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Article 22

Hanes v. Wawanesa Mutual Insurance Co., [1963] S.C.R. 154

C. S. R.

Hanes v. Wawanesa Mutual Insurance Company,[1] a Supreme Court of Canada decision, decided that the standard of proof applicable in a civil case where it is necessary to prove a criminal act is the balance of probabilities test rather than the more stringent test in criminal proceedings proper of proof beyond a reasonable doubt.

The double standard of proof for civil and criminal cases, established in the nineteenth century, has been the subject of unclear consideration by the courts, much discussion and much criticism.[2]

The respondent insurance company brought this action against the appellant Hanes, pursuant to the provisions of *The Insurance Act*, Ontario, for reimbursement of $22,174.85 paid by it towards satisfaction of a judgment against the appellant. The appellant was insured by the respondent under a standard automobile insurance policy and was the unsuccessful litigant in an action arising out of a motor vehicle accident. The respondent alleged that the sum paid was one which it would not have been liable to pay except for the provisions of s. 214(1) and (3)(ii) of the Insurance Act because the appellant at the time of the accident was "under the influence of intoxicating liquor to such an extent as to be for the time being incapable of the proper control of the automobile" within the meaning of the prohibition in statutory condition 2(1)(a) of the policy.

The trial judge thought that on the reasonable balance of probabilities the defendant was under the influence of intoxicating liquor to the extent specified in condition 2(1)(a) but he was also of the opinion that he was bound to be satisfied "beyond reasonable doubt"

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1 [1963] S.C.R. 154.

2 G. H. L. Fridman, *Standards of Proof*, (1955) 33 Can. Bar Rev. 665. As a result of the instant case there is more certainty as to standards of proof, but the definition of the standards may still give rise to confusion.

since it was a criminal act to drive while under the influence of intoxicating beverages, hence he ruled for the defendant.

In the Court of Appeal Porter C.J. was of the opinion that the trial judge used the correct standard of proof, but the other two judges allowed the appeal upon another issue. A new trial was ordered but this decision was appealed to the Supreme Court of Canada.

The trial judge followed the case of *London Life Insurance Co. v. Trustee of the Property of Lang Shirt Co. Ltd.*,[3] as interpreted in *Earnshaw v. Dominion of Canada General Insurance Co.*[4] In the *Earnshaw* case Robertson C.J.O. interpreted Mignault J. in the *Lang Shirt* case as laying down the proposition that criminal acts in civil trials must be proved by the same standard applicable to criminal trials, namely beyond a reasonable doubt.

The Supreme Court Justices examined these two cases in the light of several others and decided that Robertson C.J.O. had misinterpreted the following passage from the *Lang Shirt* cast:

> That there is in the law of evidence, a legal presumption against the imputation of crime, requiring, before crime can be held to be established, *proof of a more cogent* character than in ordinary cases where no such imputation is made, does not appear to admit of doubt.[5]

The Supreme Court majority felt that the words "of a more cogent character" are by no means synonymous with "proof beyond a reasonable doubt"; Mignault J. did not intend that the same standard of proof as used in criminal cases should be applied to civil cases where criminal acts must be proved, as he said:

> . . . while the rule is not so strict in civil cases as in criminal I think that when a right or defence rests upon the suggestion that conduct is criminal or quasi-criminal, the court should be satisfied not only that the circumstances proved are consistent with the commission of the suggested act, but that the facts are such as to be inconsistent with any other rational conclusion that the evil act was in fact committed.

In the early case of *Cooper v. Slade*[6] which involved a quasi-criminal issue in a civil case the House of Lords supported the proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict.

The instant case is significant since it considers the policy reasons for the double standard of proof. The consequence of finding a man guilty in a criminal case often involves his very liberty, and individual liberty is the basis of the English judicial system. In civil cases, however, we are balancing the interests between two litigants and not between the state and an individual member of society.

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3 [1929] S.C.R. 117.
4 [1943] O.R. 385.
5 *Supra*, footnote 3 at p. 125.
6 (1858) 6 H.L. Cas. 746.

Despite diverse decisions as to the standard of proof required in civil cases, the Supreme Court feels that the weight of authority favours the balance of probability as the proper test. Phipson[7] and Wigmore[8] support the position here adopted by the Supreme Court.

It is submitted that this decision is not entirely unequivocal as to the standards of proof because the court incorporated in their decision Denning L.J.'s statement in *Bater and Bater*:[9]

> The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases but this is subject to the qualification that there is no absolutet 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. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

Denning L.J. pondered the meaning of real and substantial doubt (that is reasonable doubt) and decided that "reasonable doubt" could aptly be used as a test in civil or divorce cases or in criminal cases. The only difference is that a doubt might be regarded as reasonable in a criminal case yet not in a civil case. By adopting this attitude Denning L.J. made a further illusory and subtle distinction based on the old modes of speech which can only further the semantic confusion already patent in the field.

It is submitted that the two standards of proof are incapable of accurate definition, and are meaningful only as guide lines in the context of the facts of a particular case. To be realistic one must admit that there are varying standards within these standards which are constantly applied in our courts.

The *Wawanesa* case settles in Canada a long policy dispute and in doing so, it restates the real purpose of the dichotomy of standards. When balancing the interests between individuals within our society "a balance of probabilities" is to be our guide line, and the more serious the ramifications the more proof the court will require to be satisfied. However, when the state has accused a man of a crime and threatens to fine him or take away his liberty, the consequences of making a mistake are so great that an accused should be convicted only if the acts of which he is accused are proved beyond a reasonable doubt.

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[7] Phipson *On Evidence*, (9th ed.), p. 9.
[8] Wigmore, *On Evidence*, 3rd ed., para. 2498 at p. 327.
[9] [1950] 2 All E.R. 458 at p. 459.