that the essential element exists, with no other reasonable possibilities."

ignore this category of presumption for the purposes of this paper. Accordingly, it will be assumed that there is no difference between a statutory presumption and a reverse onus clause and I will use the terms interchangeably in this paper.[30]

Despite the fact that presumptions and reverse onus clauses operate identically, Canadian Courts have on occasion distinguished between presumptions and reversal of onus provisions. In the Ontario Court of Appeal decision in ***R v Lees Poultry***[31] it was suggested that the Court of Appeal[32] decision in ***R v Oakes*** was not applicable to the reversal of onus section before the Court, because while ***R v Oakes*** involved a "statutory presumption", sections reversing an onus merely "express in statutory form an exception to the general rule of pleading and proof."[33] It is submitted that the distinction between a "statutory presumption" and a "statutory exception to a general rule of proof" is specious. Any statutory exception could be rephrased as a presumption, and vice versa. To recognise such a distinction for the purposes of applying the right to be presumed innocent is to make the application of a fundamental human right dependent on techniques of drafting, and is unacceptable.

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30 Some commentators use the terms "mandatory presumption" and "reverse onus clause" to differentiate between a clause which places an evidential burden on an accused, and a clause which places a legal burden on an accused, respectively. I do not use the terms in this sense in this paper. (Indeed, it is suggested that this usage can cause confusion, given that in numerous offences the phrase "... shall be presumed, unless the contrary is proved" is utilised. Using these terms to differentiate between a legal and evidential onus would mean such wording created a "reverse onus" provision, although the word "presumed" was used, which could be confusing.)

31 (1985) 17 CCC (3d) 539.

32 The leading Supreme Court of Canada decision in ***R v Oakes*** (26 DLR (4th) 200) came out following the decision in ***Lees Poultry***, but nevertheless the remarks in the latter case distinguishing ***Oakes*** would not be affected by the later Supreme Court decision in ***Oakes***, which upheld the Court of Appeal decision.

33 Above n31, 543.

2. *"Permissive"/"mandatory" distinction*

US courts have laid down different tests for validating "permissive" presumptions and "mandatory" presumptions. While a mandatory presumption *directs* a court to treat one fact as proved upon proof of another and in the absence of evidence/proof to the contrary; a permissive presumption merely *allows* the Court to accept the presumed fact as having been proved. US Courts have held that *mandatory* reversals of a *legal* burden of proof always violate the right to due process;[34] but mandatory reversals of an *evidential* burden only, and all *permissive* reversals of onus do not violate due process, provided that where a presumption relies on a basic fact there is a rational connection between the basic fact and the presumed fact. Some Canadian Courts have also recognised this distinction as being relevant for the purposes of the right to be presumed innocent.[35] It is submitted there should be no distinction between mandatory and permissive presumptions for the purposes of the right to the presumption of innocence. Richard Mahoney compellingly points out the fallacy in recognising such a distinction:[36]

> ... the potential [with permissive presumptions] for a breach of the presumption of innocence is similar to that presented by a mandatory presumption. Just because the trier of fact need not infer the existence of the presumed fact which is one of the essential elements of the crime, does not lessen the breach of the presumption of innocence every time such a permissible conclusion is, in fact, reached.

3. *"offence"/"defence" distinction*

Finally, a distinction is often made between reversals of onus which relate to an essential part of the offence; and those which relate to a defence. In particular, this is the basis upon which English courts analyse cases involving presumption of innocence issues. While it has been noted

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34 ***Francis v Franklin*** 85 L.Ed (2d) 344.

35 See ***R v Pye*** (1984) 11 CCC (3d) 64.

36 Above n8, 36.

been noted above that the distinction between an essential part of the offence and a defence is decisive as to whether the placement of an evidential onus infringes the right to the presumption of innocence; it is submitted that this distinction is irrelevant for the purposes of applying the presumption of innocence to any transference of a legal burden of proof. It is notable that the distinction is seen by many critics as one of "mere form".[37] In the words of G Orchard:[38]

> ... [T]here 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 place. 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 Canadian Supreme Court decision in ***R v Whyte***,[39] Dickson CJC, giving the unanimous judgment of the Court, stated:[40]

> The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.

Similarly, in ***R v Keegstra***[41] it was held that in determining the application of the right to be presumed innocent, no distinction should be made between what Parliament has included as an element of the offence, and what is termed a defence.

As noted on page ? above, section 25(c) of the Bill of Rights requires the presumption of innocence to apply until the accused is "proved

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37 G Orchard, above n3, 624. See also G Williams, "Offences and Defences" (1982) 2 LS 233; Jeffries & Stephan "Defences, Presumptions and Burdens of Proof in the Criminal Law" (1979) 88 Yale LJ 1325, 1331-1332; T.A. Cromwell, above n9, 175.

38 Above n3, 624.

39 Above n16.

40 Above n16, 109.

41 Above n16.

guilty". Until the prosecution have proved, beyond reasonable doubt, that no defence exists, an accused has not been "proved guilty". Accordingly, it is submitted that the analysis in ***R v Whyte*** in this regard must be correct and any reversal of a legal burden of proof, whether it be in relation to a part of the offence, or to a defence, limits section 25(c).

Conclusion - summary of premises on which this paper is based

It emerges from the above discussion that the following premises underlie this paper:

(1) the right to be presumed innocent applies throughout the trial;

(2) the right has two facets: it means the Crown bear the burden of proof, throughout the trial, to the standard of "beyond reasonable doubt"; and the Crown must make out a case against an accused before the accused need respond.

(3) in general, the application of the right cannot be dependent on such factors as:
   (i) whether a provision is expressed as a "reverse onus" or a "presumption";
   (ii) whether a presumption is permissive or mandatory; or
   (iii) whether a presumption relates to part of the offence in question, or to a defence (at least insofar as legal burdens are concerned).

(4) the issue of whether or not the burden transferred by a reverse onus clause is a legal or evidential burden, is a crucial one which will often be determinative of whether or not the provision breaches the right to the presumption of innocence.

II. OVERVIEW OF APPROACHES ADOPTED IN OTHER JURISDICTIONS

A. *Approach Adopted by the Human Rights Committee under the International Covenant on Civil and Political Rights*

1. *Article 14(2) of the Covenant*

Article 14(2) of the Covenant provides:

> Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Article 14 encompasses rights relating to a fair trial. It is notable that the *travaux preparatoires* relating to the right to the presumption of innocence indicate that it was felt that this right was so important that it should be placed in a separate paragraph within Article 14.[42]

The views of the Human Rights Committee as to the meaning of this right can be determined from a variety of sources. The first, and most important, is the General Comments of the Human Rights Committee. Also highly relevant are the decisions of the Human Rights Committee on cases brought before it under the Covenant, and the Committee's discussions of state reports under the Covenant. I examine each of these sources below to determine the Human Rights Committee's interpretation of the right to the presumption of innocence.

2. *The General Comments of the Human Rights Committee*

The General Comments set out the Committee's interpretation of the articles of the Covenant, and are intended as a guide to State Parties in the preparation of their periodic reports under the Covenant. In

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[42] Third Committee, 14th Session, A/4299, 56.

relation to the right to be presumed innocent, the General Comments provide:[43]

> The Committee has noted a lack of information regarding article 14, paragraph 2 and, in some cases, has even observed that the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or entails conditions which render it ineffective. By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.

3. *Cases under Article 14(2) of the Covenant*

There is only one case that has come before the Human Rights Committee under Article 14(2) of the Covenant which relates to a reversal of onus provision. In ***Yves Morael v France***[44] the author complained that an article of the then French bankruptcy law placed a presumption of fault on the defendant and that this breached his right to be presumed innocent. The article in question provided that when judicial supervision of the affairs of a company revealed it had insufficient assets to pay its creditors, the court could order that all or part of the company's debts should be borne by the managers of the company. The specific portion of the provision complained of read:

> To be absolved of their liability, such persons must show that they devoted all due energy and diligence to the management of the company's affairs.

The State Party in the case objected to the complaint under Article 14(2) on the basis that the provision was not a "criminal offence" and therefore the right to be presumed innocent was not triggered. Two arguments were advanced to support this: first, because the provision could not be invoked by the public prosecutor, but only by the receiver (or the Court ex officio), therefore actions under the provision were

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[43] Above n1.

[44] Comm No 207/1986, A/44/40, 210.

in the nature of civil proceedings, not criminal. Secondly, because liability under the provision could never exceed the amount of the loss incurred by the company, the liability imposed was not of a penal nature. The Human Rights Committee accepted the State Party's arguments in this regard, and concluded that there was no violation of Article 14(2) because the provision which included a presumption of fault was not a "criminal offence".

4. *Discussions of the Human Rights Committee in relation to State Parties' Periodical Reports*

The Human Rights Committee have on numerous occasions sought further information about the circumstances when states reverse the onus of proof;[45] although the practice has not always received the Committee's condemnation following the State's explanation.

In 1986 Messrs Elkind and Shaw summarised the position of the Human Rights Committee in relation to reversal of onus provisions as follows:[46]

> [I]t is quite clear, in terms of the Covenant, that it is not permissible to rely on any general limitations as a basis for supporting restrictions on the presumption of innocence. ... This *does not* mean that all "reverse onus" provisions or "mandatory presumption" provisions are contrary to the Covenant. Resolution of such questions must take account of the "delicate" balance inherent in Article 14(2) itself. It is not, however, permissible to resolve such questions in terms of a limitations clause, general or otherwise. In this regard it is important to recall the opinion of Mr Tomuschat which was expressed in relation to provisions in the Constitution of Sri Lanka. Mr Tomuschat said:
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> > under the Constitution the presumption of innocence was subject to two restrictions. The first was that the burden of proving certain facts could be placed upon the accused person. The precise interpretation of the presumption of innocence rule was, of course, a delicate matter; in many countries, the accused had to prove specific facts in, for example, defamation proceedings. Nevertheless, the rule set forth in article 14(2) of the Covenant was an absolute one and not subject to any limitation.

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[45] For example, CCPR/C/SR.808 4-9 (Australia); CCPR/C/SR.816 (Belgium); CCPR/C/SR.905, 12 (Mauritius); CCPR/C/SR.1049, 3-4 (UK).

[46] Above n10, 105-106.

The fact that the Committee does not always express disapproval of reverse onus provisions may be taken as supporting the inference that the right does not apply to **all** criminal offences. It also seems clear, however, that when it does apply the Committee expect an offending provision to be amended. In 1989 the Human Rights Committee questioned the representatives of the State of Mauritius in relation to section 4(1) of their Official Secrets Act (relating to publication of cabinet documents) because it appeared to lay the burden of proof of innocence on an accused.[47] Mr Ramsewak of Mauritius explained that the Act "... sought not to upset the established rule concerning the burden of proof, but merely to provide that if a document had been published with lawful authorization, that fact should be established by the publisher."[48] He noted it was not publication, per se, that was the offence, but attribution of the document to cabinet. He expressed the opinion that:[49]

> Requiring the publisher to furnish proof of authorization, similar to asking a driver to produce his licence, was a requirement which did not contravene the presumption of innocence.

Mr Fodor of the Human Rights Committee in his concluding remarks on the Mauritian report stated that the explanation provided in connection with section 4 of the Official Secrets Act was not convincing:[50]

> ... if a person charged with an offence under that Act was responsible for proving his innocence, then that was not compatible with article 14 of the Covenant, and that provision must be amended.

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47 CCPR/C/SR.904-906.

48 CCPR/C/SR.905, 12-13.

49 Above n48, 13.

50 CCPR/C/SR.906, 13.

5. ***Summary***

It appears that the approach of the Human Rights Committee to Article 14(2) of the Covenant is that where a provision to which the article applies requires a person to prove his or her innocence, there is a breach of the right to be presumed innocent. Such a breach cannot be justified and the offending provision should be amended. However, it also seems that Article 14(2) will not always apply to a reversal of onus provision: in particular, it appears acceptable to reverse the onus of proof in defamation proceedings. What is not clear from any of the proceedings of the Human Rights Committee, is the criteria upon which it should be decided whether or not the right to be presumed innocent applies to a particular reverse onus provision.

B. ***Approach Adopted by the European Commission and European Court under the European Convention on Human Rights.***

1. ***Article 6(2) of the European Convention***

Article 6(2) of the European Convention on Human Rights provides:

> Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

2. ***Cases before the European Commission and the European Court of Human Rights***

Three cases have addressed the issue of reverse onus provisions under the European Convention, each case upholding the particular reverse onus clause in question.

In ***X v United Kingdom***[51] the applicant complained that his right to be presumed innocent had been violated when he was convicted of living

[51] Application No 5124/71, 42 Collected Decisions, 135.

on the immoral earnings of a prostitute pursuant to a provision which read:

> [A] man who lives with or is habitually in the company of a prostitute ... shall be presumed to be knowingly living on the earnings of prostitution unless he proves the contrary.

The Commission held that the provision created a "rebuttable presumption of fact which the defendant may in turn disprove". They went on to conclude that "[t]he provision in question is not, therefore, as such, a presumption of guilt."

The Commission did note, however, that provisions like the one in question could have the same effect as a presumption of guilt if they were widely or unreasonably worded. Accordingly, they stated that it is not sufficient to examine only the form of drafting of a statutory presumption to determine whether it infringes the right to the presumption of innocence, but the substance and effect of the presumption. They concluded that in the instant case the presumption was "neither irrebutable nor unreasonable."

In ***Salabiaku v France***[52] Mr Salabiaku alleged that in the course of his conviction for the offence of smuggling, his right to be presumed innocent had been violated. Article 392(1) of the French Customs Code provided that a person "in possession of contraband goods shall be deemed liable for the offence." A rule had evolved in the Courts that "force majeure" may be pleaded by an accused in exculpation, despite the strict wording of Article 392. The European Court of Human Rights held that Mr Salabiaku's right to be presumed innocent had not been infringed by the Courts which found him guilty, because no evidence had been led in the case which was capable of showing he was a victim of force majeure.

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52 (1988) 13 EHRR 379.

The Court held:[53]

> Presumptions of fact or law exist in many legal systems and are not contrary to the Convention in principle. However, Contracting States are under an obligation to remain within reasonable limits which take into account the importance of what is at stake and which respect the rights of the defence.

Given the importance stressed in Part I above of the type of burden that is placed on an accused when issues of the presumption of innocence are raised, it is notable that the decision of the European Court of Human Rights in ***Salabiaku*** did not turn on who would have born the burden of proving force majeure, and no distinction appears to have been recognised in the case between an evidential burden and a burden of proof, given that on the facts not even an evidential burden was discharged. This lack of distinction can be seen firstly in the quotes from the domestic court decisions. In the Court of Appeal it was said that:[54]

> ... any person in possession (detention) of goods which he or she bought into France without declaring them to customs is presumed to be legally liable unless he or she can ***prove*** a specific event of force majeure exculpating him. (emphasis added)

In the Court of Cassation (the second domestic level of appeal) it was said that:[55]

> the Court of Appeal ... found that the accused was in possession of the trunk and inferred from the fact of possession a presumption which was not subsequently rebutted by ***evidence*** of an event responsibility for which could not be attributed to the perpetrator of the offence or which he would have been unable to avoid. (emphasis added)

The former quote indicates a burden of proof on the accused, while the latter appears to be in terms of an evidential onus only. The European Court also appeared to overlook the vital distinction between an

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53 Above n52, 388.

54 Above n52, 382.

55 Above n52, 383.

evidential onus and a burden of proof. In discussing the relevant rule that had evolved in the French courts it stated:[56]

> More recently, it was held that "the specific character of [customs] offences does not deprive ... the offender of every possibility of defence since ... the person in possession may exculpate himself by ***establishing*** a case of force majeure" ... (emphasis added)

They went on to say:[57]

> As the Government argued at the hearing on 20 June 1988, the French Courts thus do enjoy a genuine freedom of assessment in this area and "the accused may ... be accorded the ***benefit of the doubt***, even where the offence is one of strict liability". (emphasis added)

The former quote intimates there is a legal burden of proof on the accused, while the reference to "the benefit of the doubt" implies there is an evidential onus only. The Court noted that it was not called upon to consider "in abstracto" whether Article 392(1) of the Customs Code conformed to the Convention, but rather whether it was applied to the applicant in a manner which conformed with the right to be presumed innocent. As noted above, the Court concluded that it was, because there was no evidence of force majeure led in the case.

In ***Hoang v France***[58] the European Commission of Human Rights came to a similar decision, based on the decision in ***Salabiaku***. Again the Commission refused to consider the express wording of the provisions in issue, and concluded that there had been no application of a reverse onus provision in a manner which was incompatible with the right to the presumption of innocence, because the accused could have raised the defence of *force majeure*. As in ***Salabiaku*** the precise allocation of the burden of proving that matter, were it raised, was not discussed in the case.

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56 Above n52, 389.

57 Above n52, 389.

58 (1992) 16 EHRR 53.

The result of these cases is that under the European Convention as long as a presumption is both "reasonable" and rebuttable, the right to the presumption of innocence will not be infringed.

C. *Approach Adopted by the Supreme Court of Canada*

1. *Section 11(d) of the Canadian Charter of Rights and Freedoms*

Section 11(d) of the Canadian Charter provides:

> Any person charged with an offence has the right ... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

2. *Case Law under Section 11(d)*

The Canadian Courts have taken a fundamentally different approach to addressing the issue of whether or not a statutory presumption violates the right to be presumed innocent. Unlike the European jurisprudence, the Canadians have interpreted the provision widely, so that virtually all provisions which reverse an onus are held to infringe the right to be presumed innocent. However, the Charter cases indicate that it is permissible to limit the right to be presumed innocent under the general limitations clause in the Charter (Section 1). Accordingly, the question the Canadian Courts ask in relation to statutory presumptions is whether or not a limit on the right to be presumed innocent is, on the particular facts, a "reasonable limit, prescribed by law" which is "justifiable in a free and democratic society."

The leading Canadian case in this regard is the Supreme Court of Canada decision in ***R v Oakes***[59]. In that case the accused was charged with possession of narcotics for the purposes of trafficking. Section 8 of the Narcotic Control Act provided that once possession by the

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[59] Above n32.

accused of a narcotic was proved, the accused must establish that the possession was not for the purposes of trafficking. It was found that section 8 placed on the accused a legal burden of negativing a mandatory presumption that possession of narcotics was for the purposes of trafficking. Dickson CJC held that this clearly infringed section 11(d) of the Canadian Charter of Rights and Freedoms. He went on to consider whether that infringement was a "reasonable limit, prescribed by law" which could be "demonstrably justified in a free and democratic society" for the purposes of justification under section 1 of the Charter. In order to decide this question, Dickson CJC laid down the test to be applied, as follows:[60]

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" ...The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
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> Secondly, once a sufficiently significant objective is recognized, then the party invoking s1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test" ... There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. ... Thirdly, there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

Applying that test to the case before him, Dickson CJC concluded that the first limb - sufficiently important objectives - was met, the limit being designed to curb drug trafficking. However he went on to hold that the second limb - proportionality - was not met. He said:[61]

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60 Above n32, 227.

61 Above n32, 229.

> ... [T]he proportionality test should begin with a consideration of the rationality of the provision: is the reverse onus clause in section 8 rationally related to the objective of curbing drug trafficking. At a minimum, this requires that section 8 be internally rational; there must be a rational connection between the basic fact of possession and the presumed fact of possession for the purposes of trafficking. ... In my view, section 8 does not survive this rational connection test. ... [P]ossession of a small or negligible quantity of narcotics, does not support the inference of trafficking.

Because the Canadian Charter is supreme law, it is possible for the Courts to strike down legislation which unjustifiably infringes Charter rights. Accordingly it was held that section 8 of the Narcotics Control Act was of no force and effect.

3. *Contrasting Canadian and European Approaches*

The case of ***R v Downey***[62] illustrates the difference in approach between the European Commission and the Canadian Courts well. The provision in question in that case was virtually identical to the provision challenged in ***X v United Kingdom***[63]. The charge was of living wholly or partly on the avails of prostitution of another person. Section 212(3) of the Canadian Criminal Code provided that proof that a person lived with or was habitually in the company of prostitutes was, in the absence of evidence to the contrary, proof that the person lived on the avails of prostitution. Unlike the European Commission, the Canadian Supreme Court judges were unanimous that this presumption infringed the right to be presumed innocent in s11(d) of the Charter. They were divided, four to three, however, as to whether that limit was justifiable under s1. The majority held that the section satisfied the ***Oakes*** test and therefore the provision was held to be constitutional.

Similarly, it has been noted above that there are indications that the view of the Human Rights Committee is that the imposition of the burden of proving the defence of truth in defamation cases is not a reversal of onus to which the presumption of innocence would apply;

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[62] Above n23.

[63] Above n51.

yet the Supreme Court of Canada in ***R v Keegstra***[64] clearly held that the placement of the burden of proving the defence of truth on an accused in relation to a charge of wilfully promoting hatred against an identifiable group, breached section 11(d) of the Charter. As in the ***Downey*** case, the majority went on to hold that the breach was a justifiable limit pursuant to section 1, because the criteria set out in ***Oakes*** were met.

D. *The Approach Adopted by the House of Lords/Privy Council ("the English approach")*

The right to be presumed innocent is a common law right in England. As a result of the decision in ***R v Hunt***[65] the position is that the right applies to essential elements of the offence only, and not to matters of excuse or justification. Where essential elements are concerned, the right may be overridden by Parliament, either expressly or by implication. The Privy Council, perhaps unsurprisingly, have recently adopted very similar reasoning in determining the approach that should be taken to the right to be presumed innocent under the Hong Kong Bill of Rights Ordinance 1991 ("HKBOR"). In ***Attorney General of Hong Kong v Lee Kwong-kut***[66] it was noted that the Canadian "two-step" approach differs from the European approach.[67] Lord Woolf, delivering the judgment of the court, opined that the existence of the express limitation clause in section 1 of the Canadian Charter made it understandable that the Canadian courts should have adopted a two stage approach to construing the right to be presumed innocent; and that the adoption of this two stage approach in turn made it understandable that a "strict" approach to contravention of the right should have been adopted.[68] He went on, however, to reject this approach in favour of what he believed to be a less complex test, based on the reasoning of the European Court in

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[64] Above n16.

[65] Above n5.

[66] (1993) 3 WLR 329.

[67] Above n66, 343.

[68] Above n66, 342.

Salabiaku v France[69] and on the English decisions in ***R v Edwards***[70] and ***R v Hunt.***[71] The test prescribed is:[72]

> The court can ask itself whether, under the provision in question, the prosecution is required to prove the important elements of the offence; while the defendant is reasonably given the burden of establishing a proviso or an exemption or the like of the type indicated by Lawton LJ [in ***R v Edwards***]. If this is the situation article 11(1) is not contravened.

The case involved two separate appeals from decisions of the Hong Kong Court of Appeal striking down certain provisions on the basis that they contravened the accused's right to be presumed innocent under the HKBOR. The first provision was determined as requiring an accused to disprove an essential element of the offence and was accordingly held to contravene the right to the presumption of innocence in a manner which could not be justified by the Crown.[73]

The second provision was construed as one which placed a burden of proof on an accused in relation to a matter which did not constitute part of the substance of the offence (it being irrelevant whether it be a matter of "defence" or "excuse"). In relation to such matters it was stated that "some exceptions will be justifiable, others will not."[74] The test as to whether or not a reversal of onus relating to a matter of defence, excuse or exception is justifiable is one of reasonableness. It was held in relation to the second provision at issue that: "In the context of the war against drug trafficking, for a defendant to bear that onus ... is manifestly reasonable and clearly does not offend article 11(1)."

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[69] Above n52.

[70] [1975] QB 27.

[71] Above n5.

[72] Above n66, 344.

[73] Above n66, 344.

[74] Above n66, 341.

The English approach could be viewed as a more exacting version of the European approach. Having adopted the "offence/defence" dichotomy as decisive, the result in English courts is that virtually[75] all reversals of the onus of proof of an essential element of an offence will be seen as unjustifiably infringing the right to be presumed innocent; while reversals of the burden of proving a matter of defence or excuse will not infringe the right to be presumed innocent, so long as the reversal in question is "reasonable". While the first part of the English approach adds a significant gloss to the approach of the European Court of Human Rights, for the purposes of considering the approach New Zealand Courts should adopt I propose to contrast the Canadian "two step" approach with the "reasonableness" approach adopted by the Human Rights Committee; the European Court and Commission; and by the Privy Council, which I shall collectively describe as the "European approach".

E. *Approach Adopted by the United States Supreme Court*

1. *Source of the right*

While there is no express provision that an accused has the right to be presumed innocent in the United States Constitution, the right has clearly been accepted as being an important part of the right to "due process" accorded in the Fifth and Fourteenth Amendments.[76] The analysis of presumption of innocence questions does not turn on whether or not a particular reversal of an onus of proof is "justifiable" or "reasonable"; rather the Supreme Court has attempted to lay down rules as to when a provision which reverses an onus is, and is not, constitutional.

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[75] It must be noted that the way has been left open for a court to hold that a reversal of the burden of proof in relation to an essential element of the offence does not infringe the right to be presumed innocent. In ***R v Hunt*** it was noted that such occasions are "likely to be exceedingly rare." (above n5, 375); and this statement was quoted with approval in ***Attorney-General of Hong Kong v Lee Kwong-kut*** (above n66, 334).

[76] ***Re Winship*** 25 L Ed 2D 368; ***Estelle v Williams*** 48 L Ed 2d 126; ***Taylor v Kentucky*** 56 L Ed 2d 468.

2. ***Types of reverse onus that will breach the presumption of innocence - permissive/mandatory distinction***

In relation to the types of reversal of a burden of proof that violate the right to the presumption of innocence, the case law takes yet another approach to those outlined above. The crucial distinction as far as the United States Supreme Court is concerned, is whether or not a presumption is "permissive" or "mandatory". Mandatory presumptions relating to an element of the offence (whether rebuttable or irrebuttable) always violate the right.[77] On the other hand, rebuttable mandatory presumptions going to matters of defence, and **all** permissive presumptions, do **not** violate the right, so long as there is a "rational connection" between the basic and presumed facts.[78] A "rational connection" for this purpose will exist where it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact.[79]

The reasoning behind holding that permissive presumptions never infringe the right to the presumption of innocence, provided the requisite rational connection exists, is explained in ***Ulster County Court v Allen***:[80]

> Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.

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77 ***Sandstrom v Montana*** 61 L Ed 2d 39; ***Patterson v New York*** 53 L Ed (2d) 281; ***Mullaney v Wilbur*** 44 L Ed (2d) 508; ***Francis v Franklin***, above n34; ***Carella v California*** 105 L Ed 2d 218.

78 ***Francis v Franklin***, above n34; ***Ulster County Court v Allen*** 60 L Ed 2d 777.

79 ***Ulster County Court v Allen*** above n78; ***Leary v United States*** 23 L Ed 2d 57; ***Yates v Evatt*** 114 L Ed 2d 432.

80 Above n78, 792.

The distinction between permissive and mandatory presumptions has been criticised above.[81] It will suffice to note here that it is incorrect to conclude that because a presumption is permissive no issue of the presumption of innocence can arise. In the context of the United States jurisprudence a permissive presumption is constitutional if the basic fact makes the existence of the presumed fact "more likely than not". This is a lower standard than that required under the right to the presumption of innocence, namely "beyond reasonable doubt". Thus a jury would be allowed to conclude that a person was guilty of an offence on the basis of evidence that made his or her guilt "more likely than not" - whenever a jury convicts on this basis, the right to the presumption of innocence is infringed. The fact that the jury came to their conclusion because of a permissive, as opposed to a mandatory presumption, is irrelevant.

3. ***Conflicting cases as to the offence/defence dichotomy***

In relation to the offence/defence dichotomy relied on so heavily in the English courts, the United States case law is contradictory. In ***Mullaney v Wilbur***[82] a rule which had the effect of placing the burden of proving the defence of provocation on the accused, was held to violate the accused's right to the presumption of innocence. In ***Patterson v New York***[83] a statutory defence of extreme emotional disturbance (described as "mental infirmity not arising to the level of insanity"[84]) that was provable by the accused, was held not to be unconstitutional. This result was said to be authorised by earlier decisions to the effect that placing the burden of proving the defence of insanity on an accused does not infringe the right to be proved innocent.[85] The analogy hinged on the

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81 Above p20.

82 Above n77.

83 Above n77.

84 Above n77, 290.

85 Namely, ***Leland v Oregon*** (1952) 96 L Ed 1302 and ***Rivera v Delaware*** (1976) 50 L Ed 2d 160.

fact that the defence in question in both these situations was not a defence that involved negating any element of the offence. Finally, in ***Martin v Ohio***,[86] relying heavily on the decision in ***Patterson***, a bare majority (5:4) held that it does not violate the right to the presumption of innocence to place the burden of proving the defence of self-defence on an accused.

In a strong dissent, Justice Powell (with whom Justices Brennan, Marshall and Blackmun concurred) noted the majority's failure to discuss or even cite the decision in ***Mullaney v Wilbur***.[87] The dissent also noted that, in their view, the majority had misapplied the decision in ***Patterson*** in using it to uphold the constitutionality of placing the burden of proving self-defence on an accused, because self-defence often involves a sudden reaction without prior plan or specific purpose to take a life, and in these cases it involves denying an essential element of the crime, namely intent.[88]

Given the conflict in the authorities, and the lack of unanimity on the Supreme Court bench, it seems unlikely that the last word has been heard on this issue.

F. *Draft Declaration on the Right to a Fair Trial*

In 1989 the Economic and Social Council Sub-Commission on the Prevention of Discrimination and Protection of Minorities requested two of its members to prepare a report on international standards in relation to the right to a fair trial and to recommend which of the fair trial provisions should be made non-derogable.[89] In their report[90] the two members (Mr Stanislav Chernichenko

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[86] (1987) 94 L Ed 2d 267.

[87] Above n86, 279.

[88] Above n86, 278.

[89] Resolution 1989/27.

[90] E/CN.4/Sub.2/1990/34.

and Mr William Treat) recommended that a comprehensive study be undertaken with a view to preparing a declaration on the right to a fair trial.

The study was undertaken and on 25 June 1993 Messrs Chernichenko and Treat submitted a draft declaration on the right to a fair trial and remedy.[91] Article 59 of the draft declaration relates to the right to be presumed innocent. Article 59(c) relates specifically to statutory presumptions. It provides:[92]

> Legal presumptions of fact or law are permissible in a criminal case only if they are rebuttable, allowing a defendant to prove his or her innocence.

This clause would appear to suggest that any reversal of onus is permissible, provided it is open to the accused to rebut it by **proving** his or her innocence. From a perusal of the 1991 and 1992 reports of Messrs Chernichenko and Treat[93] it would appear that this interpretation of the right to the presumption of innocence is based on the first two decisions under the European Convention on Human Rights discussed above. In Addendum 1 to their third report[94] they discuss the interpretation of international fair trial norms by the European Commission and the European Court of Human Rights. They conclude that under the European Convention presumptions of fact or law are not prohibited in domestic legislation, but that such presumptions must be kept within reasonable limits. They go on to conclude that, under European Human Rights jurisprudence "[a] legal system that contains rebuttable presumptions of fact ... does not violate the principle of presumption of innocence."[95]

It is notable that the conclusion that a rebuttable presumption does not infringe the presumption of innocence does not accord with the European

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91 E/CN.2/Sub.2/1993/24/Add.1.

92 Above n91, 17.

93 E/CN.4/Sub.2/1991/29 and E/CN.4/Sub.2/1992/24 respectively.

94 E/CN.4/Sub.2/1992/Add.1.

95 Above n94, 46.

decisions, which contain the additional requirement that the presumption must be "reasonable". Neither does it accord with comments of the Human Rights Committee under the Covenant, who have criticised rebuttable reverse onus provisions for breaching the right to the presumption of innocence. The draft declaration, as it stands, would clearly permit, for example, the reversal of onus in the Mauritian Official Secrets Act which attracted the reproof of one member the Human Rights Committee; and also the reversal in question in ***R v Oakes***. Indeed, with no reference to the need for the reversal to even be "reasonable", it would validate a provision which stated "Any person found within 5 metres of a recently deceased person shall be presumed to be guilty of murder unless he or she proves otherwise"! While such a provision could undoubtedly be challenged as a breach of natural justice, it should clearly not be a technically permissible provision under an international declaration on the right to a fair trial. It is to be hoped that clause 59(c) of the draft declaration will not be adopted in its present broad form. It clearly does not correctly interpret the meaning of Article 14(2) of the Covenant, and is capable of authorising patently unacceptable breaches of this fundamental right.

G. *Reasons the Approach Advocated in Part I is the Most Appropriate for New Zealand Courts to Adopt to the Application of Section 25(c)*

The New Zealand courts will be faced with a choice between two different approaches to applying the right to the presumption of innocence. In summary, these are:

(a) ***The European approach*** - the right to be presumed innocent is subject to implied limits and is not always infringed by a reversal of onus provision. Where such a provision does infringe the right, however, resort to a general limitations clause is not permissible. The European cases have concluded that the right is not triggered by a "reasonable" presumption that is rebuttable by the accused. It is not clear on what criteria the Human Rights Committee decide whether or not the right applies, but it appears to be more narrow criteria than have been

adopted in the decisions under the European Convention. The Privy Council have concluded that reversing the onus of proving an excuse or defence will not infringe the right where the reversal is "reasonable".

(b) ***The Canadian approach*** - the Canadians tend to regard virtually all statutory presumptions as *prima facie* infringing the right to the presumption of innocence. To be a permissible limit on the right, the provision in question must meet the criteria expressly provided in the general limitations section (Section 1 of the Charter).

The Bill of Rights is an act to affirm New Zealand's commitment to the Covenant. Accordingly, the approach given to the meaning of the right to be presumed innocent must not result in less protection being granted to a citizen than would be granted under the Covenant. The approach adopted under the Canadian Charter results in the right *prima facie* applying in more circumstances than it would do under the Covenant. The resort to the general limitations clause by the Canadian Courts appears to serve a similar purpose to the consideration of whether or not the right should *apply* under the European approach. It is submitted that the Canadian approach does not necessarily result in the right being accorded in fewer situations than it would be under the Covenant. In ***Attorney General of Hong Kong v Lee Kwon-kut*** the Privy Council noted there are two different approaches to interpreting the right to be presumed innocent, and concluded that:[96] "... applying the two-stage approach, the courts in Canada in the end tend to come to the same conclusion as would be reached in other jurisdictions." Accordingly, it is submitted that to adopt the Canadian approach to deciding the application of the right is open to New Zealand courts.

It is submitted that this approach is preferable to the European approach. The problem with the European approach is it is nowhere made clear exactly what criteria are applied in order to determine whether or not a particular presumption triggers the right to be presumed innocent. (Other than the general comment that a presumption must be "reasonable"; and it is notable

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[96] Above n66, 343.

that even this requirement is not present in the draft Declaration on the Right to a Fair Trial). Accordingly, if this approach were to be adopted, it would be possible for courts to declare that any presumption simply did not trigger the right to the presumption of innocence, without canvassing the issues raised by reversing the onus in the particular case. By adopting the Canadian approach, the right will almost invariably be held to be breached by reverse onus provisions, but some limitations will be held to be justifiable. This approach will require the legislature and courts to consider the effects of reversing the onus of proof pursuant to specific criteria.

It is also relevant for the purpose of deciding what approach the New Zealand courts should adopt, to note that it was clearly envisaged by the legislature that the Canadian jurisprudence would be followed in this country. The White Paper on the Bill of Rights quoted extensively from the Court of Appeal decision in ***R v Oakes***, and appeared to assume that the test which would be adopted in this country to determining whether a reversal of onus could be justified would involve the ***Oakes*** "rational connection" test.[97]

Finally, in ***Attorney-General of Hong Kong v Lee Kwong-kut***[98] the Privy Council clearly regarded the fact that the Canadian Charter contains an express section specifying permissible limits on rights as being relevant to the approach adopted in that country. Such a provision does not exist in the Hong Kong Bill of Rights, in relation to which the Privy Council adopted an analysis more closely analogous to that of the European courts. The Bill of Rights, however, **does** contain an express limitations clause, and accordingly it is appropriate that our courts should draw on the Canadian jurisprudence for its approach to the right to be presumed innocent.

While advocating the adoption of the Canadian approach in this country, a cautionary note must be sounded: any consideration by the courts of whether or not a particular presumption is a justifiable limitation, must be coloured

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[97] ***A Bill of Rights for New Zealand - A White Paper*** (Government Printer, Wellington, 1985) 95-96.

[98] Above n66, 342.

by the fact that under the Covenant the right to be presumed innocent is perceived as "fundamental". This suggests that the decision that a particular reversal of onus is justifiable should never be reached lightly. Recent Canadian cases indicate a trend away from strict application of the test laid down in the Supreme Court decision in ***R v Oakes***; and an alarming number of reverse onus provisions are being held to be justifiable limits on the right to be presumed innocent.[99] Bearing in mind the fundamental nature of the right; and the concern expressed by the Human Rights Committee that many states place conditions on the right to be presumed innocent which render it ineffective,[100] such watering down of the test should not be permitted to occur in this country. Only where a reverse onus is "demonstrably" justifiable, should such a limit on the right to the presumption of innocence be tolerated by our courts.

III. SPECIFIC INSTANCES OF REVERSALS OF ONUS

Introduction to Part II

A reversal of onus can occur in four distinct situations:

(1) where a statute specifically provides that the accused will bear the onus of proof of a particular matter;

(2) pursuant to section 67(8) of the Summary Offences Act, which reverses the onus of proving an exception, exemption, proviso, excuse or qualification in relation to summary offences;

(3) pursuant to the rule in ***R v Hunt*** (should that decision be followed) that an accused bears the onus of proving exceptions, exemptions, provisos, excuses and qualifications in relation to indictable offences;

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[99] D Stuart, "Wholesale Travel: Presuming Guilt for Regulatory Offences is Constitutional but Wrong" 8 CR (4th) 225, 228.

[100] Above n1.

(4) where the offence is categorised as a "strict liability" offence, and accordingly the burden of proving the defence of "total absence of fault" is placed upon the accused.

I discuss each of these in turn below.

A. *Specific Statutory Reversals*

1. *Methodology for interpreting specific statutory reversals*

The New Zealand statute books contain numerous examples of specific presumptions/reversals of onus.[101] Where clauses specifically setting out a presumption or reverse an onus can be interpreted as merely imposing an *evidential* onus on the accused, this will not infringe the Bill of Rights, unless the presumption relates to an essential element of the offence, not previously *prima facie* proved by the prosecution. Section 6 of the Bill of Rights Act provides that where an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred to any other meaning. Accordingly, where a specific statutory presumption can be interpreted as imposing merely an *evidential* onus on the accused, this interpretation must be preferred.[102] An evidential onus will generally not infringe the Bill of Rights at all; and in the limited cases where I have concluded that it does breach the Bill of Rights, the limit is less severe than would be the case if a legal onus were imposed on the accused.

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[101] Examples include sections 229(2) and 233(2) of the Crimes Act 1961; section 6(6) of the Misuse of Drugs Act 1975.

[102] See Robertson (ed) ***Adams on Criminal Law*** (Brooker & Friend, Wellington, 1992) Ch 10.16.08.

Such an interpretation will not always be possible, however. A case in point is ***R v Phillips***.[103] That case concerned section 6(6) of the Misuse of Drugs Act 1975, which provides:

> ... a person shall, until the contrary is proved, be deemed to be in possession of a controlled drug for a purpose set out in paragraph ... (e) *[sale]* ... if he is in possession of ...
>
> (e) ... 28 grams or more of cannabis plant.

The trial judge in that case instructed the jury that once possession of over 28 grams of cannabis was proved (and this was not contested in the case), the onus was on the accused to prove, on the balance of probabilities, that he did **not** have the drug for the purposes of sale. This instruction was challenged in the Court of Appeal, by reference to sections 6 and 25(c) of the Bill of Rights. It was contended that the words "until the contrary is proved" could be interpreted as placing an evidential onus only on the accused; and that this interpretation must therefore be the preferred interpretation, for consistency with section 25(c) of the Bill of Rights. However, Cooke P found that such an interpretation of the word "proved" was "strained and unnatural" and that the Court would not be justified in adopting it, even in light of the Bill of Rights. This decision will make it virtually impossible for a statutory presumption which employs the words "proof" or "proved" to be interpreted as casting an evidential onus only on an accused. Formulas which employ less specific wording, however, may be open to this interpretation.[104]

On the approach advocated in this paper, whenever a *legal* burden of proof is placed on an accused, the right to the presumption of innocence is infringed and the question must be asked whether or not that

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103 [1991] 3 NZLR 175.

104 For example, in ***Adams on Criminal Law***, above n102, it is suggested that where a statutory presumption employs the word "show" or "shows", it will be open to the interpretation that an evidential onus only should be placed on the accused. Given that this interpretation is possible, to comply with the Bill of Rights it is the interpretation which **must** be adopted.

infringement is justifiable in a free and democratic society. The appropriate test to use is that from ***R v Oakes***.

2. ***Recommended Approach where a Court finds there is an Unjustifiable Breach***

Under the Bill of Rights, however, courts do not have the power to do strike down legislation that is found to unjustifiably limit a right in the Bill of Rights. Section 4 provides:

> No court shall, in relation to any enactment ...
>
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) Decline to apply any provision of the enactment -
>
> by reason only that the provision is inconsistent with any provision in this Bill of Rights.

Where an unambiguous statutory provision specifically reverses the legal burden of proof, this clause will operate to save the provision, even if the provision does not satisfy the ***Oakes*** test as to reasonable limits. Accordingly the Courts must uphold the provision, as indeed was done in ***R v Phillips***.[105] This does not mean that the analysis as to whether a provision can be justified under section 5 should not be undertaken in these cases, however.

An option open to a Court to express concern about an infringement of the fundamental human right to the presumption of innocence would be to make a judicial declaration that the section in question infringes the right, and is not a reasonable limit justifiable in the free and democratic society. Such an approach has been foreshadowed in the Court of Appeal in ***Temese v Police***.[106] In that case, after noting that Professor F.M. Brookfield has helpfully analysed the relationship

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[105] Above, n103.

[106] Unreported, 27 November 1992, Court of Appeal, CA 209/92.

between sections 4, 5, 6 and 7 in a recent article,[107] Cooke P went on to opine:[108]

> [Professor Brookfield] suggests *inter alia* that, although a court may find that an enactment is inconsistent with an affirmed right or freedom and therefore overrides the right or freedom, the court should also be prepared to hear argument on whether the enactment is a limitation justified under s.5. That approach may have the drawback that, if the court were to say that the limitation was unjustified yet overridden by the enactment, the court could be seen by some to be gratuitously criticising Parliament by intruding an advisory opinion. But possibly that price ought to be paid.

It is imperative that the Courts do take such a step if they are to effectively protect human rights in New Zealand. In addition to alerting Parliament to possible breaches of the Covenant, such a declaration would pave the way for a case to be taken to the Human Rights Committee under the Optional Protocol.

B. *Blanket reversal contained in section 67(8), Summary Offences Act*

1. *Approaches to determining the validity of section 67(8) reversals*

Section 67(8) of the Summary Offences Act provides:

> 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 ... need not be negatived in the information, and whether or not it is so negatived, no proof in relation to the matter shall be required by the informant.

In Canada section 730(2) of the Criminal Code imposes a blanket reversal of onus where exceptions and exemptions etc appear in summary offences, which is analogous to section 67(8) of the Summary Offences Act. Similar provisions exist in provincial legislation. To date such provisions have generally been upheld as not violating the right to the presumption of innocence under the Charter in the cases where they have been applied.

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107 [1992] New Zealand Recent Law Review, 236.

108 Above n106, 4.

In ***R v Lees Poultry***[109] section 48(3) of the Provincial Offences Act was discussed. It provides:

> The burden of proving that an authorisation, exception, exemption or qualification, prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorisation, exception, exemption or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

The defendant in that case was charged under section 3 of the Meat Inspection Act, which provides:

> No person shall engage in the business of operating a plant, other than an establishment, without a licence therefor from the director.

The defence presented no evidence either as to the existence of a licence, or that the business was an "establishment", and the prosecution presented no evidence that the business was **not** an "establishment". The defendant was convicted. On appeal to the County Court, the conviction was dismissed on the basis that section 48(3), as applied to section 3 of the Meat Inspection Act, was unconstitutional. It required the defence to prove the existence of a licence, which was not a matter rationally connected to the operation of the business, therefore the Court of Appeal test from ***Oakes*** was not met. The Ontario Court of Appeal disagreed. As noted in Part I above, this Court distinguished the decision in ***Oakes***, as follows:[110]

> Unlike the section in question in ***R v Oakes***, ... s48(3) does not purport to create a presumption, but rather to express in statute form an exception to a general rule of pleading and proof on specific issues in summary conviction type cases.

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[109] Above n31.

[110] Above n31, 543.

(It has been submitted above that this distinction does not bear scrutiny.[111]) Brooke JA, delivering the judgment of the Court, concluded:[112]

> In my opinion, s48(3) of the Provincial Offences Act ... is a just law and does not offend important principles which are now expressed in s11(c) and (d) of the Charter.

He went on to dismiss the appeal, however, on the basis that a business not being an establishment was an essential element of the offence, and the failure of the prosecution to prove this meant the defendant was entitled to have his conviction overturned.

It is submitted that the Supreme Court decision in ***Oakes***, which was delivered after this case, must be regarded as the leading authority on the constitutionality of reverse onus provisions and statutory presumptions, and that little weight can be accorded to the obiter comments of Brooke JA in ***Lees Poultry***.

One approach to issues of reversing the onus under section 67(8) is for the Courts to examine the justifiability of the reversal imposed by the section in each case in which it is relied upon. It is submitted, however, that a better approach is to test the justifiability of the section itself for the purposes of establishing whether there is a breach of the right to be presumed innocent.

2. ***A rights centred analysis of section 67(8)***

It is submitted that blanket provisions such as section 67(8) of the Summary Offences Act, violate the right to the presumption of innocence, and further that they cannot be demonstrably justified in a free and democratic society.

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111 Above p19.

112 Above n31.

Once it is accepted that the placing of a legal burden on the accused to prove or disprove any fact contravenes the presumption of innocence,[113] it is apparent that section 67(8) (which imposes a *blanket* requirement in relation to summary offences that the accused must prove certain types of fact), **must** contravene section 25(c) of the Bill of Rights. Accordingly, the question which must be examined is whether that contravention is reasonably justifiable in a free and democratic society. It is submitted that the appropriate test to use to decide this is that in ***R v Oakes***.

It is submitted that blanket reversal of onus clauses in general do not meet the first limb of the ***Oakes*** test. The objective such clauses are designed to serve must be to ease the burden on the state of proving the guilt of persons accused of summary offences which include provisos, exceptions, exemptions etc. Objectives which are "discordant with principles integral to a free and democratic society" will not be justifiable.[114] The objective of s67(8) identified above is surely discordant with such integral principles: it is directly contrary to the right to the presumption of innocence which has been described as "fundamental to the protection of human rights."[115] Accordingly it is submitted that s67(8) does not meet the first limb of the ***Oakes*** test.

It is further submitted that the second limb of the ***Oakes*** test is also not met. Under this limb it should be noted that the measures designed to achieve an objective, may not be arbitrary or unfair.[116] The section 67(8) reversal of onus is patently "arbitrary", because it applies to all statutory exceptions, exemptions etc in summary offences, irrespective of the logic of reversing the onus in the particular case. An example will illustrate this point. In ***Oakes*** it was said that the "minimum"

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[113] Above, p9.

[114] Above n32, 227.

[115] Above n1.

[116] Above n32, 227.

requirement in order to meet the proportionality test is that there must be a rational connection between the basic fact (in that case, possession of drugs), and the fact which must be presumed unless the accused proves the contrary (in that case, possession for the purpose of trafficking). In ***Oakes*** it was held that there was no such rational connection, because mere possession of drugs (the basic fact) bore no rational connection to the proposition that a person must be a trafficker of drugs (the presumed fact). In ***Green v Ministry of Agriculture & Fisheries***[117] the accused were charged with being found in possession of toheroa taken from below the high water mark. The accused relied on a provision in the Fisheries Act that "nothing in this Act shall affect any Maori fishing rights", and argued that they were exercising Maori fishing rights when they took the toheroa. It was held that this was a matter of excuse, which meant that section 67(8) reversed the onus of proof, therefore the accused bore the onus of proving that they were entitled to possess the toheroa pursuant to Maori fishing rights. If this particular instance of the section 67(8) reversal of onus is subjected to the rational connection test in ***Oakes***, the arbitrariness of section 67(8) becomes clear. One way of applying the ***Oakes*** test is to rephrase the reversal as a presumption: namely, "anyone found in possession of toheroa shall be presumed not to have obtained the toheroa pursuant to a Maori fishing right." (This is the practical result of the reversal of onus pursuant to s67(8).) It must then be asked if the connection between the basic fact and the presumed fact is a rational connection. It patently is not. The basic fact (possession of toheroa) in no way tends to prove the presumed fact (absence of Maori fishing rights). It is arguable that it is not relevant to apply the internal rational connection test to reverse onus clauses as opposed to presumptions which rely on a basic fact to prove a presumed fact. However, it is submitted that even ignoring the lack of internal rationality in the reversal that occurred in the ***Green*** case, the placement of the burden of proof on the accused cannot be justified. While protecting toheroa stocks may well be a pressing and substantial concern in a free

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117 [1990] 1 NZLR 411.

and democratic society; it is clearly arguable that honouring Treaty of Waitangi obligations and according Maori fishing rights is an equally, if not more, pressing and substantial concern. In addition, proving the existence of Maori fishing rights is not something that will be easy to prove for an accused, and accordingly the effect of the reversal is not proportional to the objective. This undoubtedly is a reversal of the onus of proof which unjustifiably infringes the fundamental right to the presumption of innocence. It illustrates that section 67(8) results in arbitrary reversals of the onus of proof. In many cases, as in ***Green***, the reversal imposed by s67(8) would not meet the ***Oakes*** test if it were an express presumption set out in the offence itself.

Accordingly, it is submitted that section 67(8) conflicts with section 25(c) of the Bill of Rights, and it is **not** a justifiable limitation on the right to the presumption of innocence in a free and democratic society, meaning it is not saved by section 4 of the Bill of Rights. The section should be repealed.

Bearing in mind the many and varied exhortations as to the importance of the right to be presumed innocent - starting with Lord Sankey's "golden thread" analogy and running through to the Human Rights Committee's statement that the right is "fundamental" and the Canadian Supreme Court's description of the right as a "hallowed principle",[118] any provision which has the effect of reversing the legal burden of proof in vast numbers of different situations on an arbitrary basis surely cannot be acceptable. To uphold this type of provision is to reduce these statements to mere rhetoric, and the right itself to a hollow shell. Parliament knows perfectly well how to expressly reverse a burden of proof when it desires to do so; there is no need for blanket reversal provisions such as section 67(8). The only time a legal burden of proof should be placed on an accused is when Parliament explicitly

[118] Above n32, 212.

provides so (and then only if the limit on the right to be presumed innocent is a justifiable one).

3. ***Given that section 67(8) unjustifiably infringes section 25(c), what can a Court do?***

The first possible solution is for Courts to interpret section 67(8) as not imposing a legal burden on the accused when it applies, but merely an evidential burden. This has been suggested to be the correct meaning of section 67(8) in a recent article."[119] No authority for this interpretation was cited, however, and such an interpretation directly conflicts with the decisions on the meaning of the section to date.[120] Following the Court of Appeal decision in ***Phillips***[121], which clearly held that the word "proof" is not capable of being interpreted as conferring merely an evidential burden, this interpretation would appear to be impossible. The best that can therefore be hoped for is a judicial declaration that section 67(8) infringes the right to the presumption of innocence and cannot be justified in a free and democratic society. Such a declaration would provide strong support for the various calls that have already been made for the section to be repealed.[122]

While the section remains in force, however, it is incumbent upon the Courts to be constantly aware of section 25(c) of the Bill of Rights and accordingly to only allow section 67(8) to operate where there is clearly no alternative. In ***R v Oakes*** it was noted that the onus of proving that a right is limited is on the party seeking that limitation. Accordingly, the burden of proving that a provision does include an "exception,

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119 M A Kennedy, "Possession of Knives in Public Places" [1990] NZLJ 177.

120 The leading case being ***Akehurst v Inspector of Quarries*** [1964] NZLR 621.

121 Above n103.

122 See, for example, E McDonald "Hunt, the Burden of Proof and the New Zealand Bill of Rights Act 1990" NZLJ December 1992 432, 435; and J November "Burdens of Proof and the New Zealand Bill of Rights Act s25(c)" NZLJ October 1991 335, 336.

exemption, proviso, excuse or qualification" is on the prosecution (the standard of proof required being on the balance of probabilities). A finding that a provision does have this effect should not be reached lightly, given that the result will be a conflict with the Bill of Rights.

The accepted test for determining whether a given part of a provision is part of the definition of the offence, or is a matter of "exception, exemption, proviso, excuse or qualification" prior to the House of Lords decision in ***R v Hunt***[123] was the "essence" test set out in ***Akehurst v Inspector of Quarries***.[124] In that case Richmond J adopted the following test from the decision in ***R (Sheahan) v Cork Justices***:[125]

> The test, or dividing line, appears to be this: Does the statute make an act described an offence subject to particular exceptions, qualifications, etc, which, where applicable, make the prima facie offence an innocent act? Or, does the statute make an act, prima facie innocent, an offence when done under certain conditions? In the former case the exception need not be negatived; in the latter, words of exception may constitute the gist of the offence.

It is submitted that this test should continue to be the test used to determine whether or not a part of a provision is a matter of excuse, or an essential element of the offence itself, and that the less stringent test recently adopted by the House of Lords in ***R v Hunt***[126] should not be adopted in this country. On the ***Hunt*** test, where the form of the provision does not make it plain whether an element is one of excuse or exception etc, other factors must be looked at in the exercise of construing the statute, such as policy factors and the ease of proof. In this regard J.C. Smith has noted:[127]

> With great respect this does not seem to me the right approach. If Parliament has not made its intention clear, surely the presumption of innocence should

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123 Above n5.

124 Above n120.

125 [1907] 2 Ir.R 5.

126 Above n5.

127 J C Smith "The Presumption of Innocence" (1987) 38 Northern Ireland Legal Quarterly 223.

> prevail. To take into account the considerations mentioned by Lord Griffiths looks rather like forming a view as to where the court thinks Parliament ought to have put the burden of proof and then putting it there. This Lord Sankey would surely have regarded as a "whittling down" of the great principle which he enunciated in ***Woolmington***.

Smith's analysis is even more compelling in light of the Bill of Rights Act: the question cannot be one of looking at policy considerations and ease of proof where Parliament's intention as to the effect of part of the offence is unclear. If Parliament's intent is unclear, then it is possible to interpret the provision as one which does not involve an exception, exemption etc, and therefore the burden of proof remains on the prosecution. If this view is **possible**, section 6 of the Bill of Rights directs that this **must** be the interpretation given to the provision by the courts.

This was the basis of the reasoning of the Court of Appeal in the decision in ***R v Rangi***:[128]

> "Section 25(c) stipulates that everyone charged with an offence has, as a minimum right, the right to be presumed innocent until proved guilty according to law; and s6 provides that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill, that meaning shall be preferred to any other meaning. In the face of that basic principle and of these directives, it is not immediately apparent that the policy considerations advanced by Mrs Martin, or the anomalies in the summary jurisdiction, amount to a sufficiently strong indication that the neutral language of subs 4(a) is to be understood as imposing an onus on the accused. It would have been a simple matter for Parliament to have made explicit reference to such a requirement ... Taking all these considerations into account we are satisfied that s202A(4)(a) must be understood as defining an offence of having a knife in a public place without lawful authority or reasonable excuse, and in an indictable prosecution the Crown carries the onus of proof: if there is raised on the evidence an issue about the existence of such authority or excuse, the Crown must prove beyond reasonable doubt that it did not exist."

In order to comply with the Bill of Rights, *whenever* there is doubt as to the true effect of a part of a provision, that doubt must be resolved in favour of the accused by holding that the words in question form an element of the offence, and are therefore to be proved by the prosecution beyond reasonable doubt. To come to the opposite conclusion in

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128 [1992] 1 NZLR 385, 389.

uncertain cases, would contravene section 6 of the Bill of Rights which states that where more than one meaning is possible, that which is consistent with the Bill of Rights must be preferred.

C. *Common Law Reversal of Onus re Indictable Offences*

There is no parallel provision to section 67(8) of the Summary Offences Act, that applies to indictable offences. However, the House of Lords in ***R v Hunt*** has held that the English equivalent of section 67(8) simply set out the common law position in relation to exemptions, provisos etc, and that the rule applies equally to indictable offences. In that case, the accused was charged with possessing a controlled drug contrary to the Misuse of Drugs Act, the evidence establishing that he possessed a powder comprised of morphine (a controlled drug) mixed with caffeine and atropine. Schedule 1 of the Act provided that the provision creating the offence of possession would not have effect in relation to any preparation containing not more than 0.2% of morphine. The case turned on who bore the burden of proving that the powder in the accused's possession contained more or less than 0.2% morphine. The prosecution alleged that the schedule created an exception from liability and the burden of proving that exception was on the accused. This argument was accepted in the Court of Appeal and the accused was convicted on the basis that the prosecution proved possession of morphine and the defendant had not proved the compound in question contained less than 0.2% morphine. On appeal to the House of Lords the conviction was overturned on the basis that the fact the compound must contain over 0.2% morphine was an essential element of the offence and not an exception at all, and therefore it must be proved by the prosecution. Accordingly the issue of who must prove statutory exceptions, exemptions etc was not essential to the decision in the case. Nevertheless the House of Lords went on to make far reaching obiter comments on this issue, which have had a devastating effect on the right to be presumed innocent in England. As noted above, the House of Lords opined that there is a common law rule to the effect that the accused bears the legal persuasive burden of proving statutory exceptions, exemptions, provisos, qualifications and excuses.

In coming to this conclusion the House of Lords widely interpreted what was meant by the words "any statutory exception" in the celebrated passage from *Woolmington v DPP*:[129]

> 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.

The House of Lords held that a "statutory exception" need not be express, but may be implied into a statute. The result is that where a provision sets out an exception to what would otherwise be lawful, in the absence of clear words to the contrary, the burden of proof will be on the accused. Where the true construction of the statute is unclear, matters of policy and practical considerations - in particular the ease of proof - can be taken regard of in the exercise of construing the statute. It has already been argued above that this direction cannot apply in New Zealand in light of section 6 of the Bill of Rights, which compels a court to adopt the interpretation that accords with the rights in the Bill of Rights wherever such an interpretation is possible.

The rule from *Hunt* cannot apply in New Zealand in the face of the Bill of Rights. The central premise that placing a legal burden on the accused to prove anything involves a breach of section 25(c) must not be lost sight of. It has already been argued above that a blanket rule purporting to shift a burden of proof onto an accused cannot be a justifiable limit of the fundamental right to be presumed innocent. The fact that that is done in a statute in relation to summary offences is problematic, because section 4 of the Bill of Rights precludes the striking down of statutes which conflict with the Bill of Rights. No such problem arises in relation to common law rules which **must** conform to the rights prescribed in the Bill of Rights (unless the limit on those rights imposed by the common law is a reasonable limit justifiable pursuant to section 5). The rule from *Hunt* cannot be justified, for the same reasons the section 67(8) blanket reversal of onus could not be justified. One reason for the conclusion that the burden of proof is the same for indictable and summary offences that was mentioned in both the main judgments in *Hunt* is the

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[129] Above n2.

absurdity of the situation if the burden of proof were held to be different. The situation is undeniably absurd - but if we are to give effective protection to the right to be presumed innocent, surely what must be addressed to correct this absurdity is the repeal of the statutory rule in relation to summary offences as urged above, not the introduction of an equally abhorrent common law rule relating to indictable offences! The existence of the Bill of Rights statutory enactment of the right to be presumed innocent provides a valid ground for distinguishing the decision in ***Hunt*** which should be seized upon by New Zealand courts.

To mend the "somewhat frayed" golden thread by holding that the persuasive legal burden never shifts to the defence in criminal proceedings, unless legislation expressly provides so, is the only avenue open to New Zealand courts that will be consistent with section 25(c) of the Bill of Rights.

D. *Strict Liability Offences*

1. *Introduction*

The leading case which gave rise to the "strict liability" category of offence was the Canadian Supreme Court decision in ***R v City of Sault ste Marie***.[130] In that case the city was charged with causing or permitting the discharge of materials into water which may affect the quality of that water under the Ontario Water Resources Act. The penalty was a fine of up to $5,000 for the first offence. For subsequent offences the penalty was a fine of up to $10,000 or imprisonment for one year, or both. The case resulted in the creation of a "half way house" between absolute liability and a requirement that mens rea (or some "fault element") be proved in every case. In the strict liability category the prosecution must prove the actus reus, but the accused may escape liability if he or she **proves** that all due diligence was

[130] [1978] 2 SCR 1299.

exercised. In relation to the ***Woolmington*** affirmation of the presumption of innocence, Dickson J said:[131]

> It is to be noted that the case is concerned with criminal offences in the true sense; it is not concerned with public welfare offences.

Following ***City of Sault ste Marie***, public welfare offences became categorised as being *prima facie* in the strict liability category, unless the offence was worded in a way that indicated mens rea was required (eg by the use of the words "wilfully" or "with intent"), or absolute liability was intended (eg in cases where the language employed showed that "guilt would follow proof merely of the proscribed act"[132]). Other matters which are relevant when categorising offences were set out in that case, namely:

- the overall regulatory pattern adopted by the legislature;
- the subject matter of the legislation;
- the severity of the penalty; and
- the precision of the language used.

In New Zealand the strict liability category of offence was adopted in the case of ***Department of Civil Aviation v MacKenzie***.[133] In that case, Richardson J noted:[134]

> In the case of public welfare regulatory offences ... a defence of total absence of fault is available unless clearly excluded in terms of the legislation.

In ***Millar v Ministry of Transport***[135] the Court of Appeal established that there is a presumption against absolute liability where a provision is

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131 Above n130.

132 Above n130, 374.

133 [1983] NZLR 78.

134 Above n133, 85.

135 [1986] 1 NZLR 660.

silent as to the fault element required. Absolute liability will only apply where there is "clear legislative intent".[136] The Canadian Supreme Court has held that any offence that carries a penalty of imprisonment and does not permit, as a minimum, a defence of due diligence, is unconstitutional on the basis that it breaches the right to natural justice contained in section 7 of the Charter.[137]

It is submitted that the enactment of the New Zealand Bill of Rights requires a re-analysis of the burden of proof in relation to strict liability offences. The only burden on the accused in relation to the defence of total absence of fault can be an evidential burden. This is the natural result of the following conclusions, reached below:

(a) the right to the presumption of innocence applies to public welfare offences;
(b) that right is infringed when a legal burden of proof is placed on the accused to prove a defence;
(c) the limit on the right which arises by placing the legal burden of proving total absence of fault on the accused cannot be justified pursuant to section 5 of the Bill of Rights.

Before going on to illustrate each step of this argument, I note that the result of concluding the burden of proof must be an evidential burden only does not result in the abolition of the "half way house" of strict liability. Putting an evidential onus on the accused does not alter the standard that must be met in order to escape liability under a public welfare offence. The accused must still meet a higher standard than he or she would have to meet where an offence is a mens rea offence. In the latter case lack of knowledge will be a defence; but under the strict liability category an accused would have to provide some evidence that

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136 Above n135, 666.

137 ***Reference re: s94(2) of Motor Vehicle Act (British Columbia)*** 23 CCC (3d) 289; 24 DLR (4th) 536.

he or she exercised "due diligence",[138] which will involve showing the accused did "what a reasonable man would have done".[139] The requirement on the accused to adduce some evidence to show that this standard was reached provides a half-way house between mens rea and absolute liability, without offending against the Bill of Rights.

2. Section 25(c) Applies to Public Welfare Offences

Sections 24 and 25 of the Bill of Rights each commence with the words 'Everyone who is charged with an ***offence*** ...', and the heading of section 25 refers to minimum standards of 'criminal' procedure. On a narrow construction of these words it could be argued that sections 24 and 25 are intended to apply only to persons charged with "true criminal offences", and that public welfare offences are distinguishable. However a narrow approach cannot be adopted when interpreting the provisions of the Bill of Rights. This point was forcefully made by Cooke P in ***R v Butcher & Burgess***:[140]

> What can and should now be said unequivocally is that a Parliamentary declaration of human rights and individual freedoms, intended partly to affirm New Zealand's internationally proclaimed standards, is not to be construed narrowly or technically.

The Bill of Rights is an Act designed to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights. It is therefore imperative that the provisions of the Bill of Rights are interpreted by reference to the accepted meaning of the articles of the Covenant - to assign a meaning that results in lesser protection of a persons' rights would not be affirming our commitment to it. It has been clearly established that the word "offence" has an "autonomous" meaning under the Covenant; and that meaning encompasses **all** penal

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138 Above n133, 85.

139 Above n133, 85.

140 [1990-92] 1 NZBORR 59, 70.

matters, not merely "criminal" penal matters.[141] The position is the same even where the word "offence" is preceded by the word "criminal" as in the marginal note to section 25.[142]

The rejection of a narrow interpretation of the word 'offence' is further supported by tests devised under the Canadian Charter and the European Convention on Human Rights to decide what is a 'criminal offence' for the purposes of triggering the right to a fair trial. In the leading case of ***Engel and Others v the Netherlands (No 1)***[143], the European Court of Human Rights established certain principles relating to deciding whether or not a 'criminal charge' exists.

Firstly, it noted that the Convention is not opposed to States maintaining a distinction between criminal law (which triggers the right to a fair trial) and disciplinary law (which does not), but this State classification will not be determinative for Convention purposes. To decide whether conduct breaches criminal law, or disciplinary law, the Court will look at the 'nature' of the offence and at the degree of severity of penalty that the accused risks incurring. It was noted in ***Engels case*** that deprivation of liberty as a punishment is generally a penalty belonging to the 'criminal' sphere.[144]

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141 S. Stavros, ***The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights*** (Martinus Nijhoff Publishers, The Netherlands, 1993) 2-8.

142 Elkind & Shaw, above n10, 99.

143 1 EHRR 647.

144 Although this decision was confined to the area of offences at military service, the test for a 'criminal' charge (so as to trigger the right to a fair trial) has been adopted in later cases, including cases in non-military spheres, eg: ***Ozturk***, (1984) 6 EHRR 409; ***Campbell and Fell Case***, (1985) 7 EHRR 165.

In ***Wigglesworth v R***[145] the Canadian Supreme Court held that an offence is a 'criminal offence' for the purposes of the Charter guarantees, if it meets the following criteria:

(a) the offence is present in a matter of a 'public nature, intended to promote public order and welfare within a public sphere of activity'[146] (as opposed to a private, domestic or disciplinary matter which is primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity); **or**

(b) the offence is accompanied by a 'true penal consequence', which is defined as 'imprisonment or a fine which by its magnitude would appear to be imposed for the purposes of redressing the wrong done to society rather than the maintenance of internal discipline within the limited sphere of the activity.'[147]

"Public welfare" offences clearly come under the first limb of the test for a "criminal offence" laid down in this case; and generally they will also come under the second limb, given that such offences are often punishable by imprisonment[148] or a fine of such magnitude that it appears it is imposed to redress a wrong done to society.

In the leading Canadian Supreme Court decision on the issue of the constitutionality of reversing the onus of proving due diligence in relation to public welfare offences, ***R v Wholesale Travel Limited***,[149] two out of the nine strong bench did conclude that regulatory offences must be

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145 [1987] 2 SCR 541.

146 Above n145, 560.

147 Above n145, 561.

148 Where an offence is punishable by imprisonment, Wilson J noted: "If an individual is to be subject to penal consequences such as imprisonment - the most severe deprivation of liberty known to our law - then he or she, in my opinion, should be entitled to the highest procedural protection known to our law." (p562).

149 (1991) 67 CCC (3d) 193.

distinguished from criminal offences and the reversal of onus did not breach section 11(d) of the Charter in the case of regulatory offences. Cory J's judgment in this regard has been described as "extraordinary and utterly unconvincing." D. Stuart notes:[150]

> His Lordship rests heavily on a distinction between real and regulatory offences, which he tries very hard to defend. His major premise is that crimes involve punishing moral fault, but regulatory offences the protection of public and social interests. Mr Justice Cory does not seem to convince himself, since he admits that this is a theory which might be difficult to apply. This is an understatement. Many commentators and now the Law Reform Commission of Ontario have pointed to the difficulty of making a valid distinction based on the intrinsic nature of the acts prohibited as crimes and those punished as regulatory offences. How can one, for example, distinguish in advance between the conduct of one who is guilty of misleading advertising and one who fraudulently endorses a welfare cheque to get money to feed his or her children? Isn't pollution, presently classified as regulatory, morally wrong? How can one validly explain that some driving offences are under the *Criminal Code* of Canada and yet others are to be found under provincial Highway Traffic Acts?

For all the above reasons, it is submitted that in order to affirm New Zealand's commitment to fundamental human rights in accordance with the long title to the Bill of Rights, "public welfare" offences must be considered to trigger the right to be presumed innocent provided in section 25(c) of the Bill of Rights.

3. Section 25(c) is Infringed by Reversing the Onus in relation to Strict Liability Offences

The argument has already been made in Part I of this paper, but it bears repeating as it is a fundamental premise of this paper. The presumption of innocence applies until the stage where an accused is "proved guilty". This cannot merely mean the presumption applies until the Crown have prima facie established all essential elements of the case against the accused beyond reasonable doubt. Although at this point of proceedings clearly an evidential onus is placed on the accused to provide some evidence capable of raising a doubt as to his or her guilt, the accused has **not** at this stage been proved guilty. If the accused in a public welfare offence is discharged at the end of the trial

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[150] Above n99, 232.

because total absence of fault has been proved, he or she is not guilty of the offence charged. Prior to that point - that is, prior to the conclusion of the trial - the presumption of innocence will apply. To reverse the legal onus of proof in relation to proving part of the offence, or in relation to a defence, is to allow the Court to assume guilt, unless the accused can prove otherwise. Conviction will be possible despite the existence of a reasonable doubt as to guilt. Clearly this is not compatible with the right to the presumption of innocence. Thus to place a legal burden of proof on an accused at any stage of a trial, in relation to any matter, will breach the right to be presumed innocent until proved guilty.

Strict liability offences place a legal burden on an accused to prove that he or she exercised due diligence and that therefore the defence of total absence of fault is made out. The placement of this legal burden of proof on the accused infringes the right to the presumption of innocence.[151]

The limit on the section 25(c) right is a creation of common law, and therefore cannot be saved by section 4 of the Bill of Rights. The only way a common law limit on a right under the Bill of Rights can be permitted is if it can be shown to be a justifiable limit under section 5.

In ***R v Ellis Don***[152] it was held in both the Ontario Court of Appeal and the Supreme Court that placing a burden of proof on an accused at common law to prove the defence of due diligence on the balance of probabilities infringed Section 11(d) of the Charter. In reaching this conclusion it was decided that even though the legislation was only "*quasi*-criminal", Section 11(d) did apply and that the reversal of the onus breached Section 11(d). Similarly in ***R v Wholesale Travel***[153]

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151 A Tuck-Jackson, "The Defence of Due Diligence and the Presumption of Innocence" (1990) 33 Criminal Law Quarterly 11, 30.

152 (1990) 61 CCC (3d) 423.

153 Above n149.

seven out of nine members of the Canadian Supreme Court held that placing a legal burden of proving the defence of due diligence in relation to public welfare offences, breaches the right to the presumption of innocence. (In both these cases, however, it was further held by the majority that the limit was a reasonable one, justifiable under section 1 of the Charter.)

4. ***Is the Limit Justifiable?***

To meet the requirements of section 5 of the Bill of Rights as to what is a justifiable limit, a limit must be:

(1) reasonable;

(2) prescribed by law; and

(3) demonstrably justified in a free and democratic society.

The limit, being a rule of common law, is clearly "prescribed by law".[154] The appropriate test as to whether the limit is also reasonable and demonstrably justified in a free and democratic society, is that outlined in Part I from ***Oakes***:[155]

The Canadian Supreme Court in ***R v Wholesale Travel*** have held, by a narrow five to four majority, that in the context of public welfare offences the reversal of the burden of proving the defence of due diligence is constitutional. It is notable that the reasoning behind the decisions in the case differed markedly. Two judges held that section 11(d) of the Charter is not infringed at all by placing the burden of proof on an accused in the context of regulatory offences. Together with three judges who held section 11(d) was breached but the limit was justifiable, these formed the majority of five. The four remaining judges were united in finding that the burden on the accused to prove the defence of due diligence in regulatory offences infringed section 11(d) and could not be justified under section 1 of the Charter.

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[154] ***Sunday Times v The United Kingdom*** 2 EHRR 245.

[155] Above, p32.

The ***Oakes*** analysis undertaken by those members of the bench that addressed the issue of whether the limit could be justified, was based on the specific legislation in question in the case. Despite this, comments were made about the constitutionality of placing the burden of proving the defence of due diligence on the accused in strict liability offences generally, and the case has been taken as being decisive of this broader issue. Bearing in mind that the Bill of Rights is an act to affirm New Zealand's commitment to the Covenant, it is submitted that New Zealand Courts must decline to apply the ***Oakes*** criteria as liberally as was done by the majority in this case. Set out below is an analysis of the rule relating to strict liability offences pursuant to the ***Oakes*** criteria, which it is submitted shows the reversal of onus cannot be justified pursuant to section 5 of the Bill of Rights.

(a) ***The objective must be of sufficient importance*** - The main reason for the adoption of the strict liability category of offence was to enable courts to "accord sufficient weight to the promotion of public health and safety without at the same time snaring the diligent and socially responsible."[156] This general objective is undoubtedly a pressing and substantial social concern.

In ***Wholesale Travel*** a broad formulation of the objective of the provision at issue was rejected for the purposes of the ***Oakes*** analysis, in favour of a more specific formulation. The case concerned a charge of false or misleading advertising, and while it was submitted that the objective of reversing the onus of proving a statutory defence of due diligence was to "promote vigorous and fair competition", the objective identified by the Court for reversing the onus of proof was "to ensure that all those that are guilty of false/misleading advertising are convicted and to ensure that convictions are not lost due to evidential problems in proving guilt."[157] This more specific objective can also be used to test

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156 Above n133, 85.

157 Above n149, 223.

the validity of reversing the onus in relation to public welfare offences generally, by substituting the words "public welfare offences" for the words "false/misleading advertising". Whether this more specific objective can be said to be sufficiently important to "warrant overriding a constitutionally protected right or freedom" is debatable; although certainly it is a valid objective. However, it is not proposed to rest the case against the validity of the reversal of onus in strict liability offences on the lack of a sufficiently important objective.

(b) ***The means chosen must be reasonable and demonstrably justifiable*** - To meet the second limb of the ***Oakes*** test, a limit on a right must survive a three-pronged proportionality test, as follows:

(i) ***The limit must be carefully designed to achieve the objective; it must be rationally connected*** - The means chosen to further the objective is to place the burden of proof of the defence of due diligence on the accused. In ***R v Wholesale Travel*** this method was described in terms of its effect:[158]

> "... [the means] essentially amounts to a decision ... to convict all those who do not establish that they were duly diligent, including some accused who were duly diligent (and for whom a reasonable doubt exists in that regard) but who are unable to prove due diligence on the balance of probabilities."

While it is clear there is a rational connection between these means and the specific formulation of the objective noted above (namely, to ensure that all who are guilty are convicted); it is submitted there is no rational connection between these means and the original broad objective stated in ***R v City of Sault Ste Marie*** as being the reason for the creation of the strict liability category of offence. A decision to convict some accused that were duly diligent, but who are unable to prove that on the balance of

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[158] Above n149, 223.

probabilities cannot be said to further the objective of "according sufficient weight to the promotion of public health and safety ***without at the same time snaring the diligent and socially responsible.***" (emphasis added).

In ***R v Wholesale Travel*** the means adopted could be seen as rationally connected to both the specific objective discussed in the case, and also to the broad overall objective noted. However, when public welfare offences in general are considered, while the means adopted are clearly rationally connected to the specific objective, they are not rationally connected, and indeed are in part diametrically opposed, to the original broad objective of the limit. It is submitted that both the broad and specific formulations of the objective of a limit should be considered when determining the proportionality of that limit.

Even disregarding the fact that a part of the objective for introducing the strict liability category of offence was to ensure the diligent and socially responsible were not convicted; the limit cannot be sustained. It is accepted that promoting public safety is an important objective, and it is further accepted that convicting **all** persons guilty of public welfare offences that did not exercise due diligence is a means of promoting that objective. However, it is contended that convicting most persons that are guilty of public welfare offences and who did not exercise due diligence; but allowing some to escape conviction because there is a reasonable doubt that they may have exercised due diligence, is also a valid means of achieving that objective. It is not accepted that the objective will be any better served by convicting **all** guilty persons and also some that were not guilty but were unable to establish they exercised due diligence. In the

absence of strong statistical evidence of this, no court should accept such an argument, in view of the fundamental nature of the human right that is at stake.

(ii) ***The means should impair the right as little as possible*** - The objective of placing a high standard on persons in relation to public welfare offences, while at the same time not snaring the socially responsible, is met by the fact that there is but one defence: total absence of fault. This defence imposes the high standard that is necessary for public welfare offences, and allows those who exercised due diligence to escape liability. It is unnecessary to take the further step of placing a burden of proof on the accused. The objective is achieved by placing an evidential burden only on the accused. Accordingly, the means chosen are not means which impair the right as little as possible.

The three judges in ***R v Wholesale Travel*** that concluded the limit was justifiable, chose to analyse this requirement in a more liberal manner than that laid down in ***Oakes***, relying on the decision in ***R v Chaulk***[159] for authority to do so. In accordance with the lower threshold enunciated in that case, they held that Parliament could not have reasonably chosen an alternative means which would have achieved the objective "as effectively". It is submitted that efficacy cannot be the test for proportionality in analyses of the justifiability of a limit on a right. Such a low threshold test would render this component of the ***Oakes*** test totally redundant in presumption of innocence cases, because ***any*** violation by virtue of a reverse onus clause could be justified on this ground. Clearly no law that retains the burden of proof on the prosecution will operate "as effectively" as one that reverses the onus. Efficacy is too low a standard.

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[159] [1990] 3 SCR 1303, 2 CR (4th) 1, 62 CCC (3d) 193.

In ***Wholesale Travel*** three judges were prepared to hold that the less intrusive means available for furthering the objective (namely, placing an evidential burden on the accused to bring forward evidence that due diligence was exercised) would make it "virtually impossible" for Crown counsel to prove public welfare offences. It is notable that this sweeping conclusion was reached despite the absence of any statistical evidence in support.[160] It must be remembered that section 5 of the Bill of Rights requires any party seeking to limit a right to be able to "demonstrably" justify that limitation. It is submitted that in the cases of strict liability cases, no demonstrable need can be shown for placing the persuasive burden of proof of the defence of due diligence on the accused.

The view of the minority in relation to this part of the ***Oakes*** test is convincing: the imposition of a legal burden on the accused is not a means that infringes the constitutionally protected right to be presumed innocent as little as possible. Placing an evidential burden on an accused to bring forward evidence that due diligence was exercised is a less intrusive option that is available. The Ontario Law Reform Commission have recommended this option in relation to strict liability offences.[161]

(iii) ***There must be proportionality between the effects of the limit and the objective*** - The right to be presumed innocent has been described by the Human Rights committee as "fundamental to the protection of human rights". As noted in the introduction, the *travaux preparatoires* relating to the right to the presumption of innocence in the Covenant

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160 C Ruby and K Jull "The Charter and Regulatory Offences: A Wholesale Revision" 14 CR (4th) 226, 236; D Stuart, above n99, 233.

161 "Report on the Basis of Liability for Provincial Offences" (1990); as cited in ***R v Wholesale Travel***, above n149, 224.

indicate that it was felt that this right was so important that it must be placed in a separate paragraph within the article relating to the right to a fair trial. Thus it can be seen that the right that is sought to be limited by this common law rule reversing the onus of proof, is widely recognised as very important.

Further, the right is not limited in the least possible way; it is limited in a major way, given that a legal burden of proof is placed upon an accused. The issue can be reduced to one of who bears the risk of failure of proving the matter. When the prosecution bear the burden of proof, if they raise a reasonable doubt that the standard of due diligence was not reached, but fall short of proving this, it is possible an accused that was not duly diligent will be acquitted. On the other hand, when the accused bears the burden of proof, if he or she raises a reasonable doubt that the standard was reached, but fails to prove it, there is a possibility that an accused that did exercise due diligence will be convicted. Given that it has been determined that those who exercise due diligence ought not be convicted, this is an unacceptable result.

To outweigh a serious limit on an important right, an objective would need to be extremely important. It is submitted that the need to convict **all** persons guilty of public welfare offences is not an objective weighty enough to justify this limit. Even the need to 'accord sufficient weight to the promotion of public health and safety without at the same time snaring the diligent and socially responsible' is arguably insufficient to justify the limit involved.

5. *Conclusion*

It has been argued above that the reversal of onus of proving the defence of total absence of fault in strict liability offences violates the right to be presumed innocent in s25(c) of the Bill of Rights; and further, the reversal of onus in relation to such offences does not meet the ***Oakes*** test for determining reasonable limits, justifiable in a free and democratic society.

Because the rule which imposes the burden of proof on an accused in this type of offence is a common law rule, it cannot be saved by section 4 of the Bill of Rights. Accordingly, it is submitted, New Zealand courts must reassess this half-way house category in light of the enactment of the New Zealand Bill of Rights.

6. *Answers to possible objections to making the burden an evidential one*

There will undoubtedly be those who would oppose any shifting of the burden of proof from the accused to the prosecution in relation to strict liability offences. Accordingly, I now address some of the criticisms which are likely to be raised.

- ***"The strict liability offence provides the government with a practical method of imposing a high standard of care (that of the reasonable person) on regulated entities. Arguably, persons are more likely to maintain high standards of care if they know they will be prosecuted not only when they intend their acts, but also when their acts can be characterised as negligent."***[162]

  Altering the onus of proof in no way alters the standard which must be proved to have been met/breached. It merely alters who has to prove it and to what standard they must prove it; and

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162 K R Webb, ***Regulatory Offences, the Mental Element and the Charter: Rough Road Ahead***, 21 Ottawa Law Review, 419, 421.

conversely who bears the risk of failure to prove it. The high standard of care which, on this argument, will be engendered by knowing that lack of knowledge is no defence, will still apply regardless of who bears the ultimate onus of proof.

In this regard Lamer CJC in his dissenting judgment in ***R v Wholesale Travel***[163] sets out the position well. Having cited and approved the Ontario Law Reform Commission's proposal that the burden of proof in relation to strict liability offences should be an evidential one, he continues:

> This will ensure that the information as to what steps, if any, were taken to avoid the occurrence of the prohibited act is in the record and will relieve the Crown of the obligation to bring forward evidence on a matter that is exclusively in the possession of the accused. On the other hand, the Crown will bear the risk of non-persuasion if the conclusions and inferences to be drawn from such information leave the trier of fact in a state of reasonable doubt on the issue of due diligence.

- ***"Given the accused's position of superior knowledge with respect to his or her own activities, and the informational disadvantage of the prosecution in this situation, it is not capricious to suggest that raising a reasonable doubt would be an easier task for the accused in most situations than the prosecution."***[164]

Putting an evidential onus on the accused would be requiring her to raise a reasonable doubt. This is not unreasonable. If this cannot be achieved, then a conviction will follow. Where the accused does succeed in raising such a doubt, however, then the onus of disproving total absence of fault will be on the prosecution. This is fair in situations where there is a reasonable doubt that there was a total absence of fault; given that it will have been decided that the offence is one where Parliament does not intend to punish those who are totally without fault. In this

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[163] Above n149, 224.

[164] Above n162, 424.

regard the Ontario Law Reform Commission had the following to say:[165]

> ... the fact the matter is peculiarly within the knowledge of the accused is not a satisfactory rationale for shifting the onus, since this is equally true of *mens rea* offences, where no such shift occurs. The accused's testimony is only one source of evidence. Experience has demonstrated that the Crown has had little difficulty establishing *mens rea*, as the trier of fact is entitled to draw reasonable inferences from all the evidence presented, whether or not the accused testifies.

- ***The presumption of innocence is less relevant in a regulatory setting where objective negligence rather than subjective intent is the requisite mental element.***[166]

It is submitted that any argument which purports to sweepingly remove an entire category of circumstances from the reach of fundamental human rights because those rights are "not relevant" must be examined very closely! Why is the presumption of innocence not relevant in the regulatory context? Why should the fact that "objective negligence" is the test of guilt mean an accused is any less deserving of the presumption that they are innocent of such objective negligence; than somebody accused of a "true crime" is deserving of the right to be presumed innocent on the basis of lack of subjective intent? If it has been decided that a defence of total absence of fault should apply to a provision, there is no good reason why, once a person provides evidence to show that there is reasonable doubt that he or she is not morally blameworthy because due diligence was exercised, that person should not have the benefit of being presumed to be innocent on that basis until the prosecution prove otherwise. The difficulty of articulating a rational basis for distinguishing between "regulatory" offences and true crimes noted above is a further

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165 As quoted by C Ruby and K Jull, above n160, 241.

166 This was the basis on which Dickson J in ***City of Sault ste Marie*** distinguished ***Woolmington***.

basis upon which the idea that the presumption of innocence does not apply to regulatory offences should be rejected.

- ***It is ironic that the presumption of innocence, which is a principle for the benefit of the accused, should be used to justify the rejection of a defence of reasonable care for public welfare offences and the retention of absolute liability which affords the accused no defence at all.***[167]

In arguing that the burden of proof for strict liability offences should be on the prosecution in order to comply with the right to the presumption of innocence, it is not suggested that the defence of strict liability should be abolished. The half way house will remain: only the burden of proof will alter.

- ***To alter the burden of proof is likely to result in more offences being categorised as absolute liability offences; which will in fact make matters more difficult for accused persons.***

It is submitted that altering the burden of proof must not alter the test for determining what offences are strict liability offences. Very clear wording will still be necessary to impose absolute liability. The Bill of Rights in fact lends strength to this: without very clear wording, Parliament cannot be assumed to have intended to contravene the rights in the Bill of Rights such as the right to be presumed innocent or the right to natural justice.

Originally strict liability was lauded as being a half way house which would assist those accused of absolute liability offences, because many offences which had previously been categorised as absolute liability offences, could be upgraded into the strict liability category. However, the creation of the strict liability

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[167] This is an adaptation of a statement by Dickson J in ***City of Sault ste Marie***, above n130, 175.

category has in fact proved to have had an unanticipated downside which operates against accused persons. Case law has shown that in addition to some absolute liability offences being upgraded; many offences which had been in the mens rea category have been down graded into the strict liability category.

- ***Reducing the burden on an accused to merely an evidential burden will, in practice, make it virtually impossible for the Crown to prove regulatory offences and would effectively prevent governments from seeking to implement public policy through regulatory means.***[168]

The problem with law enforcement expediency arguments is that they could be used to justify any reverse onus in relation to any crime.[169] Undoubtedly there will be more convictions and the administration of criminal justice would be more efficient if we removed the requirement for the prosecution to prove *mens rea* in relation to all crimes. The point at issue is on what basis can the state justify imposing punishment on a person; the right to the presumption of innocence provides the answer to this - only when the state has proved his or her guilt beyond reasonable doubt. Questions of administrative efficiency cannot be used to justify breaches of this fundamental human right.

It is submitted that imposing an evidential burden on an accused will not derogate from the objectives which lead to the creation of the half-way house: there will still be an incentive to comply with public welfare legislation because the only way to escape liability will be to provide some evidence that due diligence was exercised. If due diligence was not exercised, an accused will be unable to adduce evidence to create a reasonable doubt that it was. Making the burden merely an evidential onus only will, however, mean the Bill of Rights is not infringed. An evidential onus on an accused to raise a defence does not breach the

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168 Above n149, 256 (per Cory J).

169 Above n99, 229.

right to the presumption of innocence. It is submitted that this is the course New Zealand courts must follow if they are to comply with the Bill of Rights.

CONCLUSION

> The presumption of innocence is a hallowed principle lying at the very heart of criminal law. ... The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our belief in humankind; it reflects our belief that individuals are decent and law-abiding members ofthe community until proven otherwise.
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> ***R v Oakes***[170]

The presumption of innocence is violated regularly in New Zealand courts. The enactment of the Bill of Rights has created the opportunity to redress this situation.

This paper has identified the approach that New Zealand courts should adopt in determining questions of whether a reversal of an onus infringes the right to be presumed innocent. It has also identified some specific ways in which section 25(c) can be relied on to "retwine" Lord Sankey's "somewhat frayed"[171] golden thread. Section 25(c) cannot be regarded as simply a continuation of the common law rule relating to the presumption of innocence. It is a provision that can, and should, have a profound effect on New Zealand law.

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[170] Above n32, 212-213.

[171] Above n3.

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