On the 13th day of Christmas, my true love gave to me: 13 axioms of fact finding!

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PRACTICES Litigation, Europe, Middle East and Africa, International Arbitration

The claimant bears the burden of proof in litigation or arbitration proceedings. It is equally well known that in civil proceedings, the standard of proof is the 'balance of probabilities'. But what does that mean in practice? How do tribunals in the common law tradition decide matters of proof, assess evidence (both witnesses and documents) and make findings of fact? How do they approach cases where there is either very little evidence, or where there may be competing explanations or theories for what happened, or where all the proffered explanations appear far-fetched? This article looks at questions of proof and fact-finding, and considers both a classic and a recent decision where the English Courts had to grapple with difficult questions of causation. The Courts found that none of the expert evidence offered an explanation that was more likely than not to be accurate. We also take you on a whistle-stop tour of the thirteen axioms of fact finding.

An unexplained death

In 1886, the body of a man, one Henry Wakelin, was found at night on a railway line near Chiswick in London, where the line crossed a public footpath. So far, so Christmassy. As to the circumstances that led to Mr Wakelin's death, not much was known. The train that had evidently hit him had its headlights switched on, but did not whistle or otherwise warn of its approach. The level crossing was protected by gates that could be opened manually. The railway company employed a watchman to operate the gates, but only during the day. From the spot where Mr Wakelin had been found on the line, an approaching train could be seen from a distance of more than half a mile, and the train's headlights would have been visible from that distance.

Mr Wakelin's widow sued the railway company for negligently operating the train that had killed her husband. She had no evidence as to precisely how the deceased ended up on the railway tracks, or the precise circumstances of the train hitting him. Such witnesses as appeared at trial only testified that the railway crossing was a ten minute walk away from his cottage, and that Mr Wakelin had left sometime after dinner, never to be seen alive again. The widow's case was essentially that it could be assumed that her husband had died using the level crossing (as he was lawfully permitted to do) and his death thus had to have been caused by the negligence of the railway company. The railway company led no evidence (by, for example, of the driver of the train). They submitted that there was no case to answer: in modern legal parlance, that the plaintiff had failed to discharge the burden of proof.

At first instance, the judge left a case of negligence for the jury to decide. The jury returned a verdict in the plaintiff's favour and awarded the widow £800 (according to the Bank of England's inflation calculator, £85,911.80 in today's money). If the case had been decided forty years earlier, the widow might have claimed ownership of the locomotive itself by virtue of it being a "*deodant*". This is because an article or piece of property that caused unlawful death could be forfeit at common law. By 1886, however, this had been abolished by Parliament. The Fatal Accidents Act had been enacted to provide for claims for damages instead. Anecdotally, the practice of claiming

entire trains as *deodant* may have precipitated the change in law (per the late R.W.M. Dias QC of Magdalene College, Cambridge).

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