

HENDERSON CHAMBERS

REVERSE BURDEN OF PROOF: DEVELOPMENTS IN THE LAW

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INTRODUCTION

1. This paper considers the compatibility of health and safety statutory defences that impose a burden of proof on the defendant with Article 6(2) of the European Convention of Human Rights (ECHR).
2. Consider, for example, the combined effect of sections 3(1) and 33(1) HSWA. It is an offence for an employer to fail to discharge *“the duty to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety”*.
3. Section 40 states that in any proceedings for such an offence *“it shall be for the accused to prove [...] that it was not reasonably practicable to do more than was in fact done to satisfy the duty”*.
4. In such proceedings, the prosecution must establish:
 - (i) that the Defendant is an employer;
 - (ii) that the defendant was engaged in the conduct of its undertaking;
 - (iii) that there was a specific risk to the health and safety of persons not in its employment in existence at the time of exposure.
5. Once this is established the onus then shifts to the defendant to establish on the balance of probabilities that it was not reasonably practicable to do more than was done. This might include:
 - (i) Whether, in the light of the precautions taken there remained a foreseeable risk of a material nature requiring more to be done;

- (ii) Whether the state of the art made available other remedies;
 - (iii) Whether in conducting the balancing act between the magnitude and immediacy of the risk in question on the one hand and the cost and efficacy of the precautions taken and such other available precautions not taken on the other, the employer got the balance right.
6. In circumstances when an onus is placed on the defendant to prove a negative, the standard of proof is on a balance of probabilities. This creates the risk whereby the defendant adduces sufficient evidence to raise a reasonable doubt about the reasonable practicability of doing more to satisfy the duty, but the judge or jury is not convinced on a balance of probabilities. In such an event the defendant may be convicted notwithstanding that a reasonable doubt as to his guilt persists - a violation of the presumption of innocence under Article 6(2) ECHR.
7. Since the introduction of the Human Rights Act 1998 this area of law has witnessed a number of actions. In this discussion I will provide a brief history of the cases which have been decided on this topic before outlining the principles which have emerged.

BACKGROUND

8. Article 6(2) ECHR provides:

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

9. Long before the passage of the Human Rights Act, Viscount Sankey LC in Woolmington v DPP [1935] AC 462 referred to the presumption of innocence as the “one golden thread” which runs through the web of English criminal law. In 1972, the Criminal Law Revision

Committee observed, “we are strongly of the opinion that, both on principle and for the sake of clarity and convenience in practice, burdens on the defence should be evidential only” (11th Report of the Criminal Law Revision Committee Evidence (General), Cmnd 4991).

10. However, the European Court of Human Rights has never made a ruling to the effect that a reverse onus provision will inevitably give rise to a finding of incompatibility with the Convention. The approach of the European Court to reverse onus provisions is clearly set out in Salabiaku v France (1988) 13 EHRR 379 (at para.28):

“Presumptions of fact and 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 respect as regards criminal law.

[...]

Article 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. This test depends upon the circumstances of the individual case.”

11. Therefore, although Article 6(2) is in absolute terms, it is not regarded as imposing an absolute prohibition on reverse onus clauses. What is required is that States confine presumptions of fact or law within reasonable limits.

R v Director of Public Prosecutions, ex parte Kebilene [2000] 2 AC 326

12. The first major UK case brought under the HRA was R v Director of Public Prosecutions, ex parte Kebilene. The case concerned allegations that the defendants were involved with terrorism in Algeria. The defendants challenged the DPP’s decision to consent to the institution of criminal proceedings against the respondents on the basis that s.16A of the Prevention of Terrorism (Temporary Provisions) Act 1989 reversed the legal burden of proof and therefore was in breach of Article 6(2) ECHR.

13. The House of Lords decided that the Human Rights Act did not give rise to a legitimate expectation that the DPP would exercise his discretion not to consent and that the decision of the DPP was not amenable to judicial review. As a result, the questions as to the reverse burden and its compatibility with Article 6(2) did not need to be answered.
14. Nevertheless, Lord Hope took the opportunity to set out and review the arguments on Article 6(2) ECHR. He stated, obiter, that criminal statutes which in certain circumstances partially reverse the burden of proof were not necessarily incompatible with the Convention. He distinguished between a legal or “persuasive” burden and an “evidential” burden. The evidential burden requires that the accused must adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in the case. Evidential burdens do not breach the presumption of innocence and are therefore compatible with Article 6(2) ECHR.
15. On the other hand, the persuasive burden requires the accused to prove, on the balance of probabilities, a fact which is essential to the determination of his guilt or innocence. Lord Hope then outlined three categories of persuasive burden:
 - (i) mandatory presumption of guilt (prima facie incompatible);
 - (ii) discretionary presumption of guilt (compatibility will depend on the circumstances);
 - (iii) presumptions which emanate from an exemption or proviso (compatibility will depend on the circumstances).
16. The first step by way of preliminary examination, therefore, is to see whether the legislative technique which has been adopted imposes a persuasive or evidential burden and if it is persuasive, does it breach the presumption of innocence?
17. However, even if it breaches the presumption of innocence, Lord Hope illustrated that this does not lead inevitably to incompatibility. In Salabiaku, the European Court stated:

“as a matter of general principle therefore a fair balance must be struck between the demands of the general interest of the Community and the protection of the fundamental rights of the individual”.

18. In assessing where the balance lies, Lord Hope suggested useful questions to be considered:
- (i) What does the prosecution have to prove in order to transfer the onus to the defence?
 - (ii) What is the burden on the accused (does it relate to something which is likely to be difficult for him to prove)?
 - (iii) What is the nature of the threat faced by society which the provision is designed to combat?

R v Lambert [2001] UKHL 37

19. Whereas in Kebilene the issue was strictly obiter, the compatibility of reverse burdens formed part of the ratio of the decision in Lambert. In Lambert, the House of Lords considered the application of the presumption of innocence as expressed in Article 6(2) ECHR to s.28 of the Misuse of Drugs Act (MDA) 1971 which sets out the offence of possession of controlled drugs with intent to supply. Section 28(2) provides a defence whereby the defendant can prove that he did not know or suspect or have reason to suspect that the items which were in his possession were in fact controlled drugs.
20. This provision had always been interpreted as placing a legal burden on the defence to prove, to the civil standard, that the defendant did not have the necessary knowledge or suspicion. However, in Lambert the majority of the House reached a different view.
21. It was decided that, by placing the persuasive burden on the defendant, the defence violated the presumption of innocence articulated in Article 6(2). However, the defence could be “saved” if it was construed in accordance with s.3(1) HRA. Lords Slynn, Steyn, Hope and Clyde concluded that the burden which fell on the defendant to “prove” that he did not have the necessary knowledge or suspicion was an evidential burden only and

therefore did not breach Article 6(2). The defendant was required only to raise the issue, which the Crown then had to disprove to the normal criminal standard.

22. The approach can be summarised thus. The first step was to establish whether the reversal was an infringement of the presumption of innocence. Their Lordships agreed that the effect of the provision was to impose a legal, persuasive burden which infringed the principle. The next step was to consider whether this infringement was objectively justified and proportionate - that the legislative means adopted were not greater than necessary (on this point Lord Hutton dissented, finding that the imposition of a legal burden on the accused was proportionate). The final step was to assess whether it was possible to read s.28 MDA in a way compatible with Convention rights (in accordance with s.3 HRA).
23. On this final point, the majority of the House of Lords agreed. Adopting the rationale of Lord Cooke in Kebilene, they applied s.3 HRA¹ so as to read s.28(2) MDA as creating an evidential burden only. In particular, this involved reading the words “prove” and “proves” as meaning giving sufficient evidence.
24. Consequently s.28 MDA is not incompatible with Article 6(2) ECHR as it can be “read down” so as to impose an evidential burden, as opposed to a persuasive burden on the accused.
25. The approach of Lambert has been adopted in subsequent Court of Appeal decisions.

R v Carass [2001] EWCA Crim 2845

26. The Defendant was charged with concealing debts in anticipation of a winding up (contrary to s.206(1)(a) of the Insolvency Act 1986). In raising the defence of “no intent to defraud” under s.206(4) it was held that the Defendant bore only an evidential burden of proof. Accordingly the word “prove” was read to mean “adduce sufficient evidence”. This is identical to the approach of the majority in Lambert.

¹ Section 3 HRA 1998 states: “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”.

R v Drummond [2002] EWCA Crim 527

27. In this case the court applied the reasoning of Lambert but came to the conclusions that had been delivered by the Court of Appeal and Lord Hutton in dissent. A defendant charged with careless driving with excess alcohol raised the defence in s.15(3) of the Road Traffic Act 1988. Under the “hipflask” defence, if an accused proves that he consumed alcohol after he ceased to drive but before a breath specimen test, he can rebut the assumption that the proportion of alcohol shown in the specimen was the proportion of alcohol in his blood whilst driving. It was held that a legal burden of proof was correctly imposed upon the defendant in requiring him to show that alcohol was consumed after driving. The interference with the presumption of innocence was both justified and no greater than necessary.

LAMBERT RECONSIDERED

28. The two cases outlined above illustrate how the Court of Appeal has followed the test laid down by the House of Lords in Lambert both to justify and to condemn the reverse burden of proof in different statutory offences. I shall return later to consider which approach would be adopted regarding s.40 HSWA.

29. However, there are two particular uncertainties that arise from the Lambert decision. The first is illustrated by the decision of the House of Lords in Lambert itself in that the compatibility of the reverse legal burden is not always a clear-cut decision. A majority of four of the House concluded that the reverse legal burden and the resulting infringement of the presumption of innocence were not justified or proportionate.

30. However, Lord Hutton (and the Court of Appeal) came to the opposite conclusion. Whereas the majority found that an evidential burden was appropriate, a decisive factor for Lord Hutton was that an evidential burden would create unresolved difficulties for the

prosecution². This outlines the inherent uncertainty as to the compatibility of individual statutory provisions which impose a legal burden of proof on the defendant.

31. In reaching their conclusion for the majority, Lords Steyn and Clyde both considered that a legal burden on the accused was not justifiable after balancing the interests of the public with what was at stake for the accused in circumstances where the accused may face a sentence of life imprisonment. Lord Clyde contrasted this with a case where strict responsibility may be more acceptable - such as statutory offences which regulate the conduct of some particular activity in the public interest, for example “the promotion of health and safety”:

“These kinds of cases may properly be seen as not truly criminal. Many may be relatively trivial and only involve a monetary penalty. Many may carry with them no real social disgrace or infamy” (at para.154)

32. I shall consider later how this distinction between regulatory and prescriptive offences has been applied in decisions concerning regulatory offences.
33. The second uncertainty created by the decision in Lambert concerns the approach as to whether the legal burden imposed on the defendant amounts to an infringement of Article 6(2). As Lord Hope set out in Kebilene, a legal burden is when the defendant must prove a fact which is essential to the determination of his guilt or innocence. The decision of Lambert illustrates, however, that it is not always easy to categorise the essential elements of the offence. Lord Steyn deemed the defence under s.28 as containing an essential element of the offence. For him, the defence is so closely linked with mens rea and moral blameworthiness that it would derogate from the presumption to transfer the legal burden to the accused (at para.35).

²At para.198, “[T]he difficulty in some cases of convicting those guilty of the crime of possession of a controlled drug with intent to supply, if the burden of proving knowledge beyond a reasonable doubt rests on the prosecution, is not resolved by placing an evidential burden on the defendant, and it is necessary to impose a persuasive burden as ss.28(2) and (3) do.”

34. However, Lord Hope concluded that the knowledge contained in s.28 was not an essential element (para.60) and there were sound policy reasons for construing the legislation in such a way as not to put the initial burden of proving knowledge on the Crown (para.71). Nevertheless, he reached the same conclusion as Lord Steyn that the burden on the accused violated the presumption of innocence (para.117). Lord Hutton, who dissented on the basis that an evidential burden was insufficient and that the persuasive burden was justified (para.198), found that whether or not it was an essential element was not conclusive of the issue (para.185):

“Therefore, following the jurisprudence of the Court, I consider that the Crown cannot rebut an argument based on a violation of Article 6(2) by simply contending that the Government of the United Kingdom is entitled “to define the constituent elements of the ... offence”, and that a violation of Article 6(2) is avoided because the 1971 Act makes absence of knowledge of being in possession of a controlled drug a defence rather than making knowledge an ingredient of the offence which the prosecution has to prove.”

35. This uncertainty is highlighted in the following case:

Sliney v Havering London Borough Council [2002] EWCA Crim 2558

36. The Court of Appeal came to the conclusion that the substance of the reverse burden in s.92(5) Trade Marks Act 1994 was not to be regarded as an essential element of the offence and that therefore there was no infringement of the presumption of innocence in Article 6(2) ECHR.
37. The Court went on to state that even if it were properly to be regarded as inconsistent with the presumption of innocence, this was a case where the reverse legal burden was necessary, justified and proportionate and that therefore it was not a case where section 3 of the Human Rights Act 1998 would require the “reading down” of the provision.

38. The Court outlined seven reasons for accepting that the prosecuting authorities had justified the reverse legal burden as necessary and proportionate: four in addition to the three identified by Lord Hope in *Kebilene*:

38.1 Important matters have to be proved by the prosecution beyond reasonable doubt before any liability can attach to the accused (Lord Hope's first consideration).

38.2 The subject matter of the legal burden would be peculiarly in the knowledge of the accused (Lord Hope's second consideration).

38.3 The provision was designed to protect both proprietors of registered trademarks and consumers from the activities of counterfeiters. The threat faced by society was a very serious one (Lord Hope's third consideration).

38.4 This is a regulatory offence so the moral obloquy is less than that in "truly criminal" cases.

38.5 The regulatory regime could not operate sensibly if it depended on the prosecution proving the trader's absence of belief on reasonable grounds that the goods were genuine etc.

38.6 Although s.92 TMA provides for a sentence of 10 years imprisonment, in reality the majority of cases under s.92 result in a fine or discharge and of the few that resulted in custody, none were over five years.

38.7 If the burden were "read down" to be evidential it would create enormous obstacles for trading standard departments. This supplements the third reason above - but illustrates that the court considered the effects of s.3 HRA 1998 in its reasoning.

39. At first blush, the decision of the Court of Appeal may appear confusing. At paragraph 34, Rose LJ comes to the conclusion that the defence “does not relate to an essential element of the offence” so Art.6(2) is not infringed. Nevertheless, he continues in para.35 that “in the light of the arguments we would not regard it as satisfactory to rest the ultimate decision in this case solely on that basis” and that the analysis of the compatibility of the reversal (the seven factors outlined above) is “a further and necessary part of our ultimate disposal of this appeal”.
40. Sliney suggests that if the defence does not relate to an essential element of the offence, then there is no infringement of the presumption of innocence. But at the same time, the Court was unwilling to dispose of the case on that basis alone. This indicates that Courts are perhaps keen to decide cases by adopting a more European approach of considering the picture as a whole. As a result, it is perhaps better to consider whether or not the defence relates to an ingredient of the offence as no more than one of number of factors to be taken into account. This would seem to accord with the opinion of Lord Hutton in Lambert (at para.185).
41. Sliney is also notable in that amongst the number of factors considered, the Court decided that the prospect of a custodial sentence was, although a possibility, in fact unlikely. As a result the reverse legal burden was not so serious as to constitute an infringement of Article 6(2). The sentence for the offence proved to be a persuasive factor for the court in the following case:

Davies v Health and Safety Executive (judgment 18/12/2002)

42. This was the first health and safety case to be decided on this issue. The Court of Appeal held that the imposition of a legal burden under s.40 HSWA was justified, necessary and proportionate and therefore was compatible with Article 6(2) ECHR.
43. In considering the balance between the fundamental right of the individual and the general interests of the community, the court followed the questions set out by Lord Hope in Kebilene:

- 43.1 Before the onus shifts to the defendant the prosecution had to initially prove that the defendant owed the duty and that the safety standard had been breached (in the case of s.3 and s.33(1)(a) offences). The Court held that proof of these matters is not a mere formality.
- 43.2 The burden on the defendant was within the defendant's knowledge: he knew what he did and what he ought to have done. The defence had argued that the offences were not concerned with the defendant's state of mind (which had been the case in Lambert and Carass) and this should be contrasted with a case where the burden rested on the defendant to show that he did all that was reasonably practicable. This argument was rejected. The Court held that Lord Hope's second consideration in Kebilene was not specifically directed to the state of the prosecutor's knowledge of the facts in question, but whether they will be difficult for the defendant to prove or relate to something in his knowledge. It was held that the facts giving the defendant access to a s.40 HSWA defence would at least be within his knowledge and therefore would not be difficult for him to prove.
- 43.4 The provision was specifically enacted to combat the threat to society. The 1974 Act is regulatory rather than prescriptive and as such the concept of fault is based upon a reasonable care standard and does not imply moral blameworthiness in the same manner as criminal fault. The Court adopted the analysis of Cory J in the Canadian Supreme Court in R v Wholesale Travel Group (1991) 3 SCR 154, which it considered "convincing and extremely helpful":

"If the false advertiser, the corporate polluter and manufacturer of noxious goods are to be effectively controlled, it is necessary to require them to show on a balance of probabilities that they took reasonable precautions to avoid the harm which actually resulted. In the regulatory context there is nothing unfair about imposing that onus; indeed it is essential for the protection of our vulnerable society".

44. As a result, the Court of Appeal reached a conclusion similar to that of Lord Hutton in Lambert, whereby the reverse legal burden was justified, necessary and proportionate - and therefore did not violate Article 6(2). Consequently it was not necessary to apply the next step of Lambert and apply s.3 HRA 1998 to transfer the burden to an evidential one.
45. In addition, the Court of Appeal identified other elements which persuaded them that the legal burden on the accused was justified and proportionate. The Court considered that to impose merely an evidential burden would change the focus of the statutory scheme. As a result the Court envisaged scenarios where the prosecution would not be able to assume this burden of proof in examples where the only relevant expertise was with the defendant, or perhaps a state of art supplier in another country.
46. An equally important factor for the Court was that there was no risk of imprisonment for any of the offences in question. In Lambert, the possibility of life imprisonment weighed heavily on the minds of Lord Steyn and Clyde in their decisions to declare the reverse legal burden incompatible with Article 6(2). The risk of imprisonment would seem to suggest that a reverse legal burden in such circumstances would be incompatible.
47. However, in Sliney the Court of Appeal side-stepped this assumption by ruling that the reverse burden was justifiable notwithstanding the risk of imprisonment. For Rose LJ, the risk of imprisonment was unusual and although the maximum custodial sentence was ten years, in practice the highest sentence appeared to be five years.
48. Irrespective of the logic or correctness of this conclusion in Sliney, that conclusion only relates to the offence under s.92(5) TMA and would not bind a court deciding the same issue in the case of a health and safety offence attracting a punishment of imprisonment. In addition there are further distinguishing features between the decisions of Sliney and Davies. For example, in Sliney, s.92(5) TMA was not considered to be an essential element of the offence; accordingly there was no risk of infringement of Article 6(2). In Davies, this argument was rejected. The duty in s.3 HSWA is a “duty to ensure as far as is reasonably practicable”. It is a breach of this qualified duty which gives rise to the offence. The s.40 defence therefore concerns the gravamen of the offence.

CONCLUSIONS

49. Since the introduction of the HRA, a number of principles have been developed in order to assist the court to determine in the case of a particular statute what the right approach should be. In the decisions reviewed, the application of those principles has not always been clear-cut; the stages are not always distinct. Nevertheless some applicable criteria have emerged.
50. The starting point is to construe the words of the section in question: what is the nature of the burden imposed by them? Is it evidential or persuasive? If the persuasive burden is mandatory and/or refers to the gravamen of the offence then the burden breaches the presumption of innocence (although this appears not to be conclusive of the matter).
51. Having construed the section, it is then necessary to determine whether or not the burden in question is incompatible with Article 6(2). Is it justified, necessary and proportionate? The following criteria would appear to be persuasive factors.
- 51.1 What must the prosecution prove in order for the onus to be borne by the defendant? For example, does the prosecution have to prove the essential elements and is this more than a mere formality?
- 51.2 What are the difficulties facing the defendant in satisfying this reverse legal burden? For example, are the facts within the knowledge of the defendant?
- 51.3 What is the extent of the threat to society that determines the public interest in successful prosecution as against the rights of the individual (proportionality)? It should be noted that the public interest balance is quite different depending on the nature of the offence. Other considerations that may affect the proportionality of the reverse legal burden may include whether the offence was regulatory or prescriptive; what degree of obloquy the offence carries; and what is the nature of the penalty on conviction?

51.4 It seems that the courts have also had in mind whether the prosecution would encounter insuperable obstacles if an evidential burden was imposed; similarly whether the regulatory regime would be able to operate sensibly if such a burden was borne by the prosecution.

52. Ultimately, the decisions in the House of Lords in Kebilene and Lambert and of the Court of Appeal in subsequent cases have gone some way in clarifying certain issues in this area of law. Needless to say, each case will depend on the offence in question and the application of the above principles to the facts. However, what is evident is that, like in all balancing exercises, similar considerations will not necessarily produce similar results.

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