Presumptions in criminal law

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Presumptions are the bane of the law. Or so the authors say. There seems to be no presumption which cannot be dislodged. Many presumptions of law cannot escape. In criminal cases even the presumption of innocence has been severely eroded by legislation. Statute creates presumptions and takes them away. This article examines some aspects of the main presumptions which affect all the law, and then those which deal with criminal law and practice.

Introduction

The main function of presumptions is the saving of judicial time and effort. But many authors have been daunted by trying to group presumptions into categories and make them accord with principles of law.

> Presumptions may be looked on as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts.[1]

The few authors who have written on presumptions are aghast at the daunting nature of the subject. Professor Thayer regarded it as 'an unprofitable and monstrous task'.[2] Professor Morgan began his careful article by saying that any intelligent writer 'has approached the topic of presumptions with a sense of hopelessness and has left it with a feeling of despair'.[3]

There may be an easier way of looking at presumptions. In a court, they are probably no more than the court's exercise of common sense and reason. But this short description is not enough. Parliaments create presumptions and take them away. That is why the division of presumptions into those of law and those of fact has not too much artificiality, although the two are often mixed.

Origins

Many difficulties in presumptions have often been self-imposed by courts. In an ordinary case the fact finder will bring experience of life and common sense to the analysis of the evidence. In time, courts came to use this process to shorten the case by making assumptions on the effect of evidence. There was good reason to assume some knowledge and not to require everything to be fully proved in each case as if there were no knowledge. A stylised method of drawing conclusions gradually became part of the technique of courts. These techniques were roughly split into presumptions and judicial notice. The two are associated.

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1 *Garfath v Garfath* (1959) 59 SR(NSW) 362 (FC) at 363 per Owen J, quoting Wigmore who in turn quotes Lamm J in *Mockowick v Kansas City etc Ry Co* (1906) 196 Mo 550 at 571.

2 J B Thayer, *A Preliminary Treatise on Evidence at the Common Law*, Little, Brown & Co, Boston, 1898, Ch VIII 'Presumptions', p 313.

3 E M Morgan, 'Presumptions' (1937) 12 *Washington L Rev* 255.

As courts came to use the word presumption, the term gradually took on different meanings. Discerning the meanings was made very difficult by some judges using the term without any effort to be exact. Another difficulty came from writers suggesting new ways of how courts should use presumptions. Denning J said:

> [T]he trouble about presumptions is that they have been grouped into unscientific categories.[4]

As if science and the practice of law were bedfellows!

The word presumption these days has different meanings. One of them means nothing more than a conclusion which has to be drawn unless it is disproved. Examples are the presumptions of death and of sanity.

Another meaning is a conclusion of fact which might have to be drawn if some other fact is proved or is admitted. An example of this meaning is the presumption of death.

Common law presumptions

Everyone knows the law

What a curious presumption that everyone knows the law. Gleeson CJ and Kirby J described it as absurd.[5] Nevertheless, the proper assumptions may be these: ordinary well-behaved citizens would not commit a crime, for parliament would not pass legislation creating crimes that such ordinary people could not observe. Put another way, parliament, acting for the citizenry, would create crimes of which their constituents would approve.

There have been anomalies where a parliament has created a most unpopular crime and the parliamentary leader has asserted that the innocent have nothing to fear.

In 1937 Lord Atkin said:

> The fact that there is not, and never has been, a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application.[6]

That takes us to the presumption that ignorance of the law is no excuse. There are even statutes to that effect.[7] As usual, there are any number of Latin expressions for this presumption.[8] Windeyer J said: 'To deny that ignorance of the law does not excuse those who break the law would indeed be a heresy.'[9] It is no surprise that courts have often been perplexed whether on the evidence that there has been a mistake of fact, which is a defence, or a mistake of law,

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4 Denning J, 'Presumptions and Burdens' (1945) 61 *LQR* 379 at 382.

5 *Ostrowski v Palmer* (2004) 218 CLR 493; 206 ALR 422 at [1].

6 *Evans v Bartlam* [1937] AC 473 (HL) at 479 per Lord Atkin; [1937] 2 All ER 646. This description was approved in *R v Pureau* (1990) 19 NSWLR 372 (CCA) at 376–7 per Hunt J.

7 Criminal Code Act 1995 (Cth) ss 9.1–9.4; Criminal Code (Qld) s 22; (WA) s 22; (Tas) s 12; (NT) s 30(1); Criminal Code 2002 (ACT) ss 35–37.

8 The main one is *ignorantia iuris haud excusat*. The longest is *ignorantia iuris, quod quisque scire tenetur, neminem excusat*.

9 *Ianella v French* (1968) 119 CLR 84 at 112 per Windeyer J.

which isn't. The latest debate in the High Court on the difference between the two was in 2004.[10]

But two judges have said that in a criminal case it is a defence if the accused has a positive belief in the lawfulness of the charged act. Gaudron J said it in the High Court.[11] In the murder case of Joseph Mohr it was common ground that the accused had killed his ailing wife. He claimed successfully that he believed he was acting lawfully.[12] Balmford J directed the jury that the accused must have knowledge that what he was doing was wrong 'in the sense of being unlawful.'[13]

Liberty

The right to personal liberty is 'the most elementary and important of all common law rights' said Fullagar J in 1955.[14] Later decisions in the High Court have strongly affirmed that position.[15] But again, many parliaments have passed laws to create the presumption that bail is to be refused when a person is charged with serious offences such as murder or some drug offences. On such charges bail will be granted only in exceptional circumstances.[16]

Life and of death

In *Axon v Axon*, Dixon J said:

> The presumption of life is but a declaration of probabilities and must always depend on the accompanying facts.[17]

A later case on blood alcohol referred to Dixon J's remark as simply a demonstration of the presumption of continuance.[18] How the presumptions of life and death interact!

The presumption of death arises in two main aspects in a criminal case. The first is when a person is charged with murder and the victim's body has not been found. Recent cases where no body was found but where the murder conviction was found proper include *Weissensteiner*[19] and *Pfennig*.[20] But there

10 *Ostrowski v Palmer* (2004) 218 CLR 493; 206 ALR 422.
11 *Walden v Hensler* (1987) 163 CLR 561 at 606 per Gaudron J; 75 ALR 173.
12 See the case note by B McSherry (as part of a book review): (1997) 21 *Crim LJ* 299.
13 Defence counsel was John Smallwood, later Judge Smallwood QC of Victorian County Court who passed on to me the judge's directions to the jury.
14 *Trobridge v Hardy* (1955) 94 CLR 147 at 152.
15 Examples are *Williams v R* (1986) 161 CLR 278 at 292 per Mason and Brennan JJ; 66 ALR 385; *Foster v R* (1993) 67 ALJR 550 at 555 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; 113 ALR 1; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; 210 ALR 50 at [150] per Kirby J.
16 Bail Acts: 1978 (NSW) ss 8A–8D; 1977 (Vic) s 4(2); 198 (SA) s 10A; (NT) s 7A. The Bail Acts of Qld, WA and Tas require only that a bail application in a serious case be heard by a Supreme Court judge.
17 *Axon v Axon* (1937) 59 CLR 395 at 405 per Dixon J.
18 *White v Morton* [1998] 3 VR 316 at 334; (1998) 95 A Crim R 125 at 144–5; 26 MVR 159 (CA) at 176 per Charles JA.
19 *Weissensteiner v R* (1993) 178 CLR 217; 117 ALR 545.
20 *Pfennig v R* (1995) 182 CLR 461; 127 ALR 99.

have been many others.[21] In the multi-murder charges against the Kray brothers one of the bodies was never found.[22] The test is whether those who would have expected to see or have contact with the victim have heard nothing.

Presumption of death also arises where a spouse has not been heard of for seven years and the other spouse remarries. At common law it may have been even shorter.

In *Axon*, the second husband said he did not have to pay his wife because she was still married to her first husband who had disappeared 20 years earlier. Thus the defence of presumed death of an earlier spouse is a defence to the criminal charge of bigamy. The defence existed at common law[23] but is now in many statutes.[24] Tennyson's poem 'Enoch Arden' carries no weight in law.

Presumptions of fact

Many presumptions are so called presumptions of fact. In *Weissensteiner*, Gaudron and McHugh JJ pointed out that the term presumption of fact means two quite different things.

> It may be used to refer to a fact which is inferred from other facts, particularly an inference which is commonly drawn. . . . On the other hand, it may be used to refer to an assumption which, in the absence of evidence one way or another, may and usually will be made by reason of common sense and common experience. Such assumptions are often called 'evidentiary presumptions'.[25]

I will confine the remainder of this part to evidentiary presumptions.

Continuance

The presumption of continuance is a form of evidence in prospect. What happened in the past be it an act or a state of mind, throws light on the incident on which the court is inquiring. It is often used in driving cases. A person is speeding in a car. An accident happens very soon after. The speed is presumed to be unchanged. But the two acts must be very close in time distance and circumstance. If not, no such inference can be drawn.[26] Forty-five minutes before was held to be too remote in *Horvath*. The court held that criminal carelessness in driving on one occasion does not prove it on another. For such was 'not a constant feature of human behaviour'.[27]

Parliaments have enacted laws to say that a person whose breath test exceeds a certain limit is presumed to have had that reading when driving. The presumption however has a time limit, usually two hours. Certificates of all

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21 Two more recent examples are *R v Smith & Turner (No 2)* (1995) 64 SASR 1; *Thompson v R* [1998] AC 811.

22 *R v Kray* [1970] 1 QB 125; [1969] 3 All ER 941.

23 *R v Curgerwen* (1865) LR1; CCR 1 followed and applied *R v Lund* (1921) 16 Cr App R 31.

24 Marriage Act 1964 (Cth) s 64; Criminal Code (Qld) s 360(2); (WA) s 339; Crimes Act 1900 (NSW) s 92; Crimes Act 1958 (Vic) s 64; Criminal Law Consolidation Act 1935 (SA) s 579; Crimes Act 1961 (NZ) s 205(4).

25 *Weissensteiner v R* (1993) 178 CLR 217 at 243 per Gaudron and McHugh JJ; 117 ALR 545.

26 *R v Scott* (2003) 39 MVR 166; 141 A Crim R 323 (Vic CA) at [11] per Winneke P (with whom the others agreed).

27 *R v Horvath* [1972] VR 533 at 538.

sorts are admissible by those statutes. But the presumption of continuity does not presume a blood alcohol content beyond the prescribed time.[28]

Habit

Habit can be another form of evidence in prospect. The basis is that a habit makes the happening of the event in issue more likely. But like all evidence, the evidence of habit must have enough probative force and sufficient bearing on the issues. This sort of evidence is different from a plan or a system.[29] There are some cases where habit has been introduced by the prosecution to show the likelihood of the event in issue. A drug habit is often alleged as a motive in a property offence such as by getting the wherewithal to buy more drugs.[30] But of the non-drug cases the most prominent is *Murphy*. The appellant, a High Court judge, was convicted on one count of attempting to pervert the course of justice. He was alleged to have tried to persuade Magistrate Briese to influence another magistrate who was hearing charges against a friend. The trial judge had rejected evidence that the proof of the phone call between Murphy J and Mr Briese was the frequent use of the word 'mate'. Rightly so said the five member court. The joint judgment examined some civil cases on habit and concluded: 'The evidence was too generalised, or related to circumstances which were too dissimilar to give it a probative force . . .'.[31]

In a civil case, habitual drunkenness meant that a man could not give a detached mind to a business transaction.[32] That is because evidence of habit, to be admissible, must have a degree of entrenchment in a person's life. So, in a criminal case, did a man have the habit of refusing to let others operate his business bank account? Hard to prove that the practice was habitual. Those were the facts in *Roberts*. The Court of Appeal held that the evidence was inadmissible.[33]

A quite different use of evidence of habit occurred in *Liddy*. The prosecution alleged that Mr Liddy took different groups of boys away at different times and trained them in improper sexual activities. On appeal it was held that the evidence was properly led of the appellant's training of the boys in 'bad habits'.[34] It was an idiosyncratic use of the term. We should not derive any presumption from it.

Voluntariness

There is a presumption that acts of an accused are voluntary. In *Falconer*, three Justices said:

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28 *Griffiths v Errington* (1981) 7 NTR 3; 50 FLR 370 per Muirhead J; *R v Olejarnik* (1994) 33 NSWLR 567 (CCA) at 572 per Carruthers J (with whom the others agreed); 19 MVR 125; *Wright v Morton* [1998] 3 VR 316; (1997) 26 MVR 159; 95 A Crim R 125 (Vic CA).

29 Such as in *Griffiths v R* (1937) 58 CLR 185 and *R v Musolino* (2003) 86 SASR 37; 139 A Crim R 488 (CCA).

30 There are many examples. One is *R v Cummins* (2004) 10 VR 15 (CA) at [26] per Ormiston JA.

31 *R v Murphy* (1985) 4 NSWLR 42 at 63; 63 ALR 53. His Honour was acquitted on retrial and returned to the bench.

32 *Bromley v Ryan* (1956) 99 CLR 362 at 407 per Fullager J.

33 *Roberts v Western Australia* (2005) 29 WAR 445 (CCA).

34 *R v Liddy* (2002) 81 SASR 22 (CCA) at [490] per Williams J.

> In the absence of some contrary evidence, it is presumed . . . that an act done by a person who is apparently conscious is willed or done voluntarily. That presumption accords with, and gives expression to, common experience.
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> Nevertheless there is a difference between a willed act and a voluntary act. The will concerns the act, the intent concerns the consequences. The difference directly affects the interpretation of the Criminal Codes.[35]

Scientific instruments

Mechanical and scientific instruments are presumed to be correct and their readings accurate. Herring CJ adopted the text which allowed evidence of scientific instruments which by general experience were known to be trustworthy. They included watches, clocks, thermometers, pedometers and others.[36] Those others include speedometers,[37] speed cameras[38] and telescopes and binoculars.[39]

But Asche J heard a case where the master of a foreign vessel was charged with fishing within Australian waters. Could the prosecution use a scientific instrument to prove the position of the offending boat? Asche J looked at many cases and examined the principles. He said:

> No doubt a satellite navigator instrument may one day fall into the class of notorious instruments but . . . that day has not yet dawned.[40]

It may not have been a notorious scientific instrument but when his Honour reviewed the evidence he found that the instrument was reliable.

Confessions

A confession is often introduced by the prosecution to show an admission of the crime alleged. The meaning of a confession, as Dixon J said in *McKay*, can extend:

> from the most solemn, spontaneous express and detailed acknowledgments of the facts constituting the crime to casual admissions of some only of the specific facts involving guilt.[41]

Nevertheless, a confession must be unequivocal and inconsistent with innocence.[42]

But what presumption can be drawn from a confession? The answer is that there is no presumption that a confession is true. In *Burns*, the High Court said:

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35 (1990) 171 CLR 30 at 40 per Mason CJ, Brennan and McHugh JJ; 96 ALR 545. The same judges said 's 23 distinguishes between a willed act and an intention to cause a result'.

36 *Porter v Kolodzeij* [1962] VR 75 at 78, approved *Breedon v Kongras* (1996) 16 WAR 66; 85 A Crim R 472 per Heenan J.

37 *Re Appeal of White* (1987) 9 NSWLR 427; 31 A Crim R 194 per Shadbolt DCJ.

38 *Radalj v Taylor* (1997) 98 A Crim R 170; 26 MVR 11 (WA) per Heenan J.

39 *R v Maqsud Ali* [1966] 1 QB 688 (CCA) at 701; (1966) 49 Cr App R 230 at 238; [1965] 2 All ER 464.

40 *Chiou Yaou Fa v Morris* (1987) 46 NTR 1 at 8; 87 FLR 37 at 43–4.

41 *McKay v R* (1935) 54 CLR 1 at 9 per Dixon J.

42 *R v Smith* (1981) 5 Crim LJ 161 (NSW CCA) per Roden J

> It would be a grave misdirection to tell a jury that there is a presumption . . . that a confession is true. The jury . . . must approach the question without the aid of any presumption except that of innocence.[43]

There have been many cases which have applied this proposition. *Green* is an example. The accused said at trial that he did make admissions to the police but those admissions were false. The court collected the authorities[44] and allowed an appeal against conviction.[45]

Res ipsa loquitur

Res ipsa loquitur is a Latin expression meaning the thing itself speaks. It is a presumption with lively application in civil cases. The expression is short for the presumption that a result is so improbable that it must have been caused by the wrongdoing of someone.[46] It is the application of an inferential reasoning process.[47] It applies to civil negligence cases but does not apply in a criminal case.[48] *Volz*[49] was a case where the car left the road, collided with a tree and a passenger was killed. Why did the car leave the road? Was it speed or some other reason? Martin J, with whom the other judges agreed, recited the facts and said that the doctrine of res ipsa loquitur had no place in the criminal law.[50] Appeal against conviction allowed. A later case has followed *Volz*.[51]

Resolving conflicting presumptions

In what seem now like ancient times, courts were sometimes called upon to resolve a conflict in common law presumptions. In a case in 1819 a woman had remarried a year after splitting from her husband. Bayley J said:

> This is a case of conflicting presumptions, and the question is which is to prevail. The law presumes the continuation of life, but it also presumes against the commission of crimes.[52]

The King's Bench concluded that in the absence of proof that the first husband has been alive at the time, the second marriage was valid.

A highly reputable book on torts deals with damages for breach of criminal statutes, then says:

> The courts look to the construction of a statute, relying on a number of 'presumptions' for guidance, but in practice there are so many conflicting

43 *Burns v R* (1975) 132 CLR 258 at 262 per Barwick CJ, Gibbs and Mason CJ; 6 ALR 95.
44 *R v Green* (2002) 4 VR 471; 128 A Crim R 524 at [31] (CA).
45 See also *R v Schaeffer* (2005) 13 VR 337; 159 A Crim R 101 at [13] and [65] (Vic CA).
46 *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121; 170 ALR 594.
47 Ibid, at [22] per Gleeson CJ and McHugh J.
48 In *Pfennig v R* (1995) 182 CLR 461 at 536, McHugh J noted a difference between defending in a criminal case and defending *res ipsa loquitur* in a civil case; 127 ALR 99.
49 *Volz v R* (1990) 12 MVR 471; 100 FLR 393 (NT CCA).
50 Ibid, at 404.
51 *Findlay v Northern Territory* (2000) 114 A Crim R 292 at 297 (NT) per Thomas J.
52 *R v Inhabitants of Twining* (1819) 2 B & Ald 388 at 388; 20 RR 480 (KB) at 482 per Bayley J.

> presumptions with variable weightings, that it can be extremely difficult to predict how the courts will respond to a particular statute.[53]

Lord Denning MR said that in finding whether the breach of a criminal statute gave rise to an action for damages 'you might as well toss a coin'.[54]

The solution was long ago proposed by Professor Morgan:

> In the absence of other factors pertinent to the allocation of the burden of persuasion, why should not the trier whose mind is in equilibrium be required to find for the usual rather than the unusual.[55]

And later:

> Where presumptions conflict, that one should prevail which rests upon weightier reasons; if these underlying reasons are equal, both presumptions should vanish.[56]

In *Re Peatling*, McInerney J was faced with resolving the presumptions of death of a first husband, of continuance, of marriage and of legitimacy. His Honour cited and seemingly approved the two Morgan propositions and found that his mind was not 'in equilibrium on the issue'.[57]

There do not seem to be any cases since *Re Peatling* where a conflict in common law presumptions has needed to be resolved.

Presumptions of law

Under this heading I will deal with parliament and how its laws in general are construed. Then I will look at how statutes treat individuals.

Parliament is supreme

Not many courts have made specific reference to the supremacy of parliament. Most courts take it as a given. But those judges who have spoken of it do so in unambiguous terms. The formidable Lord Reid traced some history of parliamentary supremacy. He held that parliament had been supreme at least since 1688.[58] More recently, Dawson J said in *Kable*:

> Judicial pronouncements confirming the supremacy of parliament are rare but their scarcity is testament to the complete acceptance by the courts that an Act of Parliament is binding upon them and cannot be questioned by reference to principles of a more fundamental kind.[59]

And later:

> The doctrine of parliamentary supremacy is a doctrine as deeply rooted as any in the common law.[60]

In the House of Lords, Lord Hobhouse saw a different aspect of parliament:

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53 *Clerk and Lindsell on Torts*, 19th ed, Sweet & Maxwell, 2004, at [9-02].
54 *Ex parte Island Records* [1978] Ch 122 at 135 (CA).
55 E M Morgan, 'Observations Concerning Presumptions' (1931) 44 *Harvard L Rev* 906 at 930.
56 Ibid, at 932.
57 *Re Peatling* [1969] VR 214 at 226–7 per McInerney J.
58 *Pickin v British Railway Board* [1974] AC 765 at 782; [1978] 3 All ER 824.
59 *Kable v DPP (NSW)* (1996) 189 CLR 51 at 73–4 per Dawson J; 138 ALR 577.
60 Ibid, at CLR 76 per Dawson J.

> Parliament is the primary guardian of the public interest. In most areas of public policy, parliament will be the sole arbiter and courts should not allow themselves to trespass into them.[61]

The laws of parliament are presumed to be valid. Courts have said that often.[62] But like we will see with so many presumptions, even this one has its limits. In *Kable* the High Court by majority set aside an Act of Parliament as being invalid. Perhaps it is no surprise, given his statements in the case, that Dawson J would have upheld it. But in other cases courts have set aside Acts. Perhaps the most famous are the *Communist Party* case where the High Court set aside an Act as being beyond the Federal Government's powers.[63] It did the same in the *Tasmanian Dam* case.[64]

To complete this part, in the *Fox Hunting* case the House of Lords said that when it was deciding on the validity of legislation it would not examine whether parliament was properly constituted at the time when the law was passed. There was a presumption that the parliamentary process was proper.[65]

Interpretation

Judges have taken pains in interpreting statutes. Over the years they have set out what have become rules. The judges have applied a number of presumptions to be applied when interpreting a statute. The presumption of proper mental capacity does not affect the legal burden of proof which remains on the prosecution.[66] In a sexual case there is a presumption of fact that a victim who does not complain within a reasonable time was not sexually assaulted. It is a presumption which can be displaced.[67]

Because of parliament's supremacy, it can create presumptions and it can take them away. Legislation creates the offence of driving with a prohibited amount of alcohol. There is a test for blood alcohol concentration. It also establishes a presumption that the concentration is the same as at the time of driving.[68] The sections which create presumptions have the rider 'unless the contrary is proved'. Consent to artificial insemination is presumed where a child is born of the procedure.[69] Loitering for prostitution can be presumed.[70]

Any presumption that marriage connoted consent to sexual activity was removed by legislation in South Australia.[71] The High Court held that the removal of that presumption was within parliament's power.[72] There was once a common law presumption that an offence by a wife in the presence of her husband was committed under his coercion. Hardly any wonder that

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61 *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 at 737 per Lord Hobhouse of Woodborough; [2000] 3 All ER 673.
62 One example is *Gerhardy v Brown* (1985) 159 CLR 70 at 107 per Murphy J; 57 ALR 472.
63 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.
64 *Commonwealth v Tasmania* (1983) 158 CLR 1; 46 ALR 625.
65 *R (Jackson) v Attorney-General* [2006] 1 AC 262; [2005] 4 All ER 1253.
66 *Ryan v R* (1967) 121 CLR 205 at 216 per Barwick CJ.
67 *Kilby v R* (1973) 129 CLR 460 at 469 per Barwick CJ; 1 ALR 283.
68 For example, Road Safety Act 1986 (Vic) s 48.
69 Family Law Act 1975 (Cth) s 60H(5).
70 Prostitution Act 2000 (WA) s 52.
71 Criminal Law Consolidation Act 1935 (SA) s 73.
72 *R v L* (1991) 174 CLR 379; 103 ALR 577.

parliament has removed that presumption.[73] A person suspected of possessing money from the sale of drugs commits an offence unless the person charged gives a satisfactory account.[74] Possession of property suspected of having been stolen puts the burden of proving the negative on the person charged. That is in legislation almost everywhere.

Parliament can also make laws about criminal practice. In some jurisdictions different counts of sexual offences are presumed to be triable together.[75] Because Australia is a federation, a non-Commonwealth offence can be tried only in the jurisdiction where it was committed. Of course some offences by their nature cross borders. Yet in some jurisdictions parliament says that there is a presumption the offence is committed in the place where it is charged. Rebuttable, of course.[76]

Presumption of human rights

When a court construes legislation which may affect human rights, it does so with the greatest care. There is a presumption which applies. Fundamental rights, freedoms and immunities are presumed to survive. McHugh J put it this way:

> courts begin with the presumption that the legislature does not interfere with these fundamental rights, freedoms and immunities unless it makes its intention to do so unmistakably clear.[77]

Presumption against retrospectivity

A statute which creates an offence is presumed to apply only to actions which take place after parliament passed that statute.[78] The corollary is also true. So if a person committed a crime long ago before the offence was changed in its form, the person must be charged with the offence as it existed at the time. One example will do. In *Glennon*,[79] the accused had been convicted of buggery and attempted buggery under Crimes Act 1958 (Vic) s 68. The trial was in Melbourne in 1991. The offences occurred between 1977 and 1980. The offence of buggery was removed by Crimes (Sexual Offences) Act 1980 (Vic) and replaced. So buggery did not exist when the trial began. No point could be taken that he was not properly charged.[80]

Now for the exceptions. A law that is procedural only applies to a criminal

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73 Crimes Act 1900 (NSW) s 407A; Crimes Act 1958 (Vic) s 336; Criminal Law Consolidation Act 1935 (SA) s 328A; Crimes Act 1900 (ACT) s 289. See also Criminal Code (Tas) s 20(2). In 1997 Queensland repealed their Criminal Code marital coercion s 32. Likewise in 1996 NT amended their Criminal Code s 41 to remove marital coercion.

74 Misuse of Drugs Act 1986 (Qld) s 10A: *Gough v Braden* [1993] 1 Qd R 100; (1991) 55 A Crim R 92 (CCA).

75 Crimes Act 1958 (Vic) s 372(3AA).

76 Crimes Act 1900 (NSW) s 10E; Criminal Law Consolidation Act 1935 (SA) s 5H.

77 *Daniels Corp International Pty Ltd v ACCC* (2002) 213 CLR 543; 192 ALR 561 at [43] per McHugh J.

78 Some statutes say just that Charter of Human Rights and Responsibilities Act 2006 (Vic) s 27; Human Rights Act 2004 (ACT) s 25; New Zealand Bill of Rights Act 1990 s 26.

79 *R v Glennon* (1992) 173 CLR 592; 106 ALR 177.

80 See also Interpretation of Legislation Act 1984 (Vic) ss 14 and 15 on some effects of amendment.

trial despite its not being in force at the time of the alleged offence.[81] So it depends on the purpose of the statute. The Supreme Court of Canada adopted a text which summed it up. The presumption against retrospectivity applies only to statutes which attach prejudicial consequences to a prior event. It does not apply where the statute is benevolent. Nor does it apply where there is a penalty imposed for a prior event which is not intended as a punishment.[82]

An example of this last exception is a statute designed to protect the public. In England a statute had been introduced to disqualify a person from being employed by a lawyer if the person had been convicted of a dishonesty offence. The statute was held properly to apply to this clerk though it did not exist when the offences were committed.[83]

Immature age

Legislation in every state and territory provides that a child under the age of 10 is not criminally responsible. It was part of the law of the Australian code jurisdictions long since.[84] Now the so-called common law jurisdictions have followed suit by passing legislation to the same effect,[85] as has the Commonwealth.[86] The old Latin term for children under such age was *doli incapax* — incapable of crime.[87] If these be presumptions, as the NSW Act says, they are irrebuttable, conclusive.[88] Further it is inconceivable that any court would find these sections invalid.

A person under the age of 14 years charged with an offence must be proved to have knowledge of the wrongness of the charged act. That was part of the common law. So in *Packer*,[89] a 13-year-old boy had buggered a bitch. He was not charged. His aider and abettor was of full age and was charged and convicted. His appeal was based on the proposition that in law the boy was not capable of the act. The argument was this. If the boy were deemed not capable of committing an offence, there could be no aiding and abetting. Cussen ACJ giving the judgment of the court held there was no irrebuttable presumption that the boy was incapable of the offence of buggery. The appeal was dismissed.

Nowadays the legislation is to the effect that where a person charged is between 10 and 13 years of age, the prosecution must prove knowledge of wrongness.

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81 *Rodway v R* (1990) 169 CLR 515; 92 ALR 385. Yet Nathan J held that a change in legislation during an adjournment could not apply: *Henderson v Read* [1993] 1 VR 537; (1993) 16 MVR 403.

82 *Brousseau v Alberta Securities Commission* [1989] 1 SCR 301; (1989) 57 DLR (4th) 458.

83 *Re A Solicitor's Clerk* [1957] 3 All ER 617; [1957] 1 WLR 1219.

84 Criminal Code (Qld) s 299(1); (WA) s 29; (Tas) s 18(1); (NT) s 38(1).

85 Children (Criminal Proceedings) Act 1987 (NSW) s 5; Children and Young Persons Act 1989 (Vic) s 127; Young Offenders Act 1993 (SA) s 5; Criminal Code 2002 (ACT) s 25.

86 Crimes Act 1914 s 4M; Criminal Code Act 1995 s 7.1.

87 D Ross QC, *Ross on Crime*, 3rd ed, Lawbook Co, Sydney, 2007, at [4.3900] and following.

88 The Latin term for an irrebuttable presumption is *praesumptio iuris et de iure*: *Iannella v French* (1968) 119 CLR 84 at 113 per Windeyer J. It means a presumption of law and from law.

89 *R v Packer* [1932] VLR 225 (CCA).

Sanity

Criminal legislation now provides for extensive court examination where there is evidence that the person charged is unfit to be tried. But the starting point is the presumption of sanity. It existed at common law. As Dixon J told a jury in a murder trial:

> every person is presumed to be of sufficient soundness of mind to be criminally responsible for his actions . . .[90]

The rebuttable presumption of sanity, or absence of mental impairment, is part of the legislation in every jurisdiction.[91]

Intent

The starting point is that to obtain a conviction for an offence the prosecution must prove intent. Approved by every court in the land is this statement in *Sherras v De Rutzen*:

> There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient of every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered.[92]

Legislation in every jurisdiction has removed many parts of this presumption. The importation offences are the best examples. Yet in *He Kaw Teh*, the High Court interpreted a particular subsection of the Customs Act 1901 (Cth) and held that the prosecution had to prove knowledge of possession of imported drugs because parliament had not displaced that presumption.[93]

Has knowledge of the wrongfulness of the act has been displaced by legislation? Hunt CJ at CL examined *He Kaw Teh* and said that in a given case, courts will take into account:

> the words of the statute itself, (b) the subject matter with which the statute deals, and (c) whether an absolute liability will assist in overcoming the mischief at which the statute is aimed.[94]

There are many examples of statutes being interpreted to discover whether intent has been removed and whether mistake is a defence. Too many to set out here.[95]

Innocence

In a criminal trial a judge will often tell a jury that there is a rule of law that an accused person is presumed innocent. What usually follows is that the

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90 *R v Porter* (1933) 55 CLR 182 at 183.

91 Criminal Code Act 1995 (Cth) s 7.3(3); Criminal Code (Qld) s 26; (WA) s 26; (Tas) s 15; (NT) s 43D(1); Crimes (Mental Impairment and Fitness to be Tried) Act 1997 s 7(1); Criminal Law Consolidation Act 1935 (SA) s 269I; Crimes Act 1900 s 269D and Criminal Code 2002 s 28(4) (ACT).

92 [1895] 1 QB 918 at 921 per Wright J.

93 *He Kaw Teh v R* (1985) 157 CLR 523; 60 ALR 449.

94 *Environment Protection Authority v N* (1992) 26 NSWLR 352 at 354 and repeated in *Hawthorne v Morcam Pty Ltd* (1992) 29 NSWLR 120 at 130.

95 See *Ross on Crime*, above n 87, at [19.4500] Strict liability; [16.6700] *Proudman v Dayman*; [13.2700] Mistake.

prosecution must prove the guilt of the accused beyond reasonable doubt. This presumption is one of the most important. Lord Bingham of Cornhill described it this way:

> The presumption of innocence is perhaps the most fundamental principle underlying the administration of the criminal law. It places on the prosecution, fairly and squarely, the duty of proving guilt.[96]

But the presumption of innocence is often undermined. Where an accused has been acquitted does the presumption of innocence mean that there is a finding of innocence? Nearly all courts say no.[97]

The other guiding rule of a criminal trial is that because of the presumption of innocence, the accused does not have to prove anything. The burden of proof is always on the prosecution.

I did say that an accused did not have to prove anything. That was until *Weissensteiner* in 1993 where the High Court dismissed a murder appeal 5:2. There was a strong circumstantial case against the accused. He gave no answer to it in or out of court. The trial judge told the jury that they could more safely draw inferences in favour of the prosecution case when the accused must have known many relevant answering facts but elected not to give evidence. Quite rightly so, said the majority.[98] Since that decision, the High Court has been at pains to distinguish it as it did in *RPS*.[99] Then in *Azzopardi* the majority said that a judge's comment on the failure of an accused to give evidence will be both rare and exceptional.[100] In *Dyers*, McHugh J said that *RPS* and *Azzopardi* had re-affirmed the heresy of the *Weissensteiner* proposition.[101] It was a form of 'I told you so' from his Honour. So as far as the courts go, we're back to the state that no presumption can be drawn from the silence of as accused other than in an exceptional case.

But the presumption of innocence has been severely undermined by legislation.

First an example from New Zealand. There is a recent amendment to the Crimes Act 1961. Of course it is an offence for a person to have a sexual connection with someone under 16 years of age. A recent amendment to the Crimes Act 1961 says:

> It is a defence if the person charged proves that

And then comes taking reasonable steps to find out and to believe that the victim was of or over the age of 16 years and that the victim consented.[102]

In England two authors examined the legislation which put the burden of

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96 *Khan v State of Trinidad and Tobago* [2005] 1 AC 374; [2004] 2 WLR 692 at [14] (Privy Council).

97 Exceptions are *R v Storey* (1978) 140 CLR 364 at 387 per Gibbs J; 22 ALR 47; *R v Darby* (1982) 148 CLR 668 at 682 per Murphy J; 40 ALR 594 and *Grdic v R* [1985] 1 SCR 810 at 825 per Lamer J giving the majority judgment.

98 *Weissensteiner v R* (1993) 178 CLR 217; 117 ALR 545.

99 Cases which distinguished *Weissensteiner* include *RPS v R* (2000) 199 CLR 620; 168 ALR 729.

100 *Azzopardi v R* (2001) 205 CLR 50; 179 ALR 349 at [68] per Gaudron, Gummow, Kirby and Hayne JJ.

101 *Dyers v R* (2002) 210 CLR 285; 192 ALR 181 at [24] per McHugh J.

102 Crimes Act 1961 (NZ) s 134A.

proof or presumptions on the person charged. They found 219 examples of 540 offences triable in the Crown Court.[103] In recent times there have been four cases in the House of Lords on such legislation.[104] Professor Dennis set out some guidelines on how to interpret laws like these.[105]

That is the law everywhere. In a federal system as we have in Australia there are the parliaments of six states, two territories and a federal parliament. Nine law-making bodies altogether. Much of the legislation is adverse to the presumption of innocence. Collecting it all would be beyond the powers of even the most assiduous. But there are some obvious examples. One is recent possession which I deal with below. Drug legislation also changes the burden of proof. Consider the following:

> In any proceedings against any person for an offence under this Act the burden of proving any matter of exception qualification or defence shall lie upon the person seeking to avail himself thereof.[106]

No wonder, then, that recent enactments on terrorism provide:

> The onus of proof of reasonable excuse ... lies on the person accused of the offence.[107]

If property were used in an offence it may be forfeited. But consider the reversal of the burden of proof in the Commonwealth Act:

> If no evidence is given that the property was not used in ... the offence the court must presume that the property was used in ... the offence.[108]

The Northern Territory has a reversal of the burden of proof in a similar setting:

> it is presumed that the respondent made criminal use of the property unless the respondent establishes the contrary.[109]

As we saw earlier, parliament is supreme and generally the legislation is put into practice. Courts have no choice.

Omnia praesumuntur rite esse acta

The Latin term *omnia praesumuntur rite esse acta* means all things are presumed to have been done rightly. The starting point is that this presumption should have limited application to criminal law and especially not to prove facts central to an offence.[110] The presumption is applied in different settings. First is an admissibility of evidence. A party who produces a document signed

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103 A Ashworth and M Blake, 'The Presumption of Innocence in English Criminal Law' [1996] *Crim LR* 306.

104 *Sheldrake v DPP* [2005] 1 AC 264; [2005] 1 All ER 237 is the most recent reported decision.

105 I Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' [2005] *Crim LR* 901.

106 Drugs, Poisons and Controlled Substances Act 1981 (Vic) s 104. Other examples are Misuse of Drugs Act 1981 (WA) s 11; Drug Misuse and Trafficking Act 1985 (NSW) s 40A.

107 Terrorism (Emergency Powers) Act (NT) s 44; Terrorism (Police Powers) Act 2002 (NSW) s 33.

108 Proceeds of Crime Act 2002 (Cth) s 54(c).

109 Criminal Property Forfeiture Act (NT) s 83(1).

110 *Dillon v R* [1982] AC 484; [1982] 1 All ER 1017; 74 Cr App R 274 (PC).

by an official can usually have it admitted in evidence. Generally a statute applies to enable its admission. The document is presumed to be a true one. Here are some examples. In *Trotter*, Perry J ruled that a search warrant signed by the Deputy Commissioner of Police was admissible.[111] In a charge of selling adulterated meat the certificate signed by the woman which said that she was appointed was held admissible.[112] Likewise the appointment of the operator of a breath analysing instrument.[113] Other evidence can cure errors in an otherwise admissible certificate.[114]

Now to other decisions of courts. The nature of the presumption in this setting seems to depend on the standing and jurisdiction of the court whose act is in question. Nettle JA referred to the presumption that the separation of a jury was done in accordance with law.[115] In *Ousley*, the court debated the signing of a listening device warrant. If the signing were by a magistrate then there was no presumption and it must be proved to have been within the magistrate's power. If it were done by a superior court then it was presumed to be proper.[116]

The next part of this presumption is about officials. If an official acts in a certain way does this presumption apply to conclude that the official is properly appointed? To that presumption I now turn.

De facto officer

A de facto officer is one who seems to be properly in an office which exists. It may appear curious that this topic should be included in an article on presumptions and particularly under *omnia praesumuntur rite esse acta*. Yet the subject arose in two fairly recent criminal cases. The first was in Western Australia. There was a magistrate named Barbara Bennett-Borlase. She was born in 1933. In 1987 she applied to be appointed as a magistrate and understated her age by seven years. The legislation provided that she retire at 65. She reached that age in 1998 but on the records she was then only a sprightly 58. In 2002 she convicted a man. He appealed that claim of right applied to his property charge. That ground succeeded.[117] On his second ground he said that the magistrate was not lawfully in office. This ground failed because the Full Court said that chaos would flow if everything done by such an official were held invalid.[118]

In the next case, a court held that on the interpretation of Criminal Procedure Act 1986 (NSW) a member of the private bar could not sign an indictment.[119] The court rejected the argument that the signatory was a de facto official. It approved a US authority which set out the policy. This was the policy:

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111 *R v Trotter* (1992) 58 SASR 223; 60 A Crim R 1.
112 *Hardess v Beaumont* [1953] VLR 315 per Dean J.
113 *Henderson v Richardson* (1996) 5 Tas R 375 at 389–90 per Underwood J.
114 *Kislinsky v Spence* (1989) 10 MVR 163 (Vic) per Crockett J (errors in a breath analysis certificate).
115 *R v Buckley* (2004) 10 VR 215; 149 A Crim R 122 (CA) at [60] per Nettle JA.
116 *Ousley v R* (1997) 192 CLR 69 at 107–8 per McHugh J; 129 per Gummow J; 148 ALR 510.
117 *Jamieson v McKenna* (2002) 136 A Crim R 82 (WA FC).
118 Ibid, at [14].
119 *R v Janceski* (2005) 64 NSWLR 10; 223 ALR 580 (CCA).

> If you find a man executing the duties of an office, under such circumstances of continuance, reputation, or otherwise, as reasonably authorise the *presumption* that he is the official he assumes to be . . . the law will hold his acts valid . . . as an officer de facto.[120]

Anthony Cavit was a Darwin prosecutor who was appointed to be an acting magistrate. But the formal documents showed that he retained his previous position while on the bench. He convicted people. Nader J set the convictions aside for perceived bias. The partial position of prosecutor was at odds with the independence of a judicial officer.[121]

A conclusion can be drawn from a judgment of Kirby J. His Honour examined the subject, set out his own earlier judicial references to the topic and footnoted journal articles. He reiterated:

> a distinction has to be drawn between the validity of the acts de facto of a person invalidly appointed to a valid office and the acts of a person appointed to an office which has no validity.[122]

Recent possession

Recent possession is a presumption of fact.[123] It is a form of circumstantial evidence.[124] It works in the following way. An article is stolen. Some time later it is found in the possession or under the control of the accused. The presumption is that the accused did not come by the article innocently. I leave to one side in this discussion of this presumption the need for the prosecution to prove that the article was found in the possession of the accused and is the same one which was stolen.

For this presumption to apply, possession must be of the sort of item which does not change hands quickly. It must also be sufficiently proximate to the time when the item was taken. If both of these aspects exist, then recent possession is capable of proving the charged offence.

The presumption can of course be dislodged by the accused raising the possibility that the article was come by innocently. Like any piece of circumstantial evidence, recent possession is capable of proving a prosecution case unless the person charged provides some reason why the inference of guilt should not be drawn.

Denning J (as he then was) said:

> the presumption from being found in possession of goods recently stolen is provisional only and gives rise to a provisional burden.[125]

There can be no rule about what evidence will always amount to recent possession. In *Smyth*, the court looked at the earlier cases on the subject. The court said:

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120 Approved, *R v Janceski*, ibid, at [125] (emphasis added).

121 *R v Cavit; Ex parte Rosenfield* (1985) 33 NTR 29; 73 FLR 385.

122 *Forge v ASIC* (2006) 229 ALR 223; 80 ALJR 1616 at [168] per Kirby J.

123 *Weissensteiner v R* (1993) 178 CLR 217 at 242–3 per Gaudron and McHugh JJ; 117 ALR 545.

124 *Gilson v R* (1991) 172 CLR 353 at 368 per Brennan J; 100 ALR 729; *R v Illingworth* (2000) 127 A Crim R 302 at [28] (WA CCA).

125 A T Denning, 'Presumptions and Burdens' (1945) 61 *LQR* 379 at 382.

> We have been asked to consider a very large number of authorities, going back as far as the year 1826. Nearly every reported case is merely a decision of fact as an example of what is no more than a rule of evidence.[126]

Like any other piece of evidence, this presumption of recent invention can only arise from relevant evidence. There are two parts to relevance. The possession must be recent and the evidence must bear on the charge. First the degree of recency. This part of relevance generally depends on the nature of the item. Thus possession of a car does not have to be as near to the taking as bank notes.[127] In *Hardy*, the accused was found in possession of a flute and its case which had been stolen more than seven months before. Douglas J[128] directed the jury to acquit.[129] In *McGowan*, on a charge of receiving, it was stolen jewellery found two years after the theft. If that had been the only evidence it would have been insufficient to raise recent possession.[130]

Mostly the charge is some form of property offence, either theft or handling, however they are called in the different jurisdictions. In that way the possession is connected in the way the article was taken from the victim. The evidence of recent possession is relevant for that reason.

But the article must be connected with the crime. An example of the absence of this form of relevance is *Flowers*. A man was robbed and killed. Mr Flowers had the dead man's wallet in his possession the morning after the death. The trial judge had directed the jury that the possession of the wallet could show complicity. The Privy Council advised that such a direction was not open on the evidence on the murder charge for it showed no more than the robbery.[131]

The presumption may be inferred to enable conviction if the accused offers no explanation or if the jury is satisfied that the explanation is untrue.[132] It is only part of the wider proposition that guilt may be deduced from unreasonable behaviour of a person confronted with facts that seem to accuse.[133]

But things aren't as grim for an accused as these propositions seem to suggest. First, there is no duty for a person to speak when confronted by authorities over possession of an apparently incriminating item.[134] Next, there is a sweet decision of the Supreme Court of Canada in *L'Heureux*[135] which says that if an accused's explanation may be true there must be an acquittal. The facts are worth reciting. Ms L'Heureux was the passenger in a car. After a while she was invited to take the wheel to be taught to drive. In two written statements to the police she said that the original driver told her that the car

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126 *R v Smythe* (1980) 72 Cr App R 8 at 11. Kilner Brown J gave the judgment of the Court of Appeal.

127 *R v Mahoney* (2000) 114 A Crim R 130 at [31] (NSW CCA).

128 The grandfather of Justice James Sholto Douglas now on the Queensland Supreme Court.

129 *R v Hardy* [1924] QWN 26; 18 QJPR 89.

130 *R v McGowan* (1868) 5 WW & A'B (L) 180 (FC).

131 *Flowers v R* [2000] 1 WLR 2396.

132 *R v Smythe* (1980) 72 Cr App R 8 at 11.

133 *R v Raviraj* (1987) 85 Cr App R 93 at 103, quoted with apparent approval in *Weissensteiner v R* (1993) 178 CLR 217 at 243 n 84 per Gaudron and McHugh JJ.

134 *R v Gallagher* [1998] 2 VR 671 (CA) at 698 per Ashley AJA. See also *R v Collins* [2004] 1 WLR 1705 at [34] (CA) and *R v Salahattin* [1983] 1 VR 521 at 526–30 (CCA).

135 *R v L'Heureux* [1985] 2 SCR 159; (1985) 21 DLR (4th) 637; 21 CCC (3d) 574.

was stolen, as it had been. At trial she gave evidence on oath denying that she was told such a thing. She was convicted and successfully appealed to the Quebec Court of Appeal. The prosecution appealed to the Supreme Court and lost. Lamer J, giving the judgment of the court, held that the trial judge had been wrong for his conclusion that her evidence under oath could not be true. The presumption was dislodged.

Conclusion

Presumptions used by courts are not quite as unnerving as early authors and judges thought. But the presumptions which judges have used, even in more recent times, are just an excuse not to reinvent the wheel in every case. No more are they a curiosity. Rather they are a short way of using commonsense and reason. Parliament has changed many presumptions by adding and taking away. Each court's main function on presumptions now is to interpret those parliamentary presumptions and to see how they apply in a given case.