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The Reverse Burden of Proof in Health and Safety Prosecutions: As You Were

By Tim Green and William Moody

In *R v (1) AH Ltd and (2) Mr SJ*, the appellants sought leave from the Court of Appeal to challenge the reverse evidential and legal burdens of proof to establish the "reasonably practicable" defence pursuant to s40 HSWA1974. Although permission to appeal was ultimately refused, the reasoning behind the decision is important reading for health and safety practitioners in the context of increasingly vigorous prosecutions.

CONTEXT

1. Health and safety enforcement is increasingly robust. In 2019/20, seven H&S prosecutions ended in fines of £1m or more. The average level of fine in H&S cases has risen from £27,000 per conviction in 2014/15 to £110,000 per conviction last year. For individuals, the stakes have never been higher: around 8% of all convictions resulted in immediate custody in 2019/20, and a total of 31% of convictions resulted in either a suspended, community or custodial sentence.[1]

2. This is the context for the appeal in *R v (1) AH Ltd and (2) Mr SJ* [2021] EWCA Crim 359 in which the appellants sought leave to challenge the

[1] Health and Safety Executive, *Enforcement Statistics in Great Britain (2020)*. Published 4 November 2020.

evidential and legal burden of proof for the "reasonable practicability" defence to health and safety offences.

Facts and preliminary hearing

3. The facts in *AH Ltd* can be summarised quite shortly. Two care home workers were caring for an elderly woman in a care home run by AH Ltd. The director was Mr SJ who was also a co-accused. Whilst being assisted into her bath, the care home resident was scalded by hot water and died as a result of the burns. The prosecution case, out of which the appeal arose, contained six counts on the indictment. The Court of Appeal was concerned only with Counts 2 and 3 – breaches of s33(1)(a) of the HSWA by AH Ltd and Mr SJ for failures to appropriately fit the baths and showers within the care home and to train staff appropriately. Both pleaded not guilty to all counts.

4. The defendants made a joint application to have a preparatory hearing under s29 of the Criminal Procedure and Investigations Act 1996, and for the judge (Thornton J) to give a ruling as to where the burden lies in proving "reasonable practicability" under s40 of the HSWA. This preliminary ruling formed the issue on appeal after Thornton J found that the defence had to show both that (i) there was sufficient evidence for a defence of reasonable practicability to be left to the jury, and (ii) the defence, having discharged the evidential burden, had then to establish the defence of having done all that was reasonably practicable to the satisfaction of a jury on the balance of probabilities.

5. Both appellants sought leave to appeal Thornton J's ruling arguing that only the evidential burden should lie on the appellant and that once he had established sufficient evidence to raise the defence, then the legal burden

should shift to the prosecution to disprove the defence raised to the criminal standard of proof. The appellants were thus contending that the "reasonable practicability" defence have the same evidential and legal burden in common with other defences in the criminal law like self-defence. For example, if a defendant tried for assault adduces evidence he acted in self-defence then the prosecution must dis-prove self-defence to the criminal standard of proof.

The law before *AH Ltd*

6. It is worth considering the precise wording of s40 of the HSWA, which reads as follows (emphasis added):

> "*In any proceedings for an offence under any of the relevant statutory provisions consisting of a failure to comply with a duty or requirement to do something so far as is practicable or so far as is reasonably practicable, or to use the best practicable means to do something, it shall be for the accused to prove (as the case may be) that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement or that there was no better practicable means than was in fact used to satisfy the duty or requirement.*"

7. Thus the plain wording of s40 places a clear burden on an accused to prove that it was not reasonably practicable to do more than was in fact done to satisfy the duty. It is also fair to say that the section is not explicit as to whether this is an evidential burden only or a legal burden or both.

8. Before *AH Ltd*, the law appeared relatively settled. In *R v Davies* [2002] EWCA Crim 2949; [2003] ICR 586 the Court of Appeal found that s40 HSWA imposed both an evidential and legal burden on the accused to prove

on the balance of probability that it was not reasonably practicable for him to do more than he had in fact done to ensure safety at work (at [596C]). The Court of Appeal recognised that this would be "*some inroad into the presumption of innocence*", but did not find it incompatible with the ECHR (at [590B and 596C]). The House of Lords later approved *R v Davies* in the course of the judgement in *R v Chargot* [2008] UKHL 73; [2008] 1 WLR 1.

The appellants' case

9. AH Ltd advanced four arguments as to why *R v Davies* should be reconsidered and the law shift so that the defence only have the evidential burden to raise the issue of "reasonable practicability", whilst the legal burden to disprove the defence shifts to the prosecution (at [22-29]):

    a. "*Reasonable practicability*" is an element of the s33(1)(a) offence, and not a defence. As a result, s40 imposes a reverse burden of proof on the defence and in so doing violates the presumption of innocence.

    b. In *R v Davies*, the Court of Appeal confused "*reasonable practicability*" as a defence when in fact it was part of the offence, contributing to the so-called "*error*" identified in the first argument.

    c. The Court of Appeal in *R v Davies* drew an "*arbitrary*" distinction between regulatory offences and truly criminal offences: a distinction which ought no longer be sustained. Any such arbitrary distinction should not provide a basis upon which to undermine the presumption of innocence by reversing the usual burden of proof.

    d. Finally, the "*modern practicalities of investigating and prosecuting health and safety cases do not render proportionate a legal burden of proof on the defendant.*"

10. These arguments were further developed by AH Ltd who submitted that s40 of the HSWA should be read down to "*impose no more than an evidential*

burden on the defendant" – as opposed to the full legal burden – for a number of reasons, including compatibility with the ECHR, the presumption of innocence and the resources of the HSE which is capable of investigating facts relevant to a potential breach of the legislation (at [30]).

11. Mr SJ adopted the above arguments and added only the following two points (at [31-33]):

    a. When *R v Davies* was decided, a custodial sentence could not be imposed in respect of an offence under s3 and s37 of the HSWA, as they were introduced under the Health and Safety Offences Act 2008.

    b. Notices of contravention can now be issued by inspectors, by which the inspector must be satisfied that reasonably practicable measures were not in place.

Judgment

12. Despite the increasingly robust nature of H&S enforcement, and at face value the attractive nature of the appellants' submissions, the Court of Appeal—made up of Bean LJ, Mrs Justice Cheema-Grubb and HHJ Wendy Joseph QC—refused permission to appeal in fairly blunt terms.

13. Giving judgment for the Court, Bean LJ paid little mind to the arguments advanced by both Counsel on the basis that the law was settled and *"the approval of* Davies *in* Chargot *is clear and, in our judgment, binding"* [34]. There is nothing, Bean LJ went on to say, disproportionate in the reverse burden found in s40 of the HSWA. Further, even had *Chargot* never reached the House of Lords, the Court "*would have had great difficulty in accepting that* Davies *was decided* per incuriam" [36].

14. As for the argument advanced by Mr SJ, the Court "*could not see how the [case mentioned in submissions] assisted the argument*" and "*it is difficult to see that [Mr SJ's second point] is a relevant point either*" [32-33].

Discussion

15. The Court of Appeal chose to deal with the appellants' submissions on the crucial issue of the proper application of s40 HSWA in just three paragraphs because it felt bound by the judgment of the House of Lords in *R v Chargot.* This is not particularly surprising. The House of Lords in *Chargot* were unequivocal in their approval of the judgment in *Davies*: "*the Court of Appeal reached the right decision in [*R v Davies*], and it did so essentially for the right reasons*" (Lord Hope, at [14B]).

16. As to the question of burden under s40, the Lords in *Chargot* were similarly unequivocal. In providing the necessary statutory context, Lord Hope stated that the HSWA 1974 was designed to give effect to the Report of the Committee on Safety and Health at Work (Cmnd 5034), and that s40 deals specifically with the "*onus of proving the limits of what is reasonably practicable*", placing that onus "*on the defence*" (at [7H]). Lord Hope went on to say that s40 does not leave the "*important issue [of onus] to implication by providing expressly where the onus lies*" (at [8A]). This affirms the clarity of the statutory scheme and the little room for doubt available for subsequent appellate judges.

17. Further, the fact that an employee or a person not in employment but affected by an employer's undertaking is injured "*demonstrates that the employer failed to ensure his health and safety at work*", and the "*effect of the reverse burden must be understood against that background*" (at [14D]). Indeed,

as a result of this, Lord Hope held that *"the placing of a legal burden of proof on the employer in the case of this legislation is not disproportionate"* (at [14E]).

18. In *AH Ltd* the Court found it difficult to see how the latter part of s40 – "*it shall be for the accused to prove... that it was not practicable or not reasonably practicable to do more than was in fact done*" – could be interpreted in a way that does not impose the evidential and legal burden on an accused. The Court of Appeal considered this in detail in *Davies*, finding that "*the language of the statute... clearly imposed a legal burden*" [at 589F]. AH Ltd's suggestion to "*read down*" s40 would have the effect of effectively overriding a clear statutory provision in the courts, imposing as it would the burden of proof on the prosecution when it is clearly envisioned for the accused.

19. Bean LJ did not feel it necessary to address the Art 6(2) ECHR argument, raised by the company (at [30(a)]). The same point was raised by the appellant in *Chargot* (at [8D]) where the House of Lords dismissed the ECHR challenge by endorsing *Davies*.

20. Thus the law on s40 remains, therefore, very much "*as you were*". In *AH Ltd* there was a robust and well developed challenge to the reverse burden of proof under s40 HSWA concerning the defence of reasonably practicability. Concerns regarding proportionality, human rights and the need for consistency in the criminal law have been considered again and once again they have been dismissed. For all defendants, whether organisations or individuals, it is very clear that the burden of proof for the statutory defence will not be shifting in the near future. *As you were!*

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