Ch 3: The burden and standard of proof

The incidence of the legal burden

Criminal cases

Regulatory offences

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The question whether the legal burden under s 40 of the Health and Safety at Work Act was disproportionate arose again in *R v AH Ltd* [2021] EWCA Crim 359. In *R v AH Ltd*, it was argued that *R v Davies* had been wrongly decided and that the legal burden should be read down. The first appellant submitted, among other things, that the court in *R v Davie*s ([2003] ICR 586, CA, at [15] – [17]) had attached too much weight to its conclusion that the offence under s 3 of the 1974 Act (to which the defence under s 40 relates) was 'regulatory' and not 'truly criminal'. It was contended that such a distinction was no longer sustainable (at [34]), it being an arbitrary basis upon which to undermine the presumption of innocence (at [27]). In support of the submission, the appellant pointed out that the distinction was one that the Law Commission, in 2010, referred to as, 'familiar but misleading' in a consultation which identified many examples of offences where the distinction could be seen to be arbitrary (see Law Commission Consultation Paper No 195: Criminal Liability in Regulatory Contexts at 3.43-3.50. Accessible from http://www.lawcom.gov.uk/app/uploads/2015/06/cp195_Criminal_Liability_consultation.pdf)

However, for the court, the roadblock in the way of this submission and other submissions made by the appellant, was the fact that the decision in *R v Davies* had been expressly approved by the House of Lords in *R v Chargot*. The court held that the judgment in *R v Chargot* was clear and, in its view, binding, and there was nothing disproportionate about the legal burden in s 40 (at [34]). The court went on to state that even if the point had not come before the House of Lords in *R v Chargot*, the court would have had great difficulty in accepting that *R v Davies* was decided *per incuriam* (at [36]).

The standard of proof

The standard of proof in criminal cases

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In *R v Broughton* [2020] EWCA Crim 1093, a distinction was drawn between scientific certainty (as when an expert might express his view in percentage terms, 'there was a 90% chance of…' etc) and legal certainty which is described as 'sure'. The court stated (at [100]) that: 'it is unhelpful to attempt to contrast scientific certainty (put at 100%) with a different figure for legal certainty. Human beings asked whether they are sure of something do not think in those terms'. However, jury questions which have given rise to difficulty in a number of cases, show that human beings may well think in percentage terms when considering whether they are sure of guilt (see, for example, *R v JL* [2018] Crim LR 184 *and R v Stephens* [2002] EWCA Crim 1529).

R v Broughton [2020] EWCA Crim 1093 was a case of gross negligence manslaughter where the only evidence on the crucial issue of causation – i.e. whether the accused's failure to seek medical help for the deceased L had caused her death - came from an expert who stated that had medical help been available, L would have had a 90% chance of survival. This opinion meant that the court could not exclude the realistic possibility that L might not have lived. Prosecution evidence of causation was therefore not capable of meeting the criminal standard of 'sure' (at [101] and [104].

The standard of proof in civil cases

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Baroness Hale's reasoning in *Re B (Children) (Care Proceedings: Standard of Proof)* [2009] 1 AC 11, HL at [72], to the effect that there is a single civil standard of proof regardless of the seriousness of allegations (seriousness being only a factor to take into account when applying the standard), is not confined to care proceedings involving allegations of crime. In *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408, it was held that there was little doubt that Baroness Hale's judgment was of general application in civil proceedings (see [44]). In that case, it was held that the trial judge had applied too high a standard in saying that the counter-claim, based on an alleged dishonest conspiracy, faced the difficulty of proving the inherently improbable and that the burden could only be discharged by showing the facts to be incapable of innocent explanation.

The standard in matrimonial causes

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It is submitted that insofar as the reasoning in some of the authorities stated in the text is based on a *necessary* connection between serious allegations (or allegations which, if proved, have serious consequences) and probability, they must now be read subject to Baroness Hale's reasoning in *Re B (Children) (Care Proceedings: Standard of Proof)*: these are just factors, varying according to the other evidence in the case, which, if relevant, can be taken into account in applying the ordinary civil standard.

Miscellaneous

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The same submission above is made in respect of the examples given in the text.

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