



Criminal Law, Simester and Sullivan (updated 14.10.02)

Burden of Proof: Interpretation of the Human Rights Act 1998, ages 26-28; 34-40; 51-58

Lambert [2001] 3 WLR 206; [2001] 3 All ER 577; [2000] UKHRR 864; [2001] Crim LR 806; [2001] 2 Cr App R 511

Woolmington v. DPP [1935] AC 462 formulates with great rhetorical power a fundamental principle concerning the burden of proof in criminal trials: it is for the prosecution to prove beyond a reasonable doubt the constituent elements of any crime charged against D and to disprove beyond a reasonable doubt any defence save insanity that D may raise at his trial. Despite the rhetoric, the *Woolmington* principle - "the golden thread running through English criminal law" - has often been neglected in statutory crimes. Frequently, statutes explicitly place a probative burden on D, and even where a statute is silent on the matter of the probative burden, courts have been willing to infer a legislative intent to impose a probative burden on D.

Against that background, the decision in *Lambert* may prove to be even more significant than *Woolmington*. D was charged with possession of a controlled drug with intent to supply, contrary to s. 5 of the Misuse of Drugs Act 1971. He invoked the defence provided by s. 28 of the Act, namely that he neither knew nor suspected, nor had reason to suspect, that the substance in question was a controlled drug. In order to establish the defence, D was, under the explicit terms of the statute, required to prove these negative conditions, a probative burden to be discharged on a balance of probabilities. By a majority of 4:1, the House of Lords found that this probative burden contravened the presumption of innocence guaranteed by Art. 6(2) of the European Convention of Human Rights. Unlike the Court of Appeal, they declined to find that Art. 6(2) was complied with if the prosecution was obliged to prove the "definitional" elements of the crime. The majority reasoned that a division of issues to be contested at trial into "definitional" elements (on the one hand) and "defence" elements (on the other) was not helpful in determining the fairness of imposing a probative burden on the defence. What mattered was the forensic importance of the issue to be proved. In this case, the presence or absence of the negative conditions made the difference between a very serious offence with a maximum penalty of life imprisonment and conduct that may be completely blameless. Requiring D to establish blamelessness was a clear contravention of the presumption of innocence. Accordingly, under the statutory obligation imposed by s. 3(1) of the Human Rights Act 1998 to interpret legislation, "so far as possible \pm in a way which is compatible with Convention Rights", s. 28 of the Misuse of Drugs Act 1978 was interpreted as imposing merely an "evidential" as opposed to a probative burden. D would merely have to raise the possibility that the negative conditions were present: thereafter it would be for the prosecution to disprove beyond reasonable doubt any issue on which D had satisfied the evidential burden.

[The impact on burdens of proof](#)

This is a remarkable feat of interpretation, notwithstanding the strong terms of s. 3(1) HRA 1998. The implications of this bold approach for interpretative questions falling within the framework of the 1998 Act will be considered below. First we will consider the likely impact of the decision on statutory provisions which explicitly place probative burdens on the defence. Can we assume, post *Lambert*, that all such probative burdens will be reduced to evidential burdens? Apparently not. For example, in the subsequent case of *L v. DPP* [2002] Crim LR 320, D was found in possession of a lock-knife and was convicted of possession under s. 139 of the Criminal Justice Act 1998 because, under the terms of subsection (4), he was unable to "prove" that he had good reason or lawful authority for having the item with him in a public place. The Court of Appeal upheld the conviction and declined to read down the probative burden *à la Lambert*. In the court's view, once possession of the article in a public place had been proved, it was not disproportionate for the legislature to require proof by the defendant, on a balance of probabilities, of his good reason or lawful authority. By contrast, in *R v. C* [2002] Crim LR 316, the requirement imposed by s. 206(4)(a) of the Insolvency Act 1986 to prove an absence of intent to defraud following proof by the prosecution of concealment of a debt was found, applying *Lambert*, to contravene Art. 6(2) ECHR. One does not need to be a clairvoyant to anticipate further divergences of opinion at trial and on appeal, particularly given the scope for disagreement afforded by assessments of proportionality, an important doctrine in determining compliance with the European Convention. One might hope, that in the spirit of *Woomlington* and *Lambert*, courts will rule consistently that wherever an issue of fact disputed at trial entails the difference between guilt or innocence, any requirement imposed on D to prove his innocence is in breach of Art. 6(2), particularly if the offence carries a custodial sentence. Not only would this fortify the presumption of innocence, it could stem a series of appeals. We can only wait and see if this hope materializes.

The impact on statutory interpretation

What are the implications of *Lambert* generally for the interpretation of the Human Rights Act 1998? There are no conventional interpretive techniques whereby the term "prove" can be taken to mean "evidential burden". An evidential burden is not, as is sometimes claimed, a form of halfway house between a probative burden and its absence, but something that arises quite spontaneously in any trial where the prosecution has made a case that requires an answer. Effectively, the decision in *Lambert* removes from the defence the probative burden placed by s. 28 of the Misuse of Drugs Act 1971 and instead requires full proof from the prosecution. On the face of it, that goes beyond interpretation and makes the presumption of innocence guaranteed by Art. 6(2) of the ECHR a form of fundamental law, at the very least for offences carrying a maximum penalty of life imprisonment. The declaration of incompatibility, provided for by s. 4 of the Human Rights Act 1998, appears to be a device of very last resort.

That impression is fortified by another House of Lords decision, *A* [2001] 3 All ER 1. No amount of interpretive ingenuity could render s. 41 of the Youth Justice and Criminal Evidence Act 1999 (restrictions on the cross-examination of rape victims) compliant with the guarantee of a fair trial provided by Art. 6 of the ECHR. Essentially, the House of Lords decision in *A* requires trial judges to read s. 41 in a manner compatible with Art. 6 which, in the light of the incompatibility between the two provisions, requires primary effect to be given to Art. 6 in the event of conflict.

A procedural and evidential safeguard

Clearly then, the Human Rights Act 1998 enables the judiciary to use Art. 6 as a powerful resource to ensure minimum standards of fairness in the trial process. One should note, however, that the reach of Art. 6 is confined to matters of procedure and evidence and does not engage with the rules of substantive criminal law. In *Concannon* [2002] Crim. LR 213, D contended that the joint enterprise doctrine operated so harshly in the context of trials for murder as to breach the right to a fair trial as guaranteed by Art. 6. The argument was summarily dismissed by the Court of Appeal: Art. 6 was said to be concerned with the fairness of the trial process and not with the substance of the offences for which D was to be tried. Likewise, in *Looseley and Attorney General's Reference (No. 3 of 2000)* [2001] 4 All ER 897, the House of Lords declined to rule that Art. 6 required English courts to provide a substantive defence of entrapment.

Finally, it should be noted incidentally that *Lambert* also contains important discussion of the non-retroactive effect of the Human Rights Act 1998. See, too, on this point *Kansal (No. 2)* [2002] 1 All ER 257.