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On this article see Gavin Dingwall, ‘Statutory Exceptions, Burdens of Proof and the Human Rights Act 1998’, 65 MLR May 2002, p 450.

Statutory Exceptions: A Third Knot in the Golden Thread?

by Francis Bennion

Many concerned with the social purpose of our laws believe them to be more complicated than necessary, as illustrated by the issues underlying the House of Lords decision in Hunt. {[1987] A.C. 352; [1987] Crim. L.R. 263.} The legislature wishes to pronounce certain acts to be criminal, and decides to enact a law to that effect. The enactment must carefully describe the factual outline and the legal thrust. If anyone commits an act falling within the prescribed factual outline he will incur the legal thrust of the enactment, in other words will be guilty of an offence and liable to the prescribed punisment. {For a detailed explanation of the factual outline and the legal thrust see Bennion, Statutory Interpretation ss 78 and 79.} What could be simpler? So the legislature lays down the proposition if A then B.

But things may not after all be quite that simple. Perhaps there are some factual ingredients of the prescribed offence whose existence or otherwise falls "peculiarly within the knowledge of the defendant". {This phrase seems to originate with Bayley J. in Turner (1816) 5 M. & S. 206, 211.} An example may be whether or not a necessary licence was held by him {Apothecaries' Company v Bentley (1824) 1 C. & P. 538, 171 E.R. 1307; Scott (1921) 86 J.P. 69; Oliver [1944] K.B. 68; John v Humphreys [1955] 1 W.L.R. 325; Edwards [1975] Q.B. 27.}, though sometimes this knowledge is readily obtainable by the prosecution. {As in Edwards [1975] Q.B. 27, where the Licensing Act 1964 s. 30(1) required the clerk to the licensing justices to keep a register showing all licences granted in the district.} Coupled with this is the frequent difficulty of proving a negative. {See Stone (1801) 1 East 639, 653.}

The social justification of law indicates that the defendant should be required to prove a fact which can be known only by him, unless others can, in the absence of his testimony, draw reliable inferences about it. {As in relation to the defendant's mental state at the time his act was committed.} So the legislature may be required to modify its formula to read if A then B, unless the defendant proves C. Still a relatively simple proposition, containing now what is known as a statutory exception. {In this article the term "exception" is used to include anything within what the Magistrates' Courts Act 1980 s. 101 (which, as explained below, deals with the onus of proving exceptions, etc. in summary trials) lists as "an exception, exemption, proviso, excuse or qualification".}

Unfortunately, as we all know, the legislature, through the inadequacy of its law-making processes, often fails to lay down a clear rule when one is needed and possible. Hence such problems as arise in and from Hunt, which are not new but endemic.

In Hunt the House of Lords was faced with the startling argument by counsel for the defendant/appellant that the burden of proof in the case of statutory exceptions varies according to whether the offence is triable on indictment or summarily. When confronted with the many cases of offences triable either way, he was forced into arguing that in such instances the burden of proof depends on which way the particular case happens to be tried.

The House had to find a way of disposing of so subversive an argument. Strangely it did so, as will appear, without mentioning a crucial factor, namely rule 6(c) of the Indictment Rules 1971. {The note on the decision

at [1987] Crim. L.R. 263 does not mention it either.} This states that it is not necessary for the statement of offence and particulars in an indictment "to specify or negative an exception, exemption, proviso, excuse or qualification". With this must be contrasted the corresponding provision enacted in relation to summary trials by the Magistrates' Courts Act 1980 s. 101:

"Where the defendant to an information or complaint relies on his defence on any exception, exemption, proviso, excuse or qualification, whether or not it accompanies the description of the offence or matter of complaint in the enactment creating the offence or on which the complaint is founded, the burden of proving the exception, exemption, proviso, excuse or qualification shall be on him; and this notwithstanding that the information or complaint contains an allegation negativing the exception, exemption, proviso, excuse or qualification."

Here indeed are different things being said about exceptions according to whether the offence is tried on indictment or summarily. In the former case all the law says by way of what might be called the exceptions rule is that the exception need not be specified or negatived in the indictment. {In exculpation it should be noted that when framing the original of rule 6(c), namely the Indictments Act 1915, Sch. 1, r. 5(2), the Joint Consolidation Committee of both Houses of Parliament had a remit that did not extend to the law of evidence: see Indictments Act 1915 s. 8(1). The formulation accurately reproduced the existing common law rule concerning the form of indictments, as recently laid down in James [1902] 1 K.B. 540.} In the latter case it states the exceptions rule in the form that, whether or not the exception is negatived in the equivalent information or complaint, the burden of proving the exception lies on the defence. So instead of enacting for all cases if A then B, unless the defendant proves C, the legislature mysteriously does this only for summary trials. {The Scots have sensibly enacted the same rule for both, currently embodied in the Criminal Procedure (Scotland) Act 1975 ss. 66 (indictment) and 312(v) (complaint). The wording is an improvement on the Magistrates' Courts Act 1980 s. 101, but the effect is similar.}

One would have expected counsel for the defendant/appellant in Hunt to seize on this strange disparity and make it the basis of his argument. [He might have relied on the principle expressio unius est exclusio alterius: see Bennion, Statutory Interpretation s. 389 Also relevant is the principle that different formulations are taken to betoken a different legislative intention: ibid. pp. 376-377.} It does not appear from the six-page summary of this given in the Law Reports report that he did so. {See [1987] A.C. 352, 355-360. There is a bare mention of the Indictment Rules 1971, rr. 5(1) and 6, at p. 359.} What he did was argue that the exceptions rule applies only to summary trials. {Had he brought rule 6(c) of the Indictment Rules 1971 into his argument he would have been forced to limit this submission to the exceptions rule so far as it applies as a rule of evidence rather than a rule of pleading.} He asserted that in the absence of a statutory provision such as the Magistrates' Courts Act 1980 s. 101 in relation to trials on indictment, Viscount Sankey's golden thread comes into play. {Woolmington V D.P.P. [1935] A.C. 462, 481-482.}

As we all know, the golden thread requires that except in the case of (1) insanity, or (2) any specific modification of the burden of proof made in the enactment laying down an offence, the onus is always on the prosecution to make out its entire case beyond reasonable doubt. Does the exceptions rule furnish what one might call a third "knot" in the golden thread? The House, rejecting counsel's argument, held that it does. Moreover it held that the common law applies precisely the same exceptions rule to indictments as s. 101 does to summary trials.

This clarification by the highest appellate court is welcome, though the fact that it was obiter, arguably contrary to authority, and almost certainly arrived at per incuriam, unfortunately means that it may not succeed in settling the matter. {The contrary authority, suggesting that the common law treated rules of evidence and pleading quite separately and that at common law there is no third exception to the Woolmington rule of evidence, is set out in A. A. S. Zuckerman, "The Third Exception to the Woolmington Rule" (1976) 92 L.Q.R. 402. There is authority the other way, as for example the dictum of Lord Alverstone C.J. in James [1902] 1 K.B. 540, 543 that if compliance with conditions set out in a statutory exception must be proved by the prosecution then "statements alleging compliance with the conditions are an essential part of

the indictment".}

Proceeding (since it is obviously desirable that the exceptions rule should be the same in summary trials and those on indictment) on the basis that the decision in Hunt is authoritative and will be followed, this article examines how the rule should in future be applied in the light of the dicta in that case.

Future application of the exceptions rule

Rolling together the language of rule 6(c) and section 101, one may state the exceptions rule, as now applying in the light of Hunt both to trials on indictment and summary trials, as follows:

It is not necessary for the indictment or information to specify or negative a statutory exception, exemption, proviso, excuse or qualification (an "exception"), but where the defendant relies on any exception, whether or not it accompanies the description of the offence in the enactment creating the offence, the burden of proving the exception shall be on him; and this notwithstanding that the indictment or information contains an allegation negativing the exception.

This poses the following important questions for the draftsmen of indictments and informations, and for those concerned in trial procedure generally.

1. What, for the purpose of applying the exceptions rule, constitutes "an exception, exemption, proviso, excuse or qualification"?

2. What is the significance of the phrase "whether or not it accompanies the description of the offence in the enactment creating the offence"?

3. What is the nature of the burden of proof?

An attempt will now be made to frame answers to these questions, dealing with them in reverse order.

Nature of burden of proof It is clear that under the exceptions rule the burden of proof on the defendant is a "persuasive" burden, not an "evidential" burden, and that the civil standard of proof, namely that on the balance of probabilities, applies. {See Criminal Law Revision Committee Eleventh Report (1972) Cmnd. 4991, para. 139. The difference between the "persuasive" and "evidential" burdens was explained in Gill (1963) 47 Cr. App. R. 166, 171-172. As to whether the standard under the exceptions rule should be changed to impose merely the "evidential" burden see below in this article.}

Accompanying the description of the offence For the significance of the phrase "whether or not it accompanies the description of the offence in the enactment creating the offence" we must turn to the early history of the exceptions rule. The petitionary nature of parliamentary legislation meant that a typical enactment consisted of a clause propounded by a person who petitioned for its enactment, followed by saving clauses included at the instance of those who feared injury from the passing of the principal clause and had persuaded Parliament to cut down its effect. {This is still a common pattern in private Bill legislation.} Hence the seventeenth-century dictum of Tresby C.J. in Jones v Axen {(1696) 1 Lord Raym. 119; 91 E.R. 976.}:

"... where an exception is incorporated in the body of the clause, he who pleads the clause, ought also to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards a proviso which is against him, he shall plead the clause, and leave to the adversary to show the proviso."

Following this, Lord Mansfield said in a familiar dictum:

"... it is a known distinction that what comes by way of a proviso in a statute must be insisted on by way of a

defence by the party accused; but where the exceptions are in the enacting part of the law, it must appear in the charge that the defendant does not fall within any of them."

{Jarvis (1756) 1 East 643n, 646n. ER?}

The purpose of the phrase under discussion was to remove this distinction, which became obsolete with the change in public Bill legislation to the modern pattern whereby it is promoted almost exclusively by the Government of the day.

The nature of an exception, exemption etc For the essential nature of an exception (using it here in the narrower sense) we may turn to the law of conveyancing, where it is defined as a clause in a deed whereby the grantor excepts something out of that which he had previously granted earlier in the deed. {Jowitt, The Dictionary of English Law (1st edn 1959) tit. Exception.} In the definition of a criminal offence it is a statement reducing the extent of the factual outline previously set out as denoting the ambit of the offence.

Equally an exemption is a statement excluding specified persons or cases from the class of those who would otherwise fall within the factual outline. A proviso is a formula beginning "Provided that ..." which is placed at the end of a statutory provision and the intention of which is to narrow the effect of the preceding words. {See Bennion, Statutory Interpretation s. 268.} An excuse is a statement of exculpatory circumstances, as in the phrase "without lawful excuse". Finally a qualification is a statement qualifying, so as to cut down, the width of what has gone before.

All these share the quality of narrowing the scope of a statement setting out the ingredients of the offence or factual outline. They suggest a temporal or spatial factor, implying that they follow the (wider) statement. No doubt they often do follow it, but not necessarily so. For example section 137(1) of the Highways Act 1980 says:

"If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to a fine not exceeding #50."

The italicised phrase is clearly an excuse within the exceptions rule. {Though this was not apparent to those concerned in the case of Hirst and Agu v The Chief Constable of West Yorkshire [1987] Crim. L.R. 330, as Professor Smith's note points out.} It is not however placed at the end, though the wording could easily be rearranged to achieve this. The arrangement of the provision, though it may be a helpful guide in deciding whether the exceptions rule applies, is not conclusive.

Although, as stated above, a main justification for the exceptions rule is that possession of a necessary licence or other permission may often be peculiarly within the knowledge of the defendant, and should then be proved by him, this is not one of the terms specified in the exceptions rule, namely "an exception, exemption, proviso, excuse or qualification". Does the exceptions rule apply to a provision such as the Highways Act 1980 s. 13(1)? This reads:

"A builder's skip shall not be placed on a highway without the permission of the highway authority for the highway."

Although the reference to permission is indeed placed at the end here, on linguistic grounds it may be said to be part of the definition of the offence rather than an exception. That is not now conclusive, but tends in favour of the onus being thrown on the prosecution. What is clear is that possession of a licence or permission may fall to be treated as an "excuse", or even as an "exception" (in the narrow sense), if the wording and imputed policy justify this. {In Edwards [1975] Q.B. 27, 39-40, which was upheld in Hunt, the Court of Appeal included within its list of cases falling within the exceptions rule offences arising under enactments which prohibit the doing of an act save "with the licence or permission of specified authorities".} The mere use of a word such as "except" is not conclusive. {Taylor v Humphries (1864) 17 C.B.N.S. 539,

144 E.R. 216 (formulation beginning "except" in enactment relating to sale of beer held not to be within exceptions rule). See on this decision Davis v Scrace (1869) L.R. 4 C.P. 172, 176-177.}

The notion of exceptions is central to the idea of a rule. What parent has not said to his child: "you must be in bed by nine, except on special occasions"? Lord Wilberforce referred to "... the orthodox principle (common to both the criminal and the civil law) that exceptions, etc., are to be set up by those who rely on them". {Nimmo v Alexander Cowan & Sons Ltd [1968] A.C. 107, 130. As to civil pleading cf. R.S.C. Ord. 18 r. 8.}

Whether or not a proposition is within the exceptions rule is not to be gathered by purely grammatical tests, for any proposition may be expressed by different verbal formulae. Nevertheless linguistic attributes carry weight. The way in which one with a message sets out that message must always form a guide to his meaning. Thus Lord Griffiths says in Hunt that a formulation is more likely to be within the exceptions rule where it appears in "some subsequent proviso" rather than in "a clause creating the offence". {[1987] A.C. 352, 374.}

The central idea is that certain conduct is proscribed, with specified exceptions. Connected to this is the idea that a person concerned to establish a breach of the rule should in the first instance not be required to prove a negative (i.e. to negative an exception) but be required only to prove that, exceptions apart, the defendant's conduct prima facie contravened the rule. This done, it is then for the defendant to prove, if he can, that he lies within one of the exceptions.

Underlying this is the unspoken idea that if an exception truly exists in a particular case it is likely to be easier for the defendant to prove it exists than it is for his opponent to prove that it does not. This depends on the further idea that exceptions are based on facts lying exclusively or primarily within the knowledge of defendants. Whatever the language used in the formulation, the test of whether or not an ingredient is an exception should therefore be grounded on this factor.

In a crucial obiter dictum in Hunt Lord Griffiths said {[1987] 1 All E.R. 1, 10-11.}:

"The real difficulty in these cases lies in determining upon whom Parliament intended to place the burden of proof when the statute has not expressly so provided ... if the linguistic construction of the statute did not clearly indicate upon whom the burden should lie the court should look to other considerations to determine the intention of Parliament such as ... practical considerations affecting the burden of proof and, in particular, the ease or difficulty that the respective parties would encounter in discharging the burden. I regard this last consideration as one of great importance for surely Parliament can never lightly be taken to have intended to impose an onerous duty on a defendant to prove his innocence in a criminal case, and a court should be very slow to draw any such inference from the language of a statute."

Detail of the exceptions rule

By way of summary, the following is offered as a detailed formulation of the exceptions rule.

1. For the purpose of this rule, an "exception" is a statutory exception, exemption, proviso, excuse or qualification, whether or not accompanying the description of the offence in the enactment creating the offence. Here "excuse" includes the case where a necessary licence, permission or authority has been obtained.

2. It is not necessary for the indictment or information to specify or negative an exception.

3. Where the defendant relies on an exception, the burden of proving that it applies is on him.

4. This burden of proof is a "persuasive" burden, not an "evidential" burden, and the civil standard of proof, namely that on the balance of probabilities, applies.

5. In determining whether or not a provision is an exception paragraphs 6 to 8 below apply.

6. A provision which linguistically forms part of the formulation of the offence is less likely to be an exception than one which stands apart from that formulation.

7. A provision which is prefaced or accompanied by such terms as except or provided that is likely to be an exception.

8. In case of doubt regard must be had to the comparative ease or difficulty that the respective parties would encounter in discharging the burden of proving the fact in question. It is against the public interest either that the prosecution should be required to prove a fact peculiarly within the knowledge of the defendant or that the defendant should be placed under an onerous duty to prove his innocence.

9. It may also be relevant to consider the mischief at which the enactment creating the offence is directed. The more grave the offence the more important it is that the prosecution should be required to prove its case to the full. {In Hunt Lord Griffiths said (p. 378): "as this question of construction (sc. as to the onus of proof) is obviously one of real difficulty I have regard to the fact that offences involving the misuse of hard drugs are among the most serious in the criminal calendar ... it seems to me right to resolve any ambiguity in favour of the defendant and to place the burden of proving the nature of the substance involved in so serious a case upon the prosecution". Sed qu. Might it not be said that the more grave the offence the more the public interest requires the accused not to be given the benefit of the doubt, so as to ensure that society is protected?}

A third knot?

Can it then be said that the decision in Hunt does add a third exception or "knot" to the golden thread rule? This is really an empty question, for the case in which the rule was laid down, Woolmington v. D.P.P., {[1935] A.C. 462.} was one of murder, where the House of Lords were not concerned with statutory exceptions and could not be taken to have laid down any binding rule concerning them. {The same applies to later House of Lords cases supporting the decision, such as Mancini v. D.P.P. [1942] A.C. 1.}

What Hunt does establish is that in truth there are three exceptions to the golden thread rule. The first is one that applies by the nature of our legislative process to every legal rule, namely that Parliament can if it wishes manifest an intention (whether express or implied) that in relation to a particular offence the rule shall not apply, or shall not apply to its fullest extent, or shall be modified in some way.

The other two exceptions to the golden thread rule arise, at least to some extent, at common law. It is the common law as laid down in M'Naghten's Case {(1843) 10 Cl. & Fin. 200.} that places the burden of proving insanity upon the accused. It is the common law, as now laid down in Hunt, that applies the exceptions rule to trials on indictment in the same way as Parliament (within the first of the three exceptions to the golden thread rule), in section 101 of the Magistrates' Courts Act 1980 and previous corresponding enactments, applied it to summary trials.

Statutory Exceptions: A Third Knot in the Golden Thread?

[Notes separate]

by Francis Bennion

Many concerned with the social purpose of our laws believe them to be more complicated than necessary, as illustrated by the issues underlying the House of Lords decision in Hunt.[1] The legislature wishes to pronounce certain acts to be criminal, and decides to enact a law to that effect. The enactment must carefully describe the factual outline and the legal thrust. If anyone commits an act falling within the prescribed factual outline he will normally incur the legal thrust of the enactment, in other words will be guilty of the offence in question and liable to the prescribed punishment.[2] What could be simpler? So the legislature lays down the proposition if A then B.

But things may not after all be quite that simple. Perhaps there are some factual ingredients whose existence or otherwise falls "peculiarly within the knowledge of the defendant".[3] An example may be whether or not a necessary licence was held by him[4] though sometimes this knowledge is readily obtainable by the prosecution.[5] Where it is not, difficulty may arise from the notorious hazards of proving a negative.[6]

So the framers of a new criminal offence may consider it necessary to lay down an exception to liability, provided the defendant proves the necessary facts exist. The notion of exceptions is central to the idea of a rule. What parent has not said to his child: "you must be in bed by nine, except on special occasions"? Lord Wilberforce referred to "... the orthodox principle (common to both the criminal and the civil law) that exceptions, etc., are to be set up by those who rely on them".[7] This was described by Lord Diplock as a "general rule of statutory construction".[8]

The social justification of law indicates that the defendant should be required to prove a fact which can be known only by him, unless others can, in the absence of his testimony, draw reliable inferences about it.[9] So the legislature may decide to modify its formula to read if A then B, except where the defendant proves C. Still a relatively simple proposition, containing now a statutory exception to which what we may call the exceptions rule applies.[10]

Unfortunately, as we all know, the legislature, through the inadequacy of its law-making processes, often fails to lay down a clear provision when one is needed and possible. Hence such problems as arise in and from Hunt, which are not new but endemic. [11]

In Hunt the defendant was convicted under the Misuse of Drugs Act 1971 s. 5(2) with unlawful possession of a "controlled drug", namely morphine. Section 5(1) of the Act says that subject to any regulations under s. 7 it shall not be lawful for a person to have a "controlled drug" in his possession. Section 2 says that "controlled drug" means any substance or product specified in Schedule 2 (which includes morphine). Section 7 authorises the making of regulations excepting specified "controlled drugs" from s. 5(1), and such regulations had excepted certain preparations containing not more than 0.2 per cent of morphine. Section 5(2) says that subject to ss. 5(4) and 28 it is an offence for a person to have a controlled drug in his possession in contravention of s. 5(1). Section 5(4) says that it shall be a defence for the accused to prove certain matters, such as an intent to destroy the drug. Section 28 says it shall be a defence for the accused to prove that he neither believed nor suspected that the substance was a controlled drug.

The prosecution proved that the defendant was in possession of powder containing morphine. Their evidence did not however establish whether or not this powder was of a type covered by the exception for preparations containing not more than 0.2 per cent of morphine. After the trial judge ruled against a submission of no case to answer, the defendant changed his plea to guilty. The Court of Appeal rejected his appeal against conviction on the ground that under the exceptions rule the onus was on him to prove that the powder was within the 0.2 per cent exception and he had not done so. The House of Lords allowed the appeal on the ground that the exceptions rule did not apply. The 0.2 per cent exception was not an exception to what would otherwise be unlawful, and so within the exceptions rule. Rather it was part of the definition of the essential ingredients of the offence. As these had not been proved by the prosecution, it had not been shown that the defendant had committed the offence.

In Hunt the House of Lords was faced with the startling (though on the view taken by the House in deciding the appeal irrelevant) argument by counsel for the appellant that the burden of proof in relation to a statutory exception varies according to whether the offence is triable on indictment or summarily. When confronted with the many cases of offences triable either way, he was forced into arguing that in such instances the burden of proof depends on which way the particular case happens to be tried.

The House felt it had to find a way of disposing of so subversive an argument, even though its opinions on the point were necessarily obiter. Strangely it did so, as will appear, without mentioning a crucial factor, namely rule 6(c) of the Indictment Rules 1971.[12] This states that it is not necessary for the statement of offence and particulars in an indictment "to specify or negative an exception, exemption, proviso, excuse or qualification". With this must be contrasted the corresponding provision enacted in relation to summary trials by the Magistrates' Courts Act 1980 s. 101:

"Where the defendant to an information or complaint relies on his defence on any exception, exemption, proviso, excuse or qualification, whether or not it accompanies the description of the offence or matter of complaint in the enactment creating the offence or on which the complaint is founded, the burden of proving the exception, exemption, proviso, excuse or qualification shall be on him; and this notwithstanding that the information or complaint contains an allegation negativing the exception, exemption, proviso, excuse or qualification."

Here indeed are different things being said about exceptions according to whether the offence is tried on indictment or summarily. In the former case all the law says by way of the exceptions rule is that the exception need not be specified or negatived in the indictment.[13] In the latter case it states the exceptions rule in the form that, whether or not the exception is negatived in the equivalent information or complaint, the burden of proving the exception lies on the defence. So instead of enacting for all cases if A then B, except where the defendant proves C, the legislature mysteriously does this only for summary trials.[14]

One would have expected counsel for the appellant in Hunt to seize on the strange disparity between rule 6(c) and s. 101 and make it the basis of his argument.[15] It does not appear from the six-page summary of this given in the Law Reports report that he did so.[16] What he did was argue that the exceptions rule applies only to summary trials.[17] He asserted that in the absence of a statutory provision such as the Magistrates' Courts Act 1980 s. 101 in relation to trials on indictment, Viscount Sankey's golden thread rule comes into play.[18]

As we all know, the golden thread rule requires that except in the case of (1) insanity, or (2) any specific modification of the burden of proof made in the enactment laying down a particular offence, the onus is always on the prosecution to make out its entire case beyond reasonable doubt. Does the exceptions rule furnish what one might call a third "knot" in the golden thread? The House, rejecting counsel for the appellant's argument, held that it does. Moreover it held in effect that the common law and rule 6(c) combined apply precisely the same exceptions rule to indictments as s. 101 does to summary trials.[19]

This clarification by the highest appellate court is welcome, though the fact that it was obiter, arguably contrary to authority, and possibly arrived at per incuriam, unfortunately means that it may not succeed in settling the matter.[20]

Proceeding (since it is obviously desirable that the exceptions rule should be the same in summary trials and those on indictment) on the basis that the decision in Hunt is authoritative and will be followed, this article goes on to examine how the rule should in future be applied in the light of the dicta in that case. It is first necessary however to consider an important qualification which, though not mentioned in Hunt, must it seems be made to the rule.

Offences requiring mens rea

It seems that the exceptions rule must be taken to apply only to offences of strict liability.[20A] Where the ingredients of the offence require mens rea, the onus must always remain on the prosecution to prove the existence of this. If in such a case an exception determines whether mens rea exists (for example where it involves knowledge that a necessary licence was not held) the prosecution must affirmatively establish this.

This is illustrated by the House of Lords decision in Westminster City Council v Croyalgrange Ltd. (1986) 83 Cr. App. R. 155. An information was laid against the defendant company charging the offence of knowingly permitting the use of premises as a sex establishment without the grant of a licence, contrary to the Local Government (Miscellaneous Provisions) Act 1982 Sch. 3 para. 20(1)(a). This provides that a person who knowingly causes or permits the use of premises contrary to paragraph 6 of Schedule 3 to the Act commits an offence. Paragraph 6 says that no person shall use any premises as a sex establishment except under and in accordance with a licence.

The defendant company had let the premises to a person who then used them as a sex establishment without a licence. For this reason the tenant was convicted under paragraph 6. The magistrate dismissed the charge against the landlord company on the ground that the prosecution had not proved that its directors knew that no licence had been obtained by the tenant. On an appeal by case stated to the Divisional Court this decision was upheld, and the House of Lords agreed. The argument that because of the exceptions rule the onus lay on the company to prove that its directors knew no licence had been obtained was rejected. Lord Bridge said (p. 162):

"If the argument for the council were accepted, it would lead to the conclusion that paragraph 20(1)(a) had in effect created an offence of strict liability. The offence would consist in the unlawful use of premises as a sex establishment and even an honest belief in facts which, if true, would make the use lawful would afford no defence. It is trite law that the legislature's intention to create an offence of strict liability must be signified by clear language."

Future application of the exceptions rule

Rolling together the language of rule 6(c) and section 101, one may state the exceptions rule, as now applying in the light of Hunt both to trials on indictment and summary trials, as follows:

In the case of an offence of strict liability, it is not necessary for the indictment or information to specify or negative a statutory exception, exemption, proviso, excuse or qualification (an "exception"), but where the defendant relies on any exception, whether or not it accompanies the description of the offence in the enactment creating the offence, the burden of proving the exception is on him; and this notwithstanding that the indictment or information contains an allegation negativing the exception.

This poses the following important questions for the draftsmen of indictments and informations, and for those concerned in trial procedure generally.

1. What, for the purpose of applying the exceptions rule, constitutes "an exception, exemption, proviso, excuse or qualification"?

2. What is the significance of the phrase "whether or not it accompanies the description of the offence in the enactment creating the offence"?

3. What is the nature of the burden of proof?

An attempt will now be made to frame answers to these questions, dealing with them in reverse order.

Nature of burden of proof It is clear that under the exceptions rule the burden of proof on the defendant is a

"persuasive" burden, not an "evidential" burden, and that the civil standard of proof, namely that on the balance of probabilities, applies.[21]

Accompanying the description of the offence For the significance of the phrase "whether or not it accompanies the description of the offence in the enactment creating the offence" we must turn to the early history of the exceptions rule. The petitionary nature of parliamentary legislation meant that a typical enactment consisted of a clause propounded by a person who petitioned for its enactment, followed by saving clauses included at the instance of those who feared injury from the passing of the principal clause and had persuaded Parliament to cut down its effect.[22] Hence the seventeenth- century dictum of Tresby C.J. in Jones v Axen[23]:

"... where an exception is incorporated in the body of the clause, he who pleads the clause, ought also to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards a proviso which is against him, he shall plead the clause, and leave to the adversary to show the proviso."

Following this, Lord Mansfield said in a familiar dictum:

"... it is a known distinction that what comes by way of a proviso in a statute must be insisted on by way of a defence by the party accused; but where the exceptions are in the enacting part of the law, it must appear in the charge that the defendant does not fall within any of them." [24]

The purpose of the phrase under discussion was to remove this distinction, which became obsolete with the change in public Bill legislation to the modern pattern whereby the entirety of a parliamentary Bill which is enacted (as opposed to one which is a mere political demonstration) is presented and promoted almost invariably by the Government of the day.

The nature of an exception, exemption etc For the essential nature of an exception (using it here in the narrower sense) we may turn to the law of conveyancing, where it is defined as a clause in a deed whereby the grantor excepts something out of that which he had granted earlier in the deed.[25] In the definition of a criminal offence it is a statement reducing the extent of the factual outline set out (usually in an earlier passage) as denoting the ambit of the offence. It must be distinguished from a provision, such as arose in Hunt, which is properly construed as an ingredient of the factual outline rather than an exception to it.

Equally an exemption is a statement excluding specified persons or cases from the class of those who would otherwise fall within the factual outline. A proviso is a formula beginning "Provided that ..." which is placed at the end of a statutory provision and the intention of which is to narrow the effect of the preceding words.[26] An excuse is a statement of exculpatory circumstances, as referred to in the phrase "without lawful excuse". Finally a qualification is a statement qualifying, so as to cut down, the width of what has gone before.

All these share the quality of narrowing the scope of a statement setting out the ingredients of the offence or factual outline. They suggest a temporal or spatial factor, implying that they follow the (wider) statement. No doubt they often do follow it, but not necessarily so. For example section 137(1) of the Highways Act 1980 says:

"If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to a fine not exceeding #50."

The italicised phrase clearly refers to an excuse within the exceptions rule.[27] It is not however placed at the end, though the wording could easily be rearranged to achieve this. The arrangement of the provision, though it may be a helpful guide in deciding whether the exceptions rule applies, is not conclusive.

Although, as stated above, a main justification for the exceptions rule is that possession of a necessary licence or other permission may often be peculiarly within the knowledge of the defendant, and should then have to

be proved by him, this is not one of the terms specified in the rule, namely "an exception, exemption, proviso, excuse or qualification". Does the exceptions rule apply to a provision such as the Highways Act 1980 s. 13(1)? This reads:

"A builder's skip shall not be placed on a highway without the permission of the highway authority for the highway."

Although the reference to permission is indeed placed at the end here, on linguistic grounds it may be said to be part of the definition of the offence rather than an exception. That is not now conclusive, but may tend in favour of the onus being thrown on the prosecution.

It seems that the better view however is that possession of a licence or permission should always be treated as an "excuse", or even as an "exception" (in the narrow sense), provided the wording and imputed policy do not negative this.[28]

The use of one of the terms specified in the exceptions rule, such as "except", though persuasive is not conclusive.[29] Whether or not a proposition is within the exceptions rule is not to be gathered entirely by verbal or grammatical tests, for any proposition may be expressed by differing verbal formulae.

Nevertheless linguistic attributes carry weight. The way in which one with a message sets out that message must always form a guide to his meaning. Thus Lord Griffiths says in Hunt that a formulation is more likely to be within the exceptions rule where it appears in "some subsequent proviso" rather than in "a clause creating the offence".[30]

The central idea is that certain conduct is proscribed, with specified exceptions. Connected to this is the idea that a person concerned to establish a breach of the rule should in the first instance not be required to prove a negative (i.e. to negative an exception) but be required only to prove that, exceptions apart, the defendant's conduct prima facie contravened the rule. This done, it is then for the defendant positively to prove, if he can, that he lies within one of the exceptions.

Underlying this is the unspoken idea that if an exception truly exists in a particular case it is likely to be easier for the defendant to prove it exists than it is for his opponent to prove that it does not. This depends on the further idea that exceptions are usually based on facts lying exclusively or primarily within the knowledge of defendants. Whatever the language used in the formulation, the test of whether or not an ingredient is an exception should therefore be grounded on this factor.

In a crucial obiter dictum in Hunt Lord Griffiths said[31]:

"The real difficulty in these cases lies in determining upon whom Parliament intended to place the burden of proof when the statute has not expressly so provided ... if the linguistic construction of the statute did not clearly indicate upon whom the burden should lie the court should look to other considerations to determine the intention of Parliament such as ... practical considerations affecting the burden of proof and, in particular, the ease or difficulty that the respective parties would encounter in discharging the burden. I regard this last consideration as one of great importance for surely Parliament can never lightly be taken to have intended to impose an onerous duty on a defendant to prove his innocence in a criminal case, and a court should be very slow to draw any such inference from the language of a statute."

Detail of the exceptions rule

By way of summary, the following is offered as a detailed formulation of the exceptions rule as it now applies.

1. In the case of an offence of strict liability it is not necessary for the indictment or information to specify or negative an exception (as defined in paragraphs 4 to 8 below).

2. Where the defendant relies on such an exception, the burden of proving that it applies is on him.

3. This burden of proof is a "persuasive" burden, not an "evidential" burden, and the civil standard of proof, namely that on the balance of probabilities, applies.

4. For the purpose of the exceptions rule, an "exception" is a statutory exception, exemption, proviso, excuse or qualification, whether or not accompanying the description of the offence in the enactment creating the offence. Here "excuse" includes the case where a necessary licence, permission or authority has been obtained.[32]

5. A provision which linguistically forms part of the formulation of the offence is less likely to be an exception than one which stands apart from that formulation.

6. A provision which is prefaced or terminated by such terms of separation as except or provided that is likely to be an exception.

7. In case of doubt whether a provision is or is not an exception regard must be had to the comparative ease or difficulty that the respective parties would encounter in discharging the burden of proving the fact in question. It is against the public interest either that the prosecution should be required to prove or disprove a fact peculiarly within the knowledge of the defendant or that the defendant should be placed under an onerous duty to prove his innocence.

8. It may also be relevant to consider the mischief at which the enactment creating the offence is directed. The more grave the offence the more important it is that the prosecution should be required to prove its entire case beyond reasonable doubt.[33]

In addition the basic rule of statutory interpretation must always be borne in mind, namely that it is taken to be the legislator's intention that an enactment shall be construed in accordance with the general guides to legislative intention laid down by law; and what where these conflict the problem shall be resolved by weighing and balancing the factors concerned.[34]

The third knot

Can it then be said that the decision in Hunt does add a third exception or "knot" to the golden thread? This is really an empty question, for the case in which the rule was laid down, Woolmington v. D.P.P.[32], was one of murder at common law, where the House of Lords were not concerned with statutory exceptions and could not be taken to have laid down any binding rule concerning them.[36]

What Hunt does establish is that there are three exceptions to the golden thread rule. The first is one that applies by the very nature of our legislative process to every legal rule, namely that Parliament can if it wishes manifest directly an intention (whether express or implied) that in relation to a particular offence the golden thread rule shall not apply, or shall not apply to its fullest extent, or shall be otherwise modified in a specified way.

The other two exceptions to the golden thread rule arise, at least to some extent, at common law. It is the common law as laid down in M'Naghten's Case[37] that places the burden of proving insanity upon the accused. It is the common law, as now laid down in Hunt, that applies the exceptions rule (as a rule of evidence) to trials on indictment in the same way as Parliament, in section 101 of the Magistrates' Courts Act 1980 and previous corresponding enactments, thought fit to apply it to summary trials.[38]

To the extent that the exceptions rule is couched in express statutory provisions (i.e. rule 6(c) and s. 101) it may be objected that it is no more than an application of the first exception to the golden thread rule. The first exception is however best limited to cases where specific provision is made in, or in relation to, the enactment creating the particular offence in question. Because the exceptions rule is general in its application, and because it depends partly on common law, it seems appropriate to acknowledge it as truly a third knot in Viscount Sankey's famous golden tread. That should help to ensure it is not overlooked by those, such as criminal pleaders, trial judges, and parliamentary draftsmen, whose business it is to bear it constantly in mind.[39]

F O O T N O T E S

[1] [1987] A.C. 352; [1987] Crim. L.R. 263.

[2] For a detailed explanation of the factual outline and the legal thrust see Bennion, Statutory Interpretation ss. 78, 79 and 360. In his Pragmatism and Theory in English Law (1986 Hamlyn Lectures) Professor Atiyah says it is rarely, 'perhaps never', possible to proceed in this simplified way because statutory rules always have to be read in the light of 'general principles and objectives' (p. 49). It is true that they do have to be so read (for an elaborate discussion of this principle see Bennion, Statutory Interpretation ss. 144 and 145 and Parts XVIII (particularly s 340) and XIX). That does not however preclude 'simplified' treatment in terms of factual outline and legal thrust. What it means it that the result of applying this treatment must be treated as modified by any relevant general principle (for example that guilt requires sanity on the part of the accused: Tolson (1889) 23 Q.B.D. 168, 187).

[3] This phrase seems to originate with Bayley J. in Turner (1816) 5 M. & S. 206, 211.

[4] Apothecaries' Company v Bentley (1824) 1 C. & P. 538, 171 E.R. 1307; Scott (1921) 86 J.P. 69; Oliver [1944] K.B. 68; John v Humphreys [1955] 1 W.L.R. 325; Edwards [1975] Q.B. 27.

[5] As in Edwards [1975] Q.B. 27, where the Licensing Act 1964 s. 30(1) required the clerk to the licensing justices to keep a register showing all licences granted in the district.

[6] See Stone (1801) 1 East 639, 653; 102 E.R. 247, 253.

[7] Nimmo v Alexander Cowan & Sons Ltd [1968] A.C. 107, 130. As to the application of the principle in civil cases see James [1902] 1 K.B. 540, 545, Secretary of State for Defence v Guardian Newspapers Ltd. [1985] A.C. 339, 350, and Watts v Yeend [1987] 1 All E.R. 744, 750; and cf. R.S.C. Ord. 18 r. 8.

[8] Secretary of State for Defence v Guardian Newspapers Ltd. [1985] A.C. 339, 350.

[9] As in relation to the defendant's mental state at the time his act was committed: see Edwards [1975] Q.B. 27, 35.

[10] In this article the term "exception" is used to include anything within what the Magistrates' Courts Act 1980 s. 101 (which, as explained below, deals with the onus of proving exceptions, etc. in summary trials) lists as "an exception, exemption, proviso, excuse or qualification".

[11] Parliamentary draftsmen have consistently failed to take account of the exceptions rule and make clear in their drafting whether or not a qualifying provision is intended to be within it. This notorious failing casts doubt on the practicality of the proposal made in the 1985 Codification Report to the Law Commission that the exceptions rule should be abolished for future Acts, and that the draftsman should instead insert an express provision whenever it is intended to place the burden of proving an exception on the defence (see

LAW COM. No. 143, pp. 52-53).

[12] The note on the decision at [1987] Crim. L.R. 263 does not mention it either.

[13] In exculpation it should be noted that when framing the original of rule 6(c), namely the Indictments Act 1915, Sch. 1, r. 5(2), the Joint Consolidation Committee of both Houses of Parliament had a remit that did not extend to the law of evidence: see Indictments Act 1915 s. 8(1). The formulation accurately reproduced the existing common law rule concerning the form of indictments, as recently laid down in James [1902] 1 K.B. 540.

[14] The Scots have sensibly enacted the same rule for both, currently embodied in the Criminal Procedure (Scotland) Act 1975 ss. 66 (indictment) and 312(v) (complaint). The wording is an improvement on the Magistrates' Courts Act 1980 s. 101, but the effect is similar.

[15] He might have relied on the principle expressio unius est exclusio alterius: see Bennion, Statutory Interpretation s. 389. Also relevant is the principle that different formulations are taken to betoken a different legislative intention: ibid. pp. 376-377.

[16] See [1987] A.C. 352, 355-360. There is a bare mention of the Indictment Rules 1971, rr. 5(1) and 6, at p. 359.

[17] Had he brought rule 6(c) of the Indictment Rules 1971 into his argument he would have been forced to limit this submission to the exceptions rule so far as it applies as a rule of evidence rather than a rule of pleading.

[18] Woolmington V D.P.P. [1935] A.C. 462, 481-482.

[19] Thus confirming Edwards [1975] Q.B. 27: see Hunt [1987] A.C. 352, per Lord Griffiths at p. 370.

[20] The contrary authority, suggesting that the common law treated rules of evidence and pleading quite separately and that at common law there is no third exception to the Woolmington rule of evidence, is set out in A. A. S. Zuckerman, "The Third Exception to the Woolmington Rule" (1976) 92 L.Q.R. 402 (see also note 35 below). There is authority the other way, as for example the dictum of Lord Alverstone C.J. in James [1902] 1 K.B. 540, 543 that if compliance with conditions set out in a statutory exception must be proved by the prosecution then "statements alleging compliance with the conditions are an essential part of the indictment". In the bigamy case of Audley [1907] 1 K.B. 382, 387 Bigham J. said: "The gist of the offence of bigamy is the second marriage during the first wife's lifetime, and when that fact has been established by the prosecution the case is complete. The fact that the accused is not a British subject and the other matters specified in the proviso to s. 57 [of the Offences against the Person Act 1861] are all matters of confession and avoidance, and they must be alleged and proved by the defence" (emphasis added).

[20A] In this article I mean by references to strict liability what Professor L. H. Leigh describes as an offence where "the prosecution need not prove mens rea as to some or all of the elements of the actus reus as part of its case in chief; in other words it can secure a conviction without proving that the accused acted intentionally, recklessly or even negligently in respect of some or all elements of the actus reus" (Strict and Vicarious Liability (1982) p. 1). The fact that there is a defence such as mistake or duress does not prevent an offence being one of strict liability in this sense. (I am grateful to Dr. A. J. Ashworth for helpful suggestions on this and other points.)

[21] Gatland v. Metropolitan Police Commissioner [1968] 2 Q.B. 279, 286; Criminal Law Revision Committee Eleventh Report (1972) Cmnd. 4991, para. 139. The difference between the "persuasive" and "evidential" burdens is explained in Gill (1963) 47 Cr. App. R. 166, 171-172.

[22] This is still a common pattern in private Bill legislation.

[23] (1696) 1 Lord Raym. 119; 91 E.R. 976.

[24] Jarvis (1756) 1 East 643n, 646n.

[25] Jowitt, The Dictionary of English Law (1st edn 1959) tit. Exception.

[26] See Bennion, Statutory Interpretation s. 268.

[27] Though this was not apparent to those concerned in the case of Hirst and Agu v The Chief Constable of West Yorkshire [1987] Crim. L.R. 330, as Professor Smith's note points out.

[28] In Edwards [1975] Q.B. 27, 39-40, which was upheld in Hunt, the Court of Appeal included within its list of cases falling within the exceptions rule offences arising under enactments which prohibit the doing of an act save "with the licence or permission of specified authorities".

[29] Taylor v Humphries (1864) 17 C.B.N.S. 539, 144 E.R. 216 (formulation beginning "except" in enactment relating to sale of beer held not to be within exceptions rule). See on this decision Davis v Scrace (1869) L.R. 4 C.P. 172, 176-177.

[30] [1987] A.C. 352, 374.

[31] [1987] A.C. 352, 374.

[32] This involves the perhaps surprising conclusion that the indictment or information in a case where the defendant is alleged to have driven a motor vehicle without a licence need not charge the absence of a licence, though it would need to allege that the driving was in contravention of the relevant Act. It is clear that the prosecution do not need to prove the absence of a licence: John v Humphrey [1955] 1 W.L.R. 325. In Oliver [1944] 1 K.B. 68, where the defendant was accused of supplying sugar without the necessary licence, Caldecote C.J. said (p. 73): "There seems ... no reason why an indictment should not have been framed without the averment that the supply was otherwise than under and in accordance with the terms of a licence granted by the Ministry of Food".

[33] In Hunt Lord Griffiths said (p. 378): "as this question of construction (sc. as to the onus of proof) is obviously one of real difficulty I have regard to the fact that offences involving the misuse of hard drugs are among the most serious in the criminal calendar ... it seems to me right to resolve any ambiguity in favour of the defendant and to place the burden of proving the nature of the substance involved in so serious a case upon the prosecution". Sed qu.: might it not be said that the more grave the offence the more the public interest requires the accused not to be given the benefit of a doubt as to whether the exceptions rule applies, so as to ensure that society is protected?

[34] See Bennion, Statutory Interpretation s. 117.

[35] [1935] A.C. 462.

[36] The same applies to later House of Lords cases supporting the decision, such as Mancini v. D.P.P. [1942] A.C. 1.

[37] (1843) 10 Cl. & Fin. 200.

[38] The conclusions reached in this article as to the effect of Hunt differ from those expressed by Zuckerman in his note on the point in the All E.R. Annual Review 1986, p. 148. In arguing that the exceptions rule does not constitute a third exception to Woolmington Mr Zuckerman overlooks the fact that the rule, so far as it is a

rule of pleading, is laid down by or under statute and must be complied with. So far as it is a rule of evidence it is also laid down by statute in relation to summary trials. What are admittedly obiter dicta in Hunt are surely to the effect that at common law the exceptions rule as a rule of evidence is now to be taken to apply in the same way to trials on indictment. Otherwise there would be different rules applying to summary trials and trials on indictment, which Lord Griffiths in Hunt dismissed as "absurd" ([1987] A.C. 352, 373).

[39] For recent examples of cases where judges have apparently failed to take account of the exceptions rule see Cotgrove v Cooney [1987] Crim. L.R. 272 and commentary thereon.