THE BURDEN AND THE STANDARD OF PROOF

Jeremy Cooper **considers where the burden of proof lies in establishing liability in a tribunal, and what standard of proof is required in establishing liability.**

THIS ARTICLE examines the concepts of 'burden of proof' and 'standard of proof' in a tribunal setting. It is important that the examination takes place at this time of widescale unification of the tribunal system across multiple areas of work including reason writing, judgecraft training, appraisal, remuneration, cross-ticketing, and the development of a common set of procedural rules. The development of the tribunal jurisdiction as a discrete and distinct process of judicial adjudication across an increasingly diverse range of disputes challenges tribunals to acquire consistency or justify diversity in every aspect of their work. The multiple structural changes contained in the Tribunals, Courts and Enforcement Act 2007 will reinforce this change agenda, reaffirming that 'tribunals do not exist in isolation. Each jurisdiction is part of a wider system for delivering justice.'[1]

The court system has already established over several centuries a clear set of principles in relation to two questions that form the bedrock of due process in both the criminal and the civil courts. Where does the burden lie in establishing liability (civil courts) or guilt (criminal courts)? What is the standard of proof required in adjudicating the evidence to establish liability?

This article will address the same two questions in relation to the tribunal setting. What is the burden of proof in a tribunal? What is the standard of proof in a tribunal? In addressing these questions the article will probe further into the procedural structure of a a tribunal hearing and the extent to which a tribunal's deliberately less formal structures paradoxically render the answering of these two questions more complex.

> *'But in truth no real mischief results from an acceptance of the fact that there is some difference of approach in civil actions. Particularly is this so, if the words which are used to define that approach are the servants but not the masters of meaning.'*
>
> **Per Morris LJ in *Hornal v Neuberger Products Ltd* [1957] 1 QB 247**

The burden of proof

The dual concepts of burden of proof and standard of proof are most clearly understood in an adversarial system. In an adversarial system, the burden of proof rests with the party bringing the action, for example the State in the case of a criminal trial and the applicant in the case of a civil trial. In these circumstances, the court or tribunal listens to the parties who present their evidence and arguments according to strict rules of evidence and procedure. The stance of the judiciary in an adversarial hearing is not unlike that of a referee in a sporting engagement, ensuring the parties are given a fair hearing according to the rules of engagement, leading to a final adjudication as to who is the winner. It is essentially more of a reactive than a proactive role, although this approach is beginning to change with the introduction of higher levels of judicial case management following the implementation of the Woolf Reforms and the introduction of the Civil Procedure Rules in 1997.

By contrast, in an inquisitorial system the judiciary are not passive recipients of information. They have key responsibility for supervising the gathering of evidence and are actively involved in determining the questions to be put to the witnesses and parties, to ascertain the facts of the case. They are given wide powers enabling them to seek and obtain any evidence they deem to be relevant to the issues to be determined. The judiciary in an inquisitorial hearing must be highly proactive, and they are explicitly tasked with positively ascertaining the truth, rather than enabling the parties to do so.

Limited meaning

Commensurate with the inquisitorial approach is a rather more relaxed attitude to any rules of evidence (the law of evidence, for example, is not a discrete subject in French law schools) and the absence of any hearsay rule. Rather, in a truly inquisitorial system, the court simply attaches to every piece of evidence such weight as it thinks fit. Some English tribunals seem already to be modelled upon just such a principle. The process of benefits adjudication is, for example, deemed to be 'inquisitorial rather than adversarial'[2] leading to 'a cooperative process of investigation in which both the claimant and the department play their part'.[3] And in the words of Baroness Hale, 'if that sensible approach is taken, it will rarely be necessary to resort to concepts taken from adversarial litigation such as burden of proof'.[4] The Mental Health Review Tribunal is also 'to a significant extent inquisitorial',[5] and has a procedural rule permitting the tribunal 'to receive in evidence any document or information notwithstanding that such document or information would be inadmissible in a court of law'[6]. It follows that the concept of a burden of proof has limited meaning in an inquisitorial system, as it is the court or tribunal that retains the responsibility to establish the facts and determine the outcome in whatever way it deems appropriate. This is particularly the case where a tribunal is engaged in assessing risk, for example in Parole Board cases,[7] in cases involving perceived threats to national security as in the Special Immigration Appeals Commission,[8] and in cases that essentially involve the appreciation or the evaluation of economic questions, for example in the Competition Appeal Tribunal.[9]

Pragmatic approach

Another striking example of the difficulties in applying a one-size-fits-all definition of burden of proof in the complex world of tribunal hearings is to be found in the Asylum and Immigration Tribunal (AIT). The general legal principle in AIT cases, based in international law, is that the burden of proof lies on the person submitting the claim. But there may be many occasions when the person submitting an asylum claim is quite unable to support his or her claim by any personal documentary or other proof because of their age, their vulnerability or simply arising out of the circumstances in which they left their homeland. The pragmatic response of the AIT to these difficult situations has been only to require that the claimant must show 'a reasonable degree of likelihood' that he or she has a well-founded fear of being persecuted if obliged to return to their country of origin. And while this burden does in theory rest with the applicant, the duty to ascertain and evaluate all the relevant facts is in practice shared between the applicant and the tribunal.[10]

Merging the concepts

Although the civil and criminal courts are generally of an adversarial nature (the small claims court, and the Family and Childrens' Courts being the principal exception to this norm)[11] tribunals range widely from the primarily adversarial (such as the Employment Tribunal), where the burden of proof clearly rests with the applicant, to the primarily inquisitorial (for example, the Criminal Injuries Compensation Adjudication Panel, the Competition Appeal Tribunal and the Social Security and Child Support Appeals Tribunal), where the tribunal takes on the role of establishing the outcome. The difficulty lies

in the case of tribunals that are hybrid, or 'quasi-inquisitorial', and thus neither one thing nor the other. The Special Educational Needs Tribunal (SENDIST) is one such example, with a process that begins in a highly adversarial mode, moving towards an inquisitorial phase of investigation once the core differences between the parties have emerged from beneath the adversarial umbrella. The Mental Health Review Tribunal (MHRT) is another such example, but with a different process. Mumby J in *R oao DJ v MHRT and Mersey Care Mental Health NHS Trust and SoS for Home Department* [2005] EWHC 587[12] struggled to define the precise nature or definition of the concept of a burden of proof in the MHRT, settling in preference for the Strasbourg term 'onus of proof',[13] or his own version of the term, the 'persuasive burden'. The Court of Appeal in this case was alive to the difficulty of talking of a 'burden of proof' in such a setting and process, coming up with an intriguing new fusion of the concepts of burden and standards of proof embracing the entire decision-making process, in their use of the phrase 'burden of persuasion':

> Analysis of this issue is not helped by the fact that 'proof' in the phrase 'standard of proof' and 'probabilities' in the phrase 'balance of probabilities' are words which go naturally with the concept of evidence relating to fact, but are less perfect with evaluative assessments. That is why the courts have started to speak of 'the burden of persuasion'.

In essence, by this statement the Court of Appeal appears either deliberately or unwittingly to have merged into closer unity the twin concepts of burden of proof and standard of proof kept separate in traditional court jurisprudence, in recognition of the particularities of the more holistic approach to the adjudication process represented by the inquisitorial tribunal. So what are the current rules regarding the standard of proof in a tribunal hearing?

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The standard of proof

In the two cases of *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 and *SoS for the Home Department v Rehman* [2003] 1 AC153 the House of Lords laid down a series of guiding principles on standard of proof, as follows:

1. Where the matters in issue are facts, the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability.
2. The balance of probability standard means that the court must be satisfied that the event in question is more likely than not to have occurred.
3. The balance of probability standard is a flexible standard. This means that when assessing this probability the court will assume that some things are inherently more likely than others. This concept was memorably encapsulated by Lord Hoffmann, when he observed:

   > 'It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an alsatian.'

4. The more serious the allegation the less likely it is that the event occurred, and thus the stronger and more cogent should be the evidence before a court determines that on the balance of probabilities, the event did occur. This principle has been regularly applied in a number of different settings for the past 60 years.

These are the principles laid down to apply in non-criminal proceedings in the general civil courts, but should they also govern all tribunal proceedings? Although there is no direct authority to support this assertion, the principles are so self-evidently applicable to tribunals that, echoing Diplock LJ in *Robson v Hallett* [1967] 2 QB 939,[14] 'there is no authority because no one has thought it plausible up till now to question them'. The principles have been meticulously grafted from the raw materials of adjudications in a range of civil settings, all of which have a judicial character and have been finessed by high judicial authority. The work of tribunals is equally judicial and adjudicative. In some tribunal jurisdictions – for example the Competition Appeal Tribunal and the Mental Health Review Tribunal - the standard of proof has already been explicitly set down in case law as being the balance of probabilities.[15] In others – for example schools' appeals panels – the standard of proof is actually set down in regulations.[16]

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A further factor that suggests the balance of probabilities to be the appropriate standard in a tribunal setting relates to the inquisitorial nature of most tribunal proceedings which is arguably best served by such a test, given the informal nature of the proceedings, and also the frequently open-textured subject matter. For example, in holding that the approach to be adopted towards the required standard of proof in cases involving children and family proceedings should be the balance of probabilities, Dame Elizabeth Butler-Sloss observed as follows:[17]

> 'The strict rules of evidence applicable in a criminal trial which is adversarial in nature is to be contrasted with the partly inquisitorial approach of the court dealing with children cases in which the rules of evidence are considerably relaxed . . . The standard of proof to be applied in Children Act 1989 cases is the balance of probabilities.'

But even where the applicable standard of proof has not yet been explicitly established within a specific tribunal jurisdiction there is strong indirect support for this proposition by inference from other case law, unless the jurisdiction in question exercises powers that are clearly more commensurate with a criminal or quasi-criminal jurisdiction, than a civil adjudication.

There have been a series of important High Court decisions over the past decade that have sought to establish special standards, where the circumstances fall markedly outwith the normal range of civil actions. These cases have related in particular to:

- Sex Offender Orders under the Crime and Disorder Act 1998 (*B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340).
- Football Banning Orders under the Football Spectators Act 1989 (*Gough v Chief Constable of the Derbyshire Constabulary* [2002] QB 1213).
- Anti Social Behaviour Orders (ASBOs) (*R (McCann) v Crown Court at Manchester* [2003] 1 AC 787).

In all three settings the court concluded that the standard of proof to be applied was of a different, more stringent, nature that the balance of probability standard. They described the standard respectively as follows:

- 'A civil standard of proof which will for all practical purposes be indistinguishable from the criminal standard.' (Sex Offender Orders)
- 'An exacting standard of proof that will, in practice, be hard to distinguish from the criminal standard.' (Football Banning Orders)

- 'A heightened civil standard (that is) virtually indistinguishable [from the] criminal standard.' (ASBOs)

What is significant about these cases, however, is that they all fall into a category of case described by Lord Hope of Craighead as cases where 'allegations are made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person against whom they are made'.[18]

While it might be argued that a number of tribunals make decisions that if adverse, have 'serious consequences' for the person against whom the adverse finding is made, Lord Steyn explained the concept of 'serious consequences' as bearing a rather more narrow meaning in this context. In Lord Steyn's words, the 'unifying element' linking the three cases was 'the use of the civil remedy as an injunction to prohibit conduct considered to be utterly unacceptable, with a remedy of criminal penalties in the event of disobedience' and this he explains is what is meant by 'serious consequences'. Such elements appear far outwith the jurisdictions and concerns of most if not all tribunals.[19]

In conclusion, where a tribunal deals with non-criminal proceedings it would seem manifestly clear that the standard of proof that should be applied in every case is that of the balance of probabilities.

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[1] *Transforming Tribunals: Implementing Part 1 of the 2007 Act*, Consultation Paper CP 30/07, p 5.

[2] *R v Medical Appeal Tribunal (North Midland Region) ex P Hubble* [1958] 2 QB 228.

[3] *Kerr (AP) v Department for Social Development (Northern Ireland)* [2004] UKHL 27.

[4] Ibid at para 63.

[5] Per Stanley Burnton J in *R oao Ashworth Hospital Authority v MHRT* [2001] EWHC Admin 901.

[6] Mental Health Review Tribunal Rules 1983, Rule 14 (2). The Office of Fair Trading and the Road Use Charging Adjudicator Tribunal have similar open-textured provisions in their rules of procedure.

[7] See for example *R oao Sim v Parole Board* [2004] QB 1288 at para 42 per Keele LJ, 'the concept of a burden of proof is inappropriate where one is involved in risk evaluation' and *R oao Brooks v The Parole Board* [2004] EWCA Civ 80 at para 28 per Kennedy LJ, 'ultimately the burden of proof has no real part to play'.

[8] See for example *SoS for Home Department v Rehman* [2003] 1AC. At para 56, Lord Hoffmann extended this scepticism also to the standard of proof (see below) when he said 'the whole concept of a standard of proof is not particularly helpful in a case such as the present'.

[9] *JJB Sports PLC v Office of Fair Trading* [2004] CAT 17.

[10] See Jarvis C (2007) *A View from the United Kingdom*, unpublished paper presented at the UNHCR and ECRE Seminar for Ukrainian Judiciary Refugee Protection, Kiev, paras 15–36.

[11] Children Act proceedings are 'primarily non-adversarial and investigative as opposed to adversarial . . . (in which) the notion of a fair trial assumes far less importance': *Re L (a Minor) (Police Investigation: Privilege)* [1997] 16 AC 17, per Lord Jauncey at 26H–27B.

[12] At para 105. See also [2005] EWCA Civ 1605.

[13] Used in *Reid v United Kingdom* (2003) 27 EHRR 211 at para 77.

[14] At p 953.

[15] (CAT) *JJB Sports PLC v Office of Fair Trading* [2004] CAT 17; (MHRT) *R oao AN v MHRT and SoS for Home Dept and Mersey Care Mental Health NHS Trust* [2005] EWCA Civ 1605. In both cases, however, the court emphasised that where serious matters are in issue (e.g. in the MHRT the liberty of the individual and the protection of the public, and in the CAT the alleged dishonest conduct of a party) the quality and the weight of the evidence needs to be stronger than it would need to be if the matters under consideration were less serious.

[16] *Education (Pupil Exclusions and Appeals) (Maintained Schools) (England) Regulations 2002*, SI 2002/3178 Reg 7A, inserted by *Education (Pupil Exclusions) (Miscellaneous Amendments) (England) Regulations 2004*, SI s 2004/402.

[17] In *re U (A Child) (Department for Education and Skills intervening)* [2005] Fam 134, at 13.

[18] *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787 at para 82.

[19] Even the fact that the Secretary of State for Justice has the power to recall to hospital a patient conditionally discharged by a tribunal, thereby taking away their liberty is not considered sufficient to alter the standard of proof required by the Secretary of State, or the tribunal reviewing the recall, which remains that of balance of probabilities.