IN THE SUPREME COURT OF NEW ZEALAND

SC 58/2005
[2007] NZSC 7

PAUL RODNEY HANSEN

v

THE QUEEN

Hearing:	22 February 2006
Court:	Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ
Counsel:	S Vidal and J Taylor for Appellant T Arnold QC, J C Pike and J M Davidson for the Crown
Judgment:	20 February 2007

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

ELIAS CJ

[1] Under s 6(6) of the Misuse of Drugs Act 1975 those who are in possession of controlled drugs above specified quantities are deemed "until the contrary is proved" to possess the drugs for the purpose of supply or sale. Possession of cannabis is an offence which carries a maximum term of imprisonment of three months. Possession of cannabis for the purpose of supply or sale carries a maximum term of imprisonment of eight years. The appellant was proved at trial to have been in possession of more than the 28 grams of cannabis plant at which the statutory presumption of purpose of supply or sale is triggered. The Judge directed the jury that s 6(6) required him to disprove on the balance of probabilities a purpose of supply or sale.[1] The appellant contends this direction was wrong, although it conforms to the decision of the Court of Appeal in *R v Phillips.*[2] Following his conviction, the appellant appealed unsuccessfully to the Court of Appeal, which declined to depart from *R v Phillips.* He was granted leave to appeal further to this Court on the question whether s 6(6) does place a legal onus of proof on the accused, as *R v Phillips* held.

[2] The appellant maintains that requiring an accused to persuade the jury that he did not have the purpose of sale or supply is inconsistent with his right under s 25(c) of the New Zealand Bill of Rights Act 1990 to be presumed innocent until proved guilty. He argues that s 6 of the New Zealand Bill of Rights Act required s 6(6) of the Misuse of Drugs Act to be given a meaning consistent with the presumption of innocence in s 25(c). Section 6 of the New Zealand Bill of Rights Act provides:

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1 In written directions given to the jury, the Judge instructed them that once the Crown had proved beyond reasonable doubt that the accused was in possession of cannabis weighing more than 28 grams, "the accused is presumed or deemed to have the drugs for the purpose of supplying them to others":

> In other words, if the Crown gets to that point, the case is proved. There does not have to be any evidence of actual sales or of an actual intention to sell in the future.
>
> But, and this is the twist, because the presumption may work unfairly, the accused is given the opportunity to rebut the presumption – to persuade you that he or she had the drugs for some purpose other than to sell them to others.
>
> In considering the defence evidence about that, two principal things need to be kept in mind:
>
> (1) He must persuade you that all of the drugs were for his own use. If you think that only some of them were for his own use, that will not be good enough.
>
> (2) The standard of proof required of an accused person is not as high as that imposed on the Crown. The standard required of an accused is what is known as the balance of probabilities. He has to satisfy you that it is more probable than not that he had all of the drugs for his own use.

2 [1991] 3 NZLR 175.

> **6 Interpretation consistent with Bill of Rights to be preferred** –
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[3] The appellant contends that consistency with the right to be presumed innocent would be achieved if s 6(6) of the Misuse of Drugs Act is construed to impose an evidential burden only. Such burden would be discharged if the evidence raised a doubt as to the purpose of supply or sale, leaving the legal onus on the Crown to satisfy the jury beyond reasonable doubt that the appellant had such purpose. On this basis, "until the contrary is proved" would mean "unless there is evidence to the contrary which, if accepted, would raise a reasonable doubt as to the purpose of supply or sale".

[4] The Solicitor-General says the clear meaning of s 6(6) is to impose upon the accused a legal onus to prove on the balance of probabilities that he did not possess the cannabis for the purpose of supply or sale, as *R v Phillips* held. He acknowledges that such onus to prove the non-aggravating purpose is contrary to the presumption of innocence under s 25(c) of the New Zealand Bill of Rights Act, but argues that s 6(6) of the Misuse of Drugs Act is a justified limit within the meaning of s 5 of the New Zealand Bill of Rights Act. It provides:

> **5 Justified limitations** –
>
> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 4, to which s 5 is subject, is the provision that ensures application by the courts of an enactment, notwithstanding any inconsistency with a recognised right:

> **4 Other enactments not affected** –
>
> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), –
>
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) Decline to apply any provision of the enactment –

> by reason only that the provision is inconsistent with any provision of this Bill of Rights.

[5] I am of the view that the presumption of fact in s 6(6) ("until the contrary is proved") imposes on the accused a legal burden of proof. There is no other tenable meaning. The provision is not capable of being interpreted to mean that an evidential burden only is transferred, even applying the interpretative direction prescribed by s 6 of the New Zealand Bill of Rights Act. My reasons on the meaning of s 6(6) of the Misuse of Drugs Act do not differ in substance from those of the other members of the Court. I agree with them that the appeal must be dismissed in application of s 6(6) of the Misuse of Drugs Act, as s 4 of the New Zealand Bill of Rights Act requires despite any inconsistency with s 25(c).

[6] I am however unable to accept the methodology adopted by other members of the Court in application of s 6 of the New Zealand Bill of Rights Act. I do not agree that s 5 applies to the s 6 preference for a meaning consistent with the enacted rights and freedoms in Part 2. The sequence suggested, by which consideration of justification under s 5 is a necessary step in determining whether an enactment is consistent with a right under Part 2, would set up a soft form of judicial review of legislation which seems inconsistent with s 4 of the Act. More importantly, it distorts the interpretative obligation under s 6 from preference for a meaning consistent with the rights and freedoms in Part 2 to one of preference for consistency with the rights as limited by a s 5 justification. I do not think that approach conforms to the purpose, structure and meaning of the New Zealand Bill of Rights Act as a whole. It risks erosion of fundamental rights through judicial modification of enacted rights according to highly contestable distinctions and values.[3] The risk is I think illustrated by persistent suggestions that it is necessary to identify the content of rights by a balance to be struck in each case which weighs a wider public interest against the right.[4] It is exacerbated by arguments from s 5 that Part 2 of the Act is a statement of "reasonable rights".[5]

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3 *Ministry of Transport v Noort* [1992] 3 NZLR 260 at p 296 (CA) per Gault J.

4 See for example *Brown v Stott* [2003] 1 AC 681 (PC) and *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264.

5 Rishworth, "Interpreting and Invalidating Enactments Under a Bill of Rights" in Bigwood (ed), *The Statute: Making and Meaning* (2004) 251, p 277.

[7] The content of the fundamental rights and freedoms recognised in Part 2 is itself a matter of statutory interpretation. Many of the rights recognised in Part 2 are qualified in their own terms or by necessary implication because they collide with other rights recognised in Part 2. The meaning of an enacted right therefore turns on the text, purpose and context of the New Zealand Bill of Rights Act. Part of the relevant context will be any qualifications in the expression of the right in the International Covenant on Civil and Political Rights.[6] In it, the right to be presumed innocent is unqualified. I consider that the right to be presumed innocent under s 25(c) is also unqualified and that it is unable to be restricted without denying the right. A reverse onus of proof is therefore in my view inconsistent with the right under s 25(c).

[8] The question whether s 6(6) of the Misuse of Drugs Act may be a demonstrably justified limitation of s 25(c) under s 5 is distinct from the s 6 question whether it can be interpreted consistently with s 25(c). The context for considering the interpretation of an enactment under s 6 is the human rights weighting provided by Parliament in the New Zealand Bill of Rights Act. Wider social ends are not to be identified and weighed by judges under s 6 to diminish the enacted rights. Justifications under s 5, on the other hand, may draw on the wider policy considerations behind the limiting enactment sought to be justified.[7] In my view, consideration of s 5 does not arise on the present appeal. The appeal is determined by the application of s 4 once it is accepted that s 6(6) of the Misuse of Drugs Act cannot be given a meaning which is consistent with s 25(c). In those circumstances, it is unnecessary to express any view on the question whether the Court may formally determine whether a limit is justifiable under s 5. I am inclined to think it a course available, where appropriate.[8] I express some tentative thoughts on the considerations which would arise in a case where justification properly arises for judicial assessment.

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6 (1966) 999 UNTS 171 (ratified by New Zealand in 1978).

7 As envisaged in *A Bill of Rights for New Zealand: A White Paper* (1985), paras [10.31] – [10.34].

8 As suggested in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) and as Cooke P in *Temese v Police* (1992) 9 CRNZ 425 at p 427 (CA) was prepared to allow in an appropriate case.

[9] Since I am of the view that the question whether s 6(6) of the Misuse of Drugs Act is a justified limit under s 5 of the New Zealand Bill of Rights Act does not arise for determination on the appeal, I would have excluded on that basis the "legislative fact"[9] evidence proffered by the Crown to demonstrate justifiability. I also agree, however, with the other members of the Court that the evidence was put forward too late for it to have been fairly admitted in this appeal. The reception of such material may be important in a case where s 5 is directly in issue.

Interpretation and justification under the New Zealand Bill of Rights Act 1990

[10] Part 2 of the Interpretation Act 1999 provides three "principles of interpretation": ascertainment of the meaning of the legislation;[10] application of enactments "to circumstances as they arise";[11] and a rule against retrospective effect.[12] Section 5 of the Interpretation Act provides the general approach to ascertaining the meaning of an enactment:

> **5 Ascertaining meaning of legislation –**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
>
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
>
> (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[11] To this general approach, s 6 of the New Zealand Bill of Rights Act adds a further principle of interpretation wherever the rights and freedoms in the Bill of Rights Act are affected by an enactment. Section 6, the text of which is set out in para [2], requires a meaning consistent with the rights and freedoms contained in the

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9 As Professor Davis first identified in 1942 and developed further in his 1978 treatise *Administrative Law*, legislative facts are general facts, not concerning the immediate parties, which help the tribunal determine the content of law as a matter of policy. Kokott in *The Burden of Proof in Comparative and International Human Rights Law* (1998), pp 34 – 35 has drawn attention to the use of such evidence in human rights judging if courts are not to rely on intuitive judgments and to stretch judicial notice unacceptably.

10 Section 5.

11 Section 6.

12 Section 7.

Bill of Rights Act to be given to an enactment wherever such consistent meaning "can" be given. The meaning of s 6 is itself to be seen in the context of the purposes of the Act. The Bill of Rights Act was enacted in 1990 with the stated purposes:

> (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
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> (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

[12] In *R v A (No 2)*[13] Lord Steyn suggested that s 3 of the Human Rights Act 1998 (UK)[14] would require the courts sometimes to adopt "an interpretation which linguistically may appear strained".[15] He thought s 6 of the New Zealand Bill of Rights Act to be a "slightly weaker model",[16] a view he repeated in *Ghaidan v Godin-Mendoza.*[17] Lord Cooke, too, has suggested that s 3 of the United Kingdom Act "read as a whole, conveys, I think, a rather more powerful message".[18]

[13] Despite the considerable authority of these views, I am unable to accept that there is any material difference between the New Zealand and United Kingdom models. The direction to give an enactment a meaning that accords with the rights and freedoms contained in the New Zealand Bill of Rights Act where such interpretation "can" be given may as equally entail an interpretation which "linguistically may appear strained", as where such interpretation is "possible". Nor is this heretical. Apparent "linguistic" interpretation is not uncommonly displaced by context. Where fundamental rights are affected, particularly those protected by international covenants to which New Zealand is a party, apparent meaning yields to less obvious meaning under common law presumptions protective of bedrock

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13 [2002] 1 AC 45.

14 Section 3 reads:

> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
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> (2) This section –
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> (a) applies to primary legislation and subordinate legislation whenever enacted;
>
> (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
>
> (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

15 At p 68.

16 At p 67.

17 [2004] 2 AC 557 at para [44].

18 *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326 at p 374.

values.[19] The common law had, I think, already evolved beyond requiring ambiguity before interpreting legislation to conform wherever possible with human rights instruments and fundamental values of the common law.[20] In any event, s 6 of the New Zealand Bill of Rights Act now makes it clear that textual ambiguity is not required; if an enactment "can" be given a meaning consistent with the New Zealand Bill of Rights Act, it must be given that meaning.[21] Section 6 is key to the policy of the New Zealand Bill of Rights Act to "promote" as well as "affirm" and "protect" human rights and fundamental freedoms in New Zealand.

[14] I have not thought it helpful to refer to legislative intention in considering the meaning of s 6(6). The Law Commission recommended against reference to such "intention".[22] The Interpretation Act as enacted follows instead the Law Commission's emphasis on meaning, context and purpose. The principle in s 6 of the Interpretation Act that an enactment must apply to circumstances as they arise underscores the self-evident point that statutes must apply in conditions which may not have been foreseen at the time of enactment. The "very strong and far reaching"[23] obligation of interpretation under s 6 of the New Zealand Bill of Rights Act may also require a meaning to be given to a provision which was not envisaged at the time of its enactment. The point has recently been made by Lord Hoffmann in *R (Wilkinson) v IRC*:[24]

> It may have come as a surprise to the members of the Parliament which in 1988 enacted the statute construed in the *Ghaidan* case that the relationship to which they were referring could include homosexual relationships. In that sense the construction may have been contrary to the "intention of Parliament". But that is not normally what one means by the intention of Parliament. One means the interpretation which the reasonable reader would give to the statute read against its background, including, now, an

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19 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532; *R v Pora* [2001] 2 NZLR 37 (CA).

20 *R v Home Secretary, ex p Pierson* [1998] AC 539; *R v Secretary for Home Department, ex p Simms* [2000] 2 AC 115; *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718 at para [17] per Lord Hoffmann.

21 As was made clear in relation to s 3 of the Human Rights Act 1998 (UK) in *Ghaidan v Godin-Mendoza* at para [30] per Lord Nicholls; at para [44] per Lord Steyn; at para [67] per Lord Millett; at para [106] per Lord Rodger of Earlsferry; with Baroness Hale concurring on the point with Lord Steyn.

22 New Zealand Law Commission, *A New Interpretation Act to Avoid "Prolixity and Tautology"* (NZLC R17, 1990), para [73].

23 As s 3 of the Human Rights Act 1998 (UK) was described by Lord Bingham in *Sheldrake* at para [28].

24 At para [18].

> assumption that it was not intended to be incompatible with Convention rights.

[15] As foreshadowed in para [6], I do not consider that s 5 of the New Zealand Bill of Rights Act forms part of the s 6 inquiry. The text of s 5 is set out in para [4]. It is not in its terms a rule of statutory interpretation, as s 6 of the Bill of Rights Act expressly is. It is directed to those enacting or prescribing limitations. In form, it prevents those enacting law from eroding the rights and freedoms contained in Part 2 of the New Zealand Bill of Rights Act. They can prescribe only such "reasonable limits … as can be demonstrably justified in a free and democratic society". I do not accept that s 6 gives preference to a meaning consistent with limitations justified under s 5, if a meaning consistent with the unlimited right is tenable. It is not in my view necessary to go beyond the terms of s 6. It requires the meaning consistent with the rights and freedoms contained in Part 2 of the New Zealand Bill of Rights Act to be preferred. I agree with the view expressed by Cooke P in *Noort*[25] that the language of s 6 of the New Zealand Bill of Rights Act makes it clear that it applies to the right as expressed in Part 2, unmodified by any limit which conforms with s 5.

[16] The use in s 5 of the same language of "rights and freedoms contained in this Bill of Rights" would make no sense if it referred to limited rights justified under it. The different wording of s 4 (with its reference to inconsistency "with any provision of this Bill of Rights" rather than "with the rights and freedoms contained in this Bill of Rights") is necessary to make it clear that a limitation which cannot be justified under s 5 must nevertheless be given effect. Interpreting s 6 to refer to the rights identified in Part 2 without qualification is also consistent with the obligation under s 7, which would otherwise require the Attorney-General to draw to the attention of the House only provisions which are inconsistent with the rights as reasonably

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[25] At p 273.

limited.[26] Applying s 5 in interpreting legislation would require words to be read into s 6 to indicate that consistency is required only with the recognised rights as reasonably limited by law. That course is not required to give proper effect to the legislation.

[17] In addition to the textual aids to interpretation, the purpose of the New Zealand Bill of Rights Act is inconsistent with interpreting the rights in Part 2 in accordance with limitations justified under s 5. A preference for a meaning consistent only with the rights as limited under s 5 fails to respect the rights and freedoms as enacted by Parliament. Nor does it "promote" fundamental rights and freedoms. It entails interpreting the right in respect of which any limitation must be justified principally by reference to the limitation. Such methodology undermines the interpretative direction of s 6 and is likely to erode rights. Section 5 is not concerned with interpretation or the scope of the affirmed rights but with the legitimacy of restrictions upon them under a wider frame of reference than is provided by the rights in Part 2.

[18] Where the scope of a right affirmed by Part 2 is qualified[27] (so that the court must give it content in order to determine under s 6 whether another enactment is able to be interpreted consistently with the right), the meaning of the right must I think be ascertained by reference to the register provided by the New Zealand Bill of Rights Act, viewed in context (including the context provided by the International Covenant). So, for example, the scope of freedom of expression may be restricted if necessary to protect the reputations of others.[28] Similarly, freedom of movement may be restricted if necessary for the protection of public order or public health.[29]

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[26] Compare Rishworth, "How does the Bill of Rights Work?" (1992) NZRL Rev, pp 198 – 199. Section 7 provides:

> **Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights** –
> Where any Bill is introduced into the House of Representatives, the Attorney-General shall, –
> (a) In the case of a Government Bill, on the introduction of that Bill; or
> (b) In any other case, as soon as practicable after the introduction of the Bill, –
> bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

[27] As indicated at para [37] I do not think the scope of the presumption of innocence gives rise to any such difficulty.

[28] As art 19 envisages.

[29] As provided by art 12.

Without adherence to the standards to be taken from the text, purpose, and context of the Bill of Rights Act, the courts are cast on to contestable judgments, often with high policy content, which "balance" disparate and incommensurable values. Such an approach has the capacity to be highly destructive of enacted rights.[30] It is perhaps not surprising that suggestions of deference to legislative judgment feature prominently in some of the cases.[31] Such deference would not be faithful to s 6. The legislatively-conferred fundamental standards identified in Part 2 of the New Zealand Bill of Rights Act cannot be balanced in the s 6 inquiry against the wider community interests that might give rise to a justified limitation under s 5. The responsibility of the court under s 6 is to interpret other enactments consistently with the Part 2 rights if such interpretation is available.

[19] The provenance of s 5 also suggests that the rights with which consistency must be achieved under s 6 are not the rights as limited under s 5. Section 5 is patterned on s 1 of the Canadian Charter of Rights and Freedoms. It was enacted in the form proposed in the White Paper in which it would have fulfilled the same function as the Canadian s 1 in a Bill of Rights binding on Parliament. (The Bill as proposed for New Zealand in the White Paper contained no equivalent to s 4.) In Canada, the courts have the responsibility of deciding whether legislation which is inconsistent with the rights enacted in the Charter should nevertheless be applied. Under s 1 of the Charter, they must determine whether or not to disallow the provision on an assessment of its reasonableness in achieving a legitimate concern of a free and democratic society. Following the inclusion of s 4 in the Bill of Rights as enacted, the question of legitimacy under s 5 is not one the New Zealand courts are required to undertake. But that difference does not detract from the assistance to be obtained from the Canadian cases on the approach to s 1 of the Charter, an assistance

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30 As Professor Ashworth has pointed out in connection with the presumption of innocence: Ashworth and Redmayne, *The Criminal Process* (3rd ed, 2005), pp 45 – 48; Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (2002), pp 116 – 118; "*Sheldrake* Case Comment" (2005) Crim LR 218. See also *Montgomery v HM Advocate* [2003] 1 AC 641 at p 670 (PC) per Lord Hope of Craighead; Tadros and Tierney, "The Presumption of Innocence and the Human Rights Act" (2004) 67(3) MLR 402; Dennis, "Reverse Onuses and the Presumption of Innocence: In Search of Principle" (2005) Crim LR 901.

31 See for example Lord Hope in *Kebilene* at pp 380 – 381; Lord Nicholls in *R v Johnstone* [2003] 1 WLR 1736 at para [51].

explicitly envisaged in the White Paper[32] and in the advice appended to the Report of the Justice and Law Reform Select Committee.[33]

[20] In the leading case of *R v Oakes*,[34] Dickson CJ (in whose judgment on this point all other members of the Supreme Court of Canada concurred) emphasised that the s 1 Charter inquiry as to justifiability is distinct from the prior question whether the human right is infringed by the legislation sought to be justified. The Court rejected the approach taken in the Ontario Court of Appeal, which construed the scope of the right to be presumed innocent[35] with reference to the limitation provision in s 1. The Court of Appeal[36] had regarded a "threshold question" to be

> whether the reverse onus clause is justifiable in the sense that it is reasonable for Parliament to place the burden of proof on the accused in relation to an ingredient of the offence in question.

The Canadian Supreme Court, in rejecting that view, held that the meaning of a right guaranteed by the Charter was to be ascertained "in the light of the interests it was meant to protect".[37] The purpose of the right in question was to be sought

> by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and, where applicable, to the meaning and purpose of the other specific rights and freedoms …

The interpretation of the right was therefore not assisted by s 1. Indeed, application of s 1 in ascertaining the meaning of s 11(d) was considered an inadequate protection of the presumption of innocence. Dickson CJ thought it "highly desirable" to keep s 1 "analytically distinct" from the interpretation of the right.[38]

[21] The Canadian approach has also been adopted in South Africa,[39] where the Constitution contains a general limitation clause similar to s 5 of the New Zealand

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32 At para [10.26(e)].
33 "Inquiry into the White Paper – A Bill of Rights for New Zealand" (Interim Report) [1986-1987] X AJHR I.8A, pp 27 – 28.
34 [1986] 1 SCR 103.
35 Section 11(d) of the Charter.
36 (1983) 145 DLR (3d) 123 at p 146.
37 At para [28], quoting with approval the Court's earlier decision in *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 at p 344.
38 At para [60]. See Hogg, *Constitutional Law of Canada* (looseleaf, 1997), para [33.4(c)].
39 *S v Zuma* (1995) 2 SA 642 (CC).

Bill of Rights Act and s 1 of the Canadian Charter.[40] There, too, the content of the right is assessed without reference to the limitation clause and "with reference to the terms in which the right is cast and to the constitutional values which are served by entrenching that right in the bill of rights".[41]

[22] The approach adopted in Canada therefore is that the question of justified limits is a distinct and later inquiry. The first question is the interpretation of the right. In ascertaining the meaning of the right, the criteria for justification are not relevant. The meaning of the right is ascertained from the "cardinal values" it embodies.[42] Collapsing the interpretation of the right and the s 1 justification is insufficiently protective of the right. The later justification is according to a stringent standard, in which a party seeking to justify must show that the limit on a fundamental right is "demonstrably justified" in a free and democratic society. The context for the application of s 1 is then the violation of a constitutionally guaranteed right or freedom.

[23] This reasoning is in my view equally compelling in the context of s 5 of the New Zealand Bill of Rights Act. Straining to graft s 5 into the interpretative direction under s 6 is not necessary to give it work to do in a Bill of Rights containing s 4. As s 3 makes clear, the New Zealand Bill of Rights Act is directed not only at those interpreting and applying the enacted rights and freedoms.[43] Section 5 is directed to those making or advising on the making of legal prescriptions potentially limiting of Part 2 rights and freedoms. In addition, as indicated, s 5 may give rise to a substantive determination of compliance.

[24] Professor Brookfield, in a comment on *Noort*, expressed the view that Cooke P was "clearly correct" to draw attention to the differences in wording between ss 4, 5, and 6.[44] He, too, considered that s 6 was:

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40 Section 36 of the Constitution of the Republic of South Africa.

41 Chaskalson et al, *Constitutional Law of South Africa* (looseleaf, 1996), para [11-32].

42 *R v Oakes* at para [28].

43 Section 3 provides:

> **Application –**
> This Bill of Rights applies only to acts done –
> (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
> (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

44 "Constitutional Law" (1992) NZRL Rev 231, p 239.

> … surely sufficient in itself, without recourse to s 5, to ensure that an enactment apparently abridging a right or freedom is interpreted so far as possible consistently with that right or freedom. Such limitations on the right as are implied in the abridgement must of course be given effect under s 4, in the sense that the Court may not (a) hold them impliedly repealed or revoked, or in any way invalid or ineffective; or (b) decline to apply them.

Nevertheless, Professor Brookfield suggested that there might still be a role for the courts in relation to s 5 in making a formal declaration of inconsistency (or consistency) with "any provision of this Bill of Rights", including s 5, at least in a case of serious infringement or unfounded concern about violation. It was in response to this suggestion of a declaratory response *after* s 6 had been exhausted as a matter of interpretation that Cooke P in *Temese*[45] allowed the possibility (while expressing some doubt as to its appropriateness) that a court might go on to consider compliance with s 5 in an appropriate case. The same possibility was identified as a fourth step in the analysis in *Moonen*. For present purposes it is sufficient to note that *Temese* does not seem to represent any modification of the view expressed by Cooke P in *Noort* that s 6 requires consistency with the rights and freedoms enacted in Part 2 and not as limited by a s 5 assessment.[46] For the reasons given, I am of the view that the approach indicated by Cooke P and Gault J in *Noort* is to be preferred to that accepted by Richardson, Hardie-Boys and McKay JJ. It accords with the text and scheme of the New Zealand Bill of Rights Act. It also avoids the risk of erosion of rights through judicial interpretation of the enacted rights on the basis of limitations justifiable under s 5.

[25] Under s 25(c), the appellant had the right to be presumed innocent until proved guilty in the determination of the charge of possession of cannabis for the purpose of supply. Under s 6 of the New Zealand Bill of Rights Act, a meaning consistent with that right was therefore to be preferred over any other meaning that could be given to any enactment prescribing the procedure for determination of the charge against him. In *Ghaidan v Godin-Mendoza*, members of the House of Lords acknowledged that a Convention-compliant interpretation might not be possible in a particular case.[47] If such meaning would be incompatible with the basis of the

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45 At p 427.

46 Compare the reasons of McGrath J at para [186] below.

47 Lord Nicholls at para [33]; Lord Steyn at para [50]; Lord Millett at para [68]; Lord Rodger of Earlsferry at para [112]; with Baroness Hale concurring on the point with Lord Steyn.

legislation, or would entail judicial "legislation" rather than interpretation, then it is not open, despite the strength of the interpretative direction under s 3 of the Human Rights Act 1998 (UK). The same is true of s 6 of the New Zealand Bill of Rights Act. While a meaning consistent with the rights and freedoms contained in the New Zealand Bill of Rights Act must be preferred if it "can" be given to an enactment, it must be a meaning that is tenable on the text and in the light of the purpose of the enactment.

The human right to be presumed innocent

[26] The presumption of innocence protects against error in criminal process. It is an aspect of fair trial. The purpose of the presumption was explained by Justice Brennan of the United States Supreme Court:[48]

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by the process of placing on the other party the burden … of persuading the fact finder at the conclusion of the trial of his guilt beyond a reasonable doubt.

[27] A legal presumption identifies who must prove the case. The presumption of innocence has this effect. It establishes that the burden of proof of guilt in criminal cases is carried by the prosecution. The common law rule that the prosecution must prove guilt even where an affirmative defence is put forward has not been in doubt since *Woolmington v Director of Public Prosecutions.*[49] The only common law exception was insanity, an excuse which is extraneous to the offence charged and which has been treated as a special case.[50] Viscount Sankey LC in *Woolmington* acknowledged that the general common law rule was subject to modification by statute. And statutory burdens of proof upon an accused have long featured in criminal enactments in New Zealand, as in other jurisdictions. From 1948, the

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48 *Speiser v Randall* 357 US 513 at pp 525 – 526 (1958).

49 [1935] AC 462.

50 In New Zealand the common law rule is now expressed in s 23(1) of the Crimes Act 1961. In Canada the insanity exception has been held to be inconsistent with the Charter presumption of innocence, but justified under s 1: *R v Chaulk* [1990] 3 SCR 1303.

"golden thread" of the common law has however been recognised as a human right, in international instruments to which New Zealand is a party.

[28] The right to be presumed innocent until proved guilty contained in art 11(1) of the Universal Declaration of Human Rights[51] and later in art 14(2) of the International Covenant on Civil and Political Rights is unqualified. Article 14(2) of the International Covenant provides:

> Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

The presumption of innocence is an independent right, contained in a stand-alone provision which stands apart from the right to fair trial in art 14(1) and the "minimum guarantees" in art 14(3). That separation was deliberately adopted to emphasise the significance of the presumption.[52]

[29] Section 25 of the New Zealand Bill of Rights Act enacts as New Zealand domestic law "minimum standards of criminal procedure" drawn from the International Covenant. Under it:

> **25 Minimum standards of criminal procedure –**
>
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> …
>
> (c) The right to be presumed innocent until proved guilty according to law.

Since 1990 therefore the presumption of innocence has been enacted as a minimum standard of criminal procedure in domestic law under the New Zealand Bill of Rights Act. The important legislative purpose contained in s 25(c) suggests the need to reassess the meaning of enacted statutory presumptions. Indeed the White Paper, which preceded enactment of the New Zealand Bill of Rights Act, identified that

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51 (1948) UNGA Res 217 A(III).

52 Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev ed, 2005) records at p 329 that the Human Rights Commission had sought to bundle the presumption of innocence with the other aspects of fair trial, but that the Committee of the General Assembly decided, on a British motion, that the presumption of innocence required additional emphasis.

existing reverse onuses of proof such as s 6(6) of the Misuse of Drugs Act were likely to be the subject of new scrutiny under the Bill.[53]

Legal and evidential burdens

[30] A party who has a burden of proof must establish the case to the standard required by law, whether beyond reasonable doubt or on the balance of probabilities.[54] The risk of non-persuasion is borne by the party who carries the burden. This is the legal burden of proof. In criminal cases the effect of s 25(c) of the New Zealand Bill of Rights Act is that the legal burden of proof is on the prosecution. The accused is presumed to be innocent. Where the standard of proof is beyond reasonable doubt, the party with the legal onus of proof will not succeed unless he eliminates reasonable doubt. Where the standard of proof is on the balance of probabilities, the party with the legal onus of proof will not succeed unless he demonstrates that his proposition is more likely than not. It is the effect on outcome that is the critical distinction between an onus which is legal and one which is purely evidentiary.[55]

[31] Who carries the legal burden of proof is determined by substantive law. Who carries the evidential burden is determined by the adjectival (procedural) law of evidence. What is sometimes referred to as the evidential burden is the burden of raising an issue in answer to the case by showing its relevance on the evidence.[56] Lord Devlin in giving the judgment of the Privy Council in *Jayasena v R*[57] explained the evidential onus on an accused in relation to a defence:

> Some evidence in support of such an answer must be adduced before the jury is directed to consider it; but the only burden laid upon the accused in this

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53 At paras [10.114] – [10.121].

54 It is not necessary for present purposes to consider whether proof beyond reasonable doubt is, as suggested by Kokott, "a corollary of the presumption of innocence" (p 126). See also Underwood, "The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases" (1977) Yale LJ 1299.

55 As Dickson CJ said in *R v Whyte* [1988] 2 SCR 3 at para [32], "It is the final effect of a provision on the verdict that is decisive."

56 The phrase is confusing. Sir Nicholas Browne-Wilkinson VC has warned "[i]n my experience, every time the phrase 'evidential burden' is used it leads to error…": *Brady v Group Lotus Car Cos Plc* [1987] 2 All ER 674 at p 687 (CA).

57 [1970] 1 AC 618 at p 623.

> respect is to collect from the evidence enough material to make it possible for a reasonable jury to acquit.

As this explanation suggests, it is not necessary for the evidence which discharges the evidential burden to have been called by the party with the burden: it is enough that he can point to evidence before the court which sufficiently raises the issue.[58]

[32] The need to discharge an evidential burden is most familiar in the case of an affirmative defence. If no evidential basis is made out for an affirmative defence, the party with the burden of proof can resist an application that there is no case to answer on the basis that the defence has not been excluded. In criminal cases, once an evidential foundation for an affirmative defence is made out, the question can be left to the jury. The jury, as the trier of fact, is not concerned with the evidential burden. That is why, in a phrase attributed to Wigmore, the evidential burden is described as "passing the judge".[59] It does not shift the legal burden of proof. Once the issue is sufficiently raised on the evidence, the party with the burden of proof must still persuade the trier of fact that it is not an answer to the case.

[33] A presumption of fact amounts to a rule about how frequently occurring circumstantial evidence may be put before the court and what inferences may be taken from it.[60] It creates an evidential burden on the party against whose interests the presumption operates by requiring him to point to evidence upon which the trier of fact could find against the presumption. A presumption of fact need not impose a legal burden of proof unless, if unrebutted by the accused, it is conclusive of guilt. A presumption, for example, that a certain quantity of drugs is more than a moderate user of the drug would usually consume in a given period of time is circumstantial evidence from which the trier of fact may conclude a purpose of supply or sale. But if it does not compel the conclusion of guilt unless the accused disproves that purpose, it imposes an evidential burden only. The trier of fact must still be carried by all the evidence to conviction on the appropriate standard of proof. So, if left

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58 Byrne and Heydon, *Cross on Evidence* (Aust ed) (looseleaf, "The Burden of Proof and Presumptions", 1996), para [7015] (last updated January 2007); *Cross on Evidence* (NZ ed) (looseleaf, "Burden of Proof and Presumptions", 2005), para [4.4] (last updated December 2006). The point is also made by Sir Francis Adams in "Onus of Proof in Criminal Cases" in Clark (ed), *Essays on Criminal Law in New Zealand* (1971) 67, p 69.

59 *Wigmore on Evidence* (Chadbourn rev 1981), vol 9, para [2487].

60 *Cross on Evidence* (Aust ed), para [7255]; *R v Oakes* at para [20].

with a reasonable doubt about the purpose of supply in a prosecution for possession for the purpose of supply, the jury must acquit.

[34] If an unrebutted presumption compels the verdict,[61] it operates to transfer a legal onus of proof. The same is true of any provision which has the effect of requiring the accused to exculpate himself. As Lord Steyn pointed out in *R v Lambert*,[62] the difference between an element of the offence and issues of defence or excuse often depends simply on the drafting technique adopted. If the jury may convict if left in doubt about the culpability of the accused, he bears a legal onus of proof. And, for reasons explained by Dickson CJ in the Supreme Court of Canada in *R v Whyte*,[63] "[w]hen that possibility exists, there is a breach of the presumption of innocence":

> The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.

[35] A reverse onus is on its face inconsistent with the presumption of innocence. The European Court of Human Rights has however held that art 6(2) of the European Convention on Human Rights[64] is not absolute. In *Salabiaku v France*[65] and in *Janosevic v Sweden*[66] it has held that a reverse onus is not incompatible with the Convention right if the means employed are reasonably proportionate to a legitimate aim. On that approach, the contracting states "are required to strike a balance between the importance of what is at stake and the rights of the defence".[67] It is not

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61 As the Judge's direction in the present case indicates, quoted in fn 1 above.
62 [2002] 2 AC 545 at para [35].
63 At paras [31] – [32].
64 (1950) 213 UNTS 221.
65 (1988) 13 EHRR 379.
66 (2004) 38 EHRR 473.
67 *Janosevic* at para [101].

clear that the Court had in mind exclusion of any independent assessment in the trier of fact.[68] The House of Lords has however relied on *Salabiaku* in holding that the presumption of innocence may be restricted.[69]

[36] The presumption of innocence is unqualified in the International Covenant on Civil and Political Rights, which the New Zealand Bill of Rights Act affirms. Moreover, while the International Covenant expressly permits restrictions on rights such as freedom of thought, conscience and religion[70] and freedom of expression,[71] and indicates the basis upon which such limitations can be made, no such licence is given in relation to the rights to fair trial and to be presumed innocent.[72] It seems well arguable, from the otherwise unaccountable absence in the International Covenant of any register of values against which limitations can be considered,[73] that these rights cannot be restricted as a matter of international obligation, although they may be subject to derogation in emergencies.[74] Whether or not that view is correct in international law, the same effect in my view follows from the nature of the right contained in s 25(c) of the New Zealand Bill of Rights Act.

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68 In *Salabiaku* at para [28], the European Court of Human Rights indicated that a presumption should not "strip the trial court of *any genuine power of assessment* and deprive the presumption of innocence of its substance" (emphasis added). For that reason presumptions "of fact or of law" are not regarded with indifference. Article 6(2) "requires States to confine them within reasonable limits which take into account the importance of what is at stake and *maintain the rights of the defence*" (emphasis added).

69 *R v Lambert* (foreshadowed by *Kebilene*), *R v Johnstone* and *Sheldrake*.

70 Article 18.

71 Article 19.

72 Article 14.

73 As in the reasons of necessity to protect "public safety, order, health, or morals or the fundamental rights and freedoms of others" (by which art 18 may be limited), and those necessary to "respect the rights or reputations of others" or to protect "national security" or "public order", or "public health or morals" (by which art 19 may be limited).

74 Article 4 of the International Covenant permits derogation "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed…". (Even then, states may derogate from the obligations under the International Covenant only to the extent "strictly required by the exigencies of the situation" and provided such measures are not incompatible with other obligations under international law and not involving discrimination "solely on the ground of race, colour, sex, language, religion or social origin".) The Human Rights Committee of the United Nations and those who adopted the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights have taken the view that, because the procedural rights underpin non-derogable rights, the fundamental principles of fair trial, including the presumption of innocence, must be observed even in an emergency: "General Comment 29: States of Emergency" (2001) UN Doc CCPR/C/21/Rev.1/Add.11, para [16]; Siracusa Principles, cl 70. On this view, the procedural rights to fair trial are "functionally non-derogable": Joseph, "Human Rights Committee: General Comment 29" (2002) 2 HRLR 81, p 94.

[37] Section 25 is enacted under the heading "minimum standards of criminal procedure". The right to be presumed innocent is available to "everyone who is charged with an offence". Section 25(c) is unqualified in its own terms. In that respect it is to be contrasted with rights such as those to be protected from "unreasonable" search and seizure or to "fair" trial, which necessarily require some assessment of the scope of the right. No such assessment is required in relation to the presumption of innocence. It is an unmistakable allocation of the burden of proof which is denied by a provision such as s 6(6) of the Misuse of Drugs Act.

[38] It seems to me to be nonsense to speak of a restricted right to fair trial in respect of an offence, because it would permit unfair trial. Similarly, it seems to me to be nonsense to restrict the right to trial before an impartial tribunal, because it would permit trial before a tribunal which is partial. Any restriction denies the right. In the same way, I think it nonsense to speak of the right to be presumed innocent as a restricted right. Under s 25(c), the right to be presumed innocent is given to everyone charged with any offence. A reverse onus excludes the right to be presumed innocent in respect of the offence charged. In the case of s 6(6) of the Misuse of Drugs Act, it permits the conviction of those who are as likely as not to have no intention of supplying others, but who cannot overcome the persuasive burden. I would therefore not follow the assertions in *Salabiaku* and the cases which have applied it that this unqualified right is not absolute.[75] In my view s 25(c) describes an unqualified right to be presumed innocent and any restriction on it is inconsistent with s 25(c).

Section 6(6) of the Misuse of Drugs Act imposes a legal burden of proof

[39] I am unable to accept that "until the contrary is proved" in s 6(6) can be interpreted as meaning "unless there is evidence to the contrary". I reach this conclusion with reluctance, given the contrary view expressed by the House of Lords in *R v Lambert* and confirmed in *Sheldrake* and despite the weight brought to the

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[75] See Ashworth (2002), pp 108 – 118.

argument by Professor Glanville Williams.[76] As already explained, an evidential burden imposes no onus of persuasion at all. It simply raises an issue for determination. Pointing to credible evidence for the trier of fact to consider may raise a reasonable doubt, but because it discharges no onus of persuasion it cannot properly be described as "proof" contrary to the presumption. That is plainly not what is provided for by s 6(6) when it "deems" a purpose of supply "until the contrary is proved". As Cooke P held for the Court of Appeal in *R v Phillips*, "until the contrary is proved" does not mean "unless sufficient evidence is given to the contrary". Moreover, no evidential threshold needs to be raised to put the purpose of possession in issue here. It is critical to culpability. There is no question of "passing the judge". The jury is seized of the question of purpose but s 6(6) requires that it must be decided against the accused unless he "proves" on the balance of probabilities an "innocent" purpose. That is a statutory allocation of the legal burden of proof.[77] The accused must persuade the jury of his innocence. Even applying s 6 of the New Zealand Bill of Rights Act, I do not think that s 6(6) "can" be given the meaning that the burden is discharged by evidence which could be taken by the jury to raise a reasonable doubt.

Justifiable limits?

[40] It is unnecessary to consider whether s 6(6) can be justified under s 5 of the New Zealand Bill of Rights Act. But I raise some matters that will require consideration in a case where s 5 is in issue, because of the discussion undertaken by other members of the Court.

[41] I have some doubt whether the presumption of innocence can be "limited" under s 5, for much the same reasons I conclude that the right itself is not able to be restricted: any "limitation" of the presumption of innocence effectively denies the right altogether. In this connection, some Canadian authorities have drawn a

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[76] "The Logic of 'Exceptions'" [1988] 47(2) CLJ 261. Sir Francis Adams disagreed with Professor Williams in *Criminal Onus and Exculpations* (1968), p 47, and in "Onus of Proof in Criminal Cases" in Clark (ed), pp 68 – 70.

[77] See also Adams, "Onus of Proof in Criminal Cases" in Clark (ed), p 78.

distinction between a limitation on a right and a "truly complete denial of a guaranteed right".[78]

[42] As I have already indicated, I think it is important not to collapse the s 5 assessment into the interpretation of the right. Where s 5 is however in issue because an enactment inconsistent with the right, properly interpreted, is sought to be justified, the approach taken by the Supreme Court of Canada in *R v Oakes* and the cases which have followed it is helpful.[79] The objective sought to be achieved by the limiting provision must be of sufficient importance to warrant infringement of a fundamental human right. The limitation must be no more than is reasonably necessary to achieve the purpose. The objective against which a provision is justified cannot be wider than can be achieved by the limitation of the right.[80]

[43] The ends which might justify a limitation of the human right to be presumed innocent must relate to the particular difficulties of proof or detection which are the immediate reason for the limitation of the right. The practicalities of proof, the risk of conviction of the innocent, and the penalties applicable on conviction are likely to be key when assessing whether a reverse onus of proof is justified. Such onus may perhaps be justified where an accused is well-placed to prove a licence or formal qualification,[81] especially if significant criminality is not in issue. It may also be more readily justified where the accused has assumed a particular risk.[82] If an unrebutted presumption compels a verdict of significant criminal culpability,[83] however, the better view may be that the prosecution must always bear the onus of proof and a reverse onus is not justified. Wider ends of criminal justice would not be sufficient justification, on this view. The public interest in repressing drug taking is

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78 *Ford v Quebec (Attorney-General)* [1988] 2 SCR 712 at p 773; *Attorney-General (Quebec) v Quebec Protestant School Boards* [1984] 2 SCR 66. If the right to be presumed innocent under the International Covenant is "functionally non-derogable", as the Siracusa Principles suggest, the argument against limitation is strengthened.

79 *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835; *Libman v Quebec (Attorney-General)* [1997] 3 SCR 569.

80 So, for example, a majority in the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (Attorney-General)* [1995] 3 SCR 199 at p 335 took the view that a ban on tobacco advertising could not be justified as "protecting public health", but only "to prevent people in Canada from being persuaded by advertising and promotion to use tobacco products".

81 See Dennis, pp 919 – 921.

82 See *R v Johnstone.*

83 The touchstone suggested by Lord Steyn in *R v Lambert* at para [35]; and see Dennis, pp 921 – 925.

addressed by the substantive statutory provisions establishing criminality and penalties. It may also be reflected in the resources applied to detection and prevention. The same is true of other prevalent and serious crimes. Exclusion of the right to be presumed innocent in respect of such crimes would undermine the right enacted as a minimum standard. Sachs J of the Constitutional Court of South Africa expressed the reasons in relation to a case of corporate fraud:[84]

> Much was made during argument of the importance of combating corporate fraud and other forms of white collar crime. I doubt that the prevalence and seriousness of corporate fraud could itself serve as a factor which could justify reversing the onus of proof. There is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book. Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and seriousness of a crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, house-breaking, drug-smuggling, corruption…the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial cases.

[44] It is difficult to see that evidential difficulties for the prosecution in the present case could not have been sufficiently addressed by a presumption of fact which leaves the onus of proof on the prosecution.[85] It is not at all clear that there is any principled basis upon which the risk of non-persuasion and therefore the risk of wrongful conviction is properly transferred to someone accused of drug dealing. Simply making it easier to secure convictions is not a principled basis for imposing a reverse onus of proof, as the House of Lords held in *R v Lambert*.

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84 *S v Coetzee* (1997) 3 SA 527 at para [220].

85 In the manner of the presumption referred to in para [33], and as Ashworth and Redmayne, and Dennis, suggest. Compare Lord Hutton in *R v Lambert* at para [192].

Conclusion

[45] Section 6(6) of the Misuse of Drugs Act imposes a legal onus on the accused. The direction given to the jury was therefore correct. I would dismiss the appeal.

BLANCHARD J

[46] Mr Hansen was convicted after a jury trial in the Invercargill District Court on a charge under s 6(1)(f) of the Misuse of Drugs Act 1975 of being in possession of cannabis plant for a purpose specified in para (d) or (e) of that subsection, namely supply to a person under 18 years of age or sale to a person of or over that age. He had been found on 26 May 2003 at his home in joint possession with another man of in excess of 28 grams of cannabis plant – indeed, considerably more than that quantity, for there was approximately 375 grams of clipped cannabis head as well as 1520 grams of other cannabis plant material.

[47] The issue at Mr Hansen's trial was whether his possession of the drug was for the requisite purpose. Section 6(6) of the Act provided at that time:

> (6) For the purposes of paragraph (f) of subsection (1) of this section, a person shall until the contrary is proved be deemed to be in possession of a controlled drug for a purpose set out in paragraph (c), paragraph (d), or paragraph (e), as the case may require, of that subsection if he is in possession of any of the following:
>
> …
>
> (e) Five grams or more of any cannabis preparation as described in the Schedule 2 to this Act, or 28 grams or more of cannabis plant as described in the Schedule 3 to this Act…

Since that time the specification of the quantities of the drugs to which the subsection applies has been removed to Schedule 5 of the Act, and the subsection re-enacted in the following form:

> (6) For the purposes of subsection (1)(f), a person is presumed until the contrary is proved to be in possession of a controlled drug for any of the purposes in subsection (1)(c), (d), or (e) if he or she is in possession of the controlled drug in an amount, level, or quantity at or over which the controlled drug is presumed to be for supply (*see* section 2(1A)).

Section 2(1A) now reads:

> Any reference in this Act to an amount, level, or quantity at and over which a controlled drug is presumed to be for supply is a reference to the amount, level, or quantity specified in Schedule 5.

[48] It is not suggested that the amendments in 2005 are material to the determination of the question which this Court must decide. That question is whether, when read with the right of a person charged with an offence to be presumed innocent until found guilty according to law,[86] s 6(6) imposes on a defendant a legal burden of proof on the balance of probabilities. The jury had been directed on that basis.

[49] The Court of Appeal[87] was not persuaded to depart from its earlier decision in *R v Phillips*,[88] which held that the accused did face a legal burden of proof under the subsection. Following the analytical approach proposed in relation to ss 4 – 6 of the New Zealand Bill of Rights Act 1990 in *Moonen v Film and Literature Board of Review*,[89] the Court concluded that s 6(6) was only properly capable of bearing one meaning. It rejected a submission citing the decision of the House of Lords in *R v Lambert*[90] and arguing that for consistency with the Bill of Rights the expression "until the contrary is proved" must be read as imposing on a defendant no more than an evidential burden. The Court of Appeal considered the word "proved" was fatal to this argument. Raising an issue as to a particular element of a crime could not be said to be "proof". The Court referred to a statement by Lord Bingham of Cornhill in *Sheldrake v Director of Public Prosecutions* that:[91]

> An evidential burden is not a burden of proof. It is a burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact.

[50] In this Court, counsel for the Crown sought leave to adduce evidence from police officers and other persons with knowledge relating to drug trafficking and use in New Zealand. This evidence apparently included unpublished material, some said

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86 Affirmed by s 25(c) of the New Zealand Bill of Rights Act 1990.
87 *R v Hansen* (Court of Appeal, CA 128/05, 29 August 2005) (Robertson, Williams and Wild JJ).
88 [1991] 3 NZLR 175.
89 [2000] 2 NZLR 9 (CA).
90 [2002] 2 AC 545.
91 [2005] 1 AC 264 at para [1].

to be of a confidential nature, concerning patterns in the supply and use of cannabis in New Zealand and the policies and strategies of law enforcement authorities in combating illicit drug supply. Ms Vidal, for the appellant, objected to the tendering of this evidence at this stage of the case and the Court declined to receive it. That decision in the particular circumstances of the present case should not be taken as any general indication that in future cases the receipt of evidence of legislative fact would necessarily be precluded.

The natural meaning

[51] In *R v Siloata*[92] there was a reminder from this Court that the presumption of innocence is a long-standing tenet of the criminal law and that there is a fundamental rule that it is for the Crown to prove all elements of the crime charged beyond reasonable doubt. There was also confirmation that s 25(c) of the Bill of Rights affirms the presumption of innocence as a minimum standard of our criminal procedure but "subject always to statutory modification by Parliament".

[52] When, in *Woolmington v Director of Public Prosecutions*, Viscount Sankey LC spoke of the golden thread throughout the web of the English criminal law, that it is the duty of a prosecution to prove the prisoner's guilt, he said that duty was subject to the (common law) defence of insanity and "subject also to any statutory exception".[93] After *Woolmington* it was appreciated that, as the Eleventh Report of the Criminal Law Revision Committee put it, all the common law burdens on the defence except that of proving insanity were evidential burdens.[94] That committee, which deprecated persuasive burdens and would have abolished them even for an insanity defence, nonetheless considered that in the typical case of a statutory statement such as "unless he proves the contrary", it would be held that the burden on the accused was still a persuasive one.[95] This, the committee thought, was in accordance with the reasoning of Lord Devlin, for the Judicial Committee, in

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92 [2005] 2 NZLR 145 at para [34].
93 [1935] AC 462 at p 481.
94 Criminal Law Revision Committee, *Eleventh Report: Evidence (General)* (Cmnd 4991, 1972), para [139].
95 At paras [139] – [140].

Jayasena v R.[96] Lord Devlin recorded that their Lordships did not understand what was meant by the phrase "evidential burden of proof":[97]

> They understand of course that in trial by jury a party may be required to adduce some evidence in support of his case, whether on the general issue or on a particular issue, before that issue is left to the jury. How much evidence has to be adduced depends on the nature of the requirement. It may be such evidence as, if believed and if left uncontradicted and unexplained, could be accepted by the jury as proof. Or it may be, as in English law when on a charge of murder the issue of provocation arises, enough evidence to suggest a reasonable possibility. It is doubtless permissible to describe the requirement as a burden and it may be convenient to call it an evidential burden. But it is confusing to call it a burden of proof. Further, it is misleading to call it a burden of proof, whether described as legal or evidential or by any other adjective, when it can be discharged by the production of evidence that falls short of proof. The essence of the appellant's case is that he has not got to provide any sort of proof that he was acting in private defence. So it is a misnomer to call whatever it is that he has to provide a burden of proof.

[53] When the reverse onus in relation to possession of drugs appeared in the Misuse of Drugs Act in 1975, legislators would have understood that they were requiring an accused to prove on the balance of probabilities that the possession of the stipulated minimum quantity of a drug was not for the purpose of sale. The standard of proof upon a reverse onus was well established and had been confirmed by the Privy Council and the English Court of Appeal post-*Woolmington*.[98]

[54] In *Phillips*, which was decided after the enactment of the Bill of Rights, the Court of Appeal rejected the view that in s 6(6) of the Misuse of Drugs Act the expression "until the contrary is proved" could be taken to mean "unless sufficient evidence is given to the contrary". Delivering the judgment of the Court, Cooke P said that it was not persuaded that the ordinary and natural meaning of the word "proof" or "proved" was capable of extending so far. This would, he said, be a "strained and unnatural interpretation" which even with the aid of the Bill of Rights the Court would not be justified in adopting. Section 6(6) was "simply not open" to that interpretation.[99]

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96 [1970] AC 618.
97 At p 624.
98 *Sodeman v Regem* (1936) 55 CLR 192 at p 233 (PC); *R v Carr-Briant* [1943] KB 607 at p 612 (CA).
99 At p 177.

[55] There can certainly be no doubting Parliament's understanding in 2005 when it re-enacted s 6(6) as a consequence of the statutory establishment of the Expert Advisory Committee on Drugs and the removal of the listing of specified quantities of drugs to a Schedule to the Act. The presumption against the accused "until the contrary is proved" was repeated after Parliament had received a report from the Attorney-General under s 7 of the Bill of Rights. The report took the form of advice from the Crown Law Office which stated several times that an accused was required to disprove the presumption in s 6(6) on the balance of probabilities.

[56] Accordingly, even in a Bill of Rights environment, it would be over-stretching the language of a provision that spoke of a person "deemed" (the pre-2005 version of s 6(6)) or "presumed" (as s 6(6) now reads) to have the relevant purpose, "until the contrary is proved", to give it a meaning which required of the accused no more than adducing or pointing to evidence which made the purpose of possession a live issue. The language used by Parliament in s 6(6), both in its present form and as it stood when Mr Hansen was found in possession of cannabis, was not "obscure or ambiguous";[100] indeed, it could hardly have been clearer.

Application of ss 4, 5 and 6 of the Bill of Rights

[57] In a case such as this, when the natural meaning of a legislative provision and the obvious Parliamentary intention coincide, the starting point for the application of the Bill of Rights must be to examine that meaning against the relevant guaranteed right – in this case, s 25(c) – to see if it apparently curtails the right so as to engage the Bill of Rights' interpretive provisions (ss 4, 5 and 6). If these provisions are engaged, the natural meaning may be adopted only in one of two circumstances. Either an application of s 5 may reveal that, because the limit placed by the meaning upon the right is a "demonstrably justified" one, its adoption will not in fact result in inconsistency with the Bill of Rights or, failing that, the provision may not be reasonably capable of bearing any other meaning.

[58] To begin casting around for other potential meanings of a provision as soon as a prima facie incursion upon a guaranteed right is identified does not give

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[100] *Sheldrake* at para [7] per Lord Bingham.

adequate recognition to the role of s 5 in the interpretive process. Nor would such an approach recognise that a meaning dictated by the application of standard interpretation principles[101] should be adopted unless the Bill of Rights actually precludes it.

[59] Although s 6 directs the court to prefer a meaning consistent with the rights and freedoms contained in the Bill of Rights, the scope of the individual rights and freedoms enumerated in Part 2 must be seen as constrained in context by other sections in the Bill of Rights, and in particular the provision for justified limits in s 5. It would surely be difficult to argue that many, if any, statutes can be read completely consistently with the full breadth of each and every right and freedom in the Bill of Rights. Accordingly, it is only those meanings that *unjustifiably* limit guaranteed rights or freedoms that s 6 requires the court to discard, if the statutory language so permits.

[60] If the natural meaning of a statutory provision does appear to limit a guaranteed right, the appropriate next step is to consider whether that limit is a justified one in terms of s 5. If it is, the meaning is not inconsistent with the Bill of Rights in the sense envisaged by s 6, and should be adopted by the court. It is only when that natural meaning fails the s 5 test that it is necessary to consider whether another meaning could legitimately be given to the provision in issue. If the words of the provision in their context are not capable of supporting a different and Bill of Rights consistent meaning, s 4 requires the court to give effect to the provision in accordance with its natural meaning notwithstanding the resulting inconsistency with the Bill of Rights.

[61] It may be said that this approach to ss 4 – 6 is not the one taken in *Moonen*[102] but in that case there was no meaning that, from the language and history of the Act and the circumstances at the time of its enactment, was obviously the one intended by the legislature. Moreover, it was indicated in *Moonen* itself that other approaches

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[101] Including, of course, the basic direction in s 5(1) of the Interpretation Act 1999 that the meaning of an enactment "must be ascertained from its text and in the light of its purpose".

[102] At paras [15] – [20].

could be open which would probably lead to the same result in the case. The Bill of Rights does not mandate any one method or sequence of application for applying and reconciling ss 4 – 6 in a given case. Those sections are broadly complementary but not necessarily always harmonious. When new situations arise it is necessary to approach them in a way which is best suited in the circumstances to give effect to what appears to be the overall Parliamentary intention. This intention must be taken to be a compound one, involving the specific intention to be discerned from the provision in issue read in light of the general overriding directions in ss 4 – 6.[103] In situations like the present, where the specific intention relating to an issue plainly within the contemplation of the legislators is clear, it is particularly important for that intention to be respected. Section 6 can only dictate the displacement of what appears to be the natural meaning of a provision in favour of another meaning that is genuinely open in light of both its text and its purpose.

[62] The above approach is, as McGrath J points out in his reasons for judgment, very much the same as that which finds favour with him and with Tipping J, albeit that in applying it I come to a different conclusion on the particular statutory provision in the Misuse of Drugs Act.

Justified limitation

[63] In this case it is conceded that the reverse onus in s 6(6) does prima facie breach s 25(c). Indeed, Parliament was so advised by the Attorney-General in the s 7 report in 2005. It was also advised, however, that in this context the reverse onus was, in terms of s 5, a reasonable limit prescribed by law which could be demonstrably justified in a free and democratic society.

[64] As Richardson J said in *Ministry of Transport v Noort*,[104] the application of s 5 involves weighing:

> (1) the significance in the particular case of the values underlying the Bill of Rights Act;

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[103] See *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718 at paras [16] – [17] per Lord Hoffmann.

[104] [1992] 3 NZLR 260 at pp 283 – 284 (CA).

(2) the importance in the public interest of the intrusion on the particular right protected by the Bill of Rights Act;

(3) the limits sought to be placed on the application of the Act provision in the particular case; and

(4) the effectiveness of the intrusion in protecting the interests put forward to justify those limits.

In deciding what constitutes a justified limitation under s 5, New Zealand courts have commonly adopted the test used by the Supreme Court of Canada in *R v Oakes*,[105] which was summarised by that Court in the following way in *R v Chaulk*:[106]

1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:

   (a) be "rationally connected" to the objective and not be arbitrary, unfair or based on irrational considerations;

   (b) impair the right or freedom in question as "little as possible"; and

   (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.

[65] As will be seen, any limitation on a guaranteed right should be accepted as demonstrably justified only after the court has worked through a careful process. In the case of some rights, no limitation could be justified. The overarching rights not to be tortured[107] or tried unfairly,[108] for example, can have no meaningful existence as anything less than absolute protections. By contrast, within the contextually defined concept of fair trial sit some "subsidiary rights" such as that to counsel[109] which, while expressed in unqualified language, may be legitimately qualified in their expression in particular circumstances without undermining the integrity of the

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105 [1986] 1 SCR 103.
106 [1990] 3 SCR 1303 at pp 1335 – 1336.
107 Section 9.
108 Section 25(a).
109 Section 24(c). See *R v Condon* [2006] NZSC 62.

criminal justice system. And no one would dispute that many of the freedoms enumerated in Part 2, for example freedom of expression, are in practice routinely limited to a greater or lesser extent by other concerns, both within and external to the Bill of Rights, which are demonstrably justified in a free and democratic society.

[66] It is clear from recent decisions of the House of Lords, in particular *R v Johnstone*[110] and *Sheldrake*, that although the presumption of innocence is a fundamental component of the absolute right to a fair trial, a limitation upon it by way of an onus of proof upon a defendant in relation to a specific element of an offence can be a justified limitation where the legislation in question is directed to a legitimate object and in the circumstances is not beyond reasonable limits or arbitrary. In *Sheldrake*, for example, a provision creating the offence of being in charge of a motor vehicle in a public place while over the permitted alcohol level for drivers stipulated that it was a defence for the accused to prove that at the time he committed the offence the circumstances were such that there was no likelihood of his driving while over the limit. The House of Lords concluded that the provision was directed to a legitimate object, which was the prevention of death, injury and damage caused by unfit drivers. The provision may have infringed the presumption of innocence but it was nevertheless held that the burden it placed on a defendant was not beyond reasonable limits or arbitrary. The likelihood of driving was a matter so closely conditioned by the driver's own knowledge and state of mind at the material time as to make it much more appropriate for him to prove on the balance of probabilities that he would not have been likely to drive than for the prosecutor to prove beyond reasonable doubt that he would. I accept that there is no direct parallel between the facts of *Sheldrake* and those in the present case and that it does not provide guidance, save of a very general nature, in other cases. My point is that even the presumption of innocence can in some instances be subject to limitation in response to a compelling social interest.[111] In *Sheldrake* Lord Bingham described it as supremely important, but not absolute.[112]

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110 [2003] 1 WLR 1736.

111 In *Johnstone* at para [49] Lord Nicholls remarked that for a reverse burden of proof to be acceptable there must be a compelling reason why it is fair and reasonable to deny the accused person the protection normally guaranteed to everyone by the presumption of innocence.

112 At para [3].

[67] No-one familiar with life in New Zealand would dispute that the misuse of drugs to which the 1975 Act is directed is a cause of grave social ills and that the trafficking of controlled drugs is an evil. They can cause death and misery for users, who are frequently stimulated to criminal activity under their mind-altering and addictive effects. As is sufficiently well known to be taken into account by a court without evidence on the subject, the production and distribution of certain types of controlled drugs is a major activity of criminal gangs in New Zealand. This country is far from alone in facing the problem. It has long been a world-wide phenomenon. The 1961 United Nations Single Convention on Narcotic Drugs required each state party, subject to its constitutional limitations, to criminalise the cultivation, possession and purchase of such drugs.[113] A later Convention went further, requiring the criminalisation of this behaviour even when all it involved was personal consumption.[114]

[68] A particular problem for law enforcement authorities derives from a feature of drug dealing that is also well known. Proof of a trafficking purpose is of course not difficult when a large quantity of drugs is found (and at the opposite extreme, such a purpose is plainly not to be found when only a very small quantity is found). The prosecutorial difficulty arises at levels of possession that may seem equivocal, that is, more than minor but less than would, in the absence of corroborating evidence, lead to an inevitable conclusion that there was a purpose of trafficking. Yet this is the typical position of a "street" drug dealer. At the crucial point of contact between the chain of drug distributors and the consumers whose drug use poses the immediate social problem, the quantity of drugs held by a street dealer at any one time is likely to be quite small.

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[113] 520 UNTS 204, art 36(1). The commentary on that Convention remarked upon the difficulty of proving the intention for which drugs are held and stated that if governments chose not to punish possession for personal consumption or to impose only minor penalties on it, "their legislation could very usefully provide for a legal presumption that any quantity exceeding a specified small amount is intended for distribution". In practice in New Zealand, only minor penalties are generally imposed for mere possession of controlled drugs.

[114] United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) 28 ILM 493, art 3(2).

[69] Because of the difficulty in proving a trafficking purpose in street dealing situations, and in order to facilitate the conviction and deterrence of dealers in possession of relatively small quantities, Parliament has considered it necessary to override the Bill of Rights guaranteed presumption of innocence by the adoption in s 6(6) of a rebuttable presumption under which it is for a person found in possession of more than a stipulated amount of a controlled drug to satisfy the trier of fact that their only purpose was self-use.[115] In my view, the commercial supply of drugs to consumers is such a "pressing and substantial" general concern, and the specific objective of s 6(6) as I have just outlined it is consequently so important, that interference with the presumption of innocence in order to achieve that objective may be warranted.

[70] It is therefore necessary to determine whether there is a rational connection between the objective and the means by which it is implemented, whether the means impairs the right as little as possible, and, ultimately, whether the means is proportionate to the objective. It should be noted, to begin with, that Parliament has not copied the provision which was struck down by the Canadian Supreme Court in *Oakes.* In the statute under scrutiny in that case a reverse onus or presumption was applicable whenever someone was found in possession of any quantity of a narcotic, no matter how minimal. Unsurprisingly, the provision in question did not pass muster. There was no rational connection to the objective because "possession of a small or negligible quantity of narcotics does not support the inference of trafficking"; it was "irrational to infer that a person had an intent to traffic on the basis of his or her possession of a very small quantity of narcotics". The presumption was "overinclusive".[116]

[71] In this country the legislature has, instead, specified a minimum quantity for each controlled drug. That is the level which triggers the reverse onus in s 6(6). The quantities are now found in Schedule 5. For example, the quantity of heroin at or over which possession of that drug is presumed to be for supply is half a gram. That

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115 In cases such as the present involving a Class C drug, but not in those where either Class A or Class B controlled drugs are concerned, the defence would be made out if the purpose extended no further than gratuitous supply to persons of or over 18 years of age.

116 At para [78].

for methamphetamine, recently reclassified as a class A drug, is five grams. And that for cannabis is 28 grams of cannabis plant or 100 cigarettes containing the drug.[117]

[72] The same process is mandated for the fixing of the trigger figure in the case of each type of controlled drug listed in Schedule 5. That process has since amending legislation in 2000 been prescribed by the Act, with further amendments having been enacted in 2005. The process is, however, one which has been used for many years by the Minister of Health without statutory recognition.

[73] Section 5AA(1) requires the Minister to establish an Expert Committee to advise the Minister on drug classification matters. The Expert Committee has the following functions:[118]

> (a) to carry out medical and scientific evaluations of controlled drugs, and any other narcotic or psychotropic substances, preparations, mixtures, or articles; and
>
> (b) to make recommendations to the Minister about—
>
> (i) whether and how controlled drugs or other substances, preparations, mixtures, or articles should be classified; and
>
> (ii) the amount, level, or quantity at and over which any substance, preparation, mixture, or article that is a controlled drug (or is proposed to be classified as a controlled drug), and that is to be specified or described in clause 1 of Schedule 5, is to be presumed to be for supply; and
>
> (iii) the level at and over which controlled drugs to which clause 2 of Schedule 5 applies are presumed to be for supply; and
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> (c) to increase public awareness of the Committee's work, by (for instance) the timely release of papers, reports, and recommendations.

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117 It is uncertain whether the definition of "cannabis plant" in Schedule 3 is really intended to cover portions of plant from which no cannabis could be extracted, but whether or not that is so it would be fanciful to suggest that a conviction of possession for supply could in practice be sustained, against a test of reasonableness of verdict, if an unusable portion of the plant were to be counted. In *R v Gillan* [2006] 2 NZLR 781, the Court of Appeal held that growing cannabis plants cannot be the subject of a charge of possession for the purpose of sale. The Crown therefore had to prove commerciality in relation to a cultivation charge based on an unharvested crop. The Court commented at para [24] that the "root system, the stem and much of what is generally referred to as 'cabbage' are of either no or little interest to those in the drug fraternity".

118 Section 5AA(2).

[74] The Expert Committee comprises up to five people with expertise in pharmacology, toxicology, drug and alcohol treatment, psychology and community medicine; up to three people employed in the Public Service who have appropriate expertise in public health, the appropriateness and safety of pharmaceuticals and their availability to the public and border control; one member of the Police; one employee of the Ministry of Justice who has appropriate expertise in matters relating to the justice system; and one person representing the views of consumers of drug treatment services.[119]

[75] Before recommending the making of a classification by Order in Council the Minister is obliged to consult with and consider the advice given by the Expert Committee and must have regard to the following matters:[120]

> (a) the likelihood or evidence of drug abuse, including such matters as the prevalence of the drug, levels of consumption, drug seizure trends, and the potential appeal to vulnerable populations; and
>
> (b) the specific effects of the drug, including pharmacological, psychoactive, and toxicological effects; and
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> (c) the risks, if any, to public health; and
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> (d) the therapeutic value of the drug, if any; and
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> (e) the potential for use of the drug to cause death; and
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> (f) the ability of the drug to create physical or psychological dependence; and
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> (g) the international classification and experience of the drug in other jurisdictions; and
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> (h) any other matters that the Minister considers relevant.

[76] The matters that the Minister must have regard to and on which the Expert Committee may give advice in connection with adding controlled drugs to the Schedule or setting trigger figures are:[121]

> (a) the amount of the drug that could reasonably be possessed for personal use, including, without limitation, levels of consumption, the ability of the drug to create physical or psychological dependence, and the specific effects of the drug; and

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119 Section 5AA(3).
120 Section 4B(1) and (2).
121 Section 4B(4).

(b) the amount, level, or quantity at and over which the drug is presumed to be for supply in other jurisdictions; and

(c) any other matters that the Minister considers relevant.

[77] From a reading of these provisions it can be seen that the system now recognised by Parliament for the classification of controlled drugs and the setting of the minimum amounts which will trigger the presumption in the case of each individual drug has been carefully constructed. The specification of particular and various qualifications for membership of the Expert Committee and the numerical balancing of the varying fields of expertise within that membership are designed to ensure that in advising the Minister the Expert Committee takes account of the factors which Parliament believes to be relevant to its recommendations. In relation to trigger levels, the Minister has to have regard to the "amount of a drug that could reasonably be possessed for personal use". Obviously this requires the identification of an amount of a drug which could *not* reasonably be possessed for personal use and therefore is most unlikely to be in someone's possession for that purpose alone. The Minister has to seek the Expert Committee's view on that specific question. Amongst the matters the Expert Committee and the Minister consider in this context are actual levels of consumption by users. They also must have regard to trigger levels in other jurisdictions, thereby drawing on the wisdom of other legislatures in dealing with the same problem of differentiating between the commercial and non-commercial purpose of possession.

[78] There is no evidence that the Expert Committee and the Minister have ever failed to follow the processes contemplated by s 4B, nor am I aware that the appropriateness of an individual trigger level set or confirmed as an outcome of those processes has ever been challenged (let alone successfully) in any court. Accordingly, it can be inferred that the current legislative scheme ensures that each trigger level is fixed at a quantity most unlikely to be in someone's possession except for the purpose of supply.[122] On examination of the methodological framework underpinning the practical operation of s 6(6), there appears to be a rational connection between the objective of removing a significant impediment to

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[122] In the case of cannabis there is the additional safeguard, as previously indicated, that the reverse onus can be discharged by showing that the possession above the trigger level was for non-commercial supply to others of or over 18 years of age.

obtaining the conviction of those who possess drugs for the purpose of supply to consumers and the means used to achieve that objective. Parliament was entitled, in my view, to consider that the legislative scheme would ensure that the operation of the reverse onus in particular cases was not arbitrary, unfair or based on irrational considerations. In this case we have no evidence that it has not operated as intended.

[79] But does the means chosen to achieve the objective – a reverse onus - impair the presumption of innocence "as little as possible"? In *Chaulk*[123] the Canadian Supreme Court pointed out that this phrase from *Oakes* was not intended to be given an absolute or literal meaning and that a choice could be made from a range of means which impaired the right as little as was reasonably necessary. I have accepted that there may well be considerable difficulty in proving the purpose of possession – something obviously best known to the accused – in typical cases of street dealing. Any remedy must be one which is effective and I am persuaded that nothing short of a reverse onus would be sufficient. In the vast majority of cases, a requirement for an evidential burden to be surmounted, dischargeable by adducing or pointing to some evidence which, if believed, could support the defence, would in practical (as opposed to theoretical) terms be no different from a requirement that the Crown discharge the onus of proving the requisite purpose of the accused beyond reasonable doubt. Lord Hutton, who had considerable experience in trying criminal cases, said as much in *Lambert*, dissenting on this point:[124]

> [I]n a drugs case, in practice, there is little difference between the burden of proving knowledge resting throughout on the prosecution and requiring the defendant to raise the issue of knowledge[125] before the burden of proof on that matter reverts to the prosecution.

His Lordship commented that it was not unprincipled to have regard to practical realities.[126] The same can be said concerning the burden of proving purpose of possession. If the burden on the accused were merely evidential, the existence of anything in the case showing some personal use by the accused would cause the Crown to have to disprove the suggestion that this was the purpose of possession.

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123 At pp 1341 – 1343.

124 At para [192].

125 *Lambert* concerned a reverse onus requiring an accused found with a bag containing drugs to prove that he had not known that it contained drugs.

126 At para [194].

Thus, for example, a man caught with a little more than the trigger level of a drug could simply call evidence that he was a user of the drug. The Crown would then have to prove that in fact he was intending to sell all or part of it. The Crown's difficulty of proof relates to establishing the state of the accused's mind – what he intended to do with the drug. In order to put the crucial question in issue, the accused would not have to point to some external fact capable of investigation and being negatived by the Crown. In my view, in a case of this kind, there is no effective way, short of imposing the persuasive burden of proof upon a person already proved to have been in possession of the specified quantity of a drug, by which the identified prosecutorial difficulty can be sufficiently remedied so as to achieve the important objective.

[80] A more difficult question remains, however, which is whether the imposition of the reverse onus – notwithstanding that it is reasonably necessary to achieve the relevant objective – impairs the presumption of innocence only to an extent proportional to the significance of the objective. Assessing the extent to which the presumption is affected in practice requires a consideration of the degree of additional risk of conviction to which a defendant is exposed under s 6(6). It is said for the appellant that there is a risk that a jury may convict a defendant who fails to discharge the onus of proof concerning the purpose of possession despite having a reasonable doubt over whether the defendant intended to supply the drug to others. I regard that risk as one which in the vast majority of cases will be more theoretical than real. It is also a risk that can easily be avoided by those whose (unlawful) possession of drugs is genuinely for their own use by refraining from acquisition of such quantities as may attract the reverse onus. Assuming that the Expert Committee follows the statutorily mandated process, it is most unlikely that a person acquiring a drug for consumption only could inadvertently take himself or herself over a trigger level set by the Expert Committee. It is important to emphasise that the Court does not have before it any evidence that any trigger levels have been inappropriately set. Inexperienced users, who might be unaware of the existence of the trigger levels for the more popular drugs, should therefore not be taken to be at risk. Users who do choose to buy in quantities that, in the opinion of the Expert Committee, could not reasonably be possessed for personal use must be taken – like the dealers who supply them – to accept the risk associated with their actions.

[81] In a very small number of borderline cases – of which the present case is certainly not one – it is possible that a user of illegal drugs could be convicted of possession for supply where there existed a reasonable doubt about purpose. But the consequence of the limitation of the presumption of innocence for such persons (if in fact there are any) would not be disproportionate to the overall net gain to society from the effective operation of the reverse onus. The disincentive to dealers provided by the existence of the reverse onus in s 6(6) and the practical ineffectiveness for the prosecution of anything less than such an onus must, in my view, be given the greater weight.

[82] It will be remembered that s 5 of the Bill of Rights has the effect of requiring the courts, to undertake, within the bounds of their jurisdiction and processes, an analysis of the legitimacy of challenged statutory provisions in their particular societal context. The present case involves the possession of cannabis, but s 6(6) of the Misuse of Drugs Act applies to all drugs controlled by that Act, and the reverse onus it contains must be considered in that light. I have concluded that the effect on the presumption of innocence is, on balance, proportionate to the objective of facilitating the conviction of those who sell small quantities of drugs to consumers with potentially terrible consequences for New Zealand society, such as have been illustrated in a number of recent cases where an offender was under the influence of methamphetamine.

Result

[83] Section 6(6) is, within the meaning of s 5 of the Bill of Rights, a limitation upon the presumption of innocence that is demonstrably justified, and is accordingly not inconsistent with the Bill of Rights. It is to be read, as Parliament clearly intended, as requiring a defendant to prove on the balance of probabilities that the drug was not in his or her possession for any of the purposes referred to in s 6(1)(f).

[84] I would therefore dismiss the appeal.

TIPPING J

TABLE OF CONTENTS

Introduction

[85] The appellant, Mr Hansen, challenges the traditional interpretation of the reverse onus in s 6(6) of the Misuse of Drugs Act 1975. The subsection provides that if the accused has in his possession more of a particular drug than the level specified for that drug,[127] he is presumed to be in possession for the purpose of sale or supply,[128] until the contrary is proved. Traditionally the obligation to prove the contrary has been interpreted as casting a legal or persuasive onus[129] onto the accused to satisfy the jury, on the balance of probabilities, that his possession was not for the presumed purpose. But Mr Hansen contends that proving the contrary can and should be interpreted as meaning no more than raising a reasonable doubt. On this basis, if there is a reasonable doubt whether the accused's purpose was supply, he cannot be found guilty of anything other than simple possession.

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127 See Schedule 5 to the Misuse of Drugs Act 1975.

128 For convenience I will refer only to supply.

129 I will refer to this onus (or burden) as the persuasive onus.

[86] The issue arises because Mr Hansen was found in possession of cannabis plant weighing more than the presumptive level of 28 grams. He failed to satisfy the jury at his trial that his possession was not for supply. He was convicted and his appeal was dismissed. Both the trial Judge and the Court of Appeal applied the traditional approach to the reverse onus, relying on the Court of Appeal's earlier decision in *R v Phillips*.[130] On the appeal to this Court Ms Vidal contended that the trial Judge had applied the wrong meaning to s 6(6) and so had the Court of Appeal.

[87] Ms Vidal's argument was based essentially on the proposition that, in its context, the word "proved" should be construed as meaning "tested" in the sense of creating a reasonable doubt. She submitted that as the word "proved" was capable of bearing that meaning, s 6 of the New Zealand Bill of Rights Act 1990 required that it be so construed because otherwise the presumption was inconsistent with the right to be presumed innocent until proved guilty.[131]

The relationship between ss 4, 5 and 6 of the Bill of Rights

[88] This argument raises, at least implicitly, a question about the correct approach to s 6 of the Bill of Rights in the light of ss 4 and 5. Does the court look first for the most Bill of Rights consistent meaning the statutory provision is capable of bearing, or does the court first identify the meaning which, on ordinary principles of statutory interpretation, the provision should be given? Section 6 is concerned with meanings which are inconsistent with the rights and freedoms contained in the Bill of Rights.[132] It is only when a meaning is inconsistent[133] that the preference for a consistent meaning mandated by s 6 comes into play. Logically, therefore, the court's initial task is to identify the meaning which the statutory provision bears without reference to the preference with which s 6 is concerned. The court then tests that meaning for Bill of Rights consistency along the lines set out below.

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130 [1991] 3 NZLR 175.

131 Under s 25(c) of the New Zealand Bill of Rights Act 1990.

132 Although in its terms s 6 is directed to interpretation, it serves the collateral purpose of encouraging explicitness if Parliament wishes to enact a provision which is inconsistent with a right or freedom contained in the Bill of Rights.

133 Or less consistent than another tenable meaning.

[89] The initial interpretation exercise should proceed according to all relevant construction principles, including the proposition inherent in s 6 that a meaning inconsistent with the rights and freedoms affirmed by the Bill of Rights should not lightly be attributed to Parliament. Once the resulting meaning, which I will call Parliament's intended meaning, has been identified, the next step is to determine whether there is any inconsistency between that meaning and the Bill of Rights. If there is none, the matter rests there. If there is an inconsistency, and this can conveniently be called apparent inconsistency, the question which then arises is whether the court's next step is to examine whether a consistent or less inconsistent meaning can be given to the statutory language to accord with the s 6 preference; or rather, whether the next step is to examine the apparent inconsistency to see whether it is nevertheless reasonable and a demonstrably justified limit and thus permitted by s 5 of the Bill of Rights. I say "permitted" in the sense that by enacting a provision with that meaning Parliament is not acting inconsistently with the Bill of Rights of which s 5 forms an integral part.

[90] I consider the latter is the appropriate course. The court does not move straight from an apparently inconsistent meaning to look for another meaning. The court first examines the apparently inconsistent meaning to see whether it constitutes a justified limit[134] on the right or freedom in question. If it does not constitute a justified limit, the court goes back to s 6 to see if a consistent or more consistent meaning is reasonably possible. If, however, the apparently inconsistent meaning does constitute a justified limit, the apparent inconsistency is overtaken by the justification afforded by s 5. In effect, s 5 has legitimised the inconsistency.[135] If this sequence were not followed, there would be the potential for subversion of a deliberate policy choice by Parliament and its (at least implicit) view that the ensuing limitation of a right or freedom was justified. This would occur if there was a reasonably possible but unintended meaning which could be given to the statutory words. Such would be the consequence of going straight from Parliament's intended

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134 I use this expression as shorthand for the statutory requirement in s 5 that a limit must be reasonable and demonstrably justified in a free and democratic society.

135 It is clear that some rights and freedoms have more potential for justified limitation than others. Some have no such potential. A limitation on the right to fair trial (s 25(a)) which renders a trial unfair could hardly qualify as a justified limitation under s 5.

but apparently inconsistent meaning to another meaning which was reasonably possible but unintended.

[91] To approach the matter in this way would give the limitation involved in Parliament's intended meaning no chance of being justified under s 5, if there was a tenable and more consistent meaning. If Parliament's intended meaning is not justified under s 5 then, and only then, should the court look for a reasonably possible alternative meaning under s 6. This is not to subvert s 6 but rather to say that if a meaning which is apparently inconsistent is nevertheless justified under s 5, it is no longer inconsistent for the purposes of s 6. Section 5 makes the inconsistency legitimate. This construction recognises Parliament's ability to legislate in terms which constitute a justified limit without having its purpose frustrated by a tenable but unintended s 6 interpretation. Section 4 comes into play only if Parliament's intended meaning constitutes an unjustified limit and no other tenable meaning can be given to the words in issue. This approach, which I regard as principled rather than prescriptive, best reflects the interrelationship between ss 4, 5 and 6. It is consistent with Parliament's plenary law making powers as emphasised by s 4. It also gives s 5 an appropriate role in the interpretation exercise entrusted to the courts.

[92] A summary may be helpful:

Step 1. Ascertain Parliament's intended meaning.

Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.

Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.

Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails.

Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.

Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.

[93] It is appropriate to say something about the way this approach fits with what was said by the Court of Appeal on this subject in *Moonen v Film and Literature Board of Review*.[136] In that case a rather differently arranged and constructed sequence was suggested as being helpful, albeit the Court recognised that other approaches would probably lead to the same result. The *Moonen* approach was not intended to be mandatory. In any event that sequence was suggested in a case which involved words that were in themselves conceptually elastic and therefore intrinsically capable of having a meaning which impinged more or less on freedom of expression. It was not a case like the present in which the words "until the contrary is proved" are said to be capable of having two conceptually distinct meanings, one involving inconsistency with the presumption of innocence contained in s 25(c) of the Bill of Rights and the other involving no or at least less inconsistency. It is important to note that in view of the way the case was argued for the appellant, the Crown was not required to address argument to the proposition that the presumption of innocence is incapable of justified limitation.[137]

[94] There is a difference between a case in which there are two conceptually distinct meanings and a case in which the issue concerns the point at which, on a possible continuum of meaning, the appropriate meaning should be found. In the continuum type of case, there may be good reason to adopt the approach set out in *Moonen*, if only because it will usually be difficult to determine where Parliament intended the meaning to fall on the continuum. The point at which a tenable meaning ceases to limit or least limits the right or freedom may well represent the appropriate point at which to fix the meaning. But in a case like the present, where the two potential meanings are conceptually quite different and distinct and, as I shall shortly indicate, there is only one candidate for Parliament's intended meaning, I consider that the approach earlier outlined is the one which will best serve the relationship between ss 4, 5 and 6.

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136 [2000] 2 NZLR 9.

137 See also para [135] below.

The meaning of the word "proved"

[95] I cannot accept that in its present context the word "proved" can properly be understood to mean "tested", as Ms Vidal submitted. The more is this so when the word "proved" is read with the words "the contrary". The composite expression "until the contrary is proved" has a clear, simple and well understood legal meaning. It places a persuasive onus on the accused, not just an evidential onus. The accused must establish to the satisfaction of the tribunal of fact the contrary of what is otherwise presumed against him. The standard of proof is the balance of probabilities. To give the expression "until the contrary is proved" the meaning "until the contrary is tested" would be to make it well nigh meaningless. The terms of s 6(6) would become redundant if they were construed to mean that the accused had to raise only a reasonable doubt; the more so if the accused could do so without an evidentiary foundation.

[96] I should add here that it is necessary to be clear what is meant by an evidential onus, as distinct from an onus of a persuasive kind. A persuasive onus, as in s 6(6), requires the accused affirmatively to satisfy the jury to a specified standard (here the balance of probabilities) that the contrary of the presumed fact represents the true position. An evidential onus requires the accused to satisfy the judge that there is sufficient evidence before the court to the contrary of the presumed fact to raise a triable issue. If that is so the Crown must then, in a case like the present, satisfy the jury beyond reasonable doubt on all the evidence, including of course the quantity of the drug, that the accused's possession was for the purpose of supply. If there is insufficient contrary evidence to leave the issue to the jury, the presumption will necessarily result in the conviction of the accused.

[97] The appellant's submission that "until the contrary is proved" means "until the contrary is tested" seems to suggest a variant of the evidential onus as I have just described it. This variant cannot logically be correct if it would allow the accused to raise a triable issue without any evidential basis for doing so. It would be the equivalent of allowing a person charged with an assault to plead self-defence without evidentiary support. The need for the accused to be able to point to sufficient evidence raising a triable issue as to the purpose of his possession is not materially

different from the requirement for a defence like self-defence to be based on a credible narrative in the evidence.

[98] If the accused was not obliged to call or point to any contrary evidence and could simply argue that a triable issue arose on the Crown's case because, as it stood, that case had not established the purpose of supply beyond reasonable doubt, despite the quantity of the drug, the Crown would effectively have to prove its case beyond reasonable doubt on that issue from the outset. There would then, as I have said, be no presumption at all.

[99] The report of the Attorney-General under s 7 of the Bill of Rights, when s 6(6) was ratified in 2005,[138] clearly advised Parliament that the expression "until the contrary is proved" had its traditional and well understood legal meaning of creating a persuasive rather than an evidential onus. The report also went on to advise that the inherent limiting of the presumption of innocence was justified, a topic to which I will come in a moment. There cannot be the slightest doubt that when Parliament originally enacted, and then effectively re-enacted, s 6(6), it understood the expression "until the contrary is proved" to bear what I have called its traditional meaning.

[100] Parliament's intended meaning has now been identified for the purpose of step 1. It is common ground that this meaning is, at least apparently, inconsistent with the presumption of innocence. So we have apparent inconsistency at step 2. Step 3 requires examination of whether this apparent inconsistency is a justified limit in terms of s 5.

The ingredients of justification under s 5

[101] Section 5 stipulates that any limit on a right or freedom affirmed by the New Zealand Bill of Rights Act 1990 must satisfy three criteria. It must be prescribed by law, it must be reasonable, and it must be demonstrably justified in a free and democratic society. It is instructive and appropriate that our society should

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138 As more fully discussed at para [139] and following below.

be described as both free and democratic. The same principle underpins both the concept of freedom and the concept of democracy. It also provides a link between them. That principle is the rule of law. Those who do not live under the rule of law cannot be truly free, and there can be no democracy save under the rule of law. A free and democratic society is therefore a society which operates under the rule of law. Senator Robert Taft put it well when he said:[139]

> Unless there is law, and unless there is an impartial tribunal to administer that law, [no-one] can be really free. Without them only force can determine controversy … and those who have no sufficient force cannot remain free. Without law and an appeal to a just and independent court to interpret that law, [everyone] must be subject to the arbitrary discretion of [their] ruler or of some subordinate government official.

Robert Taft, who lost the Republican nomination to General Dwight Eisenhower in 1952, was the son of President William Howard Taft. Many citizens did not support the ultimate purpose of his Kenyon College speech, which was to oppose war crimes trials as based on ex post facto law. Ohio's newspaper *The Toledo Blade* professed to sum up the general opinion of the speech by saying that Taft had "a wonderful mind which knows practically everything and understands practically nothing". This harsh judgment cannot be applied to the words I have quoted above, with which Taft introduced his topic.

[102] In this case the limit on the right to be presumed innocent (the reverse onus) clearly satisfies the need for prescription by law. It is a specific feature of the legislation. There remains the need for it to be reasonable and demonstrably justified. Section 5's stipulation that a limit must be demonstrably justified emphasises New Zealand's commitment to the rule of law. The legal principles affirmed by the Bill of Rights cannot be limited or overridden without demonstrable justification.

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[139] Taft, "Equal Justice Under Law: The Heritage of the English-speaking Peoples and their Responsibility", Address at Kenyon College, Ohio, 5 October 1946, published in (1946) 13 Vital Speeches of the Day 44.

Section 5 methodology

[103] It is convenient and conventional to examine the reasonableness and justification criteria together. The leading Canadian case of *R v Oakes*[140] concerned a reverse onus of the present kind. But there the reverse onus applied however small the amount of the prohibited drug found in the possession of the accused. The Supreme Court of Canada held that it was not a justified limit, largely because a trivial amount could not rationally give rise to any inference or presumption of trafficking. *Oakes* is, however, a valuable early authority on the general approach to whether limits on rights and freedoms are justified. The language of s 1 of the Canadian Charter of Rights and Freedoms is materially the same as the language of s 5 of our Bill of Rights. The headnote to *Oakes* conveniently captures the essence of the Court's methodology:

> Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective must be.

[104] This approach can be said to raise the following issues:

(a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?

(b) (i) is the limiting measure rationally connected with its purpose?

(ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?

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140 [1986] 1 SCR 103.

(iii) is the limit in due proportion to the importance of the objective?

The role of the courts under s 5

[105] This general approach, as developed in Canada and broadly to the same effect elsewhere,[141] is helpful, but before further examining and applying it I wish to say something more about the concept of a free and democratic society and the relationship of this concept to what I regard as a significant ingredient in the whole exercise. This is the need to allow some discretion to Parliament in its determination of whether a limit on a freedom or right is reasonable and justified. There is some conceptual parallel with the margin of appreciation doctrine as it has developed in the European jurisprudence. There the European Court of Human Rights allows a margin of appreciation to individual states in their application of the European Convention[142] to their own individual societies. More importantly, under English domestic jurisprudence the courts allow what is often referred to there as an area of discretion or judgment to the legislature, as I will develop below.

[106] In s 5 of our Bill of Rights the New Zealand Parliament has described New Zealand society as free and democratic. It has also required limits on rights and freedoms to be reasonable and justified. If Parliament enacts a limit, it must generally be taken to have regarded that limit as reasonable and justified in the free and democratic society in which it is designed to operate. Obviously Parliament must have anticipated that its assessment in that respect could come under judicial scrutiny, but it is not immediately clear whether it expected the judiciary to apply its own appreciation of what was reasonable and justified, without reference to Parliament's appreciation of those matters, or whether it expected the judiciary to act more as a check against a Parliamentary appreciation which was, if you like, outside the legitimate exercise of Parliamentary discretion. In this respect s 5 is just as much an instruction to Parliament as it is to the courts, and the role of the courts can be regarded as keeping Parliament faithful to the s 5 instruction, but with some inherent room for Parliamentary appreciation.

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141 See para [113] and following below.

142 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 UNTS 221.

[107] This is where the reference to New Zealand being a free and democratic society is informative. It is of the essence of a democratic society that the views of the majority of those assembled in Parliament will prevail. But, against that, a major purpose of a Bill of Rights (entrenched or otherwise) is to prevent minority interests from being overridden by an oppressive or over-zealous majority.[143] Herein lies the conundrum. How far is the majority able to go in legislating to restrict the rights and freedoms of minorities? The point is essentially the same whether the courts have power to strike down legislation or whether, as in New Zealand, they do not, and can only declare that certain legislation, although operative, is inconsistent with the Bill of Rights.

[108] Parliament has nevertheless given the New Zealand courts a significant review role. That role arises by virtue of s 5, which requires that a limit on a right or freedom be *demonstrably* justified. Determination of this question necessarily falls to the courts. Parliament must therefore be taken to have disclaimed any kind of presumptive justification simply because it has enacted the limit. The onus is on those who claim the limit is reasonable and justified to satisfy the court that this is demonstrably so. But how much weight, if any, should be given to the fact that by enacting the limit, Parliament must be regarded as expressing its view that the limit is reasonable and justified? The concept of a society being democratic, and the express reference to that concept in s 5, suggests that some weight should be given to Parliament's appreciation of the matter.

[109] The more may this be so when Parliament has before it a report from the Attorney-General under s 7 drawing its attention, as here, to the fact that the reverse onus is a limit on the presumption of innocence but in the Attorney-General's opinion the limit is reasonable and justified. Clearly the courts are not bound by the Attorney-General's assessment or by Parliament's concurrence, but the combination of the Attorney-General's view and its ratification by Parliament must command some respect as evidencing the appreciation of the senior law officer of the Crown and that of the majority of the nation's elected representatives.

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[143] It was John Stuart Mill who saw the "tyranny of the majority" as the greatest danger in a democratic society: see *Essay on Liberty* (1859), p 7. See also de Tocqueville, *Democracy in America* (1835), where the same phrase is used in a similar context.

[110] Against that, a measure of caution may be justified in the light of the intensely political aspects of much legislation. Had s 5 not required *demonstrable* justification for any Bill of Rights limiting provision, respect for the separation of powers and Parliament's sovereign and exclusive law making function might have encouraged the courts to afford the benefit of any judicial doubt as to justification of the limit to Parliament. But that cannot be so where the limit must not simply be justified but must be demonstrably justified. If anything, the benefit of the doubt should go against justification of the limit, the onus of showing such demonstrable justification being on the party claiming the limit to be justified.

[111] Bearing in mind these various matters, and the judiciary's prime responsibility to uphold rights and freedoms and not to allow them to be limited otherwise than on a convincing basis, I still consider there is a place for some latitude, greater or less according to the circumstances, to be given to Parliament. The concept of a free and democratic society signals the kind of values which the Bill of Rights is designed to protect.[144] But it also signals the need to give appropriate weight to the fact that a limit has been democratically enacted.

[112] I recognise that in *Oakes* and subsequent cases, the Canadian courts have spoken of a stringent standard of justification.[145] But I do not regard that requirement as being inimical to allowing some latitude to Parliament. That latitude is capable, as appropriate, of informing all the necessary aspects of the s 5 exercise. An approach which gives no credence at all to Parliament's view of the matter would, in my judgment, remove from the assessment the check on absolutism which the democratic process is apt to provide.

Deference to Parliament - the English approach

[113] The most helpful recent judicial discussion in England of which I am aware on the question of giving some latitude to Parliament's appreciation is that of Lord Hoffmann in the *Denbigh High School* case.[146] It is necessary first to mention

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144 *Oakes* at para [64] per Dickson CJ.
145 *Oakes* at para [65] per Dickson CJ.
146 *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100.

the supra-national concept of a margin of appreciation, to which Lord Hoffmann referred, and which was first formulated by the European Court of Human Rights in *Handyside*'s case:[147]

> [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context. Consequently, Article 10 para 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.

[114] After some intermediate developments, Fordham and de la Mare were able in 2001 to say of the relationship between the doctrine and its domestic equivalent:[148]

> Although domestic judges should not read-across the margin of appreciation as described by the Strasbourg Court, there will need to be *some* doctrine of a "margin". Otherwise, the Court will risk arrogating to itself the role of primary policy- and decision-maker.

[115] The nature of this domestic margin, or latitude, as I am calling it, was discussed by Lord Steyn in *Daly*.[149] His Lordship was of the view that a limit on a right or freedom might pass the *Wednesbury* reasonableness test but fail that of proportionality. The difference is often captured by the phrase "intensity of review". In *Daly* Lord Steyn accepted the proposition of Laws LJ[150] that the intensity of review in a public law case depends on the subject matter in hand. Lord Steyn himself added that this was so "even in cases involving Convention rights".[151] Then came his now famous observation: "In law context is everything."

[116] This approach, and that of Lord Hoffmann in the *Denbigh High School* case to which I am about to come, supports the view that the courts perform a review function rather than one of simply substituting their own view. How much latitude the courts give to Parliament's appreciation of the matter will depend on a variety of circumstances.[152] There is a spectrum which extends from matters which involve

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147 *Handyside v United Kingdom* (1976) EHRR 737 at para [48].

148 "Identifying the Principles of Proportionality" in Jowell and Cooper (eds), *Understanding Human Rights Principles* (2001) 27, p 83.

149 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at paras [27] – [28].

150 In *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 at para [18] (CA).

151 *Daly* at para [28].

152 The approach outlined is also supported by what Lord Nicholls said in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at para [19].

major political, social or economic decisions at one end to matters which have a substantial legal content at the other. The closer to the legal end of the spectrum, the greater the intensity of the court's review is likely to be. The reality is, however, that a particular matter may partake of a number of different elements involving different aspects of this spectrum. For example, the allocation of scarce public resources can often intersect with questions which, from a different standpoint, may seem more legal than political.

[117] Ultimately, judicial assessment of whether a limit on a right or freedom is justified under s 5 of the Bill of Rights involves a difficult balance. Judges are expected to uphold individual rights but, at the same time, can be expected to show some restraint when policy choices arise, as they may do even with matters primarily involving legal issues. In the *Denbigh High School* case, Lord Hoffmann observed that even if there had been an infringement of the right in question, he would have been of the opinion that the infringement was justified.[153] He added that the school was entitled to consider that its rules were necessary for the protection of the rights and freedoms of others. His Lordship's use of the word "entitled" is a clear demonstration of the view that the courts should allow the decision-maker, here the school, some degree of discretion or judgment. If the decision-maker is Parliament, and it has manifested its decision in primary legislation, the case for allowing a degree of latitude may well be the stronger.

[118] Lord Hoffmann addressed what degree of latitude should be given to the decision-maker by referring first to the margin of appreciation doctrine as developed by the European Court of Human Rights. He added, however, that in applying Convention rights which form part of the domestic law of the United Kingdom, the European Court's concept of a margin of appreciation had no application as such.[154] It was for the domestic courts to decide how the area of judgment allowed by the domestic equivalent of that margin should be apportioned between the legislative, executive and judicial branches of government. Lord Hoffmann then cited a passage

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153 At para [58].
154 At para [63].

from the speech of Lord Hope of Craighead in *R v Director of Public Prosecutions, ex p Kebilene*:[155]

> The doctrine of the 'margin of appreciation' is a familiar part of the jurisprudence of the European Court of Human Rights. The European Court has acknowledged that, by reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed to evaluate local needs and conditions than an international court … .
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> … This technique is not available to the national courts when they are considering Convention issues arising within their own countries. But in the hands of the national courts also the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality.
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> In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. *In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.*

[119] This general approach, with which I respectfully agree, can be figuratively described by reference to a shooting target. The court's view may be that, in order to qualify, the limitation must fall within the bull's-eye. Parliament's appraisal of the matter has the answer lying outside the bull's-eye but still on the target. The size of the target beyond the bull's-eye will depend on the subject matter. The margin of judgment or discretion left to Parliament represents that area of the target outside the bull's-eye. Parliament's appraisal must not, of course, miss the target altogether. If that is so Parliament has exceeded its area of discretion or judgment. Resort to this metaphor may be necessary several times during the course of the proportionality inquiry; indeed the size of the target may differ at different stages of the inquiry. The court's job is to delineate the size of the target and then say whether Parliament's measure hits the target or misses it.

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[155] [2000] 2 AC 326 at pp 380 – 381 (emphasis added).

Section 5 methodology - conclusions

[120] The Canadian jurisprudence, which started with *Oakes*, has recently produced a decision called *Multani v Commission scolaire Marguerite-Bourgeoys*.[156] In that case Charron J, delivering the judgment of the majority of the Court,[157] summarised the Canadian position in the following succinct paragraph:[158]

> The onus is on the respondents to prove that, on a balance of probabilities, the infringement is reasonable and can be demonstrably justified in a free and democratic society. To this end, two requirements must be met. First, the legislative objective being pursued must be sufficiently important to warrant limiting a constitutional right. Next, the means chosen by the state authority must be proportional to the objective in question: *Oakes*; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713.

[121] In terms of this formulation there are two requirements which must be satisfied under the justification head: a sufficiently important objective, and proportionality of the means chosen to achieve the objective.[159] In Canada the proportionality question has conventionally been further divided into three sub-issues, which can be described as rational connection, minimal impairment, and the balance of social advantage against harm to the right. In England, the first broad criterion, namely that the legislative objective must be sufficiently important to warrant limiting a constitutional right, and the first of the three proportionality issues, namely that of rational connection, are generally regarded as threshold issues. They do not normally cause the same difficulties as the two remaining proportionality aspects, albeit it can sometimes be important how the legislative objective is defined as that can influence later questions.

[122] The concept of two threshold issues, to be followed by two more substantive issues, can be found in a helpful recent article by Julian Rivers entitled "Proportionality and Variable Intensity of Review".[160] I have also derived assistance from Sandra Fredman's article entitled "From Deference to Democracy: The Rule of Equality under the Human Rights Act 1998".[161] Both these articles, and Charron J's

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156 [2006] 1 SCR 256.
157 McLachlin CJ, Bastarache, Binnie, Fish and Charron JJ.
158 At para [43].
159 They reflect my (a) and (b) analysis in para [104] above.
160 [2006] 65(1) CLJ 174.
161 (2006) 122 LQR 53.

approach for the majority in *Multani*, can be read as developing two central points, which I would summarise in the following way.

[123] Whether a limit on a right or freedom is justified under s 5 is essentially an inquiry into whether a justified end is achieved by proportionate means. The end must be justified and the means adopted to achieve that end must be proportionate to it. Several sub-issues inform that ultimate head issue. They include whether the practical benefits to society of the limit under consideration outweigh the harm done to the individual right or freedom. The court's function is not immutably to substitute its own view for that of the legislature. If the court agrees with the legislature that the limit is justified, no further issue arises. If the court does not agree, it must nevertheless ask itself whether the legislature was entitled, to use Lord Hoffmann's word, to come to the conclusion under challenge. It is only if Parliament was not so entitled that the court should find the limit to be unjustified.

[124] In this way and to this extent the court's function is one of review. It is not one of directly substituting the court's own judgment. But the more intensely it is appropriate to review Parliament's appreciation of the matter, the closer the court's role will approach a simple substitution of its own view. This is the regime under which the courts manage the ever present potential for tension between democratically elected representatives and unelected judges concerning when and to what extent a Parliamentary majority may limit individual rights and freedoms.

Application of principles to the present case

Importance of objective and rational connection

[125] I can deal quite shortly with the first two issues in the present case. I am satisfied that Parliament's objective was sufficiently important to justify some limitation of the presumption of innocence. Dealing in illegal drugs is a major social concern and has the capacity to do immeasurable harm to society and its individual citizens. The presumption contained in s 6(6) of the Misuse of Drugs Act 1975 is obviously designed to make the task of establishing guilt easier for the prosecution. That will indirectly have some deterrent effect. These interrelated objectives relate

to a matter which I am satisfied is one of serious and pressing social concern. The limit which Parliament has placed on the presumption of innocence is rationally connected with that objective. It logically tends to reduce drug dealing.

Is the impairment greater than reasonably necessary?

[126] The first of the remaining issues is often called minimal impairment. The court must be satisfied that the limit imposed on the presumption of innocence is no greater than is reasonably necessary to achieve Parliament's objective. I prefer that formulation to one which says that the limit must impair the right as little as possible. The former approach builds in appropriate latitude to Parliament; the latter would unreasonably circumscribe Parliament's discretion. In practical terms this inquiry involves the court in considering whether Parliament might have sufficiently achieved its objective by another method involving less cost to the presumption of innocence. The only serious candidate for such an alternative in this case is an evidential rather than a persuasive onus. Instead of placing on the accused the burden of proving the contrary of the presumption on the balance of probabilities, as s 6(6) does, the lesser burden would result in a conviction unless the accused could point to evidence which raised a reasonable doubt.

[127] The difference between these two approaches, as earlier noted,[162] is that under s 6(6) the accused must affirmatively satisfy the court (usually the jury) that his possession was not for the purpose of supply; under the alternative the accused would simply have to point to evidence before the court raising a triable issue in that respect, whereupon the onus passes to the Crown to establish the proscribed purpose beyond reasonable doubt. The evidential burden gives rise to less risk that a person who had no purpose of supply would be convicted because he was unable to rebut the presumption. The persuasive burden has a greater capacity to catch those who are not actually guilty of possession for supply. Indeed, the level of risk that those innocent of any supply purpose may be wrongly convicted as a result of the persuasive burden is a major ingredient in the argument that a presumption rebuttable on that basis is an unjustified limit.

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[162] At paras [96] – [98] above.

[128] With respect to those who do not share this view,[163] it seems to me that a presumption rebuttable in terms of an evidential onus does put the Crown in a materially better position than if there was no presumption at all. Take a case of possession of 30 grams of cannabis plant, with no other indicia of intent to supply. Without a presumption the Crown would have a significantly harder task to secure a finding of guilty of possession for supply than it would if the jury was obliged to convict of possession for supply on proof of possession of 30 grams, unless the accused could point to evidence raising a reasonable doubt.

[129] The second question under the minimal impairment inquiry is whether a presumption rebuttable on the basis of an evidential burden, as opposed to a persuasive burden, would sufficiently achieve the objective of reducing drug dealing by giving the Crown a forensic advantage and, through that advantage, creating greater deterrence. I have not been persuaded that the level of forensic advantage likely to be derived by the Crown from this more easily rebutted presumption would fail sufficiently to serve the overall objective. Hence the present legislative approach of a presumption rebuttable on the basis of a persuasive burden impairs the right to be presumed innocent to a greater extent than is reasonably necessary to achieve Parliament's objective.

[130] My reasons are a combination of impression, experience and the factors I will shortly be discussing under the head of whether there is proportionality between the importance of the objective and the practical benefits of the reverse onus on the one hand, and the harm done to the right on the other. In this respect I do not consider the sufficiency of the attainment of the overall objective can properly be decided

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[163] As Blanchard J has pointed out at para [79] above, one of those who do not share this view is Lord Hutton: see *R v Lambert* [2002] 2 AC 545 at para [192]. His Lordship was, however, in dissent on the issue he was there addressing. As Lord Steyn said in *Lambert* at para [38], the burden of showing "that *only* [his Lordship's emphasis] a reverse legal burden [as opposed to a reverse evidential burden] can overcome the difficulties of the prosecution in drugs cases is a heavy one". The consequence of a persuasive burden is, of course, that a conviction can follow, despite the jury having a reasonable doubt about the accused's purpose. Lord Steyn considered the transfer of the persuasive burden was a "disproportionate reaction to perceived difficulties facing the prosecution in drugs cases": para [41]. Lord Hope did not consider that an evidential burden was "so slight as to make no difference": para [90]. He too regarded a persuasive burden as disproportionate. Indeed Lord Hope, at para [91], viewed the practical difference between an evidential burden and a persuasive burden as "likely in almost every case that can be imagined to be minimal". That may, with respect, be going too far but his comment hardly supports the view that in practical terms the evidential onus is of no assistance to the Crown.

without reference to the factors which relate to this aspect of the inquiry. In a sense, sufficiency in this context is an aspect of proportionality. Although it is analytically convenient to subdivide the ultimate s 5 question into various aspects or ingredients, it would be a mistake to take too compartmentalised an approach.

[131] With that in mind I turn to the third aspect of the proportionality inquiry. I do so on the basis that on both the minimal impairment and this last aspect, the margin appropriately to be given to Parliament's judgment should be comparatively small. The subject matter of the inquiry suggests that approach. The issue is one lying close to, if not at, the heart of criminal justice, albeit issues of deterrent policy and effectiveness do come into the arena. The question is not one in respect of which Parliament's institutional competence or expertise might justify substantial judicial restraint. Using my earlier metaphor, I would regard the target as a small one, with little room for straying outside the bull's-eye. The ultimate question is whether the persuasive onus is on the target.

Is the limit in due proportion to the importance of the objective?

[132] There can be no doubt that a presumption rebuttable on the basis of a persuasive burden represents a substantial limit on the right to be presumed innocent. Any kind of presumption in favour of the Crown limits that right. But the extent of the limit is distinctly greater when the presumption carries a persuasive burden of rebuttal, as opposed to an evidential burden. The presumption is of course designed to assist the Crown in successfully prosecuting those who might be wrongly acquitted or not even prosecuted without it. Against this is the consideration that while a more easily rebuttable presumption would reduce the risk of wrongful convictions, it would also logically tend to increase the risk of wrongful acquittals. From the days of Blackstone[164] that risk has generally been regarded as more acceptable than that of convicting the innocent.[165] To what extent either of these risks are or would actually be manifested is impossible to establish with any numerical precision. The advantage on one side does not necessarily approximate

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[164] "It is better that 10 guilty persons escape than one innocent suffer": Blackstone, *Commentaries on the Laws of England* (1765 – 1769), vol 4, p 27.

[165] Here the comparatively innocent.

the disadvantage on the other. The number of guilty persons who would not be convicted if the presumption were weaker bears no necessary relationship to the number of innocent persons who would not be convicted for the same reason. The Crown sought to tender evidence in this Court on aspects of the workings of the presumption which the Court declined to admit. If I had thought that this evidence, or indeed any evidence, was capable of illuminating this issue, I would have been most reluctant to come to a conclusion without considering it. But I cannot see how it would be possible to adduce any reliable evidence concerning the numbers of people on either side of the foregoing equation.

[133] I would, in any event, be most reluctant to admit this sort of evidence for the first time in this Court. It was the subject of both substantive challenge and objection from the appellant. This Court is not the appropriate forum for initial fact finding and assessment of what can loosely be called legislative fact evidence.

[134] Ultimately, the balance to be struck is between social advantage and harm to the right. It comes down, at least in practical terms, to whether the important social objective of successfully prosecuting drug dealers justifies the risk of convicting those innocent of that crime by reason of their inability to satisfy the persuasive burden of establishing that despite their possession of an amount which attracts the presumption, that possession was not for supply. In a case where there is other evidence available to the Crown suggestive of a supply purpose, the Crown has less need for any kind of presumption. It is when the evidence is confined, or largely confined, to simple possession that the need for the presumption is most apparent. But, on that basis, it becomes crucial at what quantity of the drug the presumption is fixed. It matters whether the trigger amount is set on the basis that possession of such an amount raises a bare probability that the purpose of the possession is supply, a high probability that such is the accused's purpose, or a near certainty. The higher the probability of supply deriving from possession of the trigger amount, the more justifiable will be a presumption of supply. The lower the degree of probability, the more problematic such a presumption becomes. As I point out later, the present legislative scheme presents problems in this respect for s 5 purposes.

[135] I consider that an evidential onus would sufficiently serve the purpose but without the same risk of convicting innocent persons. That risk is obviously greatest when the amount possessed is only slightly above the presumptive level. The more independent evidence there is of a supply purpose, and the greater the amount possessed, the harder it will be for an accused person to raise a reasonable doubt. The evidential onus would give the Crown the advantage of a rebuttable presumption at a certain level of possession. In other words, if the Crown called no evidence other than possession of more than the presumptive amount, the jury would be legally bound to convict, unless the accused, by evidence, could raise a reasonable doubt. To the extent this approach might be said to impinge on the so-called right to silence, the potential gain to society is worth the cost to that right. Indeed, when arguing the interpretation side of the case, Ms Vidal accepted that an evidential onus would constitute a justified limit.

[136] The advantage of this lesser presumption to the Crown would obviously not be as great as the s 6(6) presumption; it would be easier to rebut. What I am effectively saying is that, in contrast to the lesser presumption, the Crown's advantage under s 6(6) represents a disproportionate response to the problem being addressed. Under the lesser presumption the risk of wrongful convictions would be significantly reduced and the effectiveness of the presumption from the Crown's point of view would not be inappropriately lessened.

[137] It is inherent in what I have written that I do not consider the limitation of the presumption of innocence created by s 6(6) has been shown to have created demonstrably greater social benefits than the damage inflicted on the presumption of innocence. As I have said, much of the difficulty arises in those cases which involve possession of an amount only slightly above the presumptive level. It is unclear from the legislation on what conceptual basis the presumptive levels have been and are now designed to be set. I appreciate that we now have an Expert Committee[166] which is closely involved in advising what the presumptive levels should be for each drug but, taking the figure of 28 grams for cannabis plant as an example, it is unclear

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[166] See para [145] below.

whether that level was originally set and has remained in force on the basis that possession of such an amount (all other evidence aside) suggests that a supply purpose is probable, or highly probable or indeed exists beyond reasonable doubt. I am concerned that it is not apparent how close to establishing possession for supply beyond reasonable doubt the amount of 28 grams is designed to come.[167]

[138] If the level were set for each drug on the basis that possession at that level could of itself reasonably support a conclusion of possession for supply beyond reasonable doubt, there could be little objection to some form of presumption arising at that level. If the selected level was designed to show that supply was highly probable, there might be room for some concern but not much. If the level is designed to suggest only the probability of supply, by which I mean a bare balance of probabilities conclusion, then the risk of wrongly convicting people[168] must be significant, unless of course one were to argue that the balance of probabilities was a sufficient standard of proof for this kind of offending. Such a proposition would constitute both an unjustified limit on the common law standard of proof beyond reasonable doubt and a dangerous precedent for reduction in the Crown's standard of proof in other criminal contexts. It is the uncertain extent of the potential disparity between the level of probability which arises from where the presumptive level is set and the fundamental general need for the Crown to prove every element of the offending beyond reasonable doubt which lies at the heart of my conclusion that s 6(6) represents a disproportionate response to what is undoubtedly a matter of genuine social concern. There is no sufficient basis upon which I can conclude that Parliament was entitled to view the matter otherwise.

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[167] McGrath J has helpfully referred (at para [210]) to the statement of the Minister of Health when introducing the Drugs (Prevention of Misuse) Bill in the mid-1970s. The Minister spoke of a "rule of thumb" approach to setting the quantity of a drug at which the presumption applies. But, as McGrath J has also pointed out in the following paragraph of his reasons, in *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264 at para [21] Lord Bingham, coincidentally using the same expression, said that the justifiability of any infringement of the presumption of innocence could not be resolved by any rule of thumb. The two contexts are not exactly on all fours. At the very least, however, caution must be adopted when considering the justifiability of a trigger level established on a rule of thumb basis. Since 2005 the exercise has become a little more sophisticated but that does not affect the present case and, in any event, as earlier noted, I have some concerns about the new method. I develop them in my next section.

[168] Wrongly as against what the position would be if the presumption of innocence was not limited at all and the Crown had to prove the proscribed purpose beyond reasonable doubt.

The 2005 Amendment Act

[139] In coming to this conclusion, I have given close attention to relevant aspects of the Attorney-General's report to Parliament under s 7 of the New Zealand Bill of Rights Act 1990 on what became the Misuse of Drugs Amendment Act 2005.[169] I have also examined the terms of that Act, particularly ss 4 to 6 which introduced into the principal Act new subss 4(1A), (1B) and (1C), and subss 4B(3) and (4).

[140] I will refer first to the Attorney-General's report. It focused on the s 6(6) presumption in the two respects in which it was affected by the 2005 Amendment Act. That Act fixed the trigger amount for methamphetamine at five grams. It also provided that the setting and amending of trigger amounts for controlled drugs generally could, in the future, with certain restrictions, be dealt with by Order in Council. In relation to the introduction of a trigger amount for methamphetamine, the Attorney-General advised Parliament that this constituted a prima facie breach of s 25(c) of the Bill of Rights – the presumption of innocence.[170] But the Attorney-General went on to advise that the limit contemplated was justified under s 5. That advice was based on what the Attorney-General, rightly in my view, saw as a "key factor", namely the strength of the connection between the proven fact (possession of the trigger amount or more) and the presumed fact (that the purpose of such possession was supply).

[141] The report indicated that it was "highly unlikely that a person would purchase the specified amount [of methamphetamine] in one transaction for personal use only and not for supply".[171] The report further observed that the Attorney-General considered that the trigger amount was being "set high enough that the possibility of an improper conviction is negligible".[172] Another aspect of the Attorney-General's reasoning was that there were particular difficulties for the prosecution in proving the purpose of the possession in drug dealing cases, that being a factor particularly within the knowledge of the accused.[173] That is a point which has to be weighed in

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169 A copy of the report can be found at <http://www.justice.govt.nz/bill-of-rights>.
170 At para [7].
171 At para [22].
172 At para [24].
173 At para [25].

the overall balance of interests. I should point out, however, that care is necessary before placing substantial weight on it. Although the parallel is not exact, in cases of serious assault or murder the intent with which the accused has acted is a factor particularly within his knowledge. It would be revolutionary to place any form of reverse onus on such a person.[174]

[142] With reference to the new Order in Council procedure, the Attorney-General's advice was that, as a procedure, it did not breach the Bill of Rights. The rule-making envisaged by the procedure "can and should be undertaken in a way which is consistent with NZBORA".[175] The rules or regulations made under the Order in Council procedure would, so the Attorney-General indicated, have to be consistent with the Bill of Rights if they were not to be found ultra vires. The Attorney-General concluded his advice on this topic by saying:[176]

> Therefore, ensuring that future decisions regarding the presumption of supply trigger, and the amounts and classification of drugs, are consistent with the NZBORA, will require clear justifications with reference to the substances concerned, their uses at certain quantities and the risk they pose to society.

[143] I accept that Parliament's delegation to the executive of what would otherwise be its function of setting levels for the purpose of the presumption is not per se a breach of the Bill of Rights. But I consider it important that if Parliament elects to do this, it should give very clear instructions to its delegates in relation to the conceptual basis upon which they are to fix the trigger amounts for the purpose of the presumption of supply. I have concerns on this issue which I have found relevant to my ultimate s 5 conclusion.

[144] The provisions introduced by the 2005 Amendment Act in relation to the Order in Council procedure were to the following effect. The new s 4(1B) provides that the Governor-General can, by Order in Council, in accordance with a recommendation of the Minister, amend Schedule 5 by altering the amount, level or quantity at and over which any controlled drug is presumed to be for supply. It also

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174 The risk of general slippage from the ordinary principles governing onus and standard of proof in cases where an element of the offence is particularly within the knowledge of the accused can be seen in *Sheldrake*'s case.

175 At para [27].

176 At para [28].

contains a provision whereby drugs can be added to Schedule 5 at the amount, level or quantity indicated. Section 4(1C) states that an Order in Council may not be made under s 4(1B)(a) (that is, altering amounts, levels or quantities) unless the name or description of the controlled drug is, at the same time, being moved from Schedule 1, 2 or 3 or from a Part or clause of Schedule 1, 2 or 3 to another of those Schedules, Parts or clauses.

[145] The new s 4B(3) directs what the Minister must do before making a recommendation to the Governor-General in terms of s 4(1B). The Minister must consult with the Expert Advisory Committee on Drugs, established under s 5AA, about the amount, level or quantity at and over which a controlled drug might be presumed to be for supply. The Minister must also have regard to the matters set out in s 4B(4). They are:

> (a) the amount of the drug that could reasonably be possessed for personal use, including, without limitation, levels of consumption, the ability of the drug to create physical or psychological dependence, and the specific effects of the drug; and
>
> (b) the amount, level, or quantity at and over which the drug is presumed to be for supply in other jurisdictions; and
>
> (c) any other matters that the Minister considers relevant.

[146] As can be seen, one of the matters to which the Minister must have regard is the amount of the drug that could reasonably be possessed for personal use. This is the feature of the legislative scheme which comes closest to requiring an appropriate relationship between the level set and the presumed purpose of supply. A reasonable amount for personal use is, in a sense, the other side of the supply coin. If the amount in the accused's possession exceeds the amount which is deemed reasonable for personal use, it can be inferred, with a greater or lesser degree of confidence, depending on the excess over the trigger amount, that the accused probably had the drug for supply. It is not, however, self-evident that possessing more than a "reasonable" amount for personal use necessarily makes it highly probable or nearly certain in any particular case that the possession is for supply. Furthermore, the non-exhaustive list of features, which seem to have been included as indicators of the amount which may be regarded as reasonable for personal use (for example, levels of consumption, ability to cause dependence and specific effects), are themselves

inherently variable. They are capable of producing varying results from one individual to another. Subject to how they are applied, they will not necessarily be reliable indicators of the level or quantity at which to set a general presumption of supply.

[147] This is an aspect which I find problematic. I would have thought that the Expert Committee and the Minister should be given clearer and firmer Parliamentary direction on this crucial topic. Rather than having the limit influenced by the concept of a reasonable amount for personal use, I consider that to achieve compliance with s 5 Parliament should require the Minister to be satisfied that possession of the trigger amount gives rise to a high probability that such possession is for supply. Likewise any non-exhaustive indicators suggestive of a supply purpose should be consistent with that high probability.

[148] It may well be that the necessary high probability was present in respect of methamphetamine. I say that because of the tenor of the Attorney-General's report in that respect. But, for the future, and in relation to drugs for which the level, amount or quantity was set before the 2005 Amendment Act came into force, there is, in my view, too much risk that the level may be set, or has been set, at a point which does not reflect the necessary high probability that possession at that level is for supply. The higher the probability of supply inherent in where the presumptive level is set, the stronger is the case for saying that a reverse onus of the s 6(6) kind constitutes a justified limit on the presumption of innocence. But even allowing for that point, an ability to rebut the presumption on the lesser evidential basis outlined above would give further protection to those innocent of a supply purpose. The lesser onus would also impinge less on the presumption of innocence. Overall, a package incorporating both these factors would be desirable in that it would unarguably represent a demonstrably justified limit on the presumption of innocence in terms of s 5. The Crown would still be given appropriate assistance in achieving the important objectives of conviction and deterrence of drug traffickers, but on a basis which could not be seen as a disproportionate intrusion on the presumption of innocence.

Alternative meaning?

[149] The foregoing discussion results in my reaching the conclusion at step 3[177] that s 6(6) represents an unjustified limit on the presumption of innocence. The limit has failed the s 5 test for justification. I must therefore examine the words of s 6(6) again to see if a meaning different from Parliament's intended meaning and consistent or less inconsistent with the presumption of innocence can tenably be found in them. As already foreshadowed, I cannot find any such alternative meaning in the words "until the contrary is proved". Specifically, I cannot read them as signalling an evidentiary onus as described in my earlier discussion. Proving the contrary cannot mean pointing to or calling evidence sufficient to raise a triable issue. In my view it is not reasonably possible to construe s 6(6) as prescribing only an evidential onus. I say that with deference to certain English authorities which seem to have found it possible to do so; and to Professor Glanville Williams on whose views those judgments have relied.

[150] Andrew Butler and Petra Butler (Butler and Butler) discuss the relationship between s 6 of the New Zealand Bill of Rights Act 1990 and s 3 of the Human Rights Act 1998 (UK) in their work *The New Zealand Bill of Rights Act: a commentary*.[178] I have found their discussion valuable. Butler and Butler emphasise that in New Zealand s 6 has been read on the basis that an alternative meaning must be reasonably or properly open. It must be fairly open and tenable.[179] Section 6, of course, says that whenever an enactment "can" be given a Bill of Rights consistent meaning, that meaning shall be preferred to any other meaning. In the United Kingdom, s 3 speaks in terms of a meaning which is "possible"; and in England it seems implicit, if not explicit, that the concept of possibility has not been treated, at least in some cases, as a reasonable possibility. The English position, which has developed through cases such as *Kebilene*, *Lambert*, and *Sheldrake*, is now captured

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177 At para [92] above.

178 (2005), para [7.8] and following. See also the authors' discussion of the meaning of the word "prove", in the present context, at para [23.4.32] and following.

179 The cases in which these expressions have been used are set out in Butler and Butler, p 168, fns 50 – 54, and include *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) and *Moonen*.

by the subsequent decisions of the House of Lords in *Ghaidan* and *R (Wilkinson) v Inland Revenue Commissioners*.[180]

[151] It is significant that, in his speech in *Ghaidan*, Lord Nicholls felt it necessary to say:[181]

> Unfortunately, in making this provision for the interpretation of legislation, section 3 itself is not free from ambiguity. Section 3 is open to more than one interpretation. The difficulty lies in the word 'possible'. Section 3(1), read in conjunction with section 3(2) and section 4, makes one matter clear: Parliament expressly envisaged that not all legislation would be capable of being made Convention-compliant by application of section 3. Sometimes it would be possible, sometimes not. What is not clear is the test to be applied in separating the sheep from the goats. What is the standard, or the criterion, by which 'possibility' is to be judged? A comprehensive answer to this question is proving elusive. The courts, including your Lordships' House, are still cautiously feeling their way forward as experience in the application of section 3 gradually accumulates.

[152] Having said that, Lord Nicholls went on to state that even if, when construed according to the ordinary principles of interpretation, the meaning of legislation admits of no doubt, s 3 may nonetheless require it to be given a different meaning.[182] However, in *Wilkinson* the balance may have swung back a little from the stance taken in *Ghaidan*, towards greater emphasis being placed on the need for s 3 to be viewed as mandating a process which ultimately remains one of permissible interpretation. In a speech with which the other Judges sitting, including Lord Nicholls,[183] agreed, Lord Hoffmann said:[184]

> I do not believe that s 3 of the 1998 Act was intended to have the effect of requiring the courts to give the language of statutes acontextual meanings. That would be playing games with words.

[153] His Lordship then referred to there being a strong presumption, arising from the fundamental nature of Convention rights, that Parliament did not intend a statute to mean something which would be incompatible with those rights. He added that this presumption went far beyond the old fashioned notion of using background to "resolve ambiguities" in a text.

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180 [2005] 1 WLR 1718.
181 At para [27].
182 At para [29].
183 Lord Nicholls, Lord Hope, Lord Scott and Lord Brown agreed with Lord Hoffman.
184 At para [17].

[154] Lord Hoffmann then significantly added:[185]

> But, with the addition of the Convention as background, the question is still one of *interpretation* [Lord Hoffmann's emphasis], ie, the ascertainment of what, taking into account the presumption created by s 3, Parliament would reasonably be understood to have meant by using the actual language of the statute.

[155] *Wilkinson* was a case in which a taxing statute had used the word "widow" and the question was whether it should be interpreted to include a widower. His Lordship stated that:[186]

> [B]y no process of interpretation, attempting to ascertain what a reasonable reader would understand the notional author of the text ("Parliament") to have meant by using those words in their context, could the word "widow" be read to include "widower".

He added that this interpretational conclusion could not be altered by the operation of s 3.

[156] As Butler and Butler observe,[187] and their proposition retains validity although they were writing before *Wilkinson*, the approach of the United Kingdom courts appears to be more "adventurous" than that in New Zealand. The same point could be rendered by saying that the English courts, in their different and more complicated supra-national environment, seem to have felt it appropriate to strike the balance between the judicial and the legislative roles in a rather different way. I myself have previously emphasised that the finding of alternative meanings under s 6 must follow a legitimate process of construction; s 6 must not be used as a concealed legislative tool. The courts may interpret but must not legislate.[188] A corollary of the latter proposition is that s 6 cannot be used to give a meaning to an enactment which is clearly contrary to the meaning which Parliament understood its words to convey. In such a situation no other meaning "can" be given to the enactment. Lord Millett, in his dissenting speech in *Ghaidan*, spoke of an alternative meaning having to be intellectually defensible.[189]

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185 At para [17].
186 At para [16].
187 At para [7.11.4].
188 *Quilter* at pp 572 and 581.
189 At para [67].

[157] As Butler and Butler suggest,[190] all the various words and phrases which have been used to indicate what can and cannot be done under the United Kingdom s 3 and the New Zealand s 6 give colour to the issue rather than supply criteria by means of which a specific case can be determined. There remains an inevitable element of subjectivity in the judicial assessment. The tension between what is legitimately possible and what is only illegitimately possible is to a degree reflected in the blunt and unadorned juxtaposition of s 4 against s 6 in the New Zealand legislation. Each section fulfils an important purpose but no specific guidance is provided to the courts in deciding which purpose should prevail in the case at hand. It is difficult to elaborate beyond the proposition that courts must not legislate as that would contravene s 4. This necessarily means that the courts may only interpret when exercising their function under s 6. If that creates analytical and substantive uncertainty, such is the result of what is necessarily a rather subjective exercise, with little to guide the judge except intuitive perceptions of whether a particular meaning "can" be given to Parliamentary words. That, after all, is the s 6 test. Attempts to elucidate or gloss it amount to little more than adding flavour or colour to the language Parliament has chosen to adopt.

[158] The language I have used earlier in these reasons, which inquires whether a suggested meaning is reasonably possible,[191] seems to me to come as close as possible to capturing the way in which the statutory "can" in s 6 must be applied. It is by this measure of reasonable possibility that I would distinguish at least some English discussions on the subject: they seem to adopt a meaning which is *un*reasonably possible from an interpretative point of view. I say that because alternative meanings have been found in England, under the aegis of s 3, despite an acknowledgement that this defeats Parliament's purpose. In England s 3 appears at times to have been construed as mandating a judicial override of Parliament, if Parliament's meaning is inconsistent with a right or freedom. That, for me, would be to use s 3 (the New Zealand s 6[192]) as a concealed legislative tool. Whether it is

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190 At para [7.12].

191 Or its equivalent, "tenable".

192 Suggestions that there is some material difference, if only of emphasis, between "can" and "possible" strike me as strained and unpersuasive.

appropriate in England is not for me to say, but I am satisfied it is not appropriate in New Zealand.[193]

[159] Against that background, I return to the present case. The issue, as already identified, is whether the words "until the contrary is proved" in s 6(6) can be read as creating an evidentiary as opposed to a persuasive onus. Cooke P, delivering the decision of the Court of Appeal in *Phillips*, concluded that the words were incapable of signalling an evidential onus, even with the aid of s 6.[194] Such a meaning was plainly contrary to the ordinary and natural meaning. However, when sitting in the House of Lords in *Kebilene*, Lord Cooke, relying substantially on an article written by Professor Glanville Williams,[195] expressed a different view about a provision in English legislation materially the same as our s 6(6). He said:[196]

> I agree that such is not the natural and ordinary meaning of s 16A(3). Yet for evidence that it is a *possible* [Lord Cooke's emphasis] meaning one could hardly ask for more than the opinion of Professor Glanville Williams in 'The Logic of "Exceptions"' [1988] C.L.J. 261, 265 that 'unless the contrary is proved' can be taken, in relation to a defence, to mean 'unless sufficient evidence is given to the contrary;' and that the statute may then be satisfied by 'evidence that, if believed, and on the most favourable view, could be taken by a reasonable jury to support the defence'.
>
> I must not conceal that in New Zealand the Glanville Williams approach was not allowed to prevail in *R v Phillips* [1991] 3 N.Z.L.R. 175. But, quite apart from the fact that the decision is of course not authoritative in England, section 6 of the New Zealand Bill of Rights Act 1990 is in terms different from section 3(1) of the Human Rights Act 1998.
>
> The United Kingdom subsection, read as a whole, conveys, I think, a rather more powerful message.

[160] In *Lambert*, the word "prove", in the context of a reverse onus, was again in issue. A majority of their Lordships considered that the ordinary meaning of prove denoted a persuasive onus, but as that would be inconsistent with the presumption of innocence the Court should read the word "prove" as meaning produce enough evidence to raise an issue. Lord Steyn and Lord Hope specifically relied on the Glanville Williams article.

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193 In this respect I agree with McGrath J's discussion of the legislative and constitutional background to New Zealand's s 6.

194 At p 177.

195 "The Logic of 'Exceptions'" [1988] 47(2) CLJ 261.

196 At pp 373 – 374.

[161] In the present case the Court of Appeal followed *Phillips*, not just as a matter of precedent but because the Court took the view that the word "prove" could not mean simply raising an issue which the Crown then had to negate beyond reasonable doubt. As the Glanville Williams article has provided the principal foundation in England for what I respectfully regard as an impermissible interpretation of the word "prove", at least in its present context, it is appropriate to examine the article to appreciate the basis on which it has been invoked..

[162] The essential thesis which Professor Glanville Williams propounded was that reverse onuses, however arising or framed, should carry only an evidential and not a persuasive onus of rebuttal. That was a value judgment which is entirely consistent with my conclusion in the present case that the persuasive onus is disproportionate. But the Professor's central proposition does not logically answer the question whether a particular form of words used by the legislature is capable of creating only an evidential onus, when the normal and natural meaning of those words is to create a persuasive onus. Professor Glanville Williams said that the word "proof" was open to different shades of meaning.[197] He contrasted proof beyond reasonable doubt with proof on the balance of probabilities. He then asked, rhetorically:[198]

> Should not the courts say that burdens of proof placed on the defendant mean burdens of proof of his defence sufficient to take it to the jury?

[163] After citing an example where the word "proved" meant proved beyond reasonable doubt when it first appeared in a section, and proved on the balance of probabilities where it appeared for the second time, the Professor added:[199]

> The courts see no objection to giving the word these two different meanings in the same section, because this is necessary to fit the different positions of the prosecution and the defendant. Having swallowed this camel, why strain at the remaining gnat? Why should not the concluding words "unless the contrary is proved" be taken to mean "unless sufficient evidence is given to the contrary"? "Sufficient evidence" would bear the meaning that it usually bears in relation to defences, *viz.* evidence that, if believed, and on the most favourable view, could be taken by a reasonable jury to support the defence.

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197 At p 264.
198 At p 265.
199 At p 265.

I would respectfully invert the metaphor[200] and say that the courts, having swallowed a gnat, are justifiably straining at the remaining camel. Proof can be at different standards of satisfaction but can hardly fall below the balance of probabilities.

[164] The Professor sought to advance his thesis by saying, in my view unpersuasively:[201]

> The idea that the defendant must prove a defence on the balance of probability introduced an unfamiliar concept into the criminal law; in contrast, a rule that the defendant must prove his defence to the extent necessary to create a reasonable doubt as to his guilt would utilise the traditional concept of criminal evidence.

[165] As I have already foreshadowed, a distinction must be drawn between the persuasiveness in policy terms of the proposition that all reverse onuses should be evidential and the persuasiveness of the argument that the word "prove" is capable of signalling an evidential onus. In the latter respect, I do not consider the Professor makes out his case; a fortiori when, as here, the word "prove" is accompanied by the words "the contrary". To prove something is not to raise an issue about it, nor is it to raise a reasonable doubt about it. "Prove the contrary" most certainly cannot mean "test the contrary" as the appellant contends. It is simply not reasonably possible for the word "prove", in its present context, to mean anything less than establish the existence of a fact to a defined standard of satisfaction. And as I have already noted, that level cannot logically fall below the balance of probabilities.

[166] Professor Glanville Williams asked, in the passage cited in para [162] above, why the courts should not hold that the "burden of proof" of a defence means a burden to raise an issue sufficient to go to the jury. My answer is that to come to that conclusion would be wholly inconsistent with the way in which the concept of proof is generally regarded by the law. However persuasive it may be in policy terms, the Professor's proposition simply cannot pass muster as an interpretation of the expression "until the contrary is proved". A further stark impediment to adopting

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200 The metaphor comes from the King James version of St Matthew's gospel, Matthew 23:24:

> "You blind guides, which strain at [rendered as "out" in modern translations] a gnat, and swallow a camel."

The analogy is to taking pains to strain out insects when pouring wine, but then voluntarily swallowing a much bigger creature.

201 At p 267.

the suggested interpretation is that, for the reasons given earlier, it cannot be reconciled with what Parliament clearly meant when enacting, and then effectively re-enacting, s 6(6). On that premise too, the proffered meaning cannot be given to s 6(6).

Conclusion

[167] That brings me to step 6.[202] In view of the absence of a reasonably possible alternative meaning, s 4 of the New Zealand Bill of Rights Act 1990 mandates that Parliament's intended meaning must be adopted. This means that the trial Judge and the Court of Appeal were correct in their approach to the issue under consideration. The trial Judge did not misdirect the jury and the Court of Appeal was right to uphold the resulting conviction. The appeal to this Court therefore fails and should be dismissed.

McGRATH J

TABLE OF CONTENTS

[202] At para [92] above.

Introduction

[168] This appeal is concerned with the nature of the burden which in certain circumstances the criminal law places on an accused person to rebut an element of an offence involving misuse of controlled drugs in order to avoid conviction. The appellant, Mr Hansen, was convicted of the offence of possession of controlled drugs for the purpose of supply, an element of which is that the person charged had a dealing purpose. On the longstanding view taken by the courts of the meaning of s 6 (6) of the Misuse of Drugs Act 1975, if an accused is proved at trial to have been in possession of a quantity of particular drugs sufficient to trigger the operation of that section, a statutory presumption arises that the possession was for a dealing purpose. Unless the accused then shows that the contrary is the case, that is that he had no dealing purpose, a conviction for the offence must follow.[203]

[169] The appellant, Mr Hansen, challenges the correctness of that meaning of s 6(6) of the 1975 Act, which was the basis of the direction of the trial Judge to the jury at his trial. He seeks to persuade this Court that on the correct meaning of s 6(6) the nature of the burden placed on him is not a legal onus of proof that he did not have a dealing purpose but rather an evidential onus of showing that there was an issue concerning that mental element. Once that had been done the burden of proving the dealing purpose beyond reasonable doubt fell on the Crown in the normal way.

Presumption of a dealing purpose

[170] At the time that Mr Hansen was found in possession of controlled drugs, so far as it is presently relevant, s 6 of the Misuse of Drugs Act 1975 provided:

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[203] *R v Phillips* [1991] 3 NZLR 175 (CA).

6 Dealing with controlled drugs –

(1) Except as provided in section 8 of this Act, or pursuant to a licence under this Act, or as otherwise permitted by regulations made under this Act, no person shall –

…

(d) Supply or administer, or offer to supply or administer, any Class C controlled drug to a person under 18 years of age; or

(e) Sell, or offer to sell, any Class C controlled drug to a person of or over 18 years of age; or

(f) Have any controlled drug in his possession for any of the purposes set out in paragraphs … (d), or (e) of this subsection.

…

(5) For the purposes of paragraph (e) of subsection (1) of this section, if it is proved that a person has supplied a controlled drug to another person he shall until the contrary is proved be deemed to have sold that controlled drug to that other person.

(6) For the purposes of paragraph (f) of subsection (1) of this section, a person shall until the contrary is proved be deemed to be in possession of a controlled drug for a purpose set out in … paragraph (d), or paragraph (e), as the case may require, of that subsection if he is in possession of any of the following:

…

(e) Five grams or more of any cannabis preparation as described in Schedule 2 to this Act, or 28 grams or more of cannabis plant as described in Schedule 3 to this Act, or 100 or more cigarettes containing any cannabis preparation or cannabis plant as so described.

Background

[171] Mr Hansen was found at his home in Glenorchy, together with his co-offender, in possession of cannabis plant. Prior to the arrival of the police they had been stripping dried cannabis from the plants and putting head weighing a total of 375 grams into two buckets. A further 1520 grams of unstripped plant was lying on the garage floor. The police searched the appellant's home but did not discover any other items indicating that Mr Hansen might be involved in drug dealing.

[172] The appellant was charged with possession of cannabis for the purposes of supply under s 6(1)(f) of the Misuse of Drugs Act 1975. At his trial, before a jury in

the District Court, the Crown's evidence established that the cannabis plant had been grown outdoors and had recently been harvested at the time he was apprehended, which was at the end of the growing season. The evidence also indicated that a half share of the quantity of cannabis found could last a moderate user for a year.

[173] The Crown relied on s 6(6) of the 1975 Act. It deems a person in possession of 28 grams or more of cannabis plant to be in possession for the purpose of supply or sale "until the contrary is proved". The quantity of cannabis discovered in the appellant's possession clearly exceeded that triggering amount.

[174] The appellant gave evidence at his trial and told the jury that his share of the cannabis was for his sole personal use. He was, however, convicted and sentenced to a term of imprisonment which, following an appeal, was reduced to two and a half years. He also appealed to the Court of Appeal against his conviction, on the sole ground that s 6(6), correctly interpreted, imposed only an evidential onus on an accused person rather than a legal onus. The Court of Appeal rejected that submission and dismissed his appeal against conviction.[204]

[175] Leave has been given to the appellant to bring a further appeal to this Court on whether the Court of Appeal was correct in holding that the 1975 Act imposed a legal burden of proof on him. The appellant contends that the Court of Appeal's interpretation of s 6(6) reverses the onus of proof in relation to the mental element of the offence, by placing on him the burden of showing that possession of cannabis was not for supply rather than, as is ordinarily the case, a burden on the Crown to prove the opposite. He asserts that this breaches his right to the presumption of innocence which is protected under the Bill of Rights. Section 25(c) of the New Zealand Bill of Rights Act 1990 provides:

> **25 Minimum standards of criminal procedure** -
>
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> …

[204] *R v Hansen* (Court of Appeal, CA 128/05, 29 August 2005) (Robertson, Williams and Wild JJ).

(c) The right to be presumed innocent until proved guilty according to law:

[176] As indicated, the appellant's central submission in this Court is that under s 6 of the Bill of Rights Act, the provision in the 1975 Act should be read as imposing on him only the evidential burden of having to call or identify some evidence which, if accepted by the jury, might create a reasonable doubt as to his purpose, rather than the legal (or persuasive) burden of proving on the balance of probabilities that his possession of the cannabis was not for the purposes of supply. Once he had done that the Crown should have been required to prove beyond reasonable doubt the purpose as well as all other elements of the offence.

[177] Importantly, the appellant invokes the direction on interpretation given by s 6 of the Bill of Rights Act contending that his proposed meaning is one that can be given to s 6(6) of the 1975 Act and that it should be given as it is the only available meaning that is consistent with the presumption of innocence.[205] As the trial Judge had failed to direct the jury that the accused only had an evidential onus in relation to his purpose for possessing drugs, the conviction should be quashed.

Bill of Rights interpretation principles

[178] This argument requires this Court to apply s 6 of the New Zealand Bill of Rights Act 1990 in ascertaining the meaning of the provision in the Misuse of Drugs Act 1975. That, in turn, requires that we consider the meaning of s 6 and its relationship with ss 4 and 5 of the Bill of Rights Act and the manner in which these provisions are to be applied. They read as follows:

4 Other enactments not affected –

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), –

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

(b) Decline to apply any provision of the enactment –

[205] In *R v Phillips* the Court of Appeal held that the meaning of s 6(6) of the 1975 Act was not capable of being read to impose only an evidential onus on an accused person, so that s 6 of the Bill of Rights Act did not affect the interpretation of s 6(6) of the 1975 Act.

by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5 Justified limitations –

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6 Interpretation consistent with Bill of Rights to be preferred –

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[179] Section 6 is the primary statutory direction concerning the interpretation of the Bill of Rights Act. It requires the court to interpret other legislation consistently with protected rights and freedoms, wherever that legislation can be so interpreted. If that is not possible then s 4 must be applied. That provision prohibits the court from holding that inconsistency of an enactment with a protected right or freedom impliedly repeals, revokes, invalidates or renders ineffectual any provision in the enactment and from refusing to apply legislation.[206] Section 4 accordingly directs the court to uphold enactments, despite their inconsistency with protected rights and freedoms, notwithstanding the statutory direction to prefer an available meaning which is in accord with protected rights. Subject only to the application of s 5, which concerns justified limitations, the effect of s 4 is that any inconsistent legislation prevails over the Bill of Rights, irrespective of when it is enacted, to the extent of the inconsistency. Section 4 thereby reaffirms the primacy of the legislature and makes clear that the courts' role in applying the Bill of Rights in ascertaining the meaning of legislation remains one of interpretation within the limits of the legislative directions specified in that Act. Section 4 is, however, only a default provision because whenever the court can identify a tenable meaning of an enactment that is consistent with a protected right, the court is required by s 6 to prefer that meaning and s 4 has no application.

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[206] Section 4(a) of the Bill of Rights Act enjoins the court from applying common law principles of interpretation to other legislation (including the doctrine of implied repeal) to give effect to protected rights in a way that overrides a provision in another statute. Section 4(b) is directed at prohibiting the court from disapplying, that is, striking down, the other legislation.

Justified limitations on rights

[180] During the period that the Bill of Rights Act has been in force, the main difficulty New Zealand courts have encountered in applying s 6 has concerned how they should factor into their analysis the justified limitations provision. Section 5 allows protected rights to be restricted by, and only by, such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. To be prescribed by law, limits must be identifiable and expressed with sufficient precision in an Act of Parliament, subordinate legislation or the common law.[207] The limits must be neither ad hoc nor arbitrary and their nature and consequences must be clear, although the consequences need not be foreseeable with absolute certainty.[208]

Ministry of Transport v Noort

[181] The role of s 5 was first considered by the Court of Appeal in *Ministry of Transport v Noort*[209] where Cooke P and Richardson J disagreed in their tentative views of the function of s 5 in the interaction of ss 4, 5 and 6. Cooke P inclined to the view that because s 5 was expressed to be subject to s 4, any enactment which was inconsistent with a protected right would prevail over it, so that there was little point in considering the justified limitation provision when determining the meaning of that provision.[210] Gault J, who dissented in *Noort*, also saw no role for s 5 in cases requiring consideration of statutory inconsistency.

[182] Richardson J saw in s 5 the recognition of a special characteristic of the Bill of Rights Act, that there were limitations on the absolute and general nature of affirmed rights and freedoms. The limitations reflected the consequences of membership of society and the duty each member owed to other individuals and the community.[211] In Richardson J's view it was more consistent with the purposes of the Bill of Rights Act to consider s 4 only if the challenged action could not be

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207 *A Bill of Rights for New Zealand: A White Paper* (1985), para [10.28].
208 Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001), para [26.4].
209 [1992] 3 NZLR 260.
210 At pp 271 – 272.
211 At p 277.

justified in terms of ss 5 and 6.[212] It was not, however, apparent which of those two provisions the court should turn to first in its analysis.

[183] Hardie Boys J likewise saw s 5 "as a mechanism to ensure recognition of the Act's rights and freedoms to the fullest extent that is reasonable and practicable in a specific statutory context".[213] McKay J agreed with Richardson J's judgment.[214]

Moonen v Film and Literature Board of Review

[184] Subsequently, in *Moonen v Film and Literature Board of Review (Moonen (No 1))*,[215] the Court of Appeal said that s 5 should be addressed in the analysis of inconsistency before courts applied s 6. The Court of Appeal went on to suggest an approach that might be followed where other legislation was said to limit protected rights. Once the court had determined the scope of the relevant right, identified the different interpretations of the other legislation that were properly open and determined the extent to which those meanings limited the right or freedom, it should consider whether the extent of the limitation could be justified in a free and democratic society in terms of s 5. Only if it could not be justified would s 4 have to be applied and the infringing provision given effect.

[185] The Court of Appeal in *Moonen (No 1)* also set out its view of the appropriate approach to applying s 5 to determine if limits on rights in other legislation were justified. It did this by reference to well known principles first discussed in *R v Oakes.*[216] As the Court of Appeal put it:[217]

> In determining whether an abrogation or limitation of a right or freedom can be justified in terms of s 5, it is desirable first to identify the objective which the legislature was endeavouring to achieve by the provision in question. The importance and significance of that objective must then be assessed. The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective. A sledgehammer should not be used to crack a nut. The means used must also have a rational relationship with the objective, and in achieving the objective there must be

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212 At p 284.
213 At p 287.
214 At p 297.
215 [2000] 2 NZLR 9.
216 [1986] 1 SCR 103.
217 At para [18] per Tipping J.

> as little interference as possible with the right or freedom affected. Furthermore, the limitation involved must be justifiable in the light of the objective. Of necessity value judgments will be involved. In this case it is the value to society of freedom of expression, against the value society places on protecting children and young persons from exploitation for sexual purposes, and on protecting society generally, or sections of it, from being exposed to the various kinds of conduct referred to in s 3 of the Act. Ultimately, whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.

[186] This approach to ss 5 and 6 was closer to that preferred by Richardson J in *Noort* rather than that of Cooke P. It is aptly encapsulated by Professor Rishworth in his characterisation of the Bill of Rights as "a bill of reasonable rights" [218] because the direction in s 6 to prefer a meaning which is "consistent with … this Bill of Rights" is read as consistent with the rights and freedoms contained in the Bill of Rights *as reasonably limited in accordance with s 5*. Although Cooke P in *Noort* was attracted to the proposition that references to rights and freedoms in s 6, in the context of ss 4 and 5, should be confined to their unlimited form, I note that in *Temese v Police*[219] he retreated from his tentative view that the court should not examine whether other legislation involved a justified limitation of rights, leaving the question open. I am satisfied that the approach to the justified limitation provision in *Moonen (No 1)* was right. It addresses the reality that rights are part of a social order in which they must accommodate the rights of others and the legitimate interests of society as a whole. That approach better accords with the purpose of the enacted Bill of Rights as a measure "to affirm, protect and promote human rights and fundamental freedoms in New Zealand".[220] Importantly, it is also supported by two significant aspects of the legislative history.

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218 Rishworth, "Interpreting and Invalidating Enactments Under a Bill of Rights" in Bigwood (ed), *The Statute: Making and Meaning* (2004) 251, p 277.

219 (1992) 9 CRNZ 425 at p 427.

220 Long title to the New Zealand Bill of Rights Act 1990.

Legislative history

[187] In the White Paper that was presented to the House of Representatives in 1985, which proposed a Bill of Rights under an entrenched Act of Parliament which would be a supreme law, the provision which is now s 5 appeared as cl 3 of the draft Bill in the White Paper. It took an identical form to what became s 5, save that the provision was not, of course, expressed to be subject to s 4. There was also a provision, both equivalent and similarly expressed to s 6, which was included as cl 23 of the White Paper draft, to address the interpretation of legislation. Although the Bill of Rights was ultimately enacted by Parliament in the form of an ordinary statute, which would help counter executive power and influence statutory interpretation without impacting on the validity of legislation, the first reason given in the White Paper commentary for having a justified limitation provision in the draft Bill remains instructive. It was included to recognise explicitly that the freedoms stated in the Bill of Rights were subject to limits. The limits could have been incorporated into the Bill of Rights in different ways, such as by including in each provision concerning a right or freedom a statement of the permitted limits. This format was adopted in the European Convention on Human Rights.[221] The chosen model, however, was "a single limitation provision to be applied as appropriate to each of the separate freedoms".[222] Although the eventual enactment of a statutory Bill of Rights altered the constitutional significance of what became s 6, the reason for including the justified limitations provision was, in my view, unchanged. Section 5 was included in order that justified limitations would become part of the standard by which the courts would apply the Bill of Rights and, in particular, measure the consistency of other legislation with protected rights and freedoms.

[188] The second confirming aspect of the legislative history in relation to the function of s 5 appears in the speech of the Minister of Justice, who introduced the Bill in the House of Representatives, when introducing the second reading debate:[223]

> I turn now to what the Bill does do. In essence, it sets out, in accessible form, fundamental rights and freedoms about which there is a consensus in

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221 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 UNTS 221.

222 At para [10.26].

223 Rt Hon Geoffrey Palmer (14 August 1990) 577 NZPD 3449, 3450.

> the New Zealand community. It then protects those rights and freedoms from interference by the State and it does that in three ways, the first of which is in the interpretation of the existing law. A citizen will be able to argue in court that one of his or her rights under the Bill has been infringed by the State. The court will have to decide whether that right has been infringed or whether what has been done is a justified limitation of the rights under clause 4. If there appears to be an infringement the court must consider whether the law can be given a meaning that is consistent with the rights and freedoms in the Bill. If such an interpretation is possible it must be preferred to any other interpretation of the law.

[189] The two aspects of the legislative history mentioned make plain that it was part of Parliament's purpose in enacting the Bill of Rights that s 5 would require the courts to consider whether a limitation of rights was justified, and to complete that inquiry in terms of s 5 of the Bill of Rights Act, before applying s 6. If a provision could be given a meaning that was consistent with a protected right or freedom, or involved a justified limitation of it, then under s 6 that meaning would be preferred and s 4 would not be reached.

Applying ss 4, 5 and 6 of the Bill of Rights Act

[190] From this the role of ss 4, 5 and 6 in the New Zealand Bill of Rights Act 1990 becomes clear. The Act gives general legislative force to the protection of fundamental rights and freedoms in New Zealand society, but that protection is not absolute. Its extent, in relation to provisions of other legislation, is determined by the operation of ss 5 and 6 which provide a mechanism for upholding Bill of Rights provisions, when they can be read consistently with the other legislation impinging on rights, or where the other legislation can be seen as modifying the rights in a way that meets a standard of justified limitation. Section 4 is the provision of last resort, which the legislature has directed be applied when the mechanisms for protecting the rights do not operate, because of a clearly expressed contrary legislative intention.

[191] As between ss 5 and 6 it will usually be appropriate for a court first to consider whether under s 5 there is scope for a justified limitation of the right in issue. The stage is then set for ascertaining if there is scope to read the right, as modified by a justifiable limitation, as consistent with the other enactment.

[192] In *Moonen v Film and Literature Board of Review (Moonen No 2)*[224] the Court of Appeal confirmed that the approach to application of ss 4, 5 and 6 outlined in *Moonen (No 1)* was not prescriptive and that other approaches were open.[225] An approach that better fits the desirability of addressing s 5 before applying s 6 is first to consider whether the circumstances fall within the natural meaning of the statutory provision being applied, then secondly to ask whether on that meaning there appears to be an inconsistency with a protected right. If so, the third inquiry is whether the limit on the right is a justifiable one in terms of s 5. If the limit is justifiable there is no inconsistency with the Bill of Rights. If not, then fourthly consider whether there is another meaning available through which the statute can be read consistently with the right. If there is no such other meaning, finally, the stage is reached that the natural meaning must be applied as that is required by s 4 of the Bill of Rights Act.[226] This approach will generally be the most appropriate way of applying the three provisions and is certainly the preferable approach in the present case. I should point out that the approach set out above is broadly consistent with that outlined by Tipping J in his reasons at para [92] above. It is also broadly similar to the test applied by Blanchard J at para [60] above. Blanchard J indicates that his test is appropriate where the natural meaning of the provision being examined and the clear Parliamentary intention coincide.

The importance of the presumption of innocence

[193] At this point it is necessary to consider the significance of the right that is invoked by the appellant. The protected right relied on by the appellant in this case is his right as a person charged to the presumption of innocence which, as indicated, is affirmed by s 25(c) of the Bill of Rights. The presumption of innocence has long been seen as the core value in the criminal justice system.[227] At common law, burdens of proof placed on the defence were generally seen as evidential, so that what was to be presumed was taken as proved only if there was insufficient evidence

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224 [2002] 2 NZLR 754 at paras [7] – [12].

225 The *Moonen* approach has, however, been the subject of criticism: Butler and Butler, *The New Zealand Bill of Rights Act: a commentary* (2005), para [7.19.2].

226 This approach was taken by the High Court in *Hopkinson v Police* [2004] 3 NZLR 704 at para [28] per Ellen France J.

227 *Woolmington v Director of Public Prosecutions* [1935] AC 462.

to raise an issue concerning the matter. Once there was sufficient evidence, the prosecution assumed the burden of satisfying the jury as to the question beyond reasonable doubt.[228] I note in passing that when the White Paper was presented to the House of Representatives by the Minister of Justice, in 1985, it anticipated that the question of whether reverse onus provisions met the standard of s 25(c) of the Bill of Rights was the "question most likely to arise" under that provision.[229]

[194] The affirmation in the Bill of Rights of the common law presumption of innocence is expressed in the language of art 14(2) of the International Covenant on Civil and Political Rights.[230] In that context Professor Nowak has described the presumption as "an essential principle of a fair trial".[231] He makes the important point that the word "proved" requires not only that the prosecutor at a criminal trial must prove the guilt of the person charged, but must do so to a standard of proof which puts the accused's guilt beyond reasonable doubt.[232]

[195] Article 6(2) of the European Convention on Human Rights is expressed in closely similar language to the International Covenant provision. The European Court of Justice has said of art 6(2) that domestic legislative provisions which cast the burden of proof of some matters in the criminal law on the accused must remain within certain limits in doing so. In particular in *Salabiaku v France*[233] the European Court said that such legislation should not "strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance". The Court added:[234]

> Such a situation could not be reconciled with the object and purpose of Article 6 which by protecting the right to a fair trial and in particular the right to be presumed innocent is intended to enshrine the fundamental principle of the rule of law.
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> Article 6(2) does not therefore regard presumptions of fact or law provided for in the criminal law with indifference. It requires States to confine them

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228 Criminal Law Revision Committee, *Eleventh Report: Evidence (General)* (Cmnd 4991, 1972), para [139].
229 At para [10.115].
230 (1966) 999 UNTS 171.
231 Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev ed, 2005), p 329.
232 Nowak, p 330; *White Paper*, para [10.114].
233 (1988) 13 EHRR 379 at para [27].
234 At para [28].

> within reasonable limits, which take into account the importance of what is at stake and maintain the rights of the defence.

[196] Several factors emphasise the very high level of importance that our society attaches to the presumption of innocence. The first is the seriousness of the consequences for any person who is convicted of a criminal office. As Dickson CJ put it in *R v Oakes*:[235]

> The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms.

[197] Secondly, the presumption of innocence has important effects on criminal procedure which reduce the risk of factual error in a criminal trial resulting in a wrongful conviction. As the passages cited above from *Salabiaku* recognise, the presumption of innocence ensures that a verdict of guilt is based on evidence given at the trial that has been assessed by the jury as meeting a high standard.[236] As well, as Wigmore puts it, the presumption of innocence: [237]

> … cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced.

The trial judge must direct the jury that it needs to be in a subjective state of certainty concerning the facts in issue before it convicts an accused person at trial.[238]

[198] A third factor is that the presumption of innocence helps command the confidence of the general public in the integrity of the administration of the criminal law. The public are confident that innocent people are not convicted, because guilt of criminal charges is determined by independent courts which apply the standard of proof beyond reasonable doubt.[239] Finally, the presumption of innocence is recognised by the community to be a form of constitutional protection of the citizen

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235 At para [29].
236 See para [194] above.
237 *Wigmore on Evidence* (Chadbourn rev 1981), vol 9, para [2511].
238 *In re Winship* 397 US 358 at pp 363 – 364 (1970) per Brennan J.
239 *In re Winship* at p 364 per Brennan J.

which balances the interests of persons charged against the power and resources of the State as the prosecutor of charges of criminal offending.[240]

[199] Clearly it follows that in examining whether a particular statutory provision affecting criminal procedure is a justified limitation on the presumption of innocence, the importance of the right to the benefit of the presumption of innocence along with the nature and extent of the particular intrusion on it and its effects must be given significant weight. As well, the more serious the offence and the higher the potential penalty the greater the importance of the presumption in the particular context.

Applying the test

(a) The ordinary meaning of s 6(6)

[200] Against that background I commence my consideration of the appellant's submission by examining the ordinary meaning of s 6(6) of the Misuse of Drugs Act 1975. In her oral submissions for the appellant Ms Vidal did not accept that "until the contrary is proved" ordinarily means that once the Crown has established possession of the specified quantity of illicit drugs the accused must prove on the balance of probabilities that he or she did not possess the drugs for the purposes of supply. In support she pointed out that in its context what had to be proved was not the contrary of a real fact, but only the contrary of a presumed fact. To my mind, however, to "prove" in a legal context ordinarily means to establish or demonstrate the truth of a proposition by evidence. It is not in ordinary natural usage in a legal context apt to describe the discharge of an evidential burden by showing there is evidence that might raise a reasonable doubt on an issue in the case.

[201] This reading of "prove" is reinforced by the particular context – it is "the contrary" of the presumed fact that has to be proved. It follows that on the ordinary and natural meaning of the phrase "until the contrary is proved" in s 6(6), the legal burden of proof of the element concerned is placed on the accused. The

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[240] Ashworth, *Principles of Criminal Law* (5th ed, 2006), p 83.

circumstances of the present case accordingly are covered by that meaning of the provision of the 1975 Act subject to the effect of the Bill of Rights Act's provisions.

(b) Inconsistency with the protected right

[202] In the context of a prosecution for an offence of possession of controlled drugs for the purpose of supply, that reversal of the onus of proof is obviously inconsistent with the aspect of the presumption of innocence that requires the Crown to prove all elements of a crime beyond reasonable doubt. While the Crown must prove to that standard that the person charged was in possession of the stipulated quantity of drugs, the jury can convict even if it is left with a reasonable doubt on the evidence over whether the accused had the purpose of supply of the drugs concerned. Indeed, as Lord Steyn pointed out in *R v Lambert*, the jury is obliged to convict if the version of the accused is as likely to be true as not.[241] It is accordingly necessary to go on to decide if the limit that the reverse onus places on the protected right is a justifiable one in terms of s 5 of the Bill of Rights Act.

(c) A justifiable limitation?

(i) The objective of Parliament

[203] Under the test applied by Dickson CJ in *R v Oakes* and later in *R v Whyte*,[242] two central criteria must be satisfied to establish that any limit on rights is reasonable and demonstrably justified in a democratic society. First, the objective to be served by the measure limiting the right has to be sufficiently important to warrant overriding the constitutionally protected freedom. As Dickson CJ put it, trivial objectives, or those discordant with the principles of a free and democratic society, will not enjoy protection. As a minimum, an objective must relate to concerns that are pressing and substantial in a free and democratic society before they can be said to be sufficiently important to override the freedom.

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241 [2002] 2 AC 545 at para [38].
242 [1988] 2 SCR 3 at para [36].

[204] Secondly, the means used to limit the Charter right must be shown in themselves to be reasonable and demonstrably justified.[243] This assessment involves a test of proportionality having three components. The first is that the measure must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. The second component requires that the means should impair the right in question as little as possible. On the third component there must be proportionality between the effects of the limiting measure and its objective, so that the more severe the deleterious effects of the measure, the more important must be the objective it seeks to attain.[244]

[205] This formulation by the Supreme Court of Canada of the test for establishing if a provision is a justified limitation of a right continues in my view to be the most workable basis for applying s 5 of the Bill of Rights Act in cases involving the criminal law.

[206] In applying the test in the present case the first question concerns whether the objective of the provision intruding on the presumption of innocence is of sufficient importance to override the very important right involved. Here it is necessary to identify the objective of the intrusive provision in a way that does not cause confusion in the inquiry by going directly to the particular means of achieving that objective. The objective of s 6 of the Misuse of Drugs Act to my mind is twofold. First it is to reduce the volume of controlled drugs that come onto the illegal market. Secondly it is to facilitate detection and prosecution of commercial drug dealing behaviour.

[207] This objective relates to the social concern that illicit dealing in controlled drugs should be repressed as far as possible. Whether that is a pressing concern in New Zealand is a question of social policy on which democratic principle calls for respect for the legislature's assessment. Having regard to the legislature's

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243 The European Court of Human Rights has said that "in employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence": *Janosevic v Sweden* (2004) 38 EHRR 473 at para [101].

244 I agree with the observation of Professor Dennis that the question of whether a reverse onus is proportionate to the achievement of the policy goal of the offence is "not a question of the substance of the policy but of the procedure to implement it": Dennis, "Reverse Onuses and the Presumption of Innocence" [2005] Crim LR 901, p 910.

constitutional responsibility it would be rare in New Zealand for the courts to decide that the objective of the legislature in criminalising certain behaviour was in pursuit of a policy goal that was not a legitimate aim.[245] In any event, I have no hesitation in concluding that both aspects of the legislature's objective, as described, amount to a pressing social concern in New Zealand of sufficient importance that its pursuit may legitimately override protected freedoms.

(ii) The means of achieving the objective

[208] The means of achieving the objective is to criminalise particular behaviour seen as highly likely to lead to trafficable quantities of controlled drugs coming into the possession of any person who is likely to sell them, whether or not a sale eventuates. It criminalises what is preparatory to actual commercial dealing, namely simply being in possession of drugs for that purpose. This is, however, seen as difficult behaviour to detect and to prosecute and to that end the onus of proof negating the presence of a dealing purpose is placed on the accused.

[209] There has been a reverse onus provision in New Zealand legislation in relation to the mental element of the offence of possession of drugs for the purpose of supply since 1965.[246] It is safe to assume that, when the provision was first introduced, Members of Parliament were concerned over the difficulty of proving that the holder of a large supply of drugs intended to distribute them, in the absence of any evidence of an attempted sale. Members would have reasoned that, as only a person who held commercial quantities of drugs would be able to say whether or not there was another purpose for doing so, common sense required that there be a legal burden of proof placed on the person charged to disprove that element of the offence. It was no doubt also the case that attempts at detection of incidents of actual supply of drugs within New Zealand was considered to be difficult and dangerous, as well as usually ineffective.

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245 In "Reverse Onuses and the Presumption of Innocence" at p 909, Professor Dennis expresses the view that "a criminalisation decision of Parliament might properly be said to be illegitimate if it had no rational foundation at all, but if it does have such a foundation it is not for the Courts to substitute their own views whether the public interest requires prohibition".

246 The provision was first introduced in s 5 of the Narcotics Act 1965.

[210] This led to Parliament setting quantities of classes of controlled drugs in the 1965 Act by reference to weight which, in a charged person's possession, would give rise to a presumption of having a purpose of drug dealing and which, unless rebutted by an accused, would establish the dealing purpose at trial. The basis for the 1975 Act's similar provision was explained by the Minister of Health during the second reading of the Drugs (Prevention of Misuse) Bill: [247]

> Subclause (5) of clause 6 establishes a presumption that possession of certain quantities of drugs is possession for the purposes of supply, and therefore within the major offences of the clause unless the defendant shows that he possessed the drugs for his own use. In the light of developments since 1965, there have been minor amendments in the presumption quantity, but the clause retains the rule-of-thumb concept that anyone in possession of more than 1 month's supply for a regular moderate user, which is the equivalent of about 1 week's supply for an extremely heavy user, and 6 months' supply for a casual user or taster, is almost certainly a supplier.

[211] In adopting a reverse onus provision as the means of achieving the objective, Parliament has altered the procedure by which criminal justice is administered in the case of the mental element of this offence. Criminal justice is of course an area of public administration for which the courts have both a constitutional responsibility and a special expertise. In discharging their statutory responsibility under s 5 of the Bill of Rights Act to determine whether a reverse onus provision is a proportionate response to the legislature's objective, there is not the same constitutional justification for the courts to defer to the judgment of Parliament as there is in respect of the policy decision as to the objective itself. In this situation the court must make its own assessment of whether the means are reasonable and demonstrably justified, having due regard to all relevant factors of which respect for the legislature's judgment of what is appropriate will be only one. Indeed, given the importance that our society rightly attaches to the presumption of innocence,[248] the factors indicating that a reverse onus provision is a proportionate response to a societal objective will have to be compelling if the courts are to hold that provision is to be a proportionate means of achieving the objective.[249] In this context Lord Bingham said in *Sheldrake*: [250]

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247 Hon T M McGuigan (18 July 1975) 399 NZPD 3142, 3143.
248 As discussed in paras [193] – [199] above.
249 Dennis, p 910.
250 *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264 at para [21].

> … the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case.

(iii) Rational connection

[212] I now turn to the three questions that must be asked in the *Oakes* test concerning the proportionality of the means. The first is whether the reverse onus provision is rationally related to the objective of curbing drug supply. That rational connection must be between the proved fact of possession of controlled drugs in the quantity which triggers the reverse onus, and the presumed fact that possession is for the purpose of supply. The presumed fact in this case is the purpose of the appellant, which is an essential element of the offence.

[213] It is clear that possession of a small quantity of narcotics does not provide a rational connection with a dealing purpose as it is equally explained by a purpose of personal use. This was the basis of the Supreme Court of Canada's judgment in *R v Oakes* that the reverse onus provision, which applied whatever the particular quantity of drugs possessed, did not satisfy the rational connection test.[251] On the other hand, as a matter of common sense, at some point the amount of drugs in the possession of a person charged with dealing will give rise to a strong, although rebuttable, inference that the person in possession intends to supply others. Indeed, as Ms Vidal argued, with high volumes the inference will be so strong that there is no real purpose served by a presumption of dealing. Under s 6(6)(e) of the 1975 Act the trigger point is 28 grams of cannabis plant, a figure that has been unchanged since the provision was first introduced into New Zealand legislation in 1965.[252]

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[251] At p 142.
[252] In s 5(6)(d) of the Narcotics Act 1965.

[214] The passage I have cited from the Minister's second reading speech in the course of the passage of the Misuse of Drugs Act 1975 indicates that Parliament was made aware that the trigger points were based on one month's supply for a regular moderate user of the drug and a week's supply for an extremely heavy user. At the margin this basis for triggering the presumption could lead to a moderate user who had 56 grams (two months' supply) of cannabis in his possession having to prove that he or she was not holding the cannabis for the purpose of supply. This raises a serious question as to whether the statutory threshold might give rise to unjustified convictions because it does not satisfy the rational connection test. It is not of course sufficient that it might satisfy that test in some instances, including the present case, because the accused is found in possession of a much larger amount of drugs than the triggering amount.

[215] At this point I digress to say that the 1975 Act has been amended to provide that the list of controlled drugs in the First Schedule can be amended by Order in Council as can the triggering volume for the operation of s 6(6) which may be set by the Minister. Before setting such a level the Minister must now have regard to any advice given by the Expert Advisory Committee on Drugs, which must be established under the Act,[253] as to:[254]

> (ii) the amount, level, or quantity at and over which any substance, preparation, mixture, or article that is a controlled drug (or is proposed to be classified as a controlled drug), and that is to be specified or described in clause 1 of Schedule 5, is presumed to be for supply; and …

[216] The Crown argues that the changes in approach through and in future under this recent legislation are aimed at setting objectively reasonable limits having regard to an average drug user's requirements. These changes may avoid some of the arbitrary features of the legislation that applied at the time the appellant was tried. It is as yet unclear, however, how they will operate in practice. In those circumstances I prefer not to discuss further the extent to which the changes provide for a more rational connection with the objective of Parliament.

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253 Under s 5AA(1) of the Misuse of Drugs Act 1975, as inserted by s 5 of the Misuse of Drugs Amendment Act 2000.

254 Section 5AA(2)(b)(ii) of the Misuse of Drugs Act 1975, as amended by s 7(1) of the Misuse of Drugs Amendment Act 2005.

(iv) Minimal impairment

[217] The second question concerning proportionality is whether the measure intrudes on the presumption of innocence as little as possible, in other words whether there is minimal impairment. The inquiry here is into whether there was an alternative but less intrusive means of addressing the legislature's objective which would have a similar level of effectiveness. This aspect of the analysis of proportionality has rightly been described as both crucial and difficult.[255] This is particularly so in the present case as there is an obvious alternative way of approaching the objective of drying up supplies of illicit drugs and facilitating detection and prosecution of drug dealing, namely by imposing only an evidential onus on the accused.

[218] Parliament faced the difficulty that although persons in possession of commercial quantities of drugs were likely to be dealers, it was difficult to catch them in the act of dealing at a point at which they had moved beyond purely preparatory acts. Understandably, it was apparently thought not to be consistent with the interests of justice to impose liability for the more serious offence associated with possession of drugs in commercial quantities without including a mental element in the offence. On the other hand the Police evidence to the Select Committee was that proof of that element was seen as problematic.

[219] The problem of proof of purpose in this context should not, however, be over-emphasised. Even in the absence of any statutory presumption an intent to supply drugs may be inferred from evidence of the quantity of drugs found in a person's possession. While possession of a small quantity will give less support to an inference of intention to supply than would evidence of a large holding of drugs, it is both natural and consistent with principle that the jury should have regard to the actual quantity found in the defendant's possession in deciding if there was a dealing purpose.

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[255] By Dickson CJ in *R v Whyte* at para [41]. It is not of course the case that every means of addressing the objective, which is less intrusive than that chosen by the legislature, will satisfy the minimal impairment requirement.

[220] In this context imposition of an evidential onus on a person charged who is caught in possession of a trigger quantity of drugs is likely to have effects that will be advantageous to the prosecution. There would be strong incentives for the person charged to ensure the court has evidence putting in issue what will otherwise be a presumption of intent to deal in drugs. As the United Kingdom Criminal Law Revision Committee, which favoured all burdens on the defence in criminal proceedings being evidential only, saw it in 1972:[256]

> The real purpose, we think, of casting burdens on the defence in criminal cases is to prevent the accused, in a case where his proved conduct calls, as a matter of common sense, for an explanation, from submitting at the end of the evidence for the prosecution that he has no case to answer because the prosecution have not adduced evidence to negative the possibility of an innocent explanation. This applies especially to cases (such as those mentioned above [para 137]) where the defence relates to a matter peculiarly within the knowledge of the accused.

[221] This would also not be without disadvantages for the accused. As Lord Steyn pointed out in *R v Lambert* it will not be enough simply to allege the fact in question as it is the court that decides if there is a real issue on purpose.[257] The practical consequence would usually be that it is necessary for the accused to give evidence at trial of having a benign purpose for possession, almost always that of personal consumption. The strategy of remaining inactive and silent at trial will nearly always be precluded and the credibility of the defendant's position will turn on the quantity that has to be explained together with the accused's credibility as a witness. I note that, unsurprisingly, no suggestion was made by the appellant's counsel in written submissions that even an evidential onus might breach the right to silence. The significance of that right received only passing mention in the course of oral argument and it is not necessary to consider it.

[222] It is well established in England that an evidential onus is consistent with the presumption of innocence[258] and there seems no obvious reason why this procedural mechanism should not be an effective approach in bringing those who accumulate commercial quantities of drugs for the purpose of supply to justice. I must, however, acknowledge that in some jurisdictions senior judges have been of the view that an

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256 At para [140(iv)].
257 At para [37].
258 *R v Lambert* per Lord Steyn at para [42] and Lord Hope at para [91].

evidential burden would not be as effective as a legal burden.[259] It is also the case that while Parliament decided, in 1965, and reiterated, in 1975, that the onus of proof as to the purpose of possession should be a legal one, and that clear and consistent preference is entitled to respect, there is no indication in the Parliamentary debates on either occasion that the alternative of an evidential onus was seriously examined.

[223] The Australian State of Victoria in its comparable legislation has imposed only an evidential onus on an accused in circumstances akin to those in this case. I think it is instructive that it has not been thought necessary in a jurisdiction of its size to impose a legal burden of proof on an accused charged with an offence of the present kind in order adequately to address the problems associated with detection and prosecution of illicit drug dealing in Victoria.[260]

[224] For the reasons given, my overall conclusion is that there is another available mechanism for substantially achieving the objective of the 1975 Act's provision that is less intrusive overall on protected rights, and that the reverse onus provision, under the 1975 Act, does not meet the second test of proportionality in the New Zealand context. To my mind reliance on an evidential onus would have a positive effect, very close to that of a legal onus, in securing convictions of those who possess drugs for the purpose of supply.

(v) Proportionality

[225] Finally, I turn to the third element of the test, which asks if the effects of the intrusive provision are proportionate to the objective advanced. The effect on the presumption of innocence of the reverse onus provision in the 1975 Act that applied at the time of the appellant's offending obviously is very substantial. Indeed it nullifies that right in relation to the mental element of the offence. The offence

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259 Lord Woolf expressed this view in *Attorney-General's Reference ((No 1) of 2004)* [2004] 1 WLR 2111, at para [31] on behalf of all five judges. Sitting in the Court of Appeal, Lord Hutton was of the same view in *R v Lambert* at para [198].

260 Section 73(2) of the Drugs, Poisons and Controlled Substances Act 1981 (Vic) provides that possession of more than the specified quantity is prima facie evidence that the possession is for the purposes of trafficking. It has been held that s 73(2) creates only an evidentiary presumption. If evidence is placed before the jury to rebut it the jury must be satisfied that the possession was for a trafficking purpose: see *R v Clarke* [1986] VR 643; *R v Medici* (1989) 40 A Crim R 413.

concerned is a very serious one, being punishable by a maximum term of eight years' imprisonment. The high degree of social importance of the protected right, which is not in dispute, is engaged.

[226] A key factor in balancing the conflicting societal and individual interests is to assess whether requiring an accused to prove the absence of the necessary mental element is reasonable, given that only the accused, as the person in possession of the drugs, will have first hand knowledge of what this purpose was.

[227] In some instances, the proof of facts by an accused, concerning which he has first hand knowledge, will be relatively straightforward. Often there will also be valid administrative reasons for putting the burden of proof of such facts on an accused. One instance arising in traffic offences is whether an accused held a driver's licence at the relevant time. It is obviously far easier for the accused to prove he held a driver's licence than for the authorities to prove he did not.

[228] It is not, however, always the case that having primary knowledge of facts relevant to an element of a crime makes proof of that element by the accused an easier task. First, for an accused to prove his state of mind is a more difficult exercise than proving a simple fact such as that he held a licence at a particular time. That is especially the case when an issue before the court concerns the moral culpability of the accused.[261] Secondly, a person charged with possession of controlled drugs for supply, whose defence is that the drugs were held exclusively for personal use, has to acknowledge guilt of the offence of possession. That acknowledgement of itself is likely to demean the accused in the eyes of the jury and for that reason the uncorroborated evidence of a person who admits to being a drug user as to his or her intent will often carry little weight, even assuming the accused presents well as a witness. Thirdly, those who might support the accused's version in court will often be unwilling to give evidence for the defence. In cases where the quantity of drugs was large, the accused will also face a strong case and the

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[261] See Dennis, p 919.

combined effect of these disadvantages may make it very difficult, if not impossible, to discharge the burden placed on him despite his primary knowledge of what he intended.

(vi) Further material bearing on policy

[229] An application was made by the Crown in the present case to admit affidavit evidence, including that of police officers, as to what the Solicitor-General described as the structure of the drug industry and drug dealing in New Zealand from the perspective of those addressing the problem. The Crown sought to rely on this material to establish the difficulty of achieving the objective because of the scope and complexity of the problem.

[230] I accept that this Court should be ready to receive material of this kind, without subjecting it to the requirements of the rules of evidence or of admitting new evidence. That will be appropriate when the material goes to the content of law and determination of policy, rather than to determination of facts that are in issue in the particular case. The former class of material covers matters of legislative fact which can usually properly come before the court through judicial notice. The latter class of material comprises matters of adjudicative fact which must be determined by the court, usually at trial, and in accordance with rules of evidence.[262] This is the essence of the distinction between legislative facts and adjudicative facts which was made by Professor K C Davis in his seminal analysis of the two classes of material.[263]

[231] That is not to say that matters of legislative fact should not be appropriately tested in court. Because they concern aspects of policy, that will usually be both adequately and more appropriately done by a like response from an opposing party,

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[262] I agree with the observations of McHugh J of the High Court of Australia concerning the different approaches in *Woods v Multi-Sport Holdings Ltd* [2002] 208 CLR 460 at para [65]. He cites an observation by Spigelman CJ that "the means of acquiring information for the purposes of policy development should not be confined by the rules of evidence developed for fact finding with respect to matters that only concern the parties to the particular case": *R v Henry* (1999) 46 NSWLR 346 at p 362. A different view is expressed by Callinan J in *Woods* at paras [164] – [165].

[263] Davis, "An Approach to Problems of Evidence in the Administrative Process" (1942) 55 Harv LR 364.

or by way of submission rather than by cross-examination. The Court in the present case refused to admit the Crown's material because it was belatedly submitted, shortly before the hearing in this Court. This did not allow adequate opportunity for testing of the material by the respondent. The Court would also prefer to have had the assessment of the Court of Appeal on the material raised, but recognises that it will not always be practical to put the material before that Court.

[232] As Richardson P pointed out in *Attorney-General v Prince and Gardner*,[264] in some cases relevant considerations bearing on an issue of policy are "patent". They may be implicit in the relevant legislation, or readily identifiable and capable of evaluation without support from legislative fact material. Notwithstanding that the Crown's legislative fact evidence concerning the structure and complexity of drug dealing in New Zealand was not admitted by the Court, in my view this aspect of the case is sufficiently self-evident for the Court to determine questions of whether the effects are proportionate to the objective notwithstanding that no material was admitted on the point.

Conclusions on proportionality

[233] Overall, in the context of a provision which seriously intrudes on a core value of the criminal justice system, it seems to me that the disadvantages on an accused are disproportionate to those on the prosecution, which will only commence its case if it is able to prove that the accused was caught in possession of a particular quantity of drugs from which fact alone inferences of a purpose of supply of varying strength will be available.

[234] Taking the three indicators of proportionality together, I am satisfied that the reverse onus provision in s 6(6) of the Misuse of Drugs Act 1975 was a disproportionate means of achieving the legislative objective of curbing the illicit supply of controlled drugs. It follows that this provision was not a justified limitation on the right of Mr Hansen to the benefit of the presumption of innocence at his trial under s 25(c) of the New Zealand Bill of Rights Act 1990.

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[264] [1998] 1 NZLR 262 at pp 267 – 268 (CA).

Is a different meaning available?

[235] Counsel for the appellant submitted that in these circumstances the Misuse of Drugs Act provision can be given a meaning different to its natural meaning by which it imposes only an evidential onus on the accused. They argued that under s 6 of the Bill of Rights Act the Court should prefer this meaning to the natural meaning as, unlike the natural meaning, it is consistent with the accused's right to the presumption of innocence under s 25(c) of the Bill of Rights.

[236] The starting point in considering the submission is to examine what approach must be taken to ascertaining if a rights consistent meaning of the provision in the 1975 Act can be given under s 6 of the Bill of Rights Act. The section provides that if a meaning consistent with the Bill of Rights can be given to the provision being examined, it must be preferred. Section 6 does not, however, state any principles that the court should apply to establish whether a rights consistent meaning can be given. All that is clear is that this result may be achieved by the court in some cases.

[237] Both the heading to s 6 of the Bill of Rights Act and its language indicate that the court is concerned with an exercise in *interpretation* of the statutory text being considered when it applies the section. This strongly suggests that meanings that can be given are confined to those which are available on the language of the text being interpreted. The section does not qualify the basic principle of interpretation that the text is the primary reference in ascertaining meaning and there is no authority to adopt meanings which go beyond those which the language being interpreted will bear.

[238] The legislative history of the Bill of Rights Act, and the context in which s 6 appears, also both support the centrality of the text in ascertaining alternative meanings. Prior to the enactment of an interpretative Bill of Rights, there was a public debate in New Zealand over the proposal in the White Paper that protection of human rights should take the form of a Bill of Rights that was a supreme law under which judges would have had power to declare non-compliant legislation unconstitutional. That proposal was rejected and the legislation giving effect to New Zealand's commitment to human rights and fundamental freedoms was enacted

as an ordinary statute without any entrenchment of its provisions or other indication that the measure had any higher constitutional status. This aspect of the legislative history reinforces the indications within the statute itself that the court should discharge its function under s 6 of ascertaining if a measure can be given a meaning consistent with protected rights as an exercise in interpretation within the limits of that concept.

[239] The constitutional debate which preceded the rejection of the proposal to give the Bill of Rights the status of supreme law also appears to be unique to New Zealand. It is an important contextual feature which New Zealand judges must bear in mind when considering how the courts of overseas jurisdiction with similarly structured legislation, in particular those of England and Wales, have seen their authority to look for meanings other than the natural meaning of a statutory provision, which potentially affect protected rights.

[240] In a series of recent decisions on the equivalent direction on interpretation in the United Kingdom's Human Rights Act 1998, the House of Lords has clearly indicated that it sees its interpretative obligation under s 3 of the Human Rights Act as being "a very strong and far-reaching one, [which] may require the court to depart from the legislative intention of Parliament".[265] The operation of s 3 does not depend critically upon the particular form of words appearing in the provision being considered.[266] Accordingly, to give s 3 effect in relation to what it is "possible to do", it is not necessary that there be an ambiguity in the language in the sense that the provision is capable of two different meanings.[267]

[241] The interpretative obligation under s 3 is read as focusing on the direction to read and give effect to legislation in a way which achieves compatibility with rights under the European Convention on Human Rights. While the words "so far as it is possible to do so" set limits in the interpretation of the legislation as to how far the court may depart from the intention of Parliament, the controlling feature is the

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265 *Sheldrake* at para [28] per Lord Bingham; see also *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at para [30] per Lord Nicholls.

266 *Ghaidan* at para [31] per Lord Nicholls.

267 *R v A (No 2)* [2002] 1 AC 45 at para [44] per Lord Steyn; *Ghaidan* at para [29] per Lord Nicholls and para [44] per Lord Steyn.

intention reasonably to be attributed in enacting s 3.[268] It is plain that resort to s 4 of the Human Rights Act which requires the court to make a declaration of incompatibility is an exceptional course.[269] The overall effect of these cases is that the courts can modify the meaning and effect of legislation in a manner that is not inconsistent with a fundamental feature of the legislation.[270]

[242] House of Lords decisions have referred to the earlier New Zealand provision as being "a slightly weaker model".[271] This theme was repeated in *Ghaidan*. Lord Steyn said that, although the drafter of the United Kingdom Act had before him the New Zealand statute, which imposes a requirement that the interpretation to be adopted must be reasonable, the United Kingdom had rejected the legislative model requiring a reasonable interpretation.[272]

[243] In my view the language of s 6 of the New Zealand Bill of Rights Act is not materially different from the equivalent interpretative instruction in s 3 of the United Kingdom Act when it says:

> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

Whereas s 3 of the Human Rights Act directs that:

> So far as it is possible to do so primary legislation and subordinate legislation must be given effect in a way which is compatible with convention rights.

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268 At para [30] per Lord Nicholls.

269 At para [50] per Lord Steyn.

270 At paras [32] – [33] per Lord Nicholls. The impact on traditional approaches to statutory interpretation of that taken by the majority of the House of Lords in *Ghaidan* is analysed in Geiringer, "It's Interpretation Jim, but not as we know it: *Ghaidan v Mendoza*, the House of Lords and Rights-Consistent Interpretation" (2005) Human Rights Research, Victoria University of Wellington 101 at pp 112 – 117.

271 For example *R v A (No 2)* at para [44] per Lord Steyn.

272 *Ghaidan* at para [44]. Section 6 of the Bill of Rights Act does not expressly require that only a reasonable rights consistent meaning may be preferred but in *Noort*, Cooke P said (at p 272) that under s 6 the preference will come into play only when the enactment can reasonably be given a consistent meaning.

[244] "Possible" and "can" cannot be linguistically distinguished by the context or otherwise in the meaning they convey.[273] The undoubted difference between the meaning given to the provisions by the courts of the two jurisdictions rather arises from the different constitutional contexts in which the similar broad language is interpreted. Lord Steyn has said in *Ghaidan* that the drafter of the United Kingdom Act modelled s 3 on language taken from a judgment of the Court of Justice of the European Communities.[274] *Marleasing SA v La Comercial Internacional de Alimentación SA*[275] was concerned with the interpretative obligations of domestic courts under art 10 of the EEC Treaty in relation to domestic legislation in an area that was covered by EC directives which had not been implemented or adequately implemented in the legislation. The European Court of Justice said:[276]

> It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, *as far as possible*, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.

[245] The language of the European Court ("interpret … as far as possible … in order to achieve the result") was reflected in s 3(1) of the Human Rights Act to an extent which signals that the courts should apply s 3 in the same way in relation to obligations under the European Convention on Human Rights as the *Marleasing* rule was to be applied in relation to European Court directives.

[246] Given that the New Zealand constitutional context rather reflected a decision that courts should not be empowered to modify legislation, it is unsurprising that the United Kingdom courts are interpreting s 3 on a basis that differs from the way New Zealand courts have read s 6 of the Bill of Rights Act.[277]

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273 See the discussion of this aspect of s 6 in Butler and Butler, paras [7.11] – [7.12]. See also Rishworth, p 252.

274 *Ghaidan* at para [45].

275 [1990] ECR 1-4135, 4159.

276 At p 4159.

277 See paras [187] – [189] above.

[247] It follows that while I have been assisted by decisions of the House of Lords and Court of Appeal of England and Wales, I have felt bound, in preparing my reasons for this Court's judgment, to exercise caution in relation to the meanings those Courts have given to reverse onus provisions, as in some cases to differing degrees they appear to reflect a significantly different view of interpretative directions from those that bind me.[278]

[248] How then can New Zealand courts give effect to the direction in s 6 that they should identify alternative possible meanings consistent with the Bill of Rights when the natural meaning is not? One possibility would be to say that the court should revert to the text, read it putting aside the established guiding principles of purpose and context, and decide whether on a literal reading, with the assistance only of tools such as dictionaries that illustrate the literal meaning of words, alternative possible meanings of the key words "until the contrary is proved" emerge.

[249] While such an approach would to an extent recognise that the task under s 6 is one of interpretation it would also distort that concept by confining the inquiry into meaning to the bare statutory language. While that would usually produce a variety of meanings, some of which might be consistent with the protected rights in issue, that would not be true to the implicit statutory direction that the other meanings are to be found by a process of interpretation. The Bill of Rights Act cannot in my view have been intended to influence interpretation in this formalistic way. The necessary inference in s 6 is that both context and purpose will continue to form part of the analysis that it requires.

[250] Words on their own lack precision as conveyors of meaning, and techniques of statutory interpretation are the principles for ascertaining the most appropriate meaning of those available for any text. Although scheme and purpose have emerged over the past 30 years as the principal indicators of meaning, traditionally common law presumptions, and in particular the presumption against interfering

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[278] I refer in particular to the House of Lords judgments in *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326 at p 366 per Lord Steyn and p 373 per Lord Cooke of Thorndon; *R v A (No 2)* at paras [44] – [45] per Lord Steyn; and *R v Lambert* at para [42] per Lord Steyn. Compare the more recent approach of Lord Hoffman in *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718 at paras [17] – [18].

with the personal liberty of the individual, have also had a strong place as indicators of intended meaning of legislation. It is not so long ago that Professor Willis, in his seminal article on statutory interpretation said that:[279]

> … the presumptions no longer have anything to do with the intent of the legislature; they are a means of controlling that intent. Together they form a sort of common law 'Bill of Rights'.

Professor Willis recognised that a court was not entitled, by application of presumptions, to defeat the apparent purpose of an Act but asserted that judges "can, however, use the presumptions to mould legislative innovation into some accord with the old notions".[280]

[251] The significance of the presumption against interfering with personal liberty, along with presumptions, has undoubtedly lessened over the years as greater emphasis has been placed on scheme and purpose as is now recognised in s 5 of the Interpretation Act 1999. Section 6 should however be seen as requiring that judges apply the presumption that legislation is to be interpreted in accordance with fundamental rights, as part of the statutory reassertion of the importance of New Zealand's commitment to human rights in the interpretation exercise, which requires an approach to interpretation which is sympathetic to protected rights.

[252] Section 6 accordingly adds to, but does not displace, the primacy of s 5 of the Interpretation Act, which directs the courts to ascertain meaning from the text of an enactment in light of the purpose, and it does not justify the court taking up a meaning that is in conflict with s 5. That would be contrary to s 4.[281] Rather s 6 makes New Zealand's commitment to human rights part of the concept of purposive interpretation. To qualify as a meaning that can be given under s 6 what emerges must always be viable, in the sense of being a reasonably available meaning on that orthodox approach to interpretation. When a reasonably available meaning consistent with protected rights and freedoms emerges the courts must prefer it to any inconsistent meaning.

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279 Willis, "Statutory Interpretation in a Nutshell: Preliminary Observations" (1938) 16 Can Bar Rev 1, p 17.

280 At p 17.

281 A point made in Joseph at para [26.4.5(4)].

[253] While the courts' power to read down another provision so that it accords with the Bill of Rights, or to fill identified gaps in a statute, is accordingly limited by its function of interpretation, a New Zealand court must never shirk its responsibility to indicate, in any case where it concludes that the measure being considered is inconsistent with protected rights, that it has inquired into the possibility of there being an available rights consistent interpretation, that none could be found, and that it has been necessary for the court to revert to s 4 of the Bill of Rights Act and uphold the ordinary meaning of the other statute. Normally that will be sufficiently apparent from the court's statement of its reasoning.

[254] Articulating that reasoning serves the important function of bringing to the attention of the executive branch of government that the court is of the view that there is a measure on the statute book which infringes protected rights and freedoms, which the court has decided is not a justified limitation. It is then for the other branches of government to consider how to respond to the court's finding. While they are under no obligation to change the law and remedy the inconsistency, it is a reasonable constitutional expectation that there will be a reappraisal of the objectives of the particular measure, and of the means by which they were implemented in the legislation, in light of the finding of inconsistency with these fundamental rights and freedoms concerning which there is general consensus in New Zealand society and there are international obligations to affirm.

Application of s 6 in this case

[255] Finally I turn to apply these principles to the reverse onus provision that applied to the appellant under the Misuse of Drugs Act 1975. "Until the contrary is proved" is a long established formula for providing in legislation for situations where an issue concerning whether an element of an offence has been established must be sufficiently raised by an accused to form part of the defence to a charge. Generally that must be done by cross-examination of prosecution witnesses or by leading evidence on behalf of the defence, before there will be a live issue to be left to the jury to decide. I have already concluded that the ordinary meaning of the provision requires that what is in issue is the subject of a legal burden of proof on the

accused. As discussed earlier, this turns on the usual meaning of "prove" in a legal context which is: [282]

> To establish or make certain; to establish the truth of (a fact or hypothesis) by satisfactory evidence.

[256] It is true, as Ms Vidal pointed out, that dictionaries offer other meanings of "prove", in particular "subject to a testing process",[283] that might form the basis for a reading down of the ordinary meaning. The process suggested would involve parsing the text which would throw up alternative meanings of "prove". Dictionaries do valuably offer a range of meanings of words but offer limited assistance as to a particular interpretation. In the present instance, to "test" is not an available meaning of "prove" in a legal context, especially in a context where what has to be proved is the "contrary" proposition. The basic problem in a legal context with giving a meaning of "prove" that imposes only the burden of having to establish that there is evidence that arguably raises a reasonable doubt on an element of an offence is that discharging such a burden goes no further than the raising of an issue. And raising an issue does not prove anything.[284] To accord "prove" the meaning of "put in issue" or "show a possibility of" would go beyond the reasonably available meaning of the word in its legal context. As Cooke P said in *R v Phillips*,[285] the decision applied by the Court of Appeal in this case:

> To suggest that s 6(6) of the Misuse of Drugs Act can be read in the sense contended for is … a strained and unnatural interpretation which, even with the aid of the New Zealand Bill of Rights Act, this Court would not be justified in adopting.

[257] I am accordingly satisfied that, giving full weight to the rights and freedoms affirmed by the Bill of Rights and in particular the presumption of innocence, there is no other reasonably available meaning of the phrase "until the contrary is proved" in s 6(6) of the 1975 Act which would provide consistency with the application of the presumption of innocence. The Court is, therefore, required to apply s 4 of the Bill of Rights Act and give effect to the natural meaning.

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282 *Black's Law Dictionary* (8th ed, 1999).

283 The *Shorter Oxford English Dictionary* (5th ed, 2002) describes this meaning as "chiefly technical". An instance is proving a mineral deposit.

284 As the Court of Appeal judgment pointed out at para [33].

285 At p 177.

Conclusion

[258] The impact of New Zealand's Bill of Rights on other legislation which is apparently inconsistent with protected rights and freedoms is an important one. The Bill of Rights Act confers a special role on the courts, in relation to ascertaining the meaning of the apparently inconsistent legislative provisions, which serves the statutory purpose which is to "affirm, protect and promote human rights and fundamental freedoms in New Zealand". The Act does that by modifying the general rule of interpretation that the meaning of an Act of Parliament is to be ascertained from the natural and ordinary meaning of the words used by Parliament, read in their context and in light of the statutory purpose. The modification is to include, as an important supporting indicator of meaning in addition to scheme and purpose, New Zealand's statutory commitment to human rights and freedoms.

[259] The role of the courts is, however, limited to ascertaining meaning of legislation in accordance with the statutory directions and does not extend to the responsibility that courts assume in jurisdictions where human rights are protected by a supreme law. Nor does the role allow the courts to apply common law powers to effect the implied repeal of legislation or otherwise to disapply or render its provisions ineffective. As a result, it is to be expected that New Zealand courts from time to time will be constitutionally bound, applying s 4 of the Bill of Rights Act, to give effect to legislation which they have concluded is not capable of being read consistently with the Bill of Rights. In such instances it is the constitutional responsibility of the court to indicate in its judgment that it has relied on s 4 of the Bill of Rights Act to uphold an inconsistent provision in another statute. Other branches of government are under no obligation to change the law to remedy the inconsistency, but it may be expected that there will be a reconsideration by them of the inconsistent legislation.

[260] The position I have reached in this judgment is that s 6(6) of the Misuse of Drugs Act 1975 on its ordinary meaning reverses the onus of proof of the mental element of the offence of possession of drugs for the purpose of supply. It imposes a legal burden of proof and not merely a burden of showing that there is evidence raising an element which the Crown must establish concerning the necessary

purpose. That other proposed meaning is not a possible meaning of s 6(6) which could be attributed in terms of the principles of interpretation under the Bill of Rights Act. Imposing a legal burden of proof of such an element of the serious criminal offence involved is inconsistent with an accused person's right to the presumption of innocence and is not a justified limitation of that right. While s 6 of the 1975 Act has been amended since the offending of the appellant, it is by no means clear to me that the changes have removed the inconsistency. The principal difficulties that persons charged will encounter with the provision remain.

[261] The outcome of the present case, however, is clear. The decision of the Court of Appeal, upholding the direction of the trial Judge, was a correct application of s 6(6) of the Misuse of Drugs Act. Accordingly, I would dismiss the appeal.

ANDERSON J

[262] Section 5 of the New Zealand Bill of Rights Act 1990 has two principal functions – defining and protective.

[263] Part 2 of the Bill of Rights Act refers to human rights and fundamental freedoms with varying degrees of qualification. The right not to be deprived of life,[286] for example, is subject to the exception of such grounds as are established by law and are consistent with the principles of fundamental justice. The right to be secure against search or seizure[287] is limited to unreasonable search or seizure. On the other hand, freedom of expression,[288] freedom of association,[289] and freedom of movement[290] are expressed without qualification. Yet those freedoms have never been considered absolute. The laws of defamation, confidentiality, and indecency limit freedom of expression. Freedom of association and of movement are limited by penal provisions, parental authority and family laws. Such limitations are permissible because of s 5. The effect is that although rights and freedoms are

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286 Section 8.
287 Section 21.
288 Section 14.
289 Section 17.
290 Section 18.

identified by Part 2, their scope is or may become defined in particular situations by s 5.

[264] There are some rights and freedoms in respect of which no limitation could be justified in a free and democratic society. Take, for example, the rights affirmed by s 9. What free and democratic society could contemplate as reasonable the infliction of torture or cruel, degrading or disproportionately severe punishment? The right to a fair trial[291] is another example. Whether in a particular case errors of law, or procedural deficiencies or other aberrations, do or do not render the trial unfair is a matter of degree and judgment. But should a trial properly be stigmatised as unfair, s 5 could not be invoked to redeem it. It is also fairly arguable that the burden of persuasion carried by the prosecution in criminal cases is so integral to a fair trial that no relaxation or reversal of it can be justified.

[265] The protective function of s 5 operates in two ways. The section reinforces the primacy of the rights and freedoms as defined in Part 2. It also enjoins the legislative, executive and judicial branches of the government of New Zealand, and those charged with public functions, powers or duties, against limiting those rights and freedoms in a way that cannot be demonstrably justified in a free and democratic society.

[266] In my view s 5 does not have an interpretative purpose or effect. That function is served by s 6. There may, however, be situations where, in order to give effect to s 6, consideration needs to be given to s 5. Suppose that on one interpretation an enactment would abrogate a right or freedom, and on another interpretation it would have a limiting but not abrogating effect. If, on the second possibility, the limitation were reasonable, and could be demonstrably justified in a free and democratic society, s 6 would mandate that interpretation.

[267] In some cases that method may involve a finding by a court that Parliament has enacted legislation that cannot be demonstrably justified in a free and democratic society. Although such legislation cannot be struck down, the court's opinion will have a social value in bringing to notice an enactment which is inconsistent with

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[291] Section 25(a).

fundamental rights and freedoms. It is indicative of the strength of our democratic institutions that Parliament, although not countenancing its being overruled, has, by the terms of the Bill of Rights Act, accepted the prospect of judicial assessment of the consistency of its enactments with affirmed rights and freedoms.

[268] It is important to understand that although a court may express what amounts to an advisory opinion, its perspective may be constrained by the limits of its own process and the scope of its inquiry. Its process will have the advantage of legal expertise but, sometimes, the disadvantage of lack of generality. The scope of its inquiry will be constrained by the nature of its judicial process. These limitations may warrant a margin of appreciation in circumstances where they significantly affect the court's inquiry. For the reasons I have expressed in para [264], it must be recognised that in respect of some rights and freedoms there will be little or no room for marginalisation. In any event, the courts should not be diffident about calling attention to encroachment on fundamental rights and freedoms.

[269] I turn now to the focal point in this appeal. That is, even though s 25(c) of the Bill of Rights Act affirms the right to be presumed innocent until proved guilty according to law, s 6(6) of the Misuse of Drugs Act 1975 requires that if certain evidence is adduced and accepted, then even though it may fall short of proof of an element of the particular crime, the presumption of innocence will be replaced by a presumption of guilt. This is an exception to the general rule that the prosecution bears the legal burden of proving all the elements of an offence, even if this involves proving negative averments. The conventional meaning of s 6(6) of the Misuse of Drugs Act appears to conflict with s 25(c) of the Bill of Rights Act, but will not be in conflict if it is justified in terms of s 5 of the Bill of Rights Act. A method for determining whether a limitation of a right or freedom is demonstrably justified is described in *R v Chaulk*.[292]

[270] Although I am substantially in agreement with the test summarised in *Chaulk*, I have some difficulty with the idea that there should be a preliminary

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[292] [1990] 3 SCR 1303.

inquiry as to whether the objective of the impugned provision is of sufficient importance to warrant overriding a constitutionally protected right or freedom. That envisages that some objectives may warrant overriding a constitutionally protected right or freedom irrespective of any consideration of the means of achieving the objective. I think that deciding, abstractly, that a limitation is justified, before examining the means employed in doing so, risks colouring the evaluation of those means. The essential question in any particular case is whether *the* limitation is demonstrably justified, not whether *some* limitation is justified.

[271] It is not possible to formulate a workable methodology with less abstraction and more detail than I suggest in the next paragraph because the terms of s 5 of the Bill of Rights Act are themselves quite abstract. Moreover, the norms of a free and democratic society will develop and the test must be applicable to changing circumstances. The generality of the terms of the method will accommodate different emphases, viewpoints or evaluations in the course of application. That is apparent from the differences in the various reasons for judgment here. It does not, however, detract from the importance of the core considerations. It is not helpful, in my view, to refer independently to arbitrariness, unfairness, or not being based on irrational considerations. All of those defects are comprehended by the references to rational connection and proportionate response. Further, it is clear from the terms of s 5 of the Bill of Rights Act that only very important concerns could justify any limitation of a right or freedom.

[272] I think the form of the test summarised in *Chaulk* could be refined without diminution of its core elements, which I accept. I would recast it as follows:

> A limitation of an affirmed right or freedom will not be demonstrably justified in a free and democratic society unless it:
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> (a) relates to concerns which are pressing and substantial in a free and democratic society; and
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> (b) is rationally connected to its intended purpose; and
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> (c) in light of its intended purpose is the least possible impairment; and

(d) is a proportional response to the concerns.

[273] In this case, the pressing and substantial concern is the widespread and destructive use of and dealing in controlled drugs. The health, safety and economic implications are of a degree which needs no elaboration. Limiting such use and its effects, including by criminal process, is an important social objective. However, it is not only criminal dealing in drugs which is of great social concern. Sexual abuse and other forms of serious violence, even when not drug related, are also matters of grave concern, yet our society does not and should not contemplate reversing the onus of proof in those types of case. In my view, the misuse of drugs is no more important than those types of criminality.

[274] The purpose of a presumption like the one in issue is to dispense with proof of a necessary element of an offence if there is evidence consistent with that element but not sufficiently indicative of it. A justification often advanced for such expediency is that the element is, in practice, difficult to prove. However in any type of case there may be difficulty in proving an allegation, for a number of reasons, including of course that the allegation is false. In a case such as the present the perceived difficulty is that the purpose of possession is usually ascertainable only by inference, and the conduct of concern is criminal activity in which clues to purpose or intent will be covert and elusive. But proof of mental state is almost invariably a matter of inference whatever the crime, and many types of criminal activity are hidden. Yet in those cases society adheres to the principle that the prosecution carries the burden of proving every element of a crime beyond any reasonable doubt. I see no justification for the proposition which seems to underpin s 6(6) of the Misuse of Drugs Act, namely that because it is difficult for the prosecution to prove an element of a crime it does not have to. That is an unprincipled expedient.

[275] I am not satisfied that the limitation in this case is rationally connected to its intended purpose, which is to facilitate the conviction of drug dealers. It creates a presumption based on quantities and is explicable therefore on the basis that an inference as to purpose can be drawn from possession of certain quantities. Yet, as Blanchard J appears to acknowledge in his reasons, the presumption is most telling

in cases where the quantity possessed may not give rise to the necessary inference. The presumption cuts deepest when the evidence is the most equivocal.

[276] It is the case that part of the process for altering or fixing trigger quantities involves the Minister of Health connecting with and taking advice from an Expert Advisory Committee on Drugs about the amounts, level or quantity at and over which a controlled drug might be presumed for supply. In this respect the Expert Committee may, but is not specifically required to, give advice on the following matters:[293]

> (a) the amount of the drug that could reasonably be possessed for personal use, including, without limitation, levels of consumption, the ability of the drug to create physical or psychological dependence, and the specific effects of the drug; and
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> (b) the amount, level, or quantity at and over which the drug is presumed to be for supply in other jurisdictions; and
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> (c) any other matters that the Minister considers relevant.

[277] But the presumption in s 6(6) of the Misuse of Drugs Act is not expressed in terms of how much of a controlled drug could reasonably be possessed for personal use, still less the maximum amount that could reasonably be possessed for personal use; the presumption is, rather, that possession of more than a specified amount is sufficient proof of a selling or supplying purpose. The amount, level, or quantity raising a presumption of a supplying purpose in other jurisdictions indicates policies in those jurisdictions, not indigenous patterns of drug related behaviour. There is insufficient correlation between the Expert Committee's advice and the purpose of the limitation upon s 25(c) of the Bill of Rights Act to invest the presumption with rationality.

[278] The rationale of s 6(6) seems to be that by virtue of the opinion of the Expert Committee as to how much of a controlled drug could reasonably be possessed for personal use, possession of more than the trigger quantity raises a logical inference as to purpose. In the preceding paragraph I question the rationality of that

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[293] Section 4B(4) of the Misuse of Drugs Act 1975.

proposition. But if the opinion could support a logical inference of purpose, the opinion should be presented to a court as such, and not as a proved fact. Moreover, no expert opinion will be immune to challenge by another body of experts but s 6(6) precludes any logical or scientific challenge.

[279] The trigger level is fixed in light of the opinion of the Expert Committee, indicating that the opinion is factual information from which, as a generalisation, a purpose may be inferred. If that is so, the quality of the opinion is essentially evidential, not probative. Its evidential value will vary according to the whole of the factual context. To the extent that an opinion has evidential relevance it could properly be put before a court, but the presumption goes further than that. I acknowledge that there are significant issues of cost, convenience, and practicability in putting before a court the opinion of an expert body, but they could be ameliorated by legislation permitting the opinion to be produced as such. It is not uncommon in misuse of drugs prosecutions for expert evidence to be given by an experienced member of the Police, familiar with the patterns of conduct of drug dealers. Such a witness could outline to a court the status and membership of the Expert Committee and produce its opinion. That opinion could be examined and challenged by defence witnesses, like any other expert opinion presented to a court. The prosecution might find itself at a disadvantage if it elected to rely on a written opinion rather than an expert's oral testimony. Whether and to what extent that would be so will vary from case to case and tactical decisions will no doubt be made accordingly. What is clear however, to my mind, is that the more compelling the inference to be taken in light of the expert opinion, the less there is a need for a presumption, and the less compelling the inference, the less there is a justification for a presumption. In view of these various matters I consider that s 6(6) of the Misuse of Drugs Act goes further than is reasonably necessary to curb crimes of drug dealing.

[280] Finally, I consider that the presumption is not a proportional response to the concerns about misuse of drugs. It is not necessarily effective in curbing drug dealing at street level. A dealer need only ensure possession of a drug or drugs just below the relevant trigger level to make the presumption irrelevant. But more importantly, it must impact most in cases of marginal likelihood in terms of amounts and carries a risk, which I consider unacceptable, of convicting persons who do not

in fact have a dealing purpose. Because of prosecutorial difficulty in proving a positive, an accused who does not have equality of arms in terms of resources, and may lack articulateness, is forced to carry the even heavier burden of proving a negative. That such negative is subjective and intangible only exacerbates the difficulty for an accused.

[281] In short, I am of the view that the apparent meaning of the statute is not a justified limitation of the right identified in s 25(c) of the Bill of Rights Act. But counsel for the appellant has submitted that s 6(6) can reasonably be interpreted in a way which envisages the presumption being rebutted by an accused adducing or pointing to evidence which makes the purpose of possession a live issue.

[282] Counsel for the appellant argued that "proved" should be accorded the meaning "tested". In consequence of that, the presumption would be rebutted if an accused adduced or pointed to some evidence which, if accepted, might create a reasonable doubt. It is the case that the meaning of "prove" first signified by the *Shorter Oxford English Dictionary*[294] is:

> Test the genuineness or qualities of, subject to a testing process.

However, context is an essential indication when a word is as diverse in its meanings and connotations as "prove". Amongst the meanings catalogued in that dictionary is:

> Establish or demonstrate the truth or existence of by evidence or argument.

Given the forensic context of s 6(6) I consider that to be the appropriate meaning. I note also that the only meaning of "prove" given in *Black's Law Dictionary*[295] is:

> To establish or make certain; to establish the truth of (a fact or hypothesis) by satisfactory evidence.

[283] The present appellant's argument was advanced in *R v Phillips*.[296] In delivering the judgment of the Court of Appeal Cooke P noted:[297]

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294 (5th ed, 2002).
295 (8th ed, 2004).
296 [1991] 3 NZLR 175.
297 At pp 176 – 177.

> It is said that the expression "until the contrary is proved" could be taken to mean until some evidential foundation sufficient to create a reasonable doubt appears: that it could be interpreted in such a way as to cast on the defence, not the burden of proving anything in the sense of obtaining a finding of fact, but merely an evidential onus of tendering or pointing to some evidence which, if accepted, might create a reasonable doubt.

[284] That argument was supported by reference to an article by Professor Glanville Williams[298] but the Court of Appeal was not persuaded. Cooke P said:[299]

> With the utmost respect to [Professor Glanville Williams], we are not persuaded that the ordinary and natural meaning of the word "proof" or "proved" is capable of extending so far. To suggest that s 6(6) of the Misuse of Drugs Act can be read in the sense contended for is, in our view, a strained and unnatural interpretation which, even with the aid of the New Zealand Bill of Rights Act, this Court would not be justified in adopting.

[285] A similar argument was considered by Lord Cooke of Thorndon, sitting in the House of Lords on the appeal *R v Director of Public Prosecutions, ex p Kebilene*.[300] The case concerned the prosecution of Kebilene and others pursuant to s 16A(1) of the Prevention of Terrorism (Temporary Provisions) Act 1989 (UK). That created an offence of having possession of any article "in circumstances giving rise to a reasonable suspicion" that the article is possessed for a purpose connected with the commission, preparation or instigation of specified acts of terrorism. Subsection (3) provided that it is a defence for a person charged with an offence under the section to prove that at the time of the alleged possession the article was not in possession for any such purpose. Thus, an accused could be convicted on the strength of suspicion; the spirit of *Woolmington*,[301] art 6(2) of the European Convention on Human Rights[302] and art 14(2) of the International Covenant on Civil and Political Rights[303] notwithstanding. On the question whether, upon s 3(1) of the Human Rights Act 1998 (UK) coming into effect, s 16A(3) could be read as casting only an evidential burden on an accused, their Lordships, including Lord Cooke of

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298 "The Logic of 'Exceptions'" [1988] 47(2) CLJ 261.
299 At p 177.
300 [2000] 2 AC 326.
301 *Woolmington v Director of Public Prosecutions* [1935] AC 462.
302 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 UNTS 221.
303 (1966) 999 UNTS 171.

Thorndon, were minded to think that an accused could displace the presumption by raising a reasonable doubt as to guilt.

[286] In *R v Lambert*[304] the House of Lords considered the appeal of a man convicted of possession of cocaine for supply, contrary to s 5 of the Misuse of Drugs Act 1971 (UK). The drug was in a duffel bag carried by the accused. A presumption as to possession could be displaced, pursuant to s 28, if the accused should prove that he neither believed, nor suspected, nor had reason to suspect that a substance in his possession was a controlled drug. At issue was whether a statutory reservation required him to satisfy the jury of those exceptions on the balance of probabilities, or whether it imposed only an evidential burden. The House of Lords held that although, on its ordinary meaning, s 28 imposed a legal burden upon an accused, it should be read as imposing only an evidential burden in cases where an accused is entitled to rely on art 6(2) of the Convention. Their Lordships came to that result because they regarded it as "possible to do so",[305] drawing support from Professor Glanville Williams' article and also from the speech of Lord Cooke of Thorndon in *Kebilene*,[306] which included the following:

> I agree that such is not the natural and ordinary meaning of section 16A(3). Yet for evidence that it is a *possible* meaning one could hardly ask for more than the opinion of Professor Glanville Williams in "The Logic of 'Exceptions'" [1988] C.L.J. 261, 265 that "unless the contrary is proved" can be taken, in relation to a defence, to mean "unless sufficient evidence is given to the contrary;" and that the statute may then be satisfied by "evidence that, if believed, and on the most favourable view, could be taken by a reasonable jury to support the defence."
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> I must not conceal that in New Zealand the Glanville Williams approach was not allowed to prevail in *Reg. v Phillips* [1991] 3 NZLR 175. But, quite apart from the fact that the decision is of course not authoritative in England, section 6 of the New Zealand Bill of Rights Act 1990 is in terms different from section 3(1) of the Human Rights Act 1998. The United Kingdom subsection, read as a whole, conveys, I think, a rather more powerful message.

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304 [2002] 2 AC 545.

305 Lord Slynn of Hedley at para [17]; Lord Steyn at para [42]; Lord Hope of Craighead at para [84]; Lord Clyde at para [157].

306 At pp 373 – 374.

[287] I find it difficult, however, to distinguish between s 3(1) of the Human Rights Act (UK) and s 6 of the Bill of Rights Act, whether in terms of essential meaning or in terms of relative potency. In the New Zealand statute "can" is used as an ancillary verb expressing a possibility;[307] and "shall" and "must" are equally mandatory. Lord Cooke of Thorndon did not suggest that the meaning attributed by the Court of Appeal in *Phillips* should be revised. Further, if the English position is distinguishable that does not assist the present appellant.

[288] The argument on behalf of the appellant is untenable. If in s 6(6) of the Misuse of Drugs Act "tested" were substituted for "proved", the subsection would read:

> a person shall until the contrary is tested be deemed …

But if there were only an evidential burden, it would be the deeming, not the contrary, which would be tested. Further, if a prosecution would fail because the defence were able to lead or point to evidence raising a reasonable doubt, the deeming provision would be unnecessary. Whether it existed or not, the prosecution would have to prove every element, including the proscribed purpose, beyond reasonable doubt.

[289] The terms of the 2005 amendment suggest, for the reasons given by Blanchard J, that at one level, the meaning to be attributed to s 6(6) should be that affirmed in *Phillips*. However, the Bill of Rights Act now adumbrates the application of previously conventional principles of construction and may result in the finding of a meaning different from that which would have been found prior to the Bill of Rights Act. Now, a meaning dictated by s 6, rather than a meaning ascertained without reference to s 6, is what the courts must find if it is reasonably possible to do so.

[290] But the duty of the courts is to construe, not to reconstruct. In my view no other meaning than that decided in *Phillips* is reasonably possible. The meaning suggested on behalf of the appellant is as strained and unnatural now as it was found

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[307] *Shorter Oxford English Dictionary* (5th ed, 2002): "May possibly; be enabled by circumstances etc."

to be then. Accordingly s 6 of the Bill of Rights Act is not engaged. Even though s 6(6) of the Misuse of Drugs Act is inconsistent with the right to be presumed innocent until proved guilty according to law, and is not redeemed by s 5 of the Bill of Rights Act, s 4 of that Act requires that the appeal be dismissed.

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