DEGREE OF PROOF OF ALLEGATIONS OF CRIMINAL OFFENCES MADE IN CIVIL PROCEEDINGS

W. V. MIDDLEDITCH AND SON v. HINDS [1963] N.Z.L.R. 570

Denied the luxury of scientific certainty, a Court of law must accept a more ignominious role in its assessment of what the information placed before it proves. The standard of proof is not, however, left at large, and in the case of W.V. *Middleditch and Son* v. *Hinds* [1963] N.Z.L.R. 570 the permissible deviation from absolute certainty again arose for consideration. Here the question before the Court concerned the standard of proof required where a crime is alleged as part of the cause of action in a civil proceeding. It is of course settled that the general standard in a criminal case is that of "proof beyond reasonable doubt", [1] referred to in this article as "the criminal standard", and in a civil case, that of "proof on the balance of probabilities", [2] referred to in this article as "the orthodox civil standard". In the hybrid situation where a criminal allegation is made in a civil case, however, the requisite standard of proof has caused some difficulty.

In *Middleditch's Case* the plaintiff sought to set aside, on the ground of perjury, a judgment which had been obtained against him by the defendant in the Magistrate's Court. In considering the facts in support of the allegation of perjury McGregor J. considered it necessary to determine the relevant standard of proof. The allegation of perjury was being made in a civil proceeding, but it was also an allegation of crime. Was the criminal standard or the orthodox civil standard appropriate? McGregor J. held that the civil standard was appropriate and went on to hold that the plaintiff's allegation had been made out.

His Honour first considered three Privy Council decisions. In *Doe d. Devine* v. *Wilson* (1855) 10 Moo. 501 Sir John Patteson, delivering the opinion of the Board, said that where forgery was alleged in a civil proceeding, "the reasons for suffering a doubt to prevail against the probabilities, would not, in their Lordship's opinion, apply", (id. 532). This was simply another way of stating the orthodox civil standard. There were, however, contrary remarks in two Privy Council cases which followed, where the criminal standard of proof beyond reasonable doubt was considered appropriate. In *State of New York* v. *Heirs of Phillips* [1939] 3 All E.R. 952, the appellants claimed damages for an alleged conspiracy to defraud. Lord Atkin agreed with the trial judge that "it was necessary for them to prove their case as clearly as

1. *R.* v. *Summers* [1952] 1 All E.R. 1059; *R.* v. *Dagg* [1962] N.Z.L.R. 817, 823.

2. *R.* v. *Carr-Briant* [1943] K.B. 607.

they would have to prove it in a criminal proceeding". (id. 955). Again in the judgment of the Privy Council in *Narayanan Chettyar* v. *Official Assignee* (1941) 39 Allahabad L. J. 683, [3]. Lord Atkin said:

> "Fraud of this nature like any other charge of a criminal offence whether made in civil or criminal proceedings must be established beyond reasonable doubt."

Since these three cases, which were the only ones by which His Honour considered himself bound, had spoken with "two voices" he went on to consider other New Zealand, English and Australian authority. The New Zealand Supreme Court cases cited yielded *obiter dicta* only. Hay J. had made two points in *Ellis* v. *Frape* [1954] N.Z.L.R. 341. The first was that the authority of the two Privy Council cases favouring the criminal standard was lessened to the extent that Lord Atkin's *dicta* were bald statements relatively unsupported by discussion and made without reference to *Doe d. Devine* v. *Wilson* (supra). Secondly, Hay J. himself considered, *obiter*, that the civil standard was the correct one, but subject to an emphasis on the degree of persuasion necessary. In the following two New Zealand Supreme Court cases cited, *Cheape* v. *New Zealand Law Society* [1955] N.Z.L.R. 63 and *Sulco Ltd.* v. *Redit & Co. Ltd.* [1959] N.Z.L.R. 45, Gresson J., as he then was, and McGregor J. himself respectively, had considered, but in each case again *obiter*, that the criminal standard was the correct one.

McGregor J. then considered the Australian view as expressed in the High Court decision of *Helton* v. *Allen* (1940) 63 C.L.R. 691, where the criminal standard and the orthodox civil standard were both expressly rejected. Proceedings were brought seeking a Court pronouncement on the validity of a will and opposing any benefit passing to the instituted executor on the ground that he had murdered the testatrix. In previous criminal proceedings the instituted executor had been acquitted of such a charge. In this probate hearing the judge at first instance directed the jury to find homicide if they considered that there was any greater probability favouring that conclusion. The jury found that murder had been committed by the defendant but a new hearing was ordered by the High Court of Australia. It was held by Dixon, Evatt, Rich and McTiernan JJ. that although the criminal standard did not apply, the function of the tribunal was more than a mere comparison of the probabilities of guilt with those of innocence, since reasonable satisfaction was not independent of the nature of the fact to be proved. [4].

3. The report does not appear to be available in New Zealand.

4. p. 695 *et seq.*

His Honour appeared to place the most weight, however, on the English Court of Appeal's decision in *Hornal* v. *Neuberger Products Ltd.* [1957] 1 Q.B. 247, where Denning L. J. said:

> The more serious the allegation the higher the degree of probability that is required: but it need not, in a civil case, reach the very high standard required by the criminal law. [5.]

Similarly in the same case, Hodson L.J. took the view that the normal civil standard was correct, with the gloss that there are degrees of probability within that standard, commensurate with the seriousness of the criminal allegation.[6.]

Finally, His Honour, after briefly adverting to a previous decision of his own in *Gordon* v. *Beere* [1962] N.Z.L.R. 257, considered the New Zealand Court of Appeal's decision in *Maxwell* v. *Commissioner of Inland Revenue* [1962] N.Z.L.R. 683. The appellant had been acquitted in a prosecution for wilfully filing a false return of income with the Inland Revenue Department. The Commissioner of Inland Revenue subsequently brought this civil claim for arrears of tax and the appellant claimed an issue estoppel. In the Court of Appeal North J. considered that one reason for rejecting the estoppel argument was that "the burden of proof is not the same, for usually in civil cases, the Judge or the jury may decide upon a mere preponderance of evidence: see *Phipson on Evidence*, 9th ed., 431. It may be that in civil proceedings, grounded on fraud, the standard of proof so closely approximates the standard of proof required in criminal cases, that there is no sufficient reason why a verdict of acquittal on a ground of fraud should not prevent the aggrieved person, if he was a party to the criminal proceedings, from again advancing the same allegation, even although on this occasion he was seeking a judgment for a sum of money." [7.] The learned Judge clearly favoured the civil standard, with the gloss that the standard of proof should be commensurate with the seriousness of the allegation. Cleary J., on the other hand, while agreeing that no issue estoppel arose, relied on Lord Atkin's statements *(supra)* and considered that the standard required was no less than that required in prosecution proceedings. [8.] The third member of the Court, Gresson P. did not refer to this point, which left the matter an open question in the New Zealand Court of Appeal.

Summing up in *Middleditch's Case*, McGregor J. concluded that there was really no conflict between *Wilson's Case (supra)* and the statements of Lord Atkin *(supra)*:

> [W]hen Lord Atkin laid it down that where in civil proceedings an issue arose as to the commission of a crime, the fact that the criminal

5. p. 258
6. p. 260 - 264
7. p. 702
8. p. 706

> act was done must be proved beyond reasonable doubt, he intended to say no more than that the gravity of the issue necessitates that very grave weight should be given to the presumption of innocence. That is a matter which goes into the scales in favour of the defendant and the counter-weight necessary to tip the scales in favour of the plaintiff must be correspondingly heavy. In this manner are the probabilities established commensurate with the gravity of the accusation. [9]

It is not intended to criticize the result of McGregor J.'s decision but it is proposed to submit two observations on the judgment: (i) that the judgment is not, as His Honour implied, supported by a single reconcilable body of authorities, but is the result of a necessary choice between two substantial but diametrically opposed streams of authority; and (ii) that the concept of the civil standard as a scale which varies according to seriousness of subject matter is both illogical in theory and too sophisticated to be workable in practice.

(i) The authorities quoted in *Middleditch's Case* are in complete conflict and this conflict is confirmed by a consideration of authority uncited by McGregor J. Further proponents of the criminal standard in the hybrid situation can be found in New Zealand, England and Canada. Examples are the judgments of Sir Robert Stout C.J. in *Prosser* v. *Ocean Accident and Guarantee Corporation (Limited)* (1910) 29 N.Z.L.R. 1157 and that of Ostler J. in *Moser* v. *Norwich Union Life Insurance Society* [1932] G.L.R. 164, the English Court of Appeal in *Statham* v. *Statham* [1929] P. 131, and the entire weight of Canadian authority on the subject, examples being *London Life Insurance Co.* v. *Lang Shirt Co.'s Trustee, Metropolitan Life Insurance Co.* v. *Moore, Aetna Life Insurance Co.* v. *Moore* [1929] 1 D.L.R. 328, *Earnshaw* v. *Dominion of Canada General Insurance Co.* [1943] 3 D.L.R. 163 and the recent Ontario Court of Appeal decision *Wawanesa Mutual Insurance Co.* v. *Hanes* (1961) 28 D.L.R. 386. Finally there is the case of *Bhandari* v. *Advocates Committee* [1956] 3 All E.R. 742 where the Privy Council on appeal from the Court of Appeal for Eastern Africa considered (inter alia) the standard of proof which should have been applied by the Advocates Committee and subsequently by the Supreme Court, in determining whether a barrister was guilty of professional misconduct. The judgment of the Board, consisting of Viscount Simonds, Lord Oaksey, Lord Tucker, and Mr L.M.D. de Silva, was delivered by Lord Tucker and was to the effect that "a high standard of proof" was called for and that the appellant should not be condemned on a "mere balance of probabilities". (p. 1452) [10]. However, no authorities were quoted and in addition it may well be that disciplinary proceedings before a tribunal are distinguishable from civil proceedings in a Court.

9. p. 575

These authorities are to be contrasted with further "hybrid" cases in which the civil standard was applied, examples being *Hurst* v. *Evans* [1917] 1 K.B. 352 and *In re Pollock* [1941] Ch. 219, *In re A Solicitor* [1945] 1 K.B. 368 (C.A.), a *dictum* in the House of Lords in *Lek* v. *Mathews* (1927) 29 Ll L.R. 141, the weight of authority in Australia, as illustrated by *Motehall* v. *Massoud* [1926] V.L.R. 273, *Origliasso* v. *Vitale* [1926] Q. S. R. 211, *McLelland* v. *Symons* [1951] V.L.R. 157 and *Helton* v. *Allen (supra);* the weight (as indicated by Phipson) of American authority, and the weight of text-book authority as typified by *Phipson on Evidence* 10th ed., p. 514, *An Introduction to Evidence* by G.D. Nokes 3rd ed., p.482, and *Cross on Evidence* (N.Z. ed., 1963), p. 383. Finally, a recent case is worth quoting in some detail. *In re Dellow's Will Trusts* [1964] 1 W.L.R. 451 concerned an originating summons issued by the trustees of an estate to determine succession between a husband and wife found dead together. Although the wife was younger and would *prima facie* have taken her husband's estate by virtue of the statutory presumption as to order of death, the summons asked for an enquiry as to whether the wife feloniously killed the husband, which would have prevented her estate from benefitting under his will. Ungoed-Thomas J. held at p. 454 that the civil standard of proof was the correct standard of proof to be applied in the circumstances.

It is submitted that in view of the substantial weight for both criminal and civil tests revealed by the above review of authority, it was open for a New Zealand court to choose whichever it preferred. From a precedent point of view therefore, no criticism can be levelled at the decision in *Middleditch's Case* when it chose the civil standard. However, with great respect to McGregor J., who stated that there is no fundamental conflict in the authorities, [11] it is submitted that the principal fact emerging from this array is that there is an evenly balanced conflict running through time, country and judicial hierarchy. To reconcile *Doe d. Devine* v. *Wilson (supra)* with the *New York* and *Narayanan Cases (supra)* the judgment of North J. with the judgment of Cleary J. in *Maxwell's Case (supra),* or *Cheape's Case (supra)* with *Ellis* v. *Frape (supra),* is to deny that there is really any comprehensible difference between the accepted civil and criminal standards of proof. There are of course advocates for a single standard in all cases, [12] but it is unlikely that McGregor J. intended such

10. This decision does not appear to be reconcilable with the recent decision of the Full Court in *In re C (A Solicitor)* [1963] N.Z.L.R. 259, where Hutchison J. at p. 259 (Haslam and Leicester JJ. concurring) expressly rejected the orthodox criminal standard of proof for disciplinary proceedings and applied what amounted to the orthodox civil standard.

11. p. 572 line 9, p. 576 line 6 and p. 574 line 36.

12. See for instance Sir Carleton Allen in *Legal Duties* p.288; Hilbery J. in *R.* v. *Murtagh and Kennedy* reported in *The Times* 24 May 1955; and 1955 V.U.C.L.R. No. 1, Vol. 3, p. 41.

far-reaching consequences to flow from his judgment. His Honour could reconcile the above conflict only because he considered that the civil standard varies according to subject-matter, and that this variation is large enough to accommodate virtually all that has been said on the point from "a preponderance of probabilities" to "beyond reasonable doubt". This view leads to the second point of this article.

(ii) McGregor J. summarised his attitude to the balance of probabilities as a variable standard when he said at p. 575 that "the gravity of the issue necessitates that very grave weight should be given to the presumption of innocence. That is a matter which goes into the scales in favour of the defendant and the counter-weight necessary to tip the scales in favour of the plaintiff must be correspondingly heavy. In this manner are the probabilities established commensurate with the gravity of the accusation." This followed his expressed approval of the proposition that "the graver the allegation the greater should be the strictness of proof demanded", [13.] and "the standard of proof depends on the nature of the issue. The more serious the allegation the higher the degree of probability that is required". [14.] The writer's objection to the view variously expressed above is that it is both illogical in theory and subjective in practice.

His Honour used a new approach to the idea of a variable civil standard when he justified it by emphasizing the weight to be attached to "the presumption of innocence". Cross in his textbook *Cross on Evidence* (N.Z. ed., 1963), 94, has however pointed out that the "presumption of innocence" is nothing more than the fact that the prosecution bears the legal burden of proving guilt beyond reasonable doubt. This burden of proof has usually been misleadingly referred to as a "presumption of innocence" and Cross gives a well known example, *Coffin* v. *The United States* (1895) 156 U.S. 432, where a new trial was ordered because the trial judge did not enumerate the presumption of innocence among the items of evidence favourable to the accused, in his address to the jury. Cross says:

> This decision has been universally condemned. It could hardly have been pronounced if the Court had not been misled by the verbal dissimilarity between the rule that the prosecution bears the legal burden of proof and the presumption of innocence.

If, therefore, the presumption of innocence means simply this, the statement of McGregor J. is reduced to

> the fact that the plaintiff bears the legal burden of proving guilt is a

13. From the headnote in *Helton* v. *Allen (supra).*

14. Per Denning L. J. in *Hornal* v. *Neuberger Products Ltd. (supra).*

> matter which goes into the scales in favour of the defendant and the counter-weight necessary to tip the scales in favour of the plaintiff must be correspondingly heavy.

Allowing for the fact that this was said during a civil proceeding, His Honour could have been referring to the legal burden of proof itself, without importing "beyond reasonable doubt". Even in that event, the proposition clearly envisages the presumption of innocence as a substantial item of evidence in favour of the defendant, "a matter which goes into the scales," which is logically incorrect, as indicated by Cross.

If, on the other hand, His Honour meant the presumption of innocence in the sense of a legal burden of proof beyond reasonable doubt, he has not only treated it as an item of evidence as objected to above, but while ostensibly applying the civil test, he has let the criminal test in by the back door. The plaintiff now has the burden of proof beyond reasonable doubt, because "the counter-weight necessary to tip the scales in favour of the plaintiff must be correspondingly heavy".

Quite apart from his use of "the presumption of innocence," it is clear that His Honour approved the concept of a variable civil standard so that, in the words of Denning L. J.

> ... the standard of proof depends on the nature of the issue. The more serious the allegation, the higher the degree of probability that is required. [15]

It is suggested that this view confuses two seperate functions of the Court, the first being the determination of the facts and the second the determination of the consequences to flow from those facts in the light of the gravity of the crime: the punishment, the social ostracism and the like. The proponents of a variable civil standard are putting the cart before the horse when they concern themselves with social implications before they have adjudicated on the facts. Admittedly, the law has done this by differentiating between the two orthodox standards of proof but the sole justification for the different treatment of evidence in that respect is that criminal and civil proceedings differ fundamentally in purpose and social context. Criminal proceedings are to punish the guilty; civil proceedings to compensate the wronged. The former sets the immediate protection of the individual accused against the more indirect aim of the protection of society. Both the disproportion of the importance of the outcome to the respective parties (at least in the short term view), and the parties' inherent inequality, are grounds for loading the dice in favour of the accused. A civil case is, however, basically a direct contest between equal citizens. There is no similar reason for favouring either party, beyond the incidence of the onus of proof, at the stage where

15. Per Denning L. J. in *Hornal* v. *Neuberger Products Ltd. (supra).*

the issue is still purely factual.

The proponents of a variable civil standard would conceivably be prepared to judge a man guilty of reckless driving causing injury, if the victim lived, but not guilty of manslaughter, if the victim died, the standard of proof being perhaps critically higher in the latter case because of the seriousness of the charge. Difficult as the task of ascertaining facts is, it will not be made easier by keeping one eye on the evidence and the other on the consequences of the decision. Only by measuring the evidence against a preconceived objective test will the Courts approach scientific consistency. Then, having settled on their factual finding, they can move on to the consequences they believe should follow from the facts.

It cannot be ignored that because minor crimes are more common than serious ones, stronger evidence is required in the case of a serious allegation. But this no more affects the overall standard of proof than any other of life's generalizations. Strangling by a man is more common than strangling by a child, and stronger evidence would be required to prove the latter. Nevertheless, the proponent would be faced with exactly the same standard of proof in both cases. It would merely be more difficult to attain that standard where the allegation was more improbable. The writer has found only one case where this is recognized, but the point is made with great clarity. In *In re Dellow's Will Trusts* [1964] 1 W.L.R. 451, Ungoed-Thomas J. said at p. 452:

> It seems to me that in civil cases it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but ... the gravity of the issue becomes part of the circumstances which the Court has to take into consideration in deciding whether or not the burden of proof has been discharged. The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.

The above objections to a variable civil standard are of a theoretical nature. But in addition, it is debatable whether the mind is capable in practice of rationally using a test any more sophisticated than the two already established. The fact that the law has hitherto attempted to define only two standards implies that it was considered undesirable or unattainable to create others. Professor Cootes has defined the two, with as much clarity as can be brought to the subject, on the basis of the significance to be attached to the tribunal's doubts:

> Normally, in a civil case, account must be taken of a doubt only if it results in a rational opinion that a fact in issue is *less likely than not,* whereas in a criminal case account must be taken of a doubt if it

results in a rational opinion that the contradictory of the issue is more than a *remote possibility*. 16.

When it is proposed to supplement these two with the further principle that "the more serious the allegation, the higher the degree of probability that is required", it follows that there must be a scale of persuasion capable of being expressed in a different likelihood formula. It is notable that the various proponents of this view have never attempted to *define* the degrees of probability that they refer to. But the purpose which a standard of proof serves surely demands that the standard must be definable so that evidence can be measured against it. Until therefore, new standards can be defined, the Court may well reflect that, although it is denied the luxury of scientific certainty, it will come closer to that objective if it avoids the use of an elastic ruler which expands according to the object measured.

16. 14 M.L.R. 417 n. 35. It seems unduly pessimistic to deny that even this division is useful, *pace* the writer of a casenote in 1955 V.U.C.L.R. 41, 47 - 49.