

## Chapter 2: Burden of Proof

### Question One

Rather than place the legal burden of proof on the defendant in minor regulatory offences would it be better to decriminalise such activity? Give reasons for your answer.

### Answer guidance

A good answer to this essay question requires an understanding of the difference between substantive and procedural law. You should in your introduction explain the conceptual background to the problem of reverse burdens of proof. Refer to academic views of the problems created by the application of the Human Rights Act and of Article 6 to statutory defences which place a legal burden on the accused. Address the argument that judgments cases such as *Lambert* treat an affirmative defence as if it were an element of the offence. Evidence law should not be used, it could be argued, to correct perceived deficiencies in the criminal law. Having set out the problem your essay should then develop an analytical format. Consider arguments suggesting there is a problem in the current approach such as uncertainty in the law. You should give examples of differing interpretations by the courts, for example contrasting *R v S* [2003] 1Cr App R 602 with *DPP v Wright* [2010] QB 224. Point out that there is a range of academic opinion on this. Some defend the judgment in *Lambert*. Set out the arguments for and against making regulatory transgressions civil rather than criminal offences. It might be appropriate where there is little moral opprobrium. Note also that the Strasbourg court could decide an administrative non- criminal offence was in fact criminal and so article 6(2) applies. Sum up the arguments and come to a conclusion.

### Question Two

George, Sunil and Jeremy become involved in a fight after a heated political argument outside a public house. Jeremy was knocked to the ground and suffered a broken arm. George and Sunil were both charged with assaulting Jeremy. They plead not guilty. They accept that they were at the scene of the incident but George claims that he hit Jeremy in self-defence when he (Jeremy) tried to knock off his spectacles. Sunil claims that he pushed Jeremy by accident trying to calm things down. He states he not intended to come into contact with him. In his summing up to the jury, the trial judge makes the following remarks: 'You heard that the defendants have admitted being at the scene but that both make claims in their defence. Defendant G claims self-defence and defendant S claims accident. Both defendants have accepted that they came into contact with the victim. If you are convinced that this has been established beyond reasonable doubt you may convict both defendants unless Mr. G convinces you on the balance of probabilities that he acted in self-defence and Mr. S convinces you beyond reasonable doubt that his hands came into contact with the victim by accident.' Both G and S are convicted.

Advise the defendants if they have grounds of appeal.

### Answer guidance

The difference between the evidential and the legal burden should form part of your answer here. The question requires you to firstly to identify the common law defence of self-defence. Here the evidential burden only is on the defendant to convince the judge that this could be raised at the trial. This 'burden of passing the judge' had clearly been satisfied here but consider whether the judge is correct to tell the jury that it is for the defendant to prove self-defence. Cite *R v Lobell* [1957] 1QB 547, and the Criminal Justice and Immigration Act 2008 s76(7). In relation to accident, cite *Woolmington v DPP* [1935] AC 462 that proof of intent is an element of the offence and that it is for the prosecution to prove *mens rea* beyond reasonable doubt. You would gain additional credit in your answer if you made reference to recent case law on the question of defining beyond reasonable doubt, see for example *R v Majid* [2009] EWCA Crim 2563.

### Question Three

Critically assess the impact of the Human Rights Act on the law relating to the burden and standard of proof in criminal trials.

### Answer guidance

This is a very broad question and it is crucial to set out a clear plan. A possible structure is to introduce the essay with a discussion on the preliminary question why fair trial rights require a principled approach to the allocation of the burden of proof. In a criminal trial placing the burden on the prosecution means the accused will not be convicted without stringent protections being in place. Then outline the position before the implementation of the Human Rights Act in 1998, highlighting the importance of *Woolmington v DPP* [1935] AC 462 which recognised exceptions to the burden being placed on the prosecution. The essay should be structured by setting out points in the form of an argument giving evidence suggesting whether or not the Human Rights Act has had a powerful effect on the pre-existing somewhat pragmatic approach of the courts exemplified by *R v Hunt* [1987] AC 352. On the one hand *R v Lambert* [2002] 2AC 545 showed readiness to 'read down' a statute and place the evidential burden only on the accused but subsequent cases showed some retreat from this, in some ways echoing Lord Hutton's minority judgment in that case. You should cite cases such as *R v Johnstone* [2003] 2003 UKHL 28 and *R v Williams (Orette)* [2012] 1WLR 1200 to support the argument. Cite also the Strasbourg case law which has been criticised by academics such as Ashworth (see [2001] *Crim LR* 865 'Criminal Proceedings under the Human Rights Act; the First Year) citing the decision *Salabiaku v France* (1988) 13 EHRR 379 as less principled than that in *Lambert*. Discuss how Article 6 does not place an absolute prohibition on reverse onuses.

## Question Four

A number of traffic collisions had occurred where cyclists were carrying small children on electric bicycles which included poorly fitted child seats. Some children were hurt. A more serious cause of some accidents was that older children were being carried in seats which were unsuitable for their size. As a result the (fictional) Bicycle Safeguarding Act (BSA) was passed. This states:

1. *It shall be a summary offence, punishable by a maximum of £1,000 fine, to permit an electric bicycle to be used to carry an infant passenger without the cyclist being in possession of a valid permit issued by the local authority.*
2. *It shall be an offence, triable either way, punishable by a maximum of £5,000 fine or six months imprisonment, to permit an electric bicycle to be used to carry as a passenger a person who is older than four years unless that person is no more than four and a half feet in height and forty six pounds in weight.*
3. *It shall be a defence to an offence under Section 2 for a defendant to prove that the person carried was aged four years or younger or if more than four years is no more than four and a half feet in height and no more than forty six pounds in weight at the relevant time.*
4. *In this Act 'infant' refers to a person who is aged four years or younger.*

Janet was stopped riding her electric bicycle with her three year old son in the passenger seat. She was asked to show her permit. She has been unable to find it and is facing a possible charge under s1.BSA. Harold was seen on CCTV riding his electric bicycle through a railway station forecourt. The film showed a person was in the passenger seat. Harold has been traced by Transport Police and is facing a possible charge under s2.BSA.

Advise Janet and Harold on the burden and standard of proof if they are charged under these sections.

## Answer guidance

The question requires an understanding of implied statutory exceptions to the principle that the burden of proof is on the prosecution. You need to construe the imaginary statute in the light of the s101 of the Magistrate's Court Act 1980 and apply this to the burden of proof on possession of a permit. Show you are aware of the implications of *R v Hunt* [1987] AC 352, and of the case law under the Human Rights Act following the landmark decision in *R v Lambert* [2002] 2AC 545. The key issues to cover are: are these both minor regulatory offences where the burden could shift, what are the implications of a s2 offence being tried on indictment, how to apply the law on reverse burdens to elements of the offence and statutory defences and how will the courts differentiate the evidential and legal burden. You should demonstrate knowledge of post-*Lambert* case law such as *R v Williams* [2012] EWCA Crim 2162. Is the potential social problem of serious accidents caused by a s2 BSA

offence comparable to the facts in that case? Note that there are several elements to an offence under section 2. A useful article explaining the courts' approach to the allocation of the burden of proof is Dennis I (2005) 'Reverse Onuses and the Presumption of Innocence' *Crim LR* 901.