1. INTRODUCTION

1.1. The purpose of this paper is to examine the development of the law in this jurisdiction in relation to statutory provisions which have the effect, in general terms, of placing an onus of proof on the defence in a criminal trial. The subject of the paper is stated in general terms because it will become apparent from an analysis of the authorities that there are many species of what is commonly referred to as a reversed burden of proof. The starting point of the analysis, however, must be that the ordinary rule requires that all elements of a criminal offence be proved beyond reasonable doubt by the prosecution. This rule is the corollary of the presumption of innocence, set out in the celebrated words of Viscount Sankey L.C. in *Woolmington v. DPP*:

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."\(^2\)

1.2. The acknowledgement of the possibility of statutory exceptions to the duty on the prosecution to prove the guilt of the accused beyond reasonable doubt is perhaps less celebrated but it is central to the present discussion.

1.3. The presumption of innocence was recognised in this jurisdiction as an essential element of a trial in due course of law according to Article 38.1 of the Constitution in *O'Leary v The Attorney General*. It is also, of course, expressly recognised in Article 6(2) of the European Convention on Human Rights, which provides:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

1.4. This paper will review the early Irish authorities on the presumption of innocence and the reversal of the burden of proof, will rehearse some of the criticisms of those early authorities, in particular by reference to decisions of the Canadian Supreme

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1 [1935] 1 AC 462
2 *ibid.* at 481
3 [1993] 1 IR 102 (High Court), [1995] 1 IR 254 (Supreme Court)
Court and ECHR authorities, and will review some recent decisions of the Superior Courts in light of those criticisms.

1.5. The subject of the reversal of the burden of proof is an area of law that is replete with terms of art and fine distinctions. Unfortunately, it can be difficult to extract clear and readily applicable statements of principle. The areas of doubt that remain around the application of a reversed burden of proof are capable of presenting real practical difficulties in the course of a criminal trial. The subject is not merely an academic study; establishing the correct distribution of the onus of proof in any criminal trial is the first order of business and is essential for a clear and effective opening by the prosecution.

2. RECOGNITION OF THE PRESUMPTION OF INNOCENCE IN IRISH LAW AND THE REVERSAL OF THE BURDEN OF PROOF

2.1. In O’Leary v The Attorney General, the plaintiff was a person who had been convicted by a Special Criminal Court on two counts of membership of an unlawful organisation contrary to Section 21 of the Offences Against the State Act 1939 and of possession of incriminating documents contrary to Section 12 of the same Act. The convictions were affirmed by the Court of Criminal Appeal. A year after the decision of the appeal court the plaintiff issued plenary proceedings seeking declarations that Section 24 of the Act of 1939 and Section 3(2) of the Offences Against the State (Amendment) Act 1972 were invalid having regard to the provisions of the Constitution in that they allowed the prosecution to place upon an accused the burden of disproving his guilt. The claim was unsuccessful both at first instance before Costello J and on appeal to the Supreme Court, where the judgment of the Court was given by O’Flaherty J.

2.2. Section 3(2) of the Act of 1972 provides:

"Where an officer of the Garda Sióchána, not below the rank of Chief Superintendent, in giving evidence in proceedings relating to an offence under the said section 21, states that he believes that the accused was at a material time a member of an unlawful organisation, the statement shall be evidence that he was then such a member."

2.3. Section 24 of the Act of 1939 provides:

"On the trial of a person charged with the offence of being a member of an unlawful organisation, proof to the satisfaction of the court that an incriminating document relating to the said organisation was found on such person or in his possession or on lands or in premises owned or occupied by him or under his control shall, without more, be evidence until the contrary is proved that such person was a member of the said organisation at the time alleged in the said charge."

2.4. It was argued that both of these provisions have the effect of removing from the prosecution the burden of proving all the elements of the offence and shifting to

supra fn. 3
the accused the burden of proving his innocence. Giving judgment in the High Court, Costello J accepted the basic contention on which the arguments advanced by the plaintiff were posited, that the Constitution confers on every accused in every criminal trial the constitutionally protected right to the presumption of innocence. He drew support for that view from various international instruments and also the long history of the presumption of innocence in the common law tradition. In words which have often been cited in decisions of the Superior Courts, he said:

“It seems to me that it has been for so long a fundamental postulate of every criminal trial in this country that the accused was presumed to be innocent of the offence with which he was charged that a criminal trial held otherwise than in accordance with this presumption would, prima facie, be one which was not held in due course of law. It would follow that prima facie any statute which permitted such a trial so to be held would be unconstitutional. The contentious issue in the case, therefore, is not whether the plaintiff had a constitutionally protected right to the presumption of innocence but whether the impugned provisions of the Acts of 1939 and 1972 infringed that right.”

2.5. Costello J gave a number of examples of statutory provisions, from as far back as 1843 up to 1984, which contained provisions which have the effect of shifting the onus of proof in certain circumstances from the prosecution to the accused. He made the important point that the way in which this is done differs from case to case and that

“the manner in which the statute shifts the onus of proof may produce different legal consequences and so any statute which does so must be carefully considered to appreciate exactly the effect it may have on an accused’s constitutional rights”.

2.6. He drew a distinction between two different senses of the phrase “the burden of proof”, the legal burden of proof and an evidential burden of proof. He said:

“The phrase is used firstly to describe as a matter of substantive law the burden which is imposed on the prosecution in a criminal trial to establish the case against the accused beyond a reasonable doubt. This burden is fixed by law and remains on the prosecution from the beginning to the end of the trial. It is this burden which arises from the presumption of the accused's innocence and it is the removal of this burden by statute that may involve a breach of the accused's constitutional rights. It is now usual to refer to this burden as the legal or persuasive burden of proof. But the phrase is also used to describe the burden which is cast on the prosecution in a criminal trial of adducing evidence to establish a case against an accused, a burden which is now usually referred to as the evidential burden of proof. In criminal cases the prosecution discharges this evidential burden by adducing sufficient evidence to raise a "prima facie" case against an accused. It can then be said that an evidential burden has been cast on to the accused. But the shifting of the evidential burden does not discharge the legal burden of proof which at all times rests on the prosecution. The accused may elect not to call any

5 [1993] 1 IR 102 at 107
6 ibid. at 108
evidence and will be entitled to an acquittal if the evidence adduced does not establish his or her guilt beyond a reasonable doubt. Therefore if a statute is to be construed as merely shifting the evidential burden no constitutional infringement occurs.”

2.7. The distinction between the shifting of a legal and an evidential burden was explained as follows. If the effect of the statute was that the court must convict an accused should he or she fail to adduce exculpatory evidence then its effect is to shift the legal burden of proof, “thus involving a possible breach of the accused’s constitutional rights” [emphasis added]. On the other hand, if, notwithstanding the terms of the statute, the accused may be acquitted even though he called no evidence because the statute has not discharged the prosecution from establishing the accused’s guilt beyond a reasonable doubt then no constitutional invalidity could arise.

2.8. Costello J also expressed the view that shifting a legal burden of proof did not necessarily mean the statute was unconstitutional, since it “may merely give legal effect to an inference which it is reasonable to draw from facts which the prosecution established”⁸. As an example, he refers to Section 27A of the Firearms Act 1964, in respect of which he says that the inference that possession is not for a lawful purpose exists apart from the statute and that he does not think that the statute can thereby be invalidated by the Constitution.

2.9. One particularly interesting feature of the judgment is that Costello J expressed the view that “the Constitution should not be construed as absolutely prohibiting the Oireachtas from restricting the exercise of the right to a presumption of innocence. The right is to be implied from Article 38, which provides that trials are to be held “in accordance with law”, and it [seemed to him] that the Oireachtas is permitted in certain circumstances to restrict the exercise of the right because it is not to be regarded as an absolute right whose enjoyment can never be abridged”. In that respect he adverted to the European Convention on Human Rights, Article 29 of the United Nations Universal Declaration on Human Rights, Section 1 of the Canadian Charter of Rights and Freedoms and the due process clause of the Fifth Amendment to the Constitution of the United States. Thus, as in Woolmington, O’Leary acknowledges the possibility of statutory interference in the ordinary rule that the prosecution bears the burden of proving all elements of the offence alleged and, specifically, that such interference may not be unconstitutional.

2.10. Neither of the statutory provisions concerned were found to be unconstitutional. Section 3(2) of the Act of 1972 merely made admissible evidence which would otherwise be inadmissible, without in any way affecting the plaintiff’s right to enjoy the presumption of innocence. Section 24 of the Act of 1939 only shifted an evidential burden to an accused. The court would still have to evaluate and assess the significance of the evidence and, if it had a reasonable doubt as to the accused’s guilt of an offense of membership of an unlawful organisation, it must dismiss the charge, even in the absence of exculpatory evidence.

⁷ ibid. at 109
⁸ ibid. at 110
2.11. The appeal to the Supreme Court was concerned only with the provisions of Section 24 of the 1939 Act. The essence of the appeal was that counsel for the plaintiffs submitted that the use of the words “until the contrary is proved” in the section imposed the burden on the accused of proving that he was not guilty of the offence. The Supreme Court did not accept that submission, taking the view that the section provided that the possession of the incriminating document “is to amount to evidence only; it is not to be taken as proof and so the probative value of the possession of such document might be shaken in many ways”. O’Flaherty J said

“the important thing to note about the section is that there is no mention of the burden of proof changing, much less that the presumption of innocence is to be set to one side at any stage”.

2.12. Between the date of delivery of judgment in the High Court in O’Leary and the hearing in the Supreme Court, another challenge to the validity of a statute on similar grounds was heard in Hardy v Ireland. That was also a case in which the applicant had been convicted before a Special Criminal Court and was unsuccessful in his appeal to the Court of Criminal Appeal. The proceedings were in the nature of an Article 40 inquiry. The statutory provision concerned was Section 4(1) of the Explosive Substances Act, 1883, which provided, insofar as relevant:

"Any person who . . . knowingly has in his possession . . . any explosive substance, under such circumstances as to give rise to a reasonable suspicion . . . that he . . . does not have it in his possession . . . for a lawful object, shall, unless he can show that he . . . had it in his possession . . . for a lawful object, be guilty of felony".

2.13. It will be noted that the structure of the provision is similar to that of Section 27A of the Firearms Act, 1964, to which Costello J made reference in O’Leary, except that the latter contains no requirement for the accused to “show” the lawful purpose. Flood J, in the High Court, was satisfied that the provision merely shifted an evidential burden of proof and not a persuasive burden of proof.

2.14. In the Supreme Court three judgments were given. The majority judgment of Hederman J (with which O’Flaherty J and Blayney J agreed) referred to some relevant facts from the judgment of the Court of Criminal Appeal, including the fact that, when stopped by Customs the applicant had “sought to run away from them, was apprehended and brought back” and that a search of his bag revealed not only the explosive substance for which he was prosecuted but also ten mercury tilt switches, which the evidence established were a component part of a car bomb. It must be observed that, in light of that evidence, there was an air of unreality to any discussion of the shifting of a burden of proof, either evidential or legal. Nonetheless a common feature of all three judgments is that there is an analysis of the elements of proof required of the prosecution, which are described in broadly similar terms. The majority decision concluded that once those elements of proof are in place,
“it is still open to the accused to demonstrate in any one of a number of ways, such as by cross-examination, submissions or by giving evidence, that a *prima facie* situation pointing to his guilt should not be allowed to prevail.”

2.15. This approach, he said,

“protects the presumption of innocence; it requires that the prosecution should prove its case beyond all reasonable doubt; but it does not prohibit that, in the course of the case, once certain facts are established, inferences may not be drawn from those facts and I include in that the entitlement to do this by way even of documentary evidence. What is kept in place, however, is the essential requirement that at the end of the trial and before a verdict can be entered the prosecution must show that it has proved its case beyond all reasonable doubt.”

2.16. Both Egan J and Murphy J, who delivered separate judgments, came to the conclusion that the provision did in fact shift a legal burden of proof to the standard of proof on the balance of probabilities onto the accused. In doing so they relied on the specific wording of the section. Egan J said

“The words are ‘unless he can show . . . [etc .]’. These words cannot be construed as meaning that the raising of a doubt would be a sufficient discharge. The onus, not being an onus resting on the prosecution, does not require proof beyond reasonable doubt. It is sufficient if there is proof on the balance of probabilities.”

2.17. He remarked that

“There is nothing in the Constitution to prohibit absolutely the shifting of an onus in a criminal prosecution or to suggest that such would inevitably offend the requirement of due process.”

2.18. Murphy J reached a similar conclusion, relying on the authority of the decision of the Court of Criminal Appeal in Northern Ireland in *Regina v Fegan*4. He was satisfied that the second part of the section did not deal with the charge itself but “with a statutory exoneration or exculpation from a charge already made and sustained beyond reasonable doubt.”

3. **OTHER APPROACHES TO THE REVERSED BURDEN**

3.1. It is not the purpose of this paper to conduct a comparative analysis of the treatment of reversed burdens of proof. It may be useful, nonetheless, to review briefly some of the leading authorities from other jurisdictions.

11 ibid. at 564
12 ibid. at 565
13 ibid. at 566
14 [1972] NÍ 80
15 [1994] 2 IR 550 at 568
3.2. The Canadian Charter of Rights expressly acknowledges the presumption of innocence, although Charter rights are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” In R. v Oakes the accused was charged with possession of narcotics for the purpose of trafficking. The statute provided that if the court was satisfied that the accused was in possession of the narcotic, “he shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking.” Upon failure by the accused to so establish his innocence of the trafficking charge, “he shall be convicted”. The Canadian Supreme Court was satisfied that the statute violated the presumption of innocence. Dickson CJC, giving the judgment of the Court, said

“In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.”

3.3. The Court referred to authorities in which a “rational connection” test to justify a reversed burden had been elaborated, i.e. the existence of a rational connection between the basic fact and the presumed fact might justify the reversal of the onus. The Court was not convinced of the merits of this test, saying,

“A basic fact may rationally tend to prove a presumed fact, but not prove its existence beyond a reasonable doubt. An accused person could thereby be convicted despite the presence of a reasonable doubt. This would violate the presumption of innocence.”

3.4. The Court has since made clear that the reference to a provision which requires the accused to disprove an important element of the offence should not be taken to mean that where the statute frames the reversed onus as a requirement to prove a defence or excuse that a violation of the presumption of innocence may not arise. In R. v. Whyte, the Court said:

“[T]he distinction between elements of the offence and other aspects of the charge is irrelevant to the s. 11(d) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.

16 s. 11(d)
17 s. 1
18 [1986] 1 SCR 103, 26 DLR (4th) 200
19 Narcotic Control Act, R.S.C. 1970, c. N-1, s. 8, cited at para. 2 of the judgment
20 para. 57 of the judgment.
21 [1988] 2 SCR 3, 51 DLR (4th) 481
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.  

3.5. In *Oakes* the Canadian Supreme Court went on to outline the test to be applied in the event that a violation of the presumption of innocence was identified, to determine whether it was justifiable having regard to s. 1 of the Charter.

"To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" . . . . It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test". . . . There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question . . . . Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance"."  

3.6. As previously stated, the European Convention on Human Rights expressly recognises the presumption of innocence. In *Salabiaku v. France* the applicant had been convicted of a customs offence involving the importation of drugs. Under the relevant French legislation, where possession is established the person in possession is deemed liable for the offence, although the French cases established that *force majeure*, necessity, unavoidable error or impossibility of knowledge of the contents could be a defence. The applicant alleged a violation of Article 6 of the Convention. The European Court of Human Rights found that there was no breach. The Court did, however state that

"Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this

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22 ibid. paras. 31-32
23 R. v. *Oakes*, supra, fn. 18, paras. 69-70
24 (1988) 13 EHRR 379
 respect as regards criminal law. If, as the Commission would appear to consider (paragraph 64 of the report), paragraph 2 of Article 6 (art. 6-2) merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1 (art. 6-1). Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words "according to law" were construed exclusively with reference to domestic law. Such a situation could not be reconciled with the object and purpose of Article 6 (art. 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 (see, inter alia, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 34, para. 55).

“Article 6 para. 2 (art. 6-2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It 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.”

3.7. In one of the leading decisions of the UK courts since the incorporation of the Convention into its domestic law, the House of Lords had to determine, in *R. v. Lambert*<sup>26</sup>, what those limits were with respect to a reversed onus provision. The relevant provision of the UK Misuse of Drugs Act, 1971 placed a legal burden on the accused to prove lack of knowledge that he possessed a controlled drug. The House of Lords held that a statute may place a legal burden of proof on the defendant, despite Article 6(2), in pursuit of a legitimate aim so long as the nature of the burden is proportionate to the aim to be achieved. Following a review of the evidential issues involved, and having regard to the gravity of the offence concerned in light of the applicable sentencing parameters, it concluded that the imposition of the legal burden was disproportionate and not justified.

3.8. One of the issues considered in *Lambert* was whether the better approach to a problematic statutory provision imposing a reversed onus was to use the interpretative power of the court under section 3 of the Human Rights Act 1998, rather than proceeding to make a declaration of incompatibility. Section 3 provides:

“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.”

3.9. It will be noted that the section is less qualified than the corresponding provision in section 2 of the European Convention on Human Rights Act 2003. In any event, a number of the judgments expressed the view that the word “prove” could be read as imposing no more than a requirement to satisfy an evidential burden. This view was advocated by Professor Glanville Williams in *The Logic of Exceptions*<sup>27</sup>. It has, however, been criticised in a number of subsequent judgments as depriving the

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<sup>25</sup> ibid., para. 28  
<sup>26</sup> [2002] 2 AC 545  
<sup>27</sup> [1988] CLJ 261
words “proof” or “to prove” of any proper meaning. In *R. v. Daniel* Auld LJ, giving the judgment of the Court of Appeal, said that:

“The words ‘if he proves’ must, as a matter of plain English, mean more than the evidential raising of an issue for the prosecution to refute beyond reasonable doubt.

... 

It is true that section 3(1) requires courts, through the medium of interpretation, to strive for compatibility, if necessary by reading down over-broad legislation or reading necessary safeguards into a statute or by giving a provision a meaning that it would not ordinarily bear. But there must be some limit to the extent to which the plain meaning of statutory language can be ignored or simply changed in the cause of securing compatibility. Those who are governed by, and seek to order their conduct according to, statutory words are entitled to a broad measure of certainty as to what they mean, not some contrary or wholly different meaning which a court, if and when the matter reaches it, might or might not consider permissible under section 3(1) driven by an imperative to find compatibility at all costs.

In our view, where there is plain incompatibility between the ordinary and natural meaning of statutory words whatever the context, and Article 6(2), the courts should take care not to strive for compatibility by so changing the meaning of those words as to give them a sense that they cannot, in the sense intended by section 3(1), possibly bear.

3.10. Given the more qualified terms of section 2 of European Convention on Human Rights Act 2003 and the decision of Laffoy J in *O’Donnell (a minor) v. South Dublin County Council*, it is submitted that these criticisms reflect an approach that is consistent with Irish rules of statutory interpretation.

3.11. Finally, one case worthy of note in conducting any analysis of the proportionality of a reversed burden of proof that interferes with the presumption of innocence is *Sheldrake v. Director of Public Prosecutions* in which Lord Bingham, having examined the Convention authorities, expressed the general principle as follows:

“The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of mens rea. But 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

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28 [2002] EWCA Crim 959
29 [2007] IEHC 204
30 [2005] 1 AC 246
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.\textsuperscript{31}

\textsuperscript{31} ibid. at 297
4. CRITICISM OF O’LEARY AND HARDY

4.1. The decisions in O’Leary and Hardy sustained significant criticism in commentary by Una Ní Raifeartaigh in “Reversing the Burden of Proof in Criminal Trials: Canadian and Irish Perspectives on the Presumption of Innocence”\(^{32}\). The criticism focused in particular on a comparison between the reasoning and analysis in the two Irish decisions with the approach to the same issue in the Canadian Supreme Court and in a number of decisions of the US Supreme Court\(^{33}\). It should be noted that some of these decisions were referred to, although not analysed in any detail, in O’Leary.

4.2. Commenting on O’Leary, Ní Raifeartaigh said that in the decision there is “the potential for a jurisprudence on the Canadian lines. Costello J specifically distinguished between the question of whether there is a violation of the presumption of innocence and the question of whether such a violation might be justified. This potential is not, however, developed.”. She also said it was regrettable that Costello J preferred the “rational connection” test, without referring to the Canadian “reasonable doubt” test. She also regretted that the Supreme Court had not indicated its views in these matters at all.

4.3. The judgments in Hardy were described as “disappointing”. Ní Raifeartaigh observed “the presumption of innocence and its ramifications are barely touched on; there is no discussion of case law from other jurisdictions which give constitutional status to the presumption of innocence . . . . No indication is given of whether there are limits to statutory restriction of the presumption of innocence or what these limits might be”. There was also concern about the emphasis laid on the fact that the element in respect of which the burden of proof would be reversed was a defence or excuse. Another concern was the absence of an “attempt to distinguish between the question of whether a prima facie violation of the presumption has occurred, and the question of whether such a violation might be justified”. Perhaps unusually for a barrister, Ní Raifeartaigh described the very brevity of the judgments as a “final worrying factor”.

4.4. Having examined the Canadian and US authorities, Ní Raifeartaigh suggested the following approach to the question whether any particular apparently reversed burden of proof was constitutionally permissible. The first step was to examine the precise nature of the provision in question to establish whether it was

1. A presumption of fact, which does not shift the burden of proof at all,
2. A rebuttable presumption of law, which shifts the evidential burden of proof only, or
3. A rebuttable presumption of law, which shifts the legal burden of proof, thus requiring the accused to prove an element of the offence on the balance of probabilities.

\(^{32}\) [1995] 5 ICLJ 135
4.5. The second stage would be to examine whether the provision restricts or interferes with the presumption of innocence. The test suggested as the most appropriate was "whether proof of an essential element of the offence falls to the defence in such a way that he may be convicted despite the presence of reasonable doubt as to an essential element of the offence”. Technical distinctions between “offence elements” and “excuses, defences, denials, or exceptions”, were of no real value.

4.6. The third stage suggested was that if the court found that the provision appeared to violate the presumption of innocence, it should examine whether such violation was justified with reference to the objective in question and the means chosen to achieve that objective. Specifically, are the means chosen proportionate, rationally connected to the objective, and do they embody the least intrusive approach possible and appropriate in the circumstances?

5. THE DEVELOPMENT OF IRISH JURISPRUDENCE IN RELATION TO THE REVERSED BURDEN OF PROOF

5.1. Some discussion of the constitutional status of a reversed burden of proof is to be found in the judgment of the Supreme Court in the Article 26 reference Re The Employment Equality Bill, 199634, in particular that part of the judgment concerned with section 63(3) of the Bill.

5.2. Section 63 was concerned broadly with obstruction of the Court, the Director or an equality officer and creates an offence of obstruction or impeding any of those parties or failing to comply with a requirement from them. Subs. (3) provides:

In any proceedings for an offence under this section, a document purporting to be certified by the Director or to be sealed with the seal of the Court and relating to the circumstances in which the offence is alleged to have occurred shall be received as prima facie evidence of the facts stated therein.

5.3. The Court was of the view that the subsection raised a fundamental matter wider than the presumption of innocence or the shift of an evidential burden of proof and identified the issue arising in the case as follows:

"The essential question posed is whether it is constitutionally valid to have a case of the nature proposed conducted and concluded on the basis as provided in s. 63, sub-section 3. It is proposed to apply the certification process to a criminal trial on issues of obstructing or impeding named bodies as well as to the matter of failing to comply with a requirement of named bodies. The question of whether there has been an obstruction or an impeding of a body or whether there has been a failure to comply with a requirement of a named body are issues likely to give rise to sharp conflict of evidence. They are also matters totally distinct from issues either scientific or technical or other such capable of or amenable to prima facie proof by certification.

34 [1997] 2 IR 321
5.4. Having referred in its analysis both to *O'Leary* and *Hardy*, the Court concluded as follows in relation to the effect of the section:

These issues of "circumstances" are not amenable to resolution by certificate, much less a certificate in the purported form. The idea that a criminal trial could proceed from beginning to end concluding with a verdict of guilty on the production of a document is inconsistent with the concept of trial in due course of law. The use of a certificate as proposed in s. 63, sub-s. 3 is to do more than prove evidence of certain technical matters by certificate. It is a document which may be certified by a person with no personal knowledge of or involvement in the events in issue. It purports to relate to all the facts of the offence. No other evidence may be anticipated."

5.5. Having reached that view of the subsection, the court went on to apply a form of proportionality test and specifically referred to the decision of the Canadian Supreme Court in *Oakes*. The Court found that the subsection was not specifically designed to meet the objectives of the Bill and not rationally connected to the objective. The process of certification was an intrusion into the constitutional rights of an accused but there is no rational reason why such a process is necessary in this type of case and, accordingly, no proportionality between the process of trial by certification and the objective of the Bill and the limitations of the right to trial in due course of law. The Court concluded that the use of a certificate was so contrary to the concept of affording a person a trial in due course of law as to render the provision contrary to article 38.1 of the Constitution.

5.6. The question of the shifting of the burden of proof arose more distinctly in *McNally v Ireland*. Those proceedings concerned Section 99 of the Charities Act 2009, the effect of which is to render it an offence to sell Mass cards which are not the subject of an “arrangement” made with a recognized person, i.e. a bishop or the provincial of an order of priests of the Roman Catholic Church. Subs. (2) provides:

“In proceedings for an offence under this section it shall be presumed, until the contrary is proved on the balance of probabilities, that the sale of the Mass card to which the alleged offence relates was not done pursuant to an arrangement with a recognised person.”

5.7. It will be noted that this provision could not leave open to doubt the obvious intention of the Oireachtas, which was to shift a legal burden of proof onto the accused, even going so far as to specify the standard of proof required, i.e. proof of the balance of probabilities.

5.8. The Court stated that it was well established that the presumption of innocence is a constitutionally enshrined value implicit in the requirements of Article 38, on the authority of the decision in *O'Leary*. Having given some account of that decision, the Court noted, without citing any authority, that

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35 [2009] IEHC 573 (unreported, High Court (MacMenamin J.), 17th December 2009)
“It has been held that rights under Article 38.1 are not absolute and a proportionality analysis may be advised to assess the legitimacy of restrictions on such rights”.

5.9. The court applied the same proportionality test that was applied by the Supreme Court in *Re The Employment Equality Bill 1996*, i.e.

1. Is it rationally designed to meet the objective of the legislation?
2. Does it intrude into constitutional rights as little as reasonably possible?
3. Is there a proportionality between the section and the right to trial in due course of law and the objective of the legislation?

5.10. In applying those criteria MacMenamin J noted that it was not disputed that reasonable consumers could be deluded by misrepresentations and by bogus Mass cards and that the existence of an arrangement whereby Mass cards might be validated or authenticated by a priest alone has proved unsatisfactory. He said that there was evidence that there are approximately 250,000 clergy in the Roman Catholic church who might potentially sign a Mass card. He noted that no other mode of authenticity or verification has been proposed in the course of the case and that for Roman Catholic believers the overall issues of authenticity, verification and charitable object of donation are fundamental. MacMenamin J said

“Whether or not an arrangement to ensure these requisites is in existence is a matter which would, in the event of a prosecution, be peculiarly in the knowledge of an accused person. It would be easily provable for an accused.”

5.11. The court noted that the position of the prosecution would be very much more difficult.

“By contrast an onus placed upon a prosecutor to demonstrate the non-existence of such an arrangement with any one of more than 7,000 bishops or provincials would be an impossibility.”

5.12. The court expressed its conclusions on the analysis of proportionality as follows:

“Accordingly, it may be seen that there is a rational connection between the means and the objective of the legislation. It is minimally intrusive into the constitutional rights of a potential accused. It is an attenuated intrusion into the right to trial in due course of law. No other means have been suggested to attain the object. The subsection does not ”create” guilt. It provides a framework within which the existence of the offence may be proved or disproved. Absent such a legislative framework the existence of an offence would be simply not susceptible to proof in any practical sense, as an onus would lie on the prosecution to negative literally thousands of possible avenues which might be called in aid as constituting ”validation” or ”authentication”.”

6. **RECENT DECISIONS OF THE COURT OF CRIMINAL APPEAL**

36 ibid. at p. 57 of the unreported judgment
6.1. There are three more recent decisions of the Court of Criminal Appeal on these issues. In People (DPP) v Egan, the Court was concerned with Section 3 of the Criminal Law (Sexual Offences) Act 2006, which made it an offence to engage in a sexual act with a child below a certain age. The relevant provision was subsection 5 which provides:

“It shall be a defence to proceedings for an offence under this section for the defendant to prove that he or she honestly believed that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 17 years.”

6.2. The appeal was made on the grounds of the supposedly “unsatisfactory nature of the trial judge’s directions in respect of the defence of honest belief”.

6.3. The Court noted that the accused did not attempt to advance any particular evidence of his belief regarding the age of the complainants, having given no evidence on the point and conducted no cross examination with a view to establishing that he had any such belief. The question of honest belief as to age was not raised in the closing address and the issue first arose when the learned trial judge raised the issue with counsel. Charleton J expressed the view that “if there is evidence on the prosecution case which raises a reasonable doubt whereby it is possible... that the accused genuinely believed that [the complainants] were more than 17 or over, then he is entitled to be acquitted”. The charge to the jury was in somewhat different terms and this prompted a discussion of the section in which three different views emerged. The first, which was that of the trial judge, “was that there was a burden on the accused to give evidence that he did not know the complainant was under 17 years”. Counsel for the accused submitted that it was “sufficient for the accused to raise the matter; the burden of proof then lay on the prosecutor to negative that defence according to the standard, beyond reasonable doubt”. The view advanced by the prosecution was “that the burden of proof lay on the accused, and that it was not simply an evidential burden but a legal burden of proof”.

6.4. The learned trial judge then further charged the jury and told them that “the accused had to show, on some evidence in the case, that he honestly believed that the girls or one or other of them were 17 years or more”.

6.5. Requisitions were raised and the learned Trial Judge re-charged the jury. In doing so he repeated the above direction and continued:

“If there is a reasonable doubt as to whether or not a defence was established, in other words, that the accused honestly believed at the time of the sexual act that they had attained the age of 17, then you acquit. But if there isn’t that evidence, in other words, if there isn’t that reasonable doubt in the case, on that evidence, then you convict.”

37 [2010] 3 IR 561
38 ibid. at 567-8
6.6. In the Court of Criminal Appeal three approaches to the interpretation of the section were suggested. The first interpretative approach is to conclude that the accused does not have to prove honest belief but merely has an evidential burden to discharge. The second approach is that the accused carries a persuasive burden of proof but to the standard only of establishing a reasonable doubt. The third approach is that the section requires the accused to show by way of proof on the balance of probabilities that he had the necessary honest belief.

6.7. It must be observed that it is difficult to make much sense of the distinction between the first and second approaches. A burden of proof requiring merely the raising of a reasonable doubt in the mind of the jury, is in substance an evidential burden, in the sense in which Costello J used the phrase in *O'Leary*.

6.8. Counsel for the accused had submitted that the Court should take the first approach on the basis that this was the way in which the defence of provocation to a murder charge was treated. The Court took the view that there was no obvious reason to apply that judge-made test to the provisions of an Act of the Oireachtas. More importantly, the Court observed that the defence of honest belief was at no point and in no form whatever raised in the course of the evidence and expressed the view that all of the evidence pointed away from any possibility of the accused having an honest belief as to the age of the complainants. There was evidence in the case to the effect that the accused, who was 20 at the time of the alleged offences, “frequently met the two complainants and a number of their contemporaries while they were wearing school uniforms. On occasion he drove some of them to school”. In those circumstances, it will readily be seen that this was not a case in which there was any real basis in the prosecution case to argue that even a reasonable doubt as to the existence of an honest belief had been raised. Thus the Court concluded that “even assuming the procedure in provocation cases to be applicable by some form of analogy, the present case does not qualify”. The court did however say that it was of the opinion that there was no sufficient analogy between the defence of provocation in murder cases and the statutory defence of honest belief permitted by section 3(5) of the Act of 2006.

6.9. The court did go on to consider the other interpretative options to some extent. In its analysis the Court noted that issues of burden of proof, and in particular proof of mens rea, in cases of sexual offences against children had arisen in a number of cases but that in none of the cases had the courts been confronted with a statutory provision such as the present one. The view the Court ultimately expressed on that provision was as follows:

“The court must clearly give effect to the provision. It cannot ignore the fact that the Oireachtas requires the accused person to prove the state of his honest belief. The trial judge gave effect to that statutory requirement. He did not go so far as to adopt the submission of the prosecutor to the effect that the burden must be discharged on the balance of probabilities. He held that the accused must show that there is a reasonable doubt as to whether he had the required honest belief. This, as he described it, is “a reversed burden of proof”. As such, it is a novelty in our criminal law. It proceeds, however, from an interpretation of the statutory provision which goes no further than to require the accused to prove that there is a reasonable doubt as to whether he had an honest belief that the complainant was 17 years of
age or more. In the view of the court, the trial judge was correct to require that the accused discharge at least that burden. It may be that the section, correctly interpreted, places a heavier burden on the accused person, namely to prove, on the balance of probabilities, that he had the requisite honest belief. The decision of the Court of Appeal (Criminal Division) in England in *R. v Daniel* [2003] 1 Cr. App. R.6, at p. 105, states that “there is ample authority to support the ... direction to the jury that the appellant had to discharge a persuasive, not merely evidential, burden of proof by showing on a balance of probabilities that he had no intent to defraud or conceal the state of his affairs”. The court was dealing with a section requiring a defendant to prove absence of intent to defraud. However, this authority was not opened to the court. There are others: *R v. Carr-Briant* [1948] 1 K.B. 213 and *Convening Authority v Doyle* [1996] 2 I.L.R.M. 213. The court can deal with the matter by invoking the maxim that the greater comprehends the less. If the accused was unable to satisfy the jury even that there was a reasonable doubt on this point, axiomatically, the jury could not have believed that he *probably* had the requisite honest belief. It is sufficient to sustain the conviction that the accused was unable to raise a reasonable doubt in the minds of the jury that he had an honest belief that the complainant was 17 years or more.”

6.10. It is, perhaps, unfortunate that the court was not in a position to express any opinion on the issues that arose in relation to the reversed burden of proof. It is perfectly understandable, of course, that, in the absence of any evidence whatever to support a suggestion of an honest belief, which was not in any event made by counsel for the defence at trial, the Court was inclined to avoid expressing an opinion on the question. What is clear, however, is that the decision leaves entirely open the possibility that the section does effect a reversal of the legal burden of proof in relation to the issue of honest belief. The decision in *Convening Authority v Doyle*\(^ {39} \) merits further consideration. In that case the Court Martial Appeal Court rejected a submission that a reversed onus of proof requiring proof on the balance of probabilities by the accused was a breach of the presumption of innocence. The appellant was convicted of desertion from the Defence Forces. An intention not to return to duty is an essential element of that offence, but the intention is presumed “unless the contrary is proved” in the case of a person who has been absent without authority for a continuous period of six months or more. The appellant had been so absent for more than twelve years, which period including five years of service in the French Foreign Legion. The judgment (of O’Flaherty J.) is short and the discussion of the issues arising is confined to the observation that the direction of the judge advocate was consistent with the relevant English authority. *O’Leary* was stated not to be “in point” since “that case was not concerned with the shifting of the burden of proof in the strict sense”.

6.11. Very shortly after the decision in *Egan*, the Court of Criminal Appeal decided *People (DPP) v. Smyth Snr*\(^ {40} \). In that case the accused were charged with offences of possession of controlled drugs contrary to sections 3, 15 and 15A of the Misuse of Drugs Act, 1977, as amended. The only ground of appeal was that the jury had

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\(^ {39} \) [1996] 2 ILRM 213

\(^ {40} \) [2010] 3 IR 688
been misdirected in relation to the provisions of section 29(2) of the Misuse of Drugs Act, 1977, the material part of which reads

“In any such proceedings in which it is proved that the defendant had in his possession a controlled drug … it shall be a defence to prove that

(a) he did not know and had no reasonable grounds for suspecting –

(i) that what he had in his possession was a controlled drug . . . ,

or

(ii) that he was in possession of a controlled drug”.

6.12. The case arose out of a controlled delivery of suspect packages that were found on their way through Dublin Airport to contain cannabis. The parcels were delivered to the two accused, who were arrested shortly afterwards and later tried and convicted. The evidence was that they had told the gardaí that they thought they were collecting parcels containing computer parts.

6.13. The case was opened by counsel for the prosecution on the basis that the prosecution bore the burden of proving beyond reasonable doubt possession of the controlled drug, but that the burden then shifted onto each accused to show that they did not know and had no reasonable grounds for suspecting that what they had in their possession was a controlled drug, which burden was to be discharged by proof on the balance of probabilities. The Court observed that this opening was correct given the state of the law as then understood, in light of the decision of the Court of Criminal Appeal in People (DPP) v Byrne41.

6.14. Unfortunately, in charging the jury, the learned trial judge left them with the impression that the burden of proof resting on the accused required proof beyond reasonable doubt. The Court of Criminal Appeal said that this direction was obviously in error and went on to consider what the correct direction to give to a jury would be in such a case. It noted that the existence of a burden on the accused, as set out in section 29, is not unique. The Court indicated, however, that it was confining its comments to that specific provision. In particular, the court expressed no comment on the historical feature of the insanity defence that there was an onus of proof on the defence on the balance of probabilities, although the Court did in fact comment that there were sound reasons of policy requiring that defence to be proven by the accused.

6.15. The Court observed that the question of how the burden of proof is borne depends upon the substantive law. The burden of proof is borne by the prosecution in respect of every issue. In relation to specific defences, such as self defence, provocation, automatism, the accused bears an evidential burden, which is to say “there must be some evidence to which the accused can point whereby a particular defence to a crime becomes open”42. This is different from a legal burden of proof, which “places upon the party bearing that legal burden the obligation to prove the issue that he is required to prove. The standard of proof may vary”43. The court

41 [1998] 2 IR 417
42 [2010] 3 IR 688 at 695
43 ibid. at 695
noted that there had been much argument before it as to whether a reversed burden of proof could be compatible with Article 6(2) of the European Convention and noted the decision of the House of Lords in *R v Lambert*[^44] on that issue.

6.16. Ultimately, the court did not find it necessary to express an opinion on that question. In its analysis of section 29 the Court said that the correct direction is to be derived from Article 38.1 of the Constitution and said that “the fundamental principle of our criminal justice system is that an accused should not be convicted unless it is proven beyond reasonable doubt that the accused committed the offence. . . . It is a matter for the Oireachtas to decide whether on a particular element of the offence an evidential burden of proof should be cast on an accused person”[^45]. The court acknowledged that reasons of policy might require a reversed element of proof cast on the accused to be discharged as a probability. If so, “it should either be stated in the legislation or be a matter of necessary inference therefrom”[^46].

6.17. The Court gave the following guidance to the interpretation of penal statutes:

“"The construction of a criminal statute requires the court to presume that the core elements of an offence must be proven beyond reasonable doubt; otherwise the accused must be acquitted. A special defence, beyond the core elements of the offence, may carry a different burden; insanity and diminished responsibility are examples of such a defence which casts a probability burden on the accused. Where, however, in relation to an element of the offence itself, as opposed to a defence, a burden is cast upon the accused, the necessary inference that the accused must discharge that burden on the balance of probability is not easily made. The court notes that bearing the burden of proving a defence as a probability could have the effect that in respect of an element of the offence an accused person might raise a doubt as to his guilt, but not establish it as a probability. This might lead to a situation where the charge was not proven as to each element of the offence beyond reasonable doubt, but nonetheless the accused could be convicted. That would not be right. Proof of a guilty mind is integral to proof of a true criminal offence, in distinction to a regulatory offence. In s. 29 of the Misuse of Drugs Act 1977, as amended, the normal burden of proving the mental element of possession of a controlled drug is removed from the prosecution and the accused is required to prove that it did not exist. In consequence, the court considers that an evidential burden of proof is cast on the accused by s. 29 of the Misuse of Drugs Act 1977, as amended, which is discharged when the accused proves the existence of a reasonable doubt that he did not know, and had no reasonable ground for suspecting that what he had in his possession was a controlled drug. This is not a burden merely of adducing evidence. It is legal burden discharged on the lowest standard of proof, namely that of proving a reasonable doubt."[^47]
6.18. A number of comments may be made on this analysis. First of all the rationale is based on a distinction between what is an element of the offence and what is a defence to the charge. Ní Raifeartaigh criticised this distinction as being a technical one. In the classic case of insanity, one can argue that insanity is a defence, but equally one could say that it is for the prosecution to prove mens rea. A person who does not know the nature and quality of their criminal act does not have a guilty mind. The Court acknowledged this in saying that proof of a guilty mind is integral to proof of a true criminal offence, but without pursuing the logic. The language of the concluding paragraph, which describes the section as casting both an evidential burden and a legal burden on the accused, is surprising. The latter is described as a legal burden discharged on the lowest standard of proof, namely that of proving a reasonable doubt. But in truth this has always been seen as an evidential burden only, and not a true legal burden. Indeed, it is somewhat artificial to speak of proof of a reasonable doubt. Rather, one may raise such a doubt, which is to say no more than that the prosecution has failed to meet the ordinary burden on it. Finally, given that the starting point must be the statute itself, it is hard to see how a statute which permits a defence where the accused proves something, can correctly be interpreted as requiring the accused to prove nothing except to show that the prosecution has failed to prove something.

6.19. At heart the criticism of the decision goes back to the point that Ní Raifeartaigh made, that it is necessary first to determine whether a statutory provision interferes with the presumption of innocence and then go on to consider whether that interference is capable of being justified. That view is echoed in the objections to the Glanville Williams interpretation of the word “prove”. The analysis in Smyth proceeds on the basis that interference with the presumption cannot be justified and therefore the section must be interpreted so as not to give rise to any interference. This can obviously lead to a strained interpretation of the statute and is not, it is submitted, the correct approach to statutory interpretation.

6.20. The issue arose again in the Court of Criminal Appeal in People (DPP) v PJ Carey (Contractors) Limited. It should be observed that this is a case in which, again, the factual circumstances constrained the court in its ability to analyse the issues that arose. The appellant had been convicted of a single offence of contravening section 6(1) of Safety Health and Welfare at Work Act, 1989 as it relates to section 6(2)(d) of the said Act, in that it failed to provide a safe system of work. The case concerned a fatal accident on a construction site in which an employee was interred when a trench collapsed. The evidence established that he had gone into the trench before a trench box, which was in the process of being inserted, was in fact inserted. The evidence also established that there was a “golden rule” on the site in question that no person should enter an unprotected trench and that the deceased had not long previously received a very stern reprimand for having been found in an unprotected trench. It was also established that on the day of the alleged offence, the deceased had been specifically warned not to go into the trench until the trench box was in. The only independent expert to give evidence at the trial said that there was a strong health and safety ethos in the accused company and that he was satisfied that the system of work adopted was safe as far as reasonably practicable and without risk, evidence which was not disputed. At trial the prosecution relied

48 See CC v. Ireland [2006] 4 IR 1 at 86
49 [2011] IECCA 63 (unreported, Court of Criminal Appeal, 18th October 2011)
on the fatality as, to an extent, speaking for itself and relied specifically on the provisions of section 50 of the 1989 Act, which provides:

“In any proceedings for an offence under any of the relevant statutory provisions consisting of a failure to comply with a duty or requirement to do something so far as is practicable or so far as is reasonably practicable, or to use the best practicable means to do something, it shall be for the accused to prove (as the case may be) that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement.”

6.21. It was argued that once a system had been prima facie illustrated on the evidence to be unsafe (which it was argued had happened in this case by reason of the death of the deceased), the onus shifted to the accused to satisfy the court and jury that what was done was all that was reasonably practicable in all the circumstances.

6.22. The Court referred to the decision in Smyth, in which it was observed that the court found that section 29 of the Misuse of Drugs Act, 1977 had “operated merely to cast an evidential burden on the accused and not a legal burden. It was further held that that evidential burden could be discharged by proving the existence of a reasonable doubt”. The Court said:

“Having regard to the fact that the basis for the decision in Smyth was an analysis of the constitutional provision mentioned which I am satisfied is correct, I would interpret section 50 of the Act of 1989 in the same way, that is by casting an evidential burden only onto the accused”.

6.23. The court observed that it was manifest that that burden had been discharged by the accused company on the evidence of the prosecution. The court also referred in its analysis to the commentary on section 50 of the Act of 1989 in the Statutes Annotated. That commentary observed that while section 50 appears to displace the normal burden in a criminal trial, “it may well not fall foul of Article 38.1 of the Constitution by virtue of being confined to the evidential burden rather than the burden of proof”.

6.24. The reasoning underlying the decision must give rise to some concern. It is hard to see how analysis of a Constitutional provision, i.e. Article 38.1, is necessarily a complete guide to the correct interpretation of distinct statutory provisions. It is submitted that the correct approach would be, instead, to conduct an analysis of the true meaning and intent of each statutory provision in accordance with the ordinary rules of interpretation to determine what in fact is intended to be achieved by way of a reversal or shifting of the burden of proof. If it is established that the true intent of the section is to effect a shifting of the legal burden of proof, then the question arises whether this is an interference in the presumption of innocence. It most likely would be. If so, the question of justification of that interference then arises.

7. CONCLUSION
7.1. It is undoubtedly the case that in the recent decisions in which the superior courts have grappled with a reversed burden of proof there has been some issue, whether a deficiency of evidence or an obvious defect in the charge, which has prevented the court from fully getting to grips with the issues that arise. As a consequence, the true effect and validity in Irish law, having regard to the provisions of Article 38.1 of the Constitution, of statutory provisions which purport to shift the burden of proof in a criminal trial are unclear. The authorities do suggest that one could approach the question of interpretation of any such provision from the starting point that a shifting of the legal burden of proof will not be permissible. However, some of the authorities do acknowledge the possibility that such a provision, notwithstanding that it amounts to interference with the presumption of innocence, may be justifiable. Indeed in one case, albeit in a constitutional challenge rather than an appeal against conviction, such a provision, which expressly shifted a legal burden of proof onto the accused, was found to be compatible with the Constitution on the application of a proportionality test.

7.2. What consequences the present position may have for the practising criminal lawyer it is difficult to say. Obviously, there is uncertainty, and the following guidance is suggested as a means of navigating this area of uncertainty, but it is guidance only and may ultimately assist only in identifying the key issues rather than solving them. If appearing in a case in which the charge laid against the accused is one where the statute appears to provide for some form of reversed burden of proof, the following methodology is suggested:

1. The first step is to try to make sense from an interpretative perspective of that provision.
   a. Does it give rise to an inference or create a presumption of law?
   b. Does it place on the accused a legal or evidential burden of proof?
   While the recent decisions show a willingness to “read down” reversed burden provisions so that only an evidential burden is placed on the accused, such an approach cannot be taken for granted.

2. The second step is to come to a view on the possible significance of the provision in the particular case as a matter of evidence. In other words, taking the prosecution case as a whole, try to answer the following questions.
   a. Does the prosecution need to rely on the reversed burden provision?
   b. Does the prosecution have the necessary proofs to rely on it?
   c. If so, does the prosecution case include evidence to which the defence can point in satisfaction of the onus of proof it bears?

3. The third step is to combine the first two with a view to answering the question: does the ability of the prosecution to rely on the reversed burden provision of the statute, in light of all the evidence available to the prosecution, leave the accused in a position where he could be convicted despite the presence of a reasonable doubt about his guilt? If so, it is a possible breach of the accused’s constitutional rights. It may be of some assistance in this analysis to identify whether the reversed burden relates to the core elements of the offence or to a defence or excuse that may avail the accused, but such an analysis may not determine the question.
4. If a possible interference with the presumption of innocence can be identified, the fourth step will require an analysis of any possible justification for that interference by applying a proportionality test. The outlines of such an analysis may be traced in the decision in *McNally v Ireland*\(^{50}\) and a list of important factors can be found in *Sheldrake v. DPP*\(^{51}\).