THE STANDARD OF PROOF NECESSARY ON A CRIMINAL MATTER ARISING IN A CIVIL ACTION

CHEAPE v. NEW ZEALAND LAW SOCIETY, [1955] N.Z.L.R. 63.

> The standard of proof required to establish in civil proceedings the commission of a crime is a topic upon which much has been written; it has been considered in many cases which are not easy to reconcile.

Per Gresson J. in Cheape v. New Zealand Law Society, [1955] N.Z.L.R. 63, at 67.

The beginnings of this vexatious question lie, however, exactly one century before the problem confronted Gresson J. in the title case of this note.

In Doe d. Devine v. Wilson (1855), 10 Moo. P.C. 502; 14 E.R. 581, the advice of the Privy Council was sought, upon an appeal from the Supreme Court of New South Wales, in an action for the recovery of land out of which a question of forgery arose. Discussion took place on the matter of the standard of proof necessary (at 531; 592):

> Now, there is a great distinction between a civil and a criminal case, when a question of forgery arises. . . . The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities. [Italics inserted.]

This decision is the basis of the view that the civil standard of proof is the correct one to be applied.

On appeal from the Province of Quebec in The State of New York v. Heirs of Phillips, [1939] 3 All E.R. 952, in tendering the advice of the Judicial Committee, Lord Atkin said (at 955):

> The trial judge, Mercier J., considered afresh the whole of the evidence. The only complaint made of his judgment

> in point of law is that he laid down that there was a heavy onus on the plaintiffs and that it was necessary for them to prove their case as clearly as they would have to prove it in a criminal proceeding. Their Lordships consider this criticism to be ill-founded. The proposition of the judge has been laid down time and again in the courts of this country: and it appears to be just and in strict accordance with the law.

Devine v. Wilson (supra) was not cited to the Privy Council in Phillips's case (supra). Both were however considered by the High Court of Australia in Helton v. Allen (1940), 63 C.L.R. 691, where a question of murder arose in a civil proceeding. The court adhered to the civil standard of proof. Rich J. stated (at 696):

> I do not for a moment suppose that there has been any impairment of the rule laid down in Doe d. Devine v. Wilson that in a civil proceeding involving even a direct allegation of crime "the reasons for suffering a doubt to prevail against the probabilities would not . . . apply". Lord Atkin in New York v. Heirs of Phillips Deceased cannot be understood as meaning anything contrary to a rule established so long by such high authority.

The common judgment of Dixon, Evatt, and McTiernan JJ. stated (at 714):

> In using the expression "as clearly as in a criminal proceeding" Lord Atkin may have had in mind the exactness of the proofs rather than the standard of persuasion or certainty. But in any case it is impossible to treat the observation as overriding Doe d. Devine v. Wilson and a line of cases and authority. Another explanation suggested was that Lord Atkin meant that the criticism was ill founded because it was not what the judge said.

The matter does not rest with the determination of Helton's case (supra) for subsequent to that decision Lord Atkin has again given advice in regard to this question of the correct standard of proof to be applied. In Narayanan Chettyar v.

Official Assignee, Rangoon (1941), 39 Allahabad L.J. 638 he said:

> Fraud like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt. [Italics inserted.]

This latter expression is categorical and leaves no doubt as to the opinion of the learned Lord who was speaking with the full authority of the Privy Council. It specifically states that no matter what the nature of the proceedings the charge ". . . must be established beyond reasonable doubt." A clearer expression of an adherence to the higher standard would be difficult to imagine. The Chettyar case (supra) appears to be inconsistent and irreconcilable with Devine v. Wilson (supra). Although Phillips's case (supra) was interpreted by the High Court as being not inconsistent with Devine v. Wilson the views of Lord Atkin as expressed in the Quebec appeal should not be read without reference to the Chettyar expression. Alone, Phillips's case is perhaps ambiguous, but it can be, and indeed was, reconciled with the earlier authority. Whatever ambiguity there was, whatever Lord Atkin really meant is resolved by his views, propounded but a decade after, upon the same point; views expressed with the greatest of clarity. It is respectfully contended that it would no longer be open to Rich J. to say that,

> Lord Atkin in New York v. Heirs of Phillips cannot be understood as meaning anything contrary to a rule established as long by such high authority. (ante, p.42)

The effect of the Chettyar case is then twofold:

(a) it casts doubt about the High Court interpretation of Lord Atkin's words in the Phillips case;

(b) it constitutes by itself paramount authority in support of the higher standard.

In criticism of this case however it is clear, from the report accepted by the Supreme Court in Ellis v. Frape, [1954] N.Z.L.R. 341, that Devine v. Wilson was not considered by the

Privy Council. Nevertheless the cumulative effect of the Chettyar and Phillips cases (the latter must now be reconsidered by any Court dealing with the question), is seriously to weaken the earlier decision of Devine v. Wilson. It is admitted that the fact that this case was not cited to the Judicial Committee in either of the two later decisions impairs this view.

In Ellis v. Frape (supra), Hay J. (at 345) considered the High Court's interpretation of Phillips's case and said:

> It should be borne in mind in reading the foregoing observations that they were made before the judgment of the Privy Council in the Indian case in the following year. The passage already quoted from that case may have an important bearing on the meaning to be attached to the language of Lord Atkin in the New York case.

Support for this contention will also be found in the case of Origliasso v. Vitale, [1952] Q.S.R. 211 which is the subject of a note in 26 A.L.J. 480. On an appeal from the direction of a judge in terms of the balance of probabilities the Queensland Full Court considered that the cumulative effect of the Phillips and Chettyar cases was to overthrow the Helton v. Allen decision of the High Court. Although this in no way detracts from the authoritative exposition of the High Court it does call attention to the fact that the problem may need to be reconsidered in the light of the Chettyar decision.

Little is gained by consideration of the law in other countries, such as Canada and the United States, for here too the question has not been answered with certainty. Textbook writers generally are at variance upon the point. In New Zealand Stout C.J. adopted the higher standard in Prosser v. The Ocean Accident And Guarantee Corp. Ltd. (1910), 29 N.Z.L.R. 1159 where a plea of arson was made in answer to a fire-insurance claim. He said (at 1161):

> It is clear that in such a case, where the plea of arson is raised, the onus of proving arson rests on the defendant, and that the defendant must give as satisfactory evidence of the arson as if there had been an indictment for arson against the plaintiff.

Devine v. Wilson was however not cited to the Court and the learned Chief Justice based his view on minor Irish authority. In Moser v. Norwich Union Life Insurance Society, [1932] G.L.R. 164 Ostler J. dealt with a plea of suicide raised as a defence to a claim on a life policy. Suicide is not a crime but is an allegation of a serious nature with perhaps a lingering criminal connotation similar to that of adultery. He said (at 164):

> . . . such a case as this ought not to depend on a mere balance of probabilities, unless the balance is well weighed down on its side, . . . the company must prove its allegation more strictly, and if it leaves open any reasonable probability by which death can be accounted for innocently it has failed to prove its defence.

This case is mentioned here because it was quoted in Ellis v. Frape (supra) as authority for the higher standard. It can hardly be said that it does in fact assist the claim of either standard particularly but rather suggests an intermediate view. Hay J. in Ellis's case made an exhaustive review of the authorities when he was required to deal with a charge of assault made against two constables in a civil action. He considered it unnecessary to decide in favour of either standard for he said (at 346):

> . . . even assuming the criminal rule to be applicable, the direction given by me to the jury reasonably complies with the requirement.

In Cheape v. New Zealand Law Society (supra) Gresson J. also considered that there was no necessity to decide the issue although he said (at 67):

> . . . I have for the purposes of this case adopted the higher standard, partly because of what was said by the Privy Council in Narayanan Chettyar v. Official Assignee, Rangoon . . . that fraud like any other charge of a criminal offence, whether made in civil or in criminal proceedings, must be established beyond reasonable doubt; and, partly, because, in my opinion, to warrant a conviction in this oblique fashion for the grave crime of misappropriation of moneys held in trust the evidence should be convincing and more than a mere balance of probabilities.

Thus, what New Zealand authority there is on the point, does, (except for an implied preference for a flexible lower standard by Hay J. in Ellis's case) seem to favour the view that the higher standard is correct. The New Zealand position is however almost entirely dependent upon a determination of the conflicting Privy Council decisions and although their resolution is difficult, and strong argument is against this view, it is submitted that the cumulative effect of the Phillips and Chettyar cases is to overrule Devine v. Wilson and establish the higher standard as the correct one to be applied.

Taylor on Evidence (12th ed. rg. 106, para. 112) is in favour of the higher standard, considering that it would be unjust to stigmatise a person with a finding of crime without such person having recourse to a proper criminal trial. There are however a great multitude of instances where it becomes necessary for a plaintiff in a matter of tort to prove the commission of a crime in order to found his action and where the finding of such crime would create virtually no stigma. Further such a finding in a civil action is not a conviction and carries with it no loss of liberty or other criminal punishment. This has been noted in 8 A.L.J. 207. In the case of Kane v. Hibernia Insurance Co. (1877), 23 Am. R. 239 Depue J. concisely summarised this factor:

> Almost every tortious act is by statute made indictable, if done wilfully and maliciously, and the Court should be reluctant to adopt, in civil cases, the rule peculiar to criminal law, lest wrongdoers be enabled to avoid liability, as well as escape criminal responsibility, under cover of rules of criminal prosecution, the object of which is punishment only.

In order that such injustice may not be permitted it is therefore necessary to give a court flexibility within the higher standard. The words of Denning L.J. in Bater v. Bater, [1951] P, 35 are perhaps the solution to this problem of flexibility. He said (at 36):

> The difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is of course true that by our law a higher standard of proof

> is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. [Italics inserted.]

His Lordship further considered that what amounted to a reasonable doubt depended upon the conclusion to which the person dealing with the matter had to address himself. He said (at 37):

> It would depend . . . what the charge was, and what the consequences might be . . . .

A judge, or jury, in a civil action where a criminal charge is made, should have regard to the gravity of the allegation made in determining whether or not sufficient evidence has been adduced to overcome the reasonable doubt. The more grave the offence charged the more difficult should it be to satisfy this doubt. If the crime pleaded or alleged was one of a minor character, e.g. common assault, then the Court should be more ready to consider that the higher standard has been satisfied than if the allegation were murder or rape.

This is by no means the ideal solution but if the higher standard is required by law then this suggestion may assist in mitigating its unfortunate consequences to the plaintiff in a civil action. Legislation, or definite decision by the House of Lords or the Privy Council is required to clarify the question as to which standard should be correctly applied and the manner of its application. Should such subsequent decision or legislation support the civil standard the words of Denning L.J. in Bater v. Bater concerning degrees of proof within the standard, are equally applicable and may serve the end of justice by helping to prevent a defendant in a civil proceeding being too easily branded as one who has committed a serious crime such as murder.

However, the final and best solution may lie in a future revision, necessarily by legislation, of the whole question of standards of proof. If the idea of two separate standards could be dispensed with and one standard adopted then the

matter might easily be resolved. Within such single standard there would be an infinite range of degrees of proof in the terms of Bater v. Bater and the degree of proof required in any particular instance, ". . . would depend on what the charge was and what the consequences might be . . ." (per Denning L.J., at p. 47 ante). At present this suggestion may seem heretical, but already there is evidence to be gathered in support:

1) The standard of proof of adultery in matrimonial actions is neither civil nor criminal but sui juris. This is a definite inroad on the idea that there are two exclusive standards; McDonald v. McDonald, [1952] N.Z.L.R. 924 and 1 V.U.C.L.R. 64.

2) In R. v. Summers (1952), 36 Cr. App. R. 14 Lord Goddard C.J. attacks the use of a direction to the jury in terms of the "reasonable doubt". He says (at 15):

> If a jury is told that it is their duty to regard the evidence and see that it satisfies them so that they can feel sure when they return a verdict of Guilty, that is much better than using the expression "reasonable doubt" and I hope in future that it will be done. [Italics inserted.]

This again may be an expression in favour of a single standard with the degree of proof allied to the nature of the charge and to the satisfaction of the judge or jury.

3) The words of Ostler J. in Moser v. Norwich (supra) are indicative of a desire to adopt neither standard but to consider the nature of the allegation in arriving at the degree of proof necessary.

4) Hay J. in Ellis v. Frape (supra) refers to the article in 26 A.L.J. 480 (p. 46 ante) and says (at 343):

> I am inclined to agree with the writer of the note in such journal that, if on such a review [sc. by House of Lords or Privy Council] some flexibility were allowed the concept of reasonable doubt, both civil and criminal cases could be brought under one general principle . . . .

5) The words in Bater v. Bater (supra) support, by implication, a single standard.

6) Wigmore on Evidence (2nd ed. 1923, vol. 5, s. 2498) says:

> In civil cases it should be enough to say that extreme caution and the unusual positiveness of persuasion required in criminal cases do not obtain. But it is customary to go further . . . .

Professor Wigmore continued by condemning as a "waste of judicial effort", attempts to further define, ". . . in words the quality of persuasion necessary." This passage was quoted with approval in Briginshaw v. Briginshaw (1938), 60 C.L.R. 336 at 361, by the High Court of Australia. This approval was again endorsed in Helton v. Allen (supra) which was itself considered favourably by Hay J. in Ellis v. Frape (supra).

Thus the adoption of a single standard, inclusive of an infinite number of degrees of proof, the sufficiency to be determined by the gravity of the charge, should provide a solution to the complex problem of standards of proof.

This article may therefore be summarised as follows:

1) The cumulative effect of the Privy Council decisions in the cases of Chettyar and Phillips is to overrule the earlier decision of Devine v. Wilson and establish the higher standard as the one required by law.

2) That in order to mitigate the harshness consequent upon this, flexibility should be engrafted onto this standard by an application of degrees of proof in the manner suggested by Denning L.J. in Bater v. Bater.

3) That although legislation, or decision by the House of Lords or Privy Council, is needed to resolve the present uncertainty as to which standard really does apply, the best solution lies in the adoption of neither but rather in the creation of a single standard, with a variable range of degrees; the quantum of proof required being that which is sufficient to satisfy a judge, or jury, having reference to the gravity of the allegation made.

Postscript: see p. 76.