Bringing some Sanity to the Insanity Defence:

Reforming the Reverse Persuasive Burden of Proof

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Introduction

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt...”

Viscount Sankey LC in *Woolmington v Director of Public Prosecutions* [1935] AC 462

The defence of insanity (also called the defence of mental disorder) has long been an explicit exception to Viscount Sankey's “golden thread”. “As regards insanity, every accused is presumed by law to be sane and accountable for his actions unless the contrary is proved” [2]. In itself, a reverse burden of proof – with the onus on the defendant, rather than the prosecution – can be uncontroversial. A man discovered in his car with alcohol on his breath must convince the court that he had no intention of driving [3]. A defendant found to have infringed a registered trademark must show that he acted in ignorance, rather than defiance, of the relevant law and facts [4]. Once factual guilt, or *actus reus*, is confirmed, it seems perfectly reasonable to ask a defendant why they did what they did, and to expect a convincing answer. But how convincing does the answer have to be?

In England and Wales, “the onus is on the defence to establish insanity on the balance of probabilities” [2]. In the material that follows, I will argue that this *reverse persuasive* burden of proof is impractical, ineffective, and inconsistent with European law; it should – it must – be reformed.

**Beyond Reasonable Doubt?**

In criminal cases, the onus is usually on the prosecution to prove the defendant's guilt “beyond reasonable doubt”. This is an *evidentiary* burden of proof [5], consistent with the presumption of innocence that Sankey articulated so well; to escape conviction, a defendant need only attach a reasonable doubt to their guilt in court. A *persuasive* burden of proof effectively raises the required standard – requiring that the claimant (the defence for an insanity plea) show that their claim is more likely than not to be true. It should therefore be possible for a defendant's case to meet an evidentiary
burden of proof, but fail to meet a persuasive burden of proof.

By imposing a persuasive burden of proof on defendants who wish to make use of the insanity defence, the English legal system makes it possible for people to be convicted of a crime even when the court accepts a reasonable doubt concerning their guilt. This anomaly has attracted great debate, the most recent form of which is inspired by the Human Rights Act 1998.

**Compatibility with the Human Rights Act**

The Human Rights Act (HRA) 1998 incorporates the European Convention on Human Rights into English law. Section 6(2) asserts that: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law” – codifying Viscount Sankey’s “golden thread”. Section 3(1) of the same act also requires the courts to interpret legislation, as far as possible, in accordance with the Convention. Taken together, sections 6(2) and 3(1) have provided a formal platform for those who wish to challenge the validity of reverse burdens of proof in English law.

In *Attorney General's Reference No. 1 of 2004* [6], a five-judge Court of Appeal sought to define a set of principles that could help the lower courts to navigate these challenges by identifying a set of principles that might be used to establish the compatibility of reverse burdens of proof with the HRA and with Convention law. Though unanimously approved, their principles were almost immediately rejected by the House of Lords in *Sheldrake* [3], when Lord Bingham held that that the issue was “... not to be resolved by any rule of thumb, but on examination of the facts and circumstances of the particular provision as applied to the particular case.” Though perhaps unavoidable, this position has been described as leaving the law “in some disarray” [7], since it will not be possible to establish the compatibility of particular reverse persuasive burdens until they are tested in court. Nevertheless, some rather broader principles can be drawn out of the decisions made on this subject in recent years.

The first principle concerns the “seriousness” of the offence in question – the more serious the
offence, the more compelling must be the justification for imposing a reverse persuasive burden. For example, reverse persuasive burdens have been rejected in cases involving the offence of the possession of banned substances with intent to supply banned substances [8], and the offence of membership of a banned organisation [9]. On the other hand, reverse persuasive burdens have been upheld in “less serious” cases such as drink-driving [3] and boot-legging [4]. In *R vs. Johnstone* [4], the House of Lords clarified the point by specifying that, the more serious the punishment that might flow from any conviction, the more compelling should be the justification for any derogation of the presumption of innocence.

A second principle concerns the focus of the reverse persuasive burden itself – of what the defendant must prove – in the context of the trial as a whole; the damage done to the presumption of innocence decreases as the focus of the reverse persuasive burden deviates from the *gravamen* of the offence (i.e. the wrongfulness of the alleged misconduct). In *Keogh vs. R. 2007* [9], the Court of Appeal referred to this principle when reversing the conviction of the appellant under the Official Secrets Act 1989 (UK) of distributing damaging, confidential material (the records of a meeting between the British Prime Minister and the President of the United States concerning policy in Iraq). A key feature of this decision is that it was made, in part, with the recognition that “... the critical ingredient of the offence … is the appellant's state of mind at the time of the disclosure.” If the onus of proof required the defendant to disprove such a substantial ingredient of the offence, their Honours held that it would constitute an “unjustifiable infringement of the presumption of innocence.”

A third principle is the relevance of the trade-off between the rights of the defendant and any threat to society that might be implied by the precedent set by that defendant's acquittal. This principle is particularly relevant to crimes of strict liability, such as the carrying of knives. In *L v. D.P.P.* [10], the reverse persuasive burden on a defendant found in a public place in possession of a knife was upheld by the Court of Appeal, which made explicit reference to the “strong public interest in bladed articles not being carried in public”. This is consistent with the judgement of *Salaibaku vs. France* [11]. The principle itself is that “... Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence.” When a defendant's conduct invokes this kind of strict liability – justified because it serves the interests
of society – it is for him to explain why the penalty should not apply. That said, it is still far from clear exactly how this principle of “societal need” applies. Considering the terrorism charges in Attorney General's Ref. 4/02 [12], Lord Bingham went against what appeared to be an explicit reversal of the persuasive burden in the Terrorism Act on the basis that security concerns “... do not absolve member states from their duty to observe basic standards of fairness.”

Finally, the appropriateness of a reverse persuasive burden appears to vary with the practicalities of the case. In Turner is R. vs. Halton Division Magistrates Court [13], the defendant was charged with unlicensed felling of trees. The Forestry Act 1967, which provided for the granting of licenses, also listed several situations in which unlicensed tree-felling was permitted. The defendant was held to a reverse persuasive standard because it was thought impractical for the claimant to negate every possible defence in advance. The same case raises the other factor that appears to bear on the appropriateness of a reverse persuasive burden – the “peculiar knowledge” of the defendant. If the defendant had legitimate grounds for his tree-felling, he is presumably best placed to relate it. This factor was also considered in Davies vs. Health and Safety Executive [14], in which a reverse persuasive burden was imposed on the defence to “... show that it was not reasonably practicable for him to have done more than he did to prevent or avoid...” an accident.

Relating the Principles to the Insanity Defence

Each of the four principles discussed so far provides an argument for reform of the insanity defence. First, reverse persuasive burdens encounter opposition when the offence in question is “serious”. Before the introduction of the Criminal Procedure Act (1991), defendants acquitted under the defence of insanity were generally subject to indefinite, psychiatric detention; accordingly, the defence was rarely used except in “serious” cases. The overwhelming majority of charges against which the insanity defence was raised in England between 1975 and 1989 were for fatal and non-fatal offences against the person [15] – undoubtedly “serious” in the sense described in Johnstone [4]. The defence of insanity can attach a stigma to the defendant that seems somewhat akin to the stigma that emerges from a conviction for a serious offence [16]; it is not used lightly or frivolously. In other words, the
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defence of insanity is most commonly deployed in precisely those circumstances that are thought to make reverse persuasive burdens of proof inappropriate.

Second, the defence of insanity speaks directly to the issue of *mens rea*, which is difficult to distinguish from the gravamen for an offence unless that offence carries strict liability. *Woolmington* [17] is clear that, despite its intrinsically private nature, mens rea is an essential element that the prosecution must prove beyond reasonable doubt; an evidential proof of insanity should undermine that goal. Hamer [16] suggests the opposite view – that a mistaken conviction for murder resulting from an incorrectly rejected insanity defence may not be particularly serious – after all, the defendant has caused a death, perhaps intentionally, so the issue of insanity goes less to the gravamen of the offence than to the “… appropriate way of dealing with the wrongdoer.” He also suggests that “… it may make relatively little difference to the defendant on murder charges whether his insanity defence is upheld or erroneously rejected.” Even if murder was the only relevant offence, I would hope that we could be more ambitious; with the introduction of the Criminal Procedure Act (1991), and the spread of the insanity defence to other, less serious defences, the effect on the defendant of a mistaken conviction might be dramatic.

Hypothetical though they may be, these wrongful convictions might be justified by reference to our third principle – the balance between the rights of a defendant and the imperative to protect society. The problem here is that the imperative increases with the seriousness of the offence and the gravity of the penalties associated with it. The most pressing imperatives might create the most grievous injustices. Further, a wrongful rejection of the insanity defence will deprive the court of the opportunity to fit the disposal to the defendant's condition; it must be at least as likely that an untreated defendant will re-offend after being sent to prison as it is that a the same defendant will re-offend after treatment. In 2007, 210 patients were recalled to hospital institutions after being given condition discharge – or just over 5% of the nearly 4,000 who were detained at the end of that year [18]. This compares to a re-offending rate of 39% for adult offenders in the mainstream justice system in the same year [19]. By making the insanity plea easier to justify, we are also protecting ourselves.

The current interaction between the insanity defence and the issue of proof pragmatics – our
fourth principle – is perhaps best articulated in *Chaulk* [20], in which the Supreme Court of Canada reconciled itself to the reverse persuasive burden of proof because without it, “... it would be very easy for the accused to 'fake' insanity and to raise reasonable doubt” – placing an impossibly onerous burden of proof on the prosecution. This seems over-simple; the absence of a reverse persuasive burden of proof does not imply the absence of any burden of proof whatsoever – the prosecution can still benefit from the presumption of sanity [21]. Nor is it as easy as it might once have been to “fake” insanity; our developing knowledge of psychiatry and of the physiological markers of mental disorder, have made their mark. Moreover, even a supportive diagnosis can be undermined by cross-examination – much like the other claims the defence might make on the subject of the defendant's “peculiar knowledge”.

**A Practical Reform**

The goal of the last section was to make the case that a change in the level of proof required for the defence of insanity is desirable. But the change is also practical; it could be introduced with minimum disruption to the legal system, and might even ameliorate a procedural weakness in the way the defence of insanity is currently handled.

First, the convention of “reading down” reverse persuasive burdens to reverse evidentiary burdens is already well established (see e.g. *Attorney General's Ref. No. 1*, 2004, para. 7). As we have seen, the debate on the subject of reverse persuasive burdens is far from resolved, but the authorities in favour of the change as it relates to the defence of insanity, coupled with Lord Bingham's aversion to “rules of thumb” in *Sheldrake*, could provide the impetus the courts need if the right case presents itself. Ideally – if perhaps rather more improbably – a change like this might also be made by statute, imposing the shift without waiting for a relevant case.

Shifting the burden of proof on the accused would also reduce the complexity of the instructions given to juries in criminal cases where the defence of insanity is raised. As Jones [21] points out:

“There is considerable scope for confusion (and judicial error) in this area of law. In a
trial where insanity is a live issue there are two different burdens; that of the prosecution to prove the elements of the offence beyond reasonable doubt; and that of the accused to establish insanity on the balance of probabilities.”

Doubts have been expressed, in both England and abroad [21] about the likelihood that juries have understood – or can even reliably understand – the distinction between these two burdens of proof. This is, as Waller [22] puts it, “... an easy opportunity for argument on the correctness of the trial judge's decisions.” If some grave principle were at stake, the extra complexity might be acceptable – since the principle itself is suspect, the practice seems ripe for change.

Conclusions

The court that created the M’Naghten rules treated defences of insanity, accident, and self-defence in much the same way [23], but only the former has failed to move on. The reverse persuasive burden of proof for insanity is “... an anomolous exception, explicable only as a survival from a time before the present rules of burden of proof were established” [24]. I have argued that the reverse persuasive burden of proof is illogical, socially unnecessary, impractical, and inconsistent with the presumption of innocence codified by the HRA. The practical barriers to change are also far from insurmountable; the reverse persuasive burden of proof should be replaced by a (lower) evidential burden of proof without delay.
References

1. Woolmington v Director of Public Prosecutions [1935] AC 462
3. Sheldrake v. DPP; A-G's Reference (No. 4 of 2002) [2004] UKHL 43
4. R v Johnstone [2003] 1 WLR 1736
10. L vs. DPP [2002] All ER 854
12. Attorney General's Reference No 4 of 2002
17. Woolmington v DPP [1935] AC 462
23. Youssef (1990) 50 A. Crim. R. 1 at p. 10 per Hunt J.: “Viscount Sankey did not explain why the onus of proof in relation to this particular state of mind [insanity] should be any different to that in relation to every other state of mind involved in an offence.”