CHAPTER ONE

Introduction: Basic Concepts of the Law of Evidence

Introduction

[1-01] Evidence can be defined as something that tends to prove or disprove a particular fact in the sense that it makes the existence or nonexistence of facts more likely. One of the more commonly cited definitions is “any matter of fact, the effect, tendency or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact.” The law of evidence deals with the admissibility of different types of evidence in both civil and criminal hearings. If one works from the starting point that all evidence is admissible, then the law of evidence restricts that position in that it creates numerous tests and circumstances where the evidence will be deemed inadmissible. The basic concepts and definitions of evidence law are not examined in their own right in the King’s Inns entrance exams, but they arise in numerous questions and must have a firm understanding of them.

Sources of Evidence

[1-02] The law of evidence has been sourced from multiple different sources amongst which include:

- The common law. Many of these laws have been abolished by statute or refined since their first creation. However rules such as the hearsay rule and the rule prohibiting admissions of the accused’s bad character still exist.
- The Constitution. Article 34 impacts on the laws of evidence as it requires fair procedures to be followed. Article 38 states that no person shall be tried of any criminal charges save in due course of law.
- Legislation both predating and post dating the foundation of the state has created evidence law.
- The European Convention on Human Rights. Article 6 of the Convention sets out a number of guarantees relevant to the law of evidence including the right to remain silent, the right to access to information necessary to make a defence, the right to equality of arms.

Definitions

[1-03] There are different concepts which must be understood in relation to different types of evidence. These are as follows:

**Fact in Issue**

A fact in issue is also referred to as the *facta probantia* or ‘facts going to the issue’. It is important that evidence goes to prove or disprove a ‘fact in issue’. These are facts which the prosecution/plaintiff or defence must prove or disprove in order to be successful in any claim. The fact in issue may be things like did A hit B, Did Y pay money to Z.

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Evidential Fact/Relevant Fact
An evidential fact is also known as a relevant fact, or a factum probans. An evidential fact is any fact which tends to prove a fact in issue. Evidential fact may be something witnessed in the run up to a crime, or a set of circumstances that existed between parties just before a civil suit or evidence of habitual behaviour, in other words it may indirectly tend to prove a fact in issue and therefore be regarded as circumstantial evidence. It will be for the trial judge or jury, as the case may be, to decide whether evidence is relevant or not. All relevant facts are admissible in evidence in a trial unless they fall within one of the categories which the law of evidence excludes from being admissible at trial, e.g. hearsay, privilege, similar fact evidence etc. Each of these are considered in different chapters in this manual.

Collateral Facts
These are facts at a hearing which are incidental to facts in issue but not relevant to them and are often raised in relation to the credibility or honesty of a witness in a hearing.

Direct evidence
[1-04] This is evidence of facts perceived first hand by the witness through one of his senses. If Tom sees Kate stabbing a victim that is direct evidence of a fact in issue, however if Tom sees Kate leaving a crime scene with a bloody knife then that is direct evidence of an evidential fact. This may be contrasted with hearsay evidence which is second hand evidence where Tom was told by a third party that Kate stabbed the victim. A witness cannot give their opinion in evidence and must confine it to things they know.

Real evidence
Real evidence is something which is capable of being seen or heard by a judge or jury and is therefore capable of being examined by them. Real evidence will often require oral evidence to make its significance clear. Examples of real evidence are material objects such as a knife, a gun, or drugs. Real evidence may also be the view of a particular location, or obstructions that may exist in the view of a particular location.

Documentary evidence
Documentary evidence can be from the content of relevant documents and is commonly in the form of computer records, maps, or videotaped statements. The hearsay rule prevents documents being put in evidence to prove the truth of their contents but as an exception to this they are often deemed admissible at hearing due to legislation which allows them to be used.

Circumstantial evidence
[1-05] Circumstantial evidence is evidence in which an inference is required to connect it to a conclusion of fact. Healy describes circumstantial evidence as evidence which tends to prove relevant facts that indirectly prove or infer the existence of a fact at issue and gives examples as evidence which establishes motive, shows planning or preparation, shows a state of mind or establishes an alibi or opportunity to commit the crime. A conviction can be obtained solely upon circumstantial evidence, where such evidence is sufficiently strong to satisfy the criminal burden of proof of beyond reasonable doubt as seen in People (DPP) v Kirwan. Lord Normand in Teper v R outlines the concerns related to circumstantial evidence:-

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2 Joy v Phillip Mills & Co Ltd [1916] KB 849
4 People (DPP) v Kirwan [1943] IR 279
5 Teper v R [1952] AC 480

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‘Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because the evidence of this kind may be fabricated to cast suspicion on another ... It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.’

_DPP v Devlin_ [2017] IECA 201 – the appellant was convicted of an offence of possession of explosives in suspicious circumstances contrary to s. 4 of the Explosive Substance Act 1883. The material was found in a room that the appellant was staying in at a hotel and he argued, _inter alia_, that the trial court erred in being satisfied beyond a reasonable doubt that the appellant was in possession of the explosives and that the appellant had the necessary knowledge that the explosives located in the apartment were in fact explosives. Rejecting the appeal Birmingham J. had regard to the circumstances in which the material was found in the appellant’s room:

‘This was essentially a circumstantial evidence case. The explosives were found in a hotel suite which had been in continuous occupation since 31st March, 2014. There were a number of links between the appellant and the suite, the appellant was linked to the laptop case in which the explosives were located, while not referred to specifically in the ruling and judgment of the Court there were a number of other items located in the suite which would not be usually found in a hotel bedroom such as quadcopters, cable ties and wires, disposable gloves, glass test tubes and so on.’

**Functions of Judge and Jury**

[1-06] The general rule in a criminal trial is that questions of law are decided by the judge and questions of fact by the jury. If a question of law needs to be considered it is generally done in the absence of the jury in a _voire dire_, often referred to as a trial within a trial. In relation to the judge’s direction to the jury, s/he must direct the jury on the law of evidence in the case. A judge may, when summing up, comment on the strength or weakness of certain evidence. The judge must direct them as to the burden of proof in a case and explain terms. S/He must bring certain evidential rules to their attention; e.g. that under section 1(f) (ii) and (iii) of the Criminal Justice (Evidence) Act 1924 that statements of the accused’s bad character can only be taken into account in judging the accused’s credibility. Where there is no jury, the judge is the arbiter of both law and fact.

**Relevance/Admissibility Distinction**

*Relevance*

[1-07] For evidence to be admissible it has to be relevant. If evidence is deemed not to be relevant then it will be inadmissible. Relevant evidence was defined in the _DPP v Kilbourne_ as follows:-

‘Evidence is relevant if it is logically probative or disprovable of some matter which requires proof... It is sufficient to say, even at the risk of etymological tautology, that relevant (i.e., logically probative or disprovable) evidence is evidence which makes the matter which requires proof more or less probable.’

However even if evidence is relevant or probative a court will not allow relevant evidence to be admissible where it is inadmissible under one of the rules of evidence. A judge will often decide whether evidence is admissible by weighing the probative nature of the evidence against the prejudicial effect of the evidence, or its possible unreliability. Admissibility of evidence is a question of fact decided upon by a judge. Fairness and practicality may justify the exclusion of

* _DPP v Kilbourne_ [1973] AC 728
certain types of admissible evidence. E.g. hearsay, exclusion of evidence to the accused’s bad character, unconstitutionally obtained evidence, privilege. Questions of admissibility may be decided within a voire dire. Onus of proving relevance is on the party tendering the evidence. Irrelevant evidence is never admissible.

Relevance and Policy Considerations
[1-08] The case of Hart v. Lancashire & Yorkshire Railway Co’ concerned a railway accident and the plaintiff was suing the defendant on the grounds of negligence. The plaintiff wanted to admit as relevant evidence that fact that the railway company had improved their trains since the alleged incident of negligence occurred. The court held that changes in practice do not constitute an ipso facto admission that there was something wrong with the previous practice and therefore would not be relevant. Furthermore, the court considered such a precedent would have had a negative impact on public policy as it would have discouraged engaging in improvements lest a court view such improvements as admissions to previous negligence.

Another policy issue is to avoid the introduction of evidence that may not be relevant but casts the accused in a bad light. In People (AG) v. O’Neill the defendant was accused of manslaughter which arose out of a car accident. The prosecution introduced evidence that the accused had spent an hour in the pub on the evening of the accident and had consumed a small amount of alcohol. The amount of alcohol consumed was so small that the defendant was still below the legal limit. The prosecution dwelt on the factual point that the defendant had had something to drink but never made the point that it may have added to the accident. On appeal, the court questioned why the prosecution dwelt on the issue of the alcohol if they were not going to make that link. The reason provided was that all the prosecution were doing was merely trying to trace the movements of the accused and the information that he has spent a length of time in the pub allowed for that to be done. The court found that the alcohol consumption was not relevant.

Relevance and ‘Conditional Admissibility’
[1-09] Judges can admit evidence on a conditional basis or de bene esse. This means that the evidence is heard but the jury are told such evidence is only to be taken into account if it subsequently proves to be relevant. This is not a very satisfying practice and it is often argued that the best thing to do is not to admit that evidence. Perhaps a better position would be if evidence could be adduced in a trial once it becomes relevant. In People (DPP) v O’Callaghan it was held that ‘prima facie irrelevant evidence’ could turn out during the course of a trial to become relevant. The judge can review his/her decision as to the relevance of a particular piece of evidence at a later stage in a trial.

Is Relevance an Objective or a Subjective Concept?
[1-10] The case of R. v. Kearley involves a set of facts where the police searched a flat and found illegal drugs. The drugs were not in sufficient quantities to charge him as a drug dealer. However, while the police were in the apartment ten people phone the apartment looking for drugs and seven people called around asking for drugs. It was on this basis that the police charged the occupant of the flat with intent to supply. The majority of the court considered such evidence not relevant, as it provided evidence that those witnesses believed the accused to be a drug dealer, but not that he was a drug dealer. Lord Ackner stated:

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7 Hart v. Lancashire & Yorkshire Railway Co. (1869) 21 L.T. 261
9 People (DPP) v O’Callaghan [2001] 1 IR 584

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‘Each of those requests was, of course, evidence of the state of mind of the person making the request. He wished to be supplied with drugs and thought that the appellant would so supply him. It was not evidence of the fact that the appellant had supplied or could or would supply the person making the request.’

The minority in the case came to a slightly more satisfying conclusion in holding that:

‘the existence of a substantial body of potential customers provides some evidence which a jury could take into account in deciding whether the accused had an intent to supply.’

The sheer scale strongly suggests that the accused had established himself as a drug dealer. But the mere fact that different people can find things relevant or irrelevant shows that it must be subjective.

**Admissibility**

[1-11] All relevant evidence is admissible however the law of evidence recognises a number of exclusionary rules that preclude the admission of relevant evidence. These are based on considerations of fairness and practicality and include:

- The rule against hearsay.
- Evidence that may breach the rights of the accused.
- Exclusion of evidence relating to the bad character of the accused.
- Privilege
  - Evidence may be excluded if the person asked to provide it successfully claims privilege.
    - Legal professional privilege.
    - Privilege against self-incrimination.
    - Public interest privilege. – state might say some evidence is not allowed
    - Sacerdotal and counselling privilege. Priests – sacerdotal privilege is more extensive in Ireland.

Each of the above listed exclusions will be considered in more detail in later chapters. It is the judge who decides on the admissibility of evidence, and that arguments on admissibility will be heard in a *voire dire* in the absence of the jury.

**Receivability/Materiality**

[1-12] The materiality of evidence relates to whether the facts in evidence are adequately related to the case being made by the moving or defending party.

Only evidence that is relevant, admissible and material is receivable. Relevant evidence is evidence which goes to prove a fact in issue in the case or an evidential fact. However it is possible for evidence to be relevant but not admissible as it may not be admissible within the rules of evidence.

**Determination of the ‘ultimate issue’**

[1-13] An opinion cannot be given as to the ultimate issue in the case. An ultimate issue is an issue which has to be proved before guilt can be shown. An example of this would be that the plaintiff was unable to drive in a prosecution for fitness to drive. The inability to drive is the ultimate issue. It has been seriously under cut in cases of expert evidence where they are now allowed to say things like ‘in my opinion his inability to drive was impaired.’
Determining an ultimate issue is the job of the jury or trial judge. The issue arose in the case of *Maher v AG*. Section 44 of the Road Traffic Act 1968 stated that ‘conclusive evidence’ of intoxication would be given in the form of blood alcohol concentration if this was recorded on a certificate, and that tendered in evidence. In the Supreme Court it was noted that judges are reserved the right to determine if all or any essential ingredients of an offence are in existence. If the above certificate were deemed to be ‘conclusive evidence’ then the judge’s role of determining would be removed from them. It is a judicial power to weigh up evidence. For the Oireachtas to step in and say something was conclusive was to interfere with the power of determination of the courts.

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11 *Maher v AG* [1973] IR 140

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CHAPTER TWO

Burden of Proof in Civil and Criminal Cases

Introduction

In a criminal prosecution the accused benefits from a presumption of innocence until proven guilty to a standard of beyond a reasonable doubt. While in civil proceedings a defendant must have a case proven against him/her to the standard of the balance of probabilities in order for the plaintiff’s claim to succeed.

Generally the prosecution/plaintiff must prove the elements of their case, in other words it is said that the burden of proof rests on that party. However, on occasion that burden can shift to the defendant. Such occasions are considered in this chapter.

Exam Focus

In reality, knowledge of the burden of proof is required to answer any problem question that may arise in relation to a prosecution of an offence or a civil suit. When this topic arises in its own right it is generally examined in an essay question. The topic can also arise indirectly, so where for example a student is asked to examine the law relating to inferences from silence, any answer to that question would have to include an analysis of the shifting of the evidential burden which has been legislated for over the years. It can be examined therefore in a number of ways:

- Presumption of Innocence
  - 2008 Question 4 – Essay Question
  - 2005 Question 2(b) – Essay Question

- The burden of proof/exceptions to the legal burden of proof resting on the prosecution
  - 2017 Question 3 – Problem Question
  - 2016 Question 2 – Essay Question
  - 2014 Question 5 – Essay Question
  - 2013 Question 2 – Essay Question
  - 2006 Question 4 – Essay Question
  - 2003 Question 2 – Essay Question

Criminal Cases

[2-01] In order to understand the burden of proof two distinct concepts must be understood: (a) the legal burden (b) the evidential burden.
Legal Burden of Proof on Prosecution

The legal burden of proof in criminal cases places an obligation on the prosecutor to prove all the facts in issue or essential elements of their case and to persuade the jury, or the judge, whoever the trier of fact may be, of the accused’s guilt. In criminal cases the legal burden of proof rests with the prosecution, the golden thread running through criminal law is that the prosecution has to prove every fact in issue and the defence have to disprove nothing. As Murnahan J stated in McGowan v Carville:

‘[T]here is no onus on a person charged with an offence to prove his innocence, the onus at all times being on the State to prove his guilt.’

In a criminal case, the prosecution has to prove to the court that they have proven their case beyond reasonable doubt. Where there is a presumption in law that operates against the accused in a criminal case, e.g. that they are presumed to be sane, the accused has an evidential burden to fulfil in order to rebut the presumption.

The Evidential Burden of Proof

[2-02] This is the obligation to adduce a prima facie case in relation to a fact in issue. Sufficient evidence must be put forward to allow a prosecution to succeed. It is not necessary for the side bearing this burden to go so far as to prove the existence of fact conclusively but they must produce some evidence that it exists. The evidential burden is discharged by evidence sufficient to warrant, but not necessarily to require, an affirmative finding by a reasonable jury. Therefore it is a judge who decides if an evidential burden has been discharged. Then any evidence which is deemed sufficient to have discharged the evidential burden must then be put before the trier of fact, whether that is the judge, or the jury.

In Bratty v AG for Northern Ireland it was said that the evidential burden would be satisfied if there was:

‘sufficient evidence, fit to be left to a jury, on which a jury might conclude that the appellant had acted unconsciously and involuntary or which might leave a jury in reasonable doubt whether this must be so.’

If an accused wants to raise one of the defences then they too have to satisfy the evidential burden in order to adduce evidence at trial to prove that defence.

Lord Devlin said in Jayasena v. R that the burden of adducing evidence is satisfied when:

‘[S]uch evidence as, if believed and left un-contradicted and unexplained, could be accepted by the jury as proof.’

Criminal Burden of proof

Woolmington v. DPP

[2-03] In this case the plaintiff was accused of murder. His wife had left him and she had moved in with her mother. Soon after she had moved, one of the wife’s new neighbours discovered the wife dead in her mother’s house. The accused, admitted to playing a part in her death but he claimed it was an accident. He claimed that he had told his wife that he was going to kill himself.
using a shot gun that he was holding when it went off by accident and killed her. The trial judge gave directions to the jury that Woolmington should have to prove that it was an accident. The House of Lords, as it then was, disagreed saying it was not for the accused to prove his innocence. The importance of the legal burden of proof resting on the prosecution was verbalised by Sankey LC:

‘Throughout the web of 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 ... 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.’

In Ireland, the rule in Woolmington was referred to in People (AG) v. McMahon\(^5\) where Maguire P. noted that:

‘The Court is of the opinion that this principle is the true one, and, as applicable to the facts of this case, imposes on the prosecution the necessity of negativing every supposition consistent with the innocence of the accused.’

Similarly DPP v Kiely\(^6\) was appealed and McGuiness J found that the judge at first instance had not stated in his charge to the jury that where there were two versions of events before them in evidence that the jury should adopt the accused’s version of events unless the prosecution had managed to prove their version of events beyond reasonable doubt. McGuiness J found that it would have been a better direction if the trial judge had followed the dicta of Kenny J in People v Byrne\(^7\) where he stated

‘the jury should be told ... that when two views ... are possible on the evidence, they should adopt that which is favourable to the accused.’

Notwithstanding that McGuiness J found that the trial judge in Kiely had placed considerable emphasis on the presumption of innocence and the concept of proof beyond reasonable doubt and for that reason the direction to the jury was satisfactory.

People (DPP) v DO’T\(^8\)

[2-04] The accused was convicted of rape. When the trial judge had been charging the jury he forgot to mention the presumption of innocence to the jury. The Court of Criminal Appeal had no hesitation in quashing the conviction. The judge had called the jury back to recharge them, this is a perfectly acceptable thing to do, but again the judge did not mention the presumption of innocence. In the CCA the judge stressed the importance of a presumption of innocence. The judge called a retrial.

AG v Quinn\(^9\)

[2.05] Quinn appealed his conviction to the Court of Criminal Appeal on the grounds, inter alia, that the trial judge had failed to provide the jury with a proper explanation of self-defence and had misdirected the jury on the onus of proof of self-defence. The Court of Criminal Appeal upheld the conviction. However, on appeal the Supreme Court reversed it finding that the trial judge’s directions to the jury introduced such an element of doubt on the question of onus of proof in relation to self-defence. Per Walsh J:

\(^5\) People (AG) v. McMahon [1946] I.R. 267
\(^6\) DPP v Kelly (21 March 2001), CCA McGuiness J.
\(^7\) People v Byrne [1974] IR 1
\(^8\) People (DPP) v DO’T [2003] 4 IR 286
\(^9\) AG v Quinn [1965] IR 366
'When the evidence in a case, whether it be the evidence offered by the prosecution or by the defence, discloses a possible defence of self-defence the onus remains throughout upon the prosecution to establish that the accused is guilty of the offence charged. The onus is never upon the accused to raise a doubt in the minds of the jury. In such case the burden rests on the prosecution to negative the possible defence of self-defence which has arisen and if, having considered the whole of the evidence, the jury is either convinced of the innocence of the prisoner or left in doubt whether or not he was acting in necessary self-defence they must acquit. Before the possible defence can be left to the jury as an issue there must be some evidence from which the jury would be entitled to find that issue in favour of the appellant. If the evidence for the prosecution does not disclose this possible defence then the necessary evidence will fall to be given by the defence. In such a case, however, where it falls to the defence to give the necessary evidence it must be made clear to the jury that there is a distinction, fine though it may appear, between adducing the evidence and the burden of proof and that there is no onus whatever upon the accused to establish any degree of doubt in their minds. In directing the jury on the question of the onus of proof it can only be misleading to a jury to refer to 'establishing' the defence 'in such a way as to raise a doubt.' No defence has to be 'established' in any case apart from insanity. In a case where there is evidence whether it be disclosed in the prosecution case or in the defence case, which is sufficient to leave the issue of self-defence to the jury the only question the jury has to consider is whether they are satisfied beyond reasonable doubt that the accused killed the deceased (if it be a case of homicide) and whether the jury is satisfied beyond reasonable doubt that the prosecution has negatived the issue of self-defence. If the jury is not satisfied beyond reasonable doubt on both of these matters the accused must be acquitted.'

Although Quinn places some kind of obligation to adduce evidence in an accused’s defence, at most it could only arise to being an evidential burden.

*DPP v. Wilson [2017] IESC 54* [2-06] We will look at this case again in the manual, in particular in relation to the constitutional right to privacy. However, it also provides a modern discussion on the criminal burden and DNA evidence. The appellant argued that DNA evidence, without more, and no matter what the statistical probabilities, cannot be sufficient to establish proof beyond reasonable doubt. It was accepted by the Court that there remained a theoretical, however slight, mathematical possibility that two unconnected persons could have the same DNA. The question to be assessed was whether there was a reasonable risk that the one person who is on trial might, notwithstanding the match concerned, nonetheless not be the person whose DNA was found at the crime scene. The Court gives over significant space to detailed consideration of the statistics and the extremely low probability of a false-positive arising. However, the Court also draws parallels with fingerprint evidence and notes such evidence has been accepted by courts as sufficient proof beyond reasonable doubt even though, unlike DNA evidence, it is not capable of robust statistical analysis. In relation to proof beyond reasonable doubt the court held at para. 5.60:-

'What the criminal standard requires is proof beyond reasonable doubt or alternatively that the prosecution exclude any reasonable possibility of the accused being innocent. That test, in whichever of those ways it is expressed, makes reference to the doubt or possibility of innocence being 'reasonable'. It is implicit in the fact that the test is formulated in that way that there may always be highly theoretical possibilities of innocence which a jury can be satisfied are so remote that they do not give rise to a reasonable doubt or a reasonable possibility of innocence. A witness may identify the perpetrator in circumstances where they have a very good view and actually know the individual quite well. A jury is entitled to conclude that the risk that the witness concerned might be mistaken is so remote that it can be discounted in assessing whether there is a reasonable doubt. The same applies to forensic evidence. A mere theoretical possibility of a false positive or some equivalent phenomenon may be so remote that a jury is nonetheless entitled to regard it as being
insufficient to create a reasonable doubt or to establish that the prosecution has failed to exclude a reasonable possibility of innocence.’

Shifting of the Legal Burden of Proof to Defence/Exceptions to the Rule in Woolmington

Common Law exceptions – Insanity
Every person is assumed to be sane until the contrary is proved so if an accused wants to raise a defence of insanity he bears the legal burden to prove it. The burden of proof is on the balance of probabilities.

In R. v. M’Naghten\textsuperscript{10} it was stated:-

‘The jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.’

But the accused only has to prove insanity on the balance of probabilities. This has been approved by the Irish courts in Attorney General v. Boylan\textsuperscript{11}.

Statutory Exceptions

Statute may reverse which party bears the burden of proving or disproving certain facts in some small categories of cases and the reversal may be done either expressly or implicitly. The prosecution will still have to prove an offence beyond reasonable doubt but statute can contain reverse onus clauses which result in the prosecution not having to prove a particular issue. This is done often for reasons of public policy and for expediency purposes or alternatively because the matters to be proved are within the particular knowledge of the accused and for that reason they are put on proof of it. Some of the statute which attempts to reverse the burden of proof have been subject to constitutional challenges. Each challenge has been rejected on the grounds of a distinction between reversing the evidential burden as opposed to the legal burden as discussed above. Below are a few examples of legislation which does just that:

(a) S.3(2) and s.24 of Offences Against the State Act 1939

O’Leary v AG\textsuperscript{12} This case involves anti terrorism legislation. The accused was convicted of membership of an unlawful organisation. Section 24 of the Offences Against the State Act 1939 provides that if you are caught with an incriminating document it is presumed you are a member of an unlawful organisation unless the contrary is shown. Section 3(2) provides that where an officer of the Garda Síochána, not below the rank of Chief Superintendent, in giving evidence in proceedings relating to an offence of being a member of a prohibited organisation within the meaning of section 21 of that Act, states that he believes that the accused was at a material time a member of an unlawful organisation, the statement shall be evidence that he was then such a member.

\textsuperscript{10} R. v. M’Naghten (1843) 4 St. Tr. 847
\textsuperscript{11} Attorney General v. Boylan [1937] I.R. 449
\textsuperscript{12} O’Leary v AG [1991] I.L.R.M. 454
The accused in this case was caught with thirty seven posters with the slogan ‘IRA calls the shots’ written on them. In addition a chief superintendent gave evidence saying that he thought the accused was a member of the IRA.

The accused sought to challenge the constitutionality of the above provisions. Costello J examined the provisions in detail. Costello J upheld the constitutionality of both provisions and made a number of important observations:

- Firstly, he considered that any statute that shifts the onus of proof from the prosecution to the defendant requires special consideration regarding the constitutional rights of the accused and, specifically, the nature of the inference the court is being asked to draw.
- Secondly, the shift of the evidential burden, does not change the requirement of the legal burden and the prosecution must still prove its case beyond a reasonable doubt, the accused may elect not to present any evidence in his or her defence and be entitled to an acquittal if the evidence adduced does not find him or her guilty beyond a reasonable doubt. Therefore the constitutional protection remains in place. He observed that if a statutory provision mandated that the shift of the burden must lead the court to convict should the accused fail to provide exculpatory evidence that, in those circumstances, only then would there be a shift in the legal burden.
- Third, Costello J was of the opinion that it does not necessarily follow that a statute is unconstitutional merely because its effect is that the failure of an accused to adduce exculpatory evidence must result in a conviction. The statute may merely give legal effect to an inference which it is reasonable to draw from facts which the prosecution establish. The presumption of the accused’s innocence is therefore rebutted not by the statute but by the inference.
- Fourth, he found that the Constitution did not provide an absolute protection of the right to the presumption of innocence by the Oireachtas, but rather the Oireachtas can legislate to restrict the right in certain circumstances.

\[(b) \text{S.50(8) of the Road Traffic Act 1961, as inserted by s.11 of the Road Traffic Act 1994.}\]

Section 50(8) provides:

‘In a prosecution for an offence under this section, it shall be presumed that the Defendant intended to drive or attempt to drive the vehicle concerned until he shows the contrary.’

This section has the result that the prosecution do not have to prove that a person had an intention to drive a car if they are found to be ‘in charge’ of a vehicle while under the influence of alcohol.

\[\text{People (DPP) v Byrne}\]

\[2-09\] Section 50(8) of the Road Traffic Act 1961 was subject to constitutional challenge in this case but Murray J in the Supreme Court found that the above provision affected the evidential burden of proof and did not affect the legal burden of proof. The evidential burden was shifted to provide an inference of the driver’s intention to drive once it has been proved that he was “in charge” of the vehicle at the same time as being under the influence of alcohol. He found this to have the result of raising ‘a reasonable doubt in the mind of the trial judge’ and therefore only affecting the evidential burden.

\[13 \text{ People (DPP) v Byrne [2002] 2 I.L.R.M. 68}\]
(c) S.4(1) of the Explosive substances Act 1883

*Hardy v Ireland*4

[2-10] This case followed the decision of *O’Leary* in its examination of the Explosive Substances Act, 1883. Section 4(1) provides that if you are found in possession of an explosive substance, in such circumstances as to give rise to a reasonable suspicion that you don’t have it for a lawful purpose then unless you can show you had it for a lawful purpose, you can be convicted. It was held that although a court is allowed to draw inferences from the accused’s failure to offer an explanation, the court was not obliged to draw such inferences. For this reason it was only the evidential burden which was placed on the accused, not the legal burden. The judge found that the inferences were evidence but were not proof. In the Supreme Court they upheld the decision, it was agreed by all judges that the first element of the test was that the prosecution had to prove beyond reasonable doubt that circumstances has arisen to give reasonable suspicion that the explosives were in the accused’s possession and that they weren’t held lawfully. Then there was a second step to the test, that once the prosecution had reached this burden, the accused had to prove they had them lawfully. The minority felt that this was a shift of the legal burden, but concluded that this did not make the section unconstitutional as there was nothing in the constitution which absolutely prohibited legislation shifting they legal burden onto the accused.

(d) S.99 of the Charities Act 2009

*People v McNally*5

[2-11] Section 99 of the Charities Act 2009 provides that it is an offence to sell a Mass card other than pursuant to an arrangement with a recognised person. It further provided that in proceedings for an offence under that section it is presumed that the sale to which the offence relates was not done pursuant to an arrangement with a recognised person until proven otherwise on the balance of probabilities. MacMenamin J in the High Court upheld the constitutionality of the provision, engaging in a test of proportionality by considering: (a) the necessity to establish whether the means the provision employs to achieve its aims correspond to the importance of those aims, (b) whether the means adopted are necessary for the achievement of the objection, (c) whether the means actually becomes the end in itself, (d) whether the objective can be obtained by other methods which may be more conveniently applied, (e) whether the method chosen was the least restrictive and disadvantage caused the least disproportionate to the aim, and (f) whether the means may be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations.

(e) S.29(2) of the Misuse of Drugs Act 1977

*The People (DPP) v Smyth*6

[2-12] Section 29(2) of the Misuse of Drugs Act 1977 provides that in proceedings for possession of a controlled drug it will be a defence to prove that the accused did not have reasonable grounds for suspecting that he what he had in his possession was a controlled drug or that he was in possession of a controlled drug. The Court of Criminal Appeal found that the trial judge erred in his directions to the jury by suggesting that the reversed burden required the accused to prove beyond a reasonable doubt that they did not know and had no reasonable grounds for suspecting that what was in their possession was a controlled substance. The Court found that in directing the jury in this offence, the a trial judge should point out that the prosecution are obliged to prove possession of the substance and that the substance is a

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4 *Hardy v Ireland* [1994] 2 I.R. 550
5 *People v McNally* [2011] 4 IR 431
6 *The People (DPP) v Smyth* [2010] 3 IR 688

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controlled drug beyond a reasonable doubt. The trial judge should tell the jury that the burden shifts to the defence to prove the existence of a reasonable doubt and that it should be clearly stated that this burden is discharged if the defence prove a reasonable doubt and no more than that. **Students should take the time to read paragraphs 19 – 22 of this decision as they provide a concise summary of many of the core principles of reverse onus clauses.**

(f) **S.41 Criminal Justice Act 1999**

*McNulty v Ireland*\(^{17}\)

[2-13] Section 41 of the Criminal Justice Act 1999 makes it an offence for a person to intimidate a witness or juror and/or members of their families with the intention of obstructing or interfering with the course of justice. Subsection 3 provides that proof that the accused performed the conduct accused of shall be evidence that that act was done with the requisite intention. In the Supreme Court the appellant argued the provision undermined his presumption of innocence. The Supreme Court dismissed the appeal with Denham CJ observing that the prosecution must prove every element of the offence beyond a reasonable doubt, including the intention. The effect of the section was that the conduct provided evidence, not proof, of the intention. Therefore the legal burden cannot be said to shift. Murray J observed that the Oireachtas may provide that a certain proven fact or facts may be evidence of another fact. He agreed with the judgment of Denham CJ that the burden of proof on the prosecution remained unaffected by the legislative provision and that it would remain a matter for the court and the jury to decide what weight, if any, to attach to the evidence tendered before it.”

**Civil Cases**

*Legal and Evidential Burdens*

[2-14] The standard of proof in civil cases is that the case must be proved on the balance of probabilities. In *DPP v Cahill*\(^{18}\) the civil standard of proof was described as follows:

‘In a civil case, a case about a traffic accident or a dispute about land, the burden of proof of course is on the balance of probabilities. A plaintiff going to court suing a defendant in a civil matter need only prove the case on the balance of probabilities. This is just over 50%.’

If a Plaintiff is seeking to raise a particular fact, it is for them to prove it. Similarly, if a defendant wants to put a particular fact into evidence, they too must prove it on the balance of probabilities. There are some exceptions to this general rule, most notably the doctrine of *res ipsa loquitur*.

_Res ipsa loquitur* translate to mean ‘the acts speak for themselves’. The doctrine allows the court in exceptional circumstances to draw an inference of negligence on the basis of circumstantial evidence of a highly suggestive nature. It allows for an inference to be drawn of a fact in issue at an early stage in the hearing. In an ordinary negligence action, the plaintiff must show that the defendant was negligent. However, where there is a situation that a plaintiff cannot prove negligence, but the accident is something that could not have happened but for negligence, then the court will presume negligence. Therefore, the onus is now on the defendant to prove that he was not negligent. The courts use the principle of _res ipsa loquitur_ to alleviate injustice in situations of obvious negligence but where the plaintiff is unable to satisfactorily prove it for some reason.

\(^{17}\) [2015] 2 IR 592

\(^{18}\) *DPP v Cahill* [2001] 3 IR 494

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[2-15] In Lyndsay v Mid Western Health Board\(^{19}\) the doctrine was applied where an 8 year old girl went into get a appendix removed during the course of which she fell into a deep coma.

The case of Scott v London\(^ {20}\) it was held that before the doctrine of res ipsa loquitur can be applied that there must be reasonable evidence of negligence, but:-

‘where the thing is shown to be under the management of the defendant, and; where the accident is such that as in the ordinary circumstances does not happen if those who have the management use proper care; this affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.’

The plaintiff in Scott v London was entitled to rely on the principle.

In O’Reilly v Lavelle\(^ {21}\), the plaintiff, while driving her car, collided with a calf. Johnston J held that res ipsa loquitur applied and on the facts before him imposed liability on the defendant cattle owner. He stated:

‘Cattle properly managed should not wander on the road and therefore the burden of proof in this case shifts to the defendant to show that he took reasonable care of his animals. I believe that there is no matter more appropriate for the application of the doctrine of res ipsa loquitur than cattle wandering on the highway.’

[2-16] If there is a plausible or reasonable reason which would explain an accident aside from the defendants conduct then the maxim of res ipsa loquitur will not be applied. In Neill v Minister for Finance\(^ {22}\) a toddler had injured her hand after a postman shut a van door on it. The judge found that the doctrine will not be applied when there are gaps in evidence surrounding the injury which are too wide.

If res ipsa loquitur is applied then the plaintiff has discharged his early burden of raising a prima facie case against the defendant and the burden of proof is passed on to the defence to refute the inference of negligence. In Lyndsay v Mid Western Health Board\(^{23}\) the Supreme Court noted that when the doctrine of res ipsa loquitur is applied all a defendant would have to do within the particular facts of that case was establish that the were not negligent in carrying out the operation and had exercised all reasonable care. A better way of putting it is that the evidential burden is shifted onto the defendant in respect of the negligence issue, but the legal burden is not. If the defendant had to prove what did actually happen in the operation that would be excessive and unfair. Ultimately what the rule is aiming to achieve is to remove the burden of having to prove a case from a plaintiff when the ability to prove it is beyond their reach and is “peculiarly within the range of the defendant’s capacity of proof”\(^ {24}\) As noted in the third part of the test in Scott v London\(^ {25}\) when the doctrine of res ipsa loquitur applies it provides ‘reasonable evidence, in the absence of explanation by the defendant that an accident arose from want of care.’ This has the resulting effect in giving a court the opportunity to find for the plaintiff, but does not result in the court having to find in the plaintiff’s favour.

\(^ {19}\) Lyndsay v Mid Western Health Board [1993] I.L.R.M. 550
\(^ {20}\) Scott v London and St Katherine Docks Co (1865) 3 H & C 596
\(^ {21}\) O’Reilly v Lavelle [1990] 2 IR 372
\(^ {22}\) Neill v Minister for Finance [1948] I.R. 88
\(^ {23}\) Lyndsay v Mid Western Health Board [1993] I.L.R.M. 550
\(^ {24}\) Hanranan v Merck, Sharpe and Dohme Ltd [1988] I.L.R.M. 629
\(^ {25}\) Scott v London and St Katherine Docks Co (1865) 3 H & C 596