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the design is clear. As argued above,⁷⁰ *Murphy* involved reliance by ABC Homes on the local authority and their independent contractor whereas it is quite clear that the majority in the Australian decision regarded the absence of any kind of reliance in the case before them as crucial. Indeed at one point,⁷¹ Deane J indicates that the result might have been different if the plaintiffs' predecessor in title had relied on the local authority. Deane J was thus prepared to contemplate reliance by someone other than the plaintiff as a factor sufficient to establish the required proximity.

Conclusion

Murphy is a deeply disappointing decision both in relation to the substantive law on defective premises and in its implications for the judicial process. As to the latter, it is worrying that their Lordships failed to consider adequately the conceptual, policy, and institutional arguments involved. On a substantive level, there are good grounds for concurring with the judgment of Wilson J in the Supreme Court of Canada when he spoke of

Anns . . . a useful protection to the citizen whose ever-increasing reliance on public officials seems to be a feature of our age.⁷²

After *Hunt*: The Burden of Proof, Risk of Non-Persuasion and Judicial Pragmatism

*Alex Stein**

At common law, and under section 101 of the Magistrates' Courts Act 1980, when the accused relies on a defence which constitutes an 'exception, exemption, proviso, excuse or qualification' to a statutory offence, the accused has to establish it on the balance of probabilities. Along with other exceptions to the general principle which requires the prosecution to prove its case and disprove any defence put forward by the accused beyond reasonable doubt,¹ this rule (hereafter: section 101) applies in both summary trials and trials on indictment.² Classification of criminal defences as falling within its ambit by virtue of being 'exceptions' etc, has proved to be

70 *supra* notes 19–22 and accompanying text.

71 *supra* n 63 at 65, 15–20.

72 *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641 at 674.

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1 Apart from the exception under consideration, this rule is qualified by numerous statutes and, at common law, by the defence of insanity which specifically impose the burden of persuasion on the accused. See *Woolmington v DPP* [1935] AC 462; C. Tapper, *Cross on Evidence*, 7th ed, 125–26; 133ff (1990).

2 *R v Hunt* [1987] 1 All ER 1, 9–10; 14–15.

difficult. More than fifteen years ago, the Court of Appeal in *R v Edwards*³ resolved this difficulty syntactically by attributing crucial importance to the way in which the offence is drafted. Linguistic patterns which included 'except,' 'unless' and the like, as well as sectional separation between offences and defences, have become disadvantageous to the accused. In all such cases, his defence was classified as an 'exception' and so he had to carry the risk of non-persuasion.⁴ The fallacy of relying on these verbal contingencies, spotted long ago by Julius Stone,⁵ exposed *Edwards* to penetrating critique.⁶ Indeed, a qualifying condition of any crime can be replaced with a definition of that crime limited *ab initio*. Similarly, any definition of any offence can be reformulated so as to include defences within that definition. In all such cases, the statutory meaning would remain exactly the same, which demonstrates the arbitrariness of the syntactical approach adopted in *Edwards*.

In *R v Hunt*,⁷ the House of Lords departed from this approach, ruling that *Edwards*, a correct decision on its own facts,⁸ could no longer apply across the board. Classification of defences within the framework of section 101 is not dependent alone on their syntactical status or sectional location in the list of statutory norms. It requires a rather more complex interpretation, one that pays regard not only to the verbal structure of the Act, but also to the mischief at which it was aimed and practical matters which affect the burden of proof. The House also laid down a number of general guidelines. First, the courts should be 'very slow' in classifying defences as ones that fall within section 101 because Parliament can never lightly be taken to have intended to diverge from protecting the innocent. Second, the ease and difficulty to be encountered by the parties in discharging the probative burden have to be regarded as factors of great importance. Judges should be reluctant to adopt interpretive options which impose a heavy burden on the accused. Finally, the gravity of the offence in question must also be considered. A conclusion that Parliament intended that those charged with serious crimes carry the risk of non-persuasion should not be reached easily.

This decision prompted numerous academic comments, some approving and others disapproving.⁹ It has also been argued that classification of defences as falling

3 [1974] 2 All ER 1085.

4 See, eg, *Guyl v Bright* [1987] RTR 104 and *Leeds City Council v Azam and Another* [1989] RTR 66. However, this way of interpretation may also support the accused. Thus, when a section relied upon by the accused '... is not a section which creates an offence subject to exceptions,' and '... does not say that the holder of a Justices' on-licence, subject to conditions, may not sell liquor to anyone unless they are within the class of persons named in the condition,' his defence would not be an 'exception.' What that section (s 161 of the Licensing Act 1964) says is that '... it is an offence to sell liquor to persons to whom he is not permitted to sell such liquor,' and '... on that wording, the legal burden of proof must lie upon the prosecution.' *Oxford v Lincoln* (QB, 25.2.1982; unpublished and available via LEXIS).

5 J. Stone, 'Burden of Proof and the Judicial Process' (1944) 60 LQR 262, 280ff.

6 A.A.S. Zuckerman, 'The Third Exception to the Woolmington Rule' (1976) 92 LQR 402.

7 *supra*, n 2.

8 The defendant in *Edwards* was accused of unlicensed selling of intoxicating liquor. It was held that the burden of persuading the court that he had a licence to sell intoxicating liquor rests upon him. Defences based upon a licence to do something which is otherwise prohibited have been classified as 'exceptions' for the purposes of s 101. As will become clear from the following discussion, this decision was wrong both as a matter of principle and on its own facts. It was only the burden of adducing evidence that could justifiably be imposed upon the defendant.

9 See J.C. Smith, 'The Presumption of Innocence' (1987) 38 NILQ 223; A. Zuckerman, 'No Third Exception to the Woolmington Rule' (1987) 103 LQR 170; P. Healy, 'Proof and Policy: No Golden Threads' [1987] Crim LR 355; P. Mirfield, 'The Legacy of Hunt' [1988] Crim LR 19; D.J. Birch, 'Hunting the Snark: The Elusive Statutory Exception' [1988] Crim LR 221; G. Williams, 'The Logic

within the ambit of section 101 should not merely be independent of their syntax or sectional location in criminal law statutes, but must also be independent of forensic contingencies, such as the ease or difficulty encountered by the parties in proving various facts.¹⁰ Section 101 deals with the allocation of the risk of non-persuasion, not merely with the burden of adducing evidence, and the mere fact that the accused holds the relevant information or has a better or even exclusive access to evidence does not alone support the view that he should therefore carry that risk. This fact can only justify an imposition of a duty on the accused to put forward such evidence that he possesses. Once the accused produces his evidence for examination at the trial, his advantage evaporates and should therefore not be used against him any further.

Hence, classification of defences for the purposes of section 101 can cogently be made only on the grounds of their substance. Those defences which are no different from ordinary protestations of innocence should not be subject to a less favourable treatment in allocating the risk of non-persuasion. Section 101 should therefore apply solely to 'excuses,' that is, defences which, on individual grounds, as a matter of leniency and concession to human frailty, exonerate or mitigate the responsibility of those who committed a criminally blameworthy act. It cannot properly be interpreted as including 'justifications,' those defences which render the act in question unblameworthy, making the actor's claim of innocence no different from any other form of saying 'I did nothing wrong.' If the rules allocating the risk of non-persuasion in criminal cases are to be carried through consistently, and an interpreter's standpoint is that like cases should always be treated alike, this interpretive possibility would be the only one available.

It has therefore been submitted that the guidelines laid down in *Hunt* are inadequate. Without discriminating between various defences on the grounds of their substance, the courts could hardly be certain about when to be 'very slow' in imposing the risk of non-persuasion on the accused by classifying his defence as falling within section 101. What the courts will almost always be certain about would be that the accused holds better knowledge of the facts that can prove or refute his defence. When the charges brought against the accused are not too serious, he would probably end up bearing the risk of non-persuasion in respect of both 'excuses' and 'justifications.'

This prediction seems to have been fulfilled in the first reported case decided under the guidelines of *Hunt*. In *R v Alath Construction Ltd; R v Brightman*,¹¹ the appellants (hereafter: the developers) contested their conviction of unlawfully felling a beech tree which was subject to a tree preservation order made by a local authority under the Town and Country Planning Act 1971. The order was issued to protect the 'interests of amenity' (s 60(1) of the Act) and its contravention, ie, felling of a tree without the authority's consent, constituted a criminal offence (s 102(1) of the Act). This framework of prohibitions was qualified by section 60(6) (hereafter: the statutory permission), which reads as follows:

Without prejudice to any other exemptions for which provision may be made by a tree preservation order, no such order shall apply to the cutting down, uprooting, topping or lopping of trees which are dying or dead or have become dangerous, or the cutting down, uprooting,

of Exceptions' (1988) 47 Camb LJ 261; F. Bennion, 'Statutory Exceptions: A Third Knot in the Golden Thread?' [1988] Crim LR 31; R. Mahoney, 'The Presumption of Innocence: A New Era' (1988) 67 Can Bar Rev 1, 41-49.

¹⁰ A. Stein, 'Criminal Defences and the Burden of Proof' (1991) 28 Coexistence 133.

¹¹ [1990] 1 WLR 1255.

topping or lopping of any trees in compliance with any obligations imposed by or under an Act of Parliament or so far as may be necessary for the prevention or abatement of a nuisance.

The tree's position did not fit the developers' plans, prompting them to make a number of abortive attempts to obtain local authority permission to fell it. Subsequently, the tree was cut down without permission upon the instructions of the developers. The developers relied in their defence on the statutory permission. According to them, the conditions specified in that permission had been satisfied at the time of felling the tree as a result of a great gale which ravaged large areas of the UK. Mr Recorder Zucker QC ruled that this defence constituted an 'exception' covered by section 101 which, to be relied on, had to be proved by the developers on the balance of probabilities. In so ruling he relied on *Hunt*. It was common ground in the Court of Appeal that the Recorder's ruling was reflected in his summing up to the jury who found the developers guilty as charged.

Dismissing the developers' appeals, the Court of Appeal upheld this ruling and the reasoning on which it was founded. The holding that the statutory permission to cut down a protected tree is one of the defences that fall within section 101 was justified by the Court on the grounds of syntax and practicality. The first line of reasoning was based on the structure of the Act and the language employed in the statutory permission. The second one drew on the fact that it is far easier for the person felling a tree to prove its condition at the time when he decided to take that action than it would be for the local authority. For if the local authority were required to check every protected tree in order to ascertain whether it is dying or has become dangerous, this would impose on it an unbearable burden. These two classes of reasons require separate examination.

The Court of Appeal observed that the absolute offence of cutting down a protected tree is set out in section 102(1) of the Act, whilst the circumstances permitting its removal are enumerated in section 60(6). Hence:

section 60(6) . . . is in our judgment a free-standing provision quite independent of section 102 and defines in terms the exceptions to the normal consequences of cutting down a tree which is the subject matter of an order. That being so, as it seems to us, section 60(6) is truly an exception to the definition of criminal liability to be found in section 102 and it does not create negative ingredients of the offence in respect of which a burden of proof rests upon the prosecution.¹²

Those who believed, after *Hunt*, that sectional separation between 'offences' and 'defences' would no longer constitute a compelling factor for section 101 would undoubtedly be disillusioned by this reasoning. In *Hunt*, the accused was charged with possession of a controlled drug, contrary to section 5(2) of the Misuse of Drugs Act 1971. His defence, which was stated in separate provisions of that Act, was nevertheless held not to be one of the 'exceptions' mentioned in section 101. The Court of Appeal in *Alath*, however, found it unnecessary to take notice of the exact facts of *Hunt*'s case because it concerned drugs and thus 'had nothing whatever to do with tree preservation orders.'¹³ It appears, therefore, that it was the fact that the felling of a protected tree is not a crime of notorious gravity which has resurrected the idea of relying on sectional separation.

The Court in *Alath* also adopted the observation previously made by the Recorder that the opening of section 60(6), 'Without prejudice to any other exemptions for which provision may be made by a tree preservation order,' implied that the defences

¹² pp 1257–58.

¹³ p 1258.

enumerated in that section were 'exceptions' or 'exemptions.' This, once again, is very disappointing to those who believed that such syntactical matters are no longer decisive. Moreover, this interpretation is also syntactically unconvincing. After its opening, the section explicitly provides that '... no such order shall apply to the cutting down' etc, which indicates that any tree falling, by virtue of its dangerous condition, within this provision is excluded *ab initio* from the preservation order. Rather than being an 'exemption' etc, this provision limits the very definition of the offence. How can one be guilty of an offence of not complying with an order when, according to the relevant statute, this order 'shall not apply' to his situation?¹⁴ It seems that the opening words of the section were deployed merely to eliminate an 'argumentum a contrario' in respect of the local authority's power to provide for further defences in its tree preservation order.

Another reason adopted by the Recorder as reinforcing his opinion and approved of by the Court of Appeal was that 'from a practical viewpoint ... it is far easier ... for the person responsible for the cutting down of a tree to prove its condition.'¹⁵ This reason emanates from *Hunt*. It should nevertheless be employed with great caution. An inference that the risk of non-persuasion in respect of the defence in dispute should be placed on the accused or that Parliament has intended to impose that risk upon the accused does not necessarily follow from this reason. It may well be the case that Parliament was not concerned with evidential matters at all, thus leaving them to the general law of evidence. This may, after all, be a sound strategy. Under such law, when the facts relevant to the defence relied on by the accused are peculiarly within his knowledge, he has to put them forward. If he abstains from doing so, his defence would remain unsubstantiated.¹⁶ But if he decides to adduce some evidence and the trier of fact is left in doubt as to any of the defensive issues, the outcome of this case can only be an acquittal. Practical problems such as that mentioned by the Recorder can thus be resolved not only by classifying the defence in question as an 'exception' which falls within section 101, but also by the 'evidential burden' doctrine, viz. by requiring the accused to raise a reasonable doubt as to the facts that support his defence.¹⁷ In the present case, the developers were proved to have a motive to fell the tree irrespective of statutory permission to fell it. They applied for permission to cut down the tree before the gale of October 1987 upon which they later based their defence. This, in conjunction with a failure to produce independent evidence about the tree's condition at the time when it was cut down, would have enabled the prosecution to have gone a long way towards refuting the developers' defence.¹⁸

The existence of these two strategies casts serious doubts on the fashion in which the developers' defence has been classified in *Alath* as falling within section 101. As both of these strategies were pertinent to this classification, what exactly was

14 cf Lord Templeman's separate opinion in *Hunt*, supra n 2, at pp 3–4, which provides support for this critique of *Alath*.

15 pp 1259–60.

16 See, eg, *R v Gannon* (1988) 87 Cr App Rep 254, 256; and Cross, supra n 1, at p 121.

17 This minimal standard would be sufficient for discharging an evidential burden. See Cross, supra n 1, at pp 145–46 and cases cited therein.

18 See Zuckerman, supra n 9, at p 175. As was mentioned, in quite similar circumstances, by Donaldson LJ, 'all sensible licensees will in fact assist the police with the supervision of the sale of intoxicating liquor and it would not surprise me in the very least if justices, faced with a licensee who was standing strictly on his legal rights and refusing to assist the police in any way at all, drew an inference that although the burden of proof might well be on the prosecution the offences had been committed and he was doing his best to make certain that the police did not have the best evidence that they had been committed.' *Oxford v Lincoln*, supra n 4.

the basis for endorsing one of them rather than another? What justifies the view that it is the risk of non-persuasion, as distinguished from the risk involved in not adducing evidence, that was imposed upon the accused by the law? Given that neither the syntactical status of the defence in question nor the forensic contingencies associated with its proof could properly classify this defence as an 'exception' falling within section 101, the reasoning adopted in *Alath* seems to be seriously wanting.

The question that ought to have been addressed in *Alath* (and also in *Hunt*) is whether the defence in question differs substantively from other claims of innocence which need not be proved by the accused. If that defence is a 'justification,' viz. if it relates to the act itself and is thus no different from an ordinary claim of innocence, it should, accordingly, be presumed that Parliament intended that defence to be subject to the ordinary principles of proof. In such cases, subject to explicit statutory provisions to the contrary, it is only the burden of adducing evidence that may judicially be imposed on the accused. If, however, the defence in question is an actor-related 'excuse,' it would have to be proved by the accused, as ordained by section 101.¹⁹

The statutory permission to cut down a protected tree is based on a number of alternatives and the judgment delivered in *Alath* does not reveal what exactly was contended by the developers in that respect. The common denominator of these alternatives seems to be the 'balance of utilities.'²⁰ When a tree dies and thus ceases to be beneficial, it can be cut down. When a tree creates a nuisance or becomes dangerous, it can also be cut down, and it seems to be implicit in these conditions that the 'danger' or 'nuisance' must be tangible and thus greater than the tree's utility. In each one of these defences, the interest that has been saved outweighs the interest that has been sacrificed. Such actions cannot be treated as blameworthy ones. All of them are justifiable. The defence put forward by the developers could thus not properly be classified as an 'exception' that falls within section 101.

The statutory permission to cut down a protected tree calls for further comment. A general defence of necessity seems now to have gained recognition at common law. In two recent cases recognising that defence, it was held that it could arise only from objective danger threatening the defendant or others with death or serious injury.²¹ This restriction should, however, be understood by reference to the gravity of the crimes to which the defence was applied, so that its scope might be wider in less serious offences.²² If this is correct, the defence of necessity would hinge on a 'balance of utilities,' thus encompassing most of the instances enumerated in the statutory permission to fell a protected tree. In any event, that defence would overlap with at least some of those instances. Criminal defendants carry no risk of non-persuasion in respect of 'necessity.' They can only be required to adduce

19 The normative question whether the risk of non-persuasion in respect of 'excuses' should be borne by the accused transcends the scope of this note as it is apparent that s 101 applies to 'excuses.' For the view that this also ought to be the law see Stein, *supra* n 10, at pp 136–140.

20 Felling a tree in compliance with a statutory duty is also exempted from the prohibition, but no such defence (which is clearly a 'justification') was put forward by the developers in *Alath*.

21 See *R v Conway* [1988] 3 All ER 1025 and *R v Martin* [1989] 1 All ER 652.

22 In *R v Martin* (*ibid*, at p 654), the Court of Appeal held that:

R v Conway is authority also for the proposition that the scope of the defence [of necessity] is no wider for reckless driving than for other serious offences. As was pointed out in the judgment, 'reckless driving can kill.' . . . We see no material distinction between offences of reckless driving and driving whilst disqualified so far as the application and scope of this defence is concerned.

This statement leaves room for discriminating between more and less serious offences in determining the scope of 'necessity.'

some evidence to substantiate that defence.²³ At the same time, section 60(6) of the Town and Country Planning Act 1971 does not imply that common law defences such as duress and necessity would not be available to a tree-feller. Hence, it would be a far better strategy for a tree-feller to forsake, when appropriate, the statutory permission and rely upon the common law defence of necessity. The fact that this choice between defences of identical substance may have such far-reaching implications reinforces the foregoing critique of *Alath*.

It is not suggested that *Alath's* outcome necessarily amounts to a miscarriage of justice. Rather, it is submitted that insofar as its allocation of the burden of proof is concerned, the decision delivered in that case is wrong in principle. It is, nevertheless, good news for tree-lovers.

Directors' Duties and Insolvent Companies

*Ross Grantham**

The recent decision of Hoffmann J in *Re Welfab Engineers Ltd*¹ raises again the question of what, if any, obligations company directors owe to the company's creditors. The circumstances of this case are however novel in that the allegation was not, as in earlier cases, that creditors suffered as a result of the board's action, but rather that while the directors did not do a bad job, they could have done a better one.

The story of Welfab Engineers Ltd begins for our purposes in 1979. The company which had until that time been profitable, began a slow descent into insolvency, due in the main to factors outside its control. The company suffered from the insolvency of its customers, the general down-turn in the economy, and from the departure of one of its directors, who set up in competition. In late 1982 the board decided that, if the company was to continue trading, its principal asset, a freehold property, would have to be sold and thereafter the business of the company conducted from rented premises. The land, which was subject to a charge to the bank, would, if the plan was to succeed, have to fetch close to its valuation of £145,000. The directors through estate agents placed the property on the market, asking £200,000. It was however to be indicated to prospective purchasers that a lower figure would be considered. At the board's request, the estate agent's marketing of the property was discreet, so as not to advertise the company's difficulties.

The estate agent's marketing, and the activities of the board elicited a total of three offers, of which two remained serious contenders. The first of these was an offer, from Bell & Webster (Steel Structures) Ltd, for £125,000. This offer, for the freehold property and some equipment, also allowed for the possibility of a lease-back of the property to Welfab. It was clear to the directors that this figure would be insufficient to enable the company to remain in business. As the board were determined that the company should either continue to trade or be sold as a going concern, this offer was rejected. The other offer was from Thermaspan Roofing

23 Since this defence is based on 'duress of circumstances,' its proof would be guided by the rules which apply to 'duress' and other common law defences except that of insanity. See, eg, *R v Gill* [1963] 1 WLR 841, and *supra* n 16.

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1 [1990] BCC 600.