

Innocent beyond reasonable doubt?

I have noticed in the press that an increasing number of criminal convictions are being quashed and suggestions that claims of child abuse in the distant past had been accepted too easily. I raised the matter with Charles and wasn't surprised when he looked at the other side of the coin.

'Charles, don't you think that it's terrible that the number of convictions overturned by the Court of Appeal appears to be increasing?'

'Do you really think that that represents an increase in the number of miscarriages of justice?'

'I don't know,' I said. 'Perhaps people didn't bother to appeal when they felt the Court of Appeal was not so sympathetic.'

'There may be something in that, Coe,' he said, 'but whether or not numbers are increasing, one must remember the usual wording in a successful case.'

'That the conviction is "unsafe"?''

'Yes,' he replied, 'that means that the test of guilty beyond reasonable doubt was not met, but not that the person is necessarily innocent.'

'But isn't there a presumption of innocence before the crime? Shouldn't it follow logically that they are innocent?'

'Yes, but nevertheless, it is still presumption and not proof of innocence. It causes me grave concern when the successful litigant and, more particularly, their lawyers flaunt this new found innocence.'

'Yes but aren't they entitled to?'

'Yes, but like all rights this should be exercised with discretion. An absolute presumption of innocence may give rise to great difficulties where the alleged offence is within the sphere of an authority that has a duty of care to others.'

'You mean in cases of child abuse?'

'Yes, that is probably the easiest example to take,' he replied, 'but there are many other situations, for example financial regulation, where the same principles apply. Let's take an extreme example.'

A schoolteacher's conviction for raping a pupil is quashed because the prosecution withheld a material fact. Despite the girl being pregnant, the police make no secret of the fact that they have decided to take no further action, and this is the only complaint against the schoolmaster. What do the Board of Governors do?'

'Difficult,' I said.

'Well, let's start at the other end. It is the duty of an educational institution to establish that all teachers are not a risk to the pupils they teach. This implies that the employer should be confident of this beyond reasonable doubt, rather than on balance of probabilities. The governors are therefore quite justified in not employing someone if they have reasonable suspicions that this might present a risk.'

'But that is allowing a presumption of guilt rather than innocence.'

'From the innocent individual's point of view that is most unfortunate, but the balance of good requires that a few people will wrongly suffer the indignity of refusal of employment.'

'But that is wrong!' I protested.

'But is it right to employ a teacher who you feel may rape a pupil even if you haven't got proof?'

'Certainly not,' I replied.

'You can't have it both ways! There is a clear conflict here.'

'But he has been found not guilty,' I protested.

'Yes, but clearly the information before the court was sufficient to refuse employment. It would have remained so, had a trial not taken place, had the prosecution decided not to present inadmissible evidence and so lost the case, and of course it would have remained so had the man stayed convicted. Should he now be employed despite the fact he is a probable though not certain offender?'

'I suppose not, but if you don't employ him it is effectively a vote of no confidence in the Court of Appeal,' I replied.

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'Not if you accept the wording of the judgement literally.'

'But say he was innocent, Charles?'

'He has a civil remedy, which is alright if he is indeed innocent, but as the test is balance of probabilities; the danger is that he succeeds despite being a risk.'

'And that might lead to disaster!'

'Yes,' he replied, 'but I am sure that the law should be clarified now. As appeals become more frequent, tests of evidence more strict and the demands of protection greater, but human rights more prominent, the potential for tragedy and administrative catastrophe must increase. A major review of the law and practice will then be demanded. It is better to anticipate this, if only to prevent overreaction in the other direction. Think of dangerous dogs and Dunblane! Hasty and bad legislation was introduced in response to public, or press, outcry! Now Olympic marksmen cannot practice in this country and dogs are destroyed unnecessarily.'

'What is the solution?' I asked.

'Any solution must recognise that a large proportion of cases will be in the range of 5 – 95% probability of guilt, where the approaches of the criminal courts and of the regulatory authorities will correctly lead to opposite conclusions. Apparently perverse decisions are inevitable'

'Yes, but anything more specific that might help?'

'In the example, the conviction was quashed without commenting on the certainty of innocence. It seems to me that where a third party who has a duty to care of others is involved, the Court of Appeal should be prepared to state the probability of innocence, either on a graded scale, or by giving to give a verdict of innocent beyond reasonable doubt when appropriate.'

'Then if the verdict were not innocent beyond reasonable doubt that would leave him in limbo.'

'True,' he replied, 'particularly with graded verdicts. I think these would have to be only released on a confidential basis to those with a duty of care. I am not so sure about 'innocent beyond reasonable doubt'; it could be argued that justice demands its publication.'

'And what about acquittal in the first instance?'

'The otherwise unsatisfactory verdict of not proven would solve the problem, but at this level it is probably better to keep the verdict simple. A new code of practice should explicitly state that the Court's implication of innocence in a criminal court's verdict of not guilty is not binding on employers and regulatory authorities with a duty of care.'

I can see the strength of his arguments. Is now the time for public education and debate on the inevitable conflict that arises when one tribunal demands proof of innocence and another proof of guilt in cases that, by their very nature, are often difficult to prove either way?

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