

Chapter 4: The burden and standard of proof

The legal burden

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Footnote 9

See also *Constandas v Lysandrou* [2018] 2 FLR 983, CA.

The evidential burden

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Footnote 15

Compare *Dera Commercial Estate v Derya Inc*, ‘*The Sur*’ [2018] EWHC 1673 (Comm): where evidence is adduced by an applicant in support of an application to strike out a shipping claim on grounds of the respondent’s inordinate and inexcusable delay in bringing the claim (the applicant bearing the legal burden in respect of striking out), it is unhelpful to speak in terms of a ‘shifting evidential burden’, but it will normally be the respondent that identifies a credible excuse for the delay. See [130]-[150] and [183].

The incidence of the legal burden

Criminal cases

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Under the principle in *Woolmington v DPP* [1935] AC 462, HL, where, for example, two accused are tried for a crime that must have been committed one of them, if the prosecution fails to discharge the legal burden against one or the other, both must be acquitted. However, concerning offences of causing serious harm or death to children or vulnerable adults, see the Domestic Violence, Crime and Victims Act 2004, ss 5 and 6.

Express statutory exceptions

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Footnote 29

See now, the Crown Court Compendium (July 2019), Part 1, 19–1.

Implied statutory exceptions: trials on indictment

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Footnote 54

See also *R v K(M)* [2019] QB 86, CA: policy reasons underlie the Modern Slavery Act 2015, justifying a legal burden on the prosecution in respect of the defence under s 45 of the Act, a defence which applies in respect of any offence the accused says was committed as a result of compulsion attributable to slavery or exploitation; where the accused seeks to rely on the defence, he bears an evidential burden to show compulsion in respect of every element of the offence charged and the prosecution bear the legal burden of disproof.

Reverse onus provisions and the Human Rights Act 1998

R v Lambert

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Concerning the first stage of the test, it should be born in mind that an evidential burden may well apply as a simple matter of statutory construction: see *Shepherd v Information Commissioner* [2019] 4 WLR 50.

R v S and R v Johnstone

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Compare *Shepherd v Information Commissioner* [2019] 4 WLR: in respect of the offence of unlawfully obtaining personal data under s 55(1) of the Data Protection Act 1998, an evidential burden applies in relation to s 55(2) which provides, in effect, that there is no offence if a person 'shows' he acted in reasonable belief that he had the right in law to obtain the data; a criminal statute must be interpreted narrowly in the interests of the defendant and on a close linguistic analysis of the provision, it could not be said that Parliament intended to impose a legal burden on the accused.

DPP v Barker

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Footnote 76

However, it is not easy to distinguish *R v Williams* from *R v Lambert* [2002] 2 AC 545, HL; it may be that in deciding the burden should not be read down, the court in *R v Williams* was influenced by the fact that the maximum sentence for the offence was 10 years (see at [44]), whereas the maximum sentence for the offence in *R v Lambert* was life imprisonment.

The legal burden in civil cases

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The legal burden of proof will generally lie on the party asserting the affirmative of such an issue (see the text). A recent example is provided by *Dera Commercial Estate v Derya Inc*, ‘*The Sur*’ [2018] EWHC 1673 (Comm): where a party applies to strike out a shipping claim on the basis that, in bringing the claim, there has been an inordinate and inexcusable delay under s 41(3) of the Arbitration Act 1996, the applicant bears the legal burden to prove that the delay was inordinate and the inordinate delay was inexcusable

In a claim for equitable compensation for breach of fiduciary duty, the ‘burden is squarely on the applicants to prove the breach and the losses that flow from the breach.’ See *Wessely v White* [2018] EWHC 1499 (Ch) at [50]. However, where the claimant proves the breach of duty but the defendant prevents the claimant from adducing evidence to prove the value of his loss (for example, by conduct to conceal the loss), the burden can be properly put on the defendant to show the loss was zero, and if he fails to do so it can be presumed to be the highest possible (ibid at [51]).

The incidence of the evidential burden

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Concerning the defence of loss of control, it was held in *R v Goodwin* [2018] 4 WLR 165, CA that where there is sufficient evidence of loss of control, then the defence should be left to the jury whether or not it has been expressly relied on by the accused at trial (at [33(2)]). This might occur where the accused relies on the defence of self-defence, but the particular facts relating to that defence also raise an issue of loss of control. However, a judge should not be tempted to leave the defence to the jury in order to avoid providing a ground of appeal (at [35]). In any appeal on the grounds that the defence was not properly left to the jury, the fact that the accused at the trial did not assert loss of control, although not decisive, is a powerful point against the issue arising (at [40]).

As to the relationship between the two defences, see *R v Goodwin* [2018] 4 WLR 165, CA, at [36]. See also *R v Martin* [2017] EWCA Crim 1359.

Footnote 125

See now, the Crown Court Compendium (July 2019), Part 1, 19–14

The standard of proof

Appropriate standards of proof

The standard of proof in criminal cases

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See now, the Crown Court Compendium (July 2019), Part 1, 5, Example 1.

‘ The prosecution must prove that D is guilty. D does not have to prove anything to you. D does not have to prove that he/she is innocent. The prosecution will only succeed in proving that D is guilty if you have been made sure of D’s guilt. If, after considering all of the evidence, you are sure that D is guilty, your verdict must be ‘Guilty’. If you are not sure that D is guilty, your verdict must be ‘Not Guilty’.’

However, concerning the direction of ‘sure’, see the problem that arose in *R v JL* [2018] Crim LR 184. See also *R v Stephens* [2002] EWCA Crim 1529. For a critical analysis of the current direction on standard of proof and the need for a replacement, see Keane and McKeown, ‘Time to abandon ‘beyond reasonable doubt’ and ‘sure’: the case for a new direction on the criminal standard and how it should be used’, [2019] Crim LR 505.

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Judges are advised to follow the standard direction in the Compendium. See *R v Miah* [2018] EWCA Crim 563 where a conviction was unsafe in circumstances where the judge at no stage directed the jury that they had to be sure and, at most, had directed that the prosecution had to ‘satisfy’ them and ‘prove’ its case if they were to convict.

Where the accused bears the legal burden

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The Crown Court Compendium (July), Part 1, 5, Example 2, suggests a direction in the following terms.

‘When you are considering {specify} this is for D to prove. D has to show that it is more likely than not that {specify}. D does not have to make you sure of it.’

The standard of proof in civil cases

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When applying the standard, is it not acceptable to use or aggregate percentages values. In *Re A (Care Proceedings: Burden of Proof)* 4 WLR 117, CA, the local authority applied for care orders in respect of five children following the death of their 10 year old sister, who had sustained injuries to her genitals and a ligature compression injury to her neck. The judge decided that the probability of suicide was 10% and of accident was 45%, and combining the two (55%) held that he could not be satisfied on the balance of probabilities that the little girl had died as a result of a perpetrated act. Allowing the local authority's appeal, the Court of Appeal held that this was not the proper approach to the judicial function in respect of the simple application of the balance of probabilities (at [51]). Nor, when applying the standard, is it correct to evaluate and assess evidence in separate compartments. The correct approach is to exercise an overview of the totality of the evidence: *Re T (Children)(Abuse: Standard of Proof)* [2004] 2 FLR 838 at [33]. For an article which considers an explanation-based approach to legal fact-finding and standards of proof, see Ribeiro, 'Can there be a burden of best explanation?' (2018) 22(2) E&P 91.

The standard where there are allegations of crime in civil proceedings

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It is submitted that Baroness Hale's reasoning is not confined to care proceedings where there are allegations of crime. In *Braganza v BP Shipping* [2015] 1 WLR 1661, SC. a case concerning a contract of employment, Baroness Hale made it clear that in respect of *all* civil proceedings, 'there is not a sliding scale of probability to be applied, commensurate with the seriousness of the subject matter or the consequences of the decision. The only question is whether something is more likely than not to have happened.'(at [34]).

Miscellaneous

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As to the example at paragraph 4 (cases involving child sexual abuse), in *Re B(Children)(Sexual Abuse: Standard of Proof)*, [2009] 1 AC 11, HL Baroness Hale went so far as to '... announce loud and clear that the standard of proof... is the simple balance of probabilities, no more no less.' (Ibid at [70]). It is submitted that all the examples above now need to be seen in the light of both *Re B (Children) (Sexual Abuse: Standard of Proof)* 2009] 1 AC 11, HL and the dictum of Baroness Hale in *Braganza v BP Shipping* [2015] 1 WLR 1661, SC (see immediately above in this update).

Additional reading

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Keane and McKeown, 'Time to abandon 'beyond reasonable doubt' and 'sure': the case for a new direction on the criminal standard and how it should be used', [2019] Crim LR 505.

An article which critically analyses 'beyond reasonable doubt' and 'sure' as descriptions of the criminal standard of proof. The argument is made that the descriptions are not fit for purpose and should be replaced by a more accurate description of 'no realistic doubt'. A new direction is proposed which includes guidance to the jury on how to use the criminal standard when reaching their verdict .