LEGAL UNDERSTANDING OF THE BURDEN OF PROOF AND ITS APPLICATION

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KEY WORDS:

Burden of proof, evidential burden, plaintiff, respondent, petitioner, tactical burden, provisional burden, order of proof.

ABSTRACT:

The burden of proof is a central feature of all systems of adjudication, yet one that has been subject to little normative analysis in this area. This article examines how strong evidence should have to be in order to assign liability when the objective is to maximize social welfare. In basic settings, there is a tradeoff between deterrence benefits and chilling costs, and the optimal proof requirement is determined by factors that are almost entirely distinct from those underlying the preponderance of the evidence rule and other traditional standards. As a consequence, these familiar burden of proof rules have some surprising properties, as do alternative criteria that have been advanced.

AÇAR SÖZLƏR:

Sübutetmə yükü, ittiham yükü, iddiaçı, cavabdeh, ərizəçi, taktiki yük, müvəqqəti yük, sübutetmə qaydası.

XÜLASƏ:

Sübutetmə yükü bütün məhkəmə sistemlərinin əsas xüsusiyyətlərindəndir, lakin bu sahədə kifayət qədər normativ təhlillər aparılmamışdır. Bu məqalə sosial rifahın maksimum səviyyədə təmin edilməsi məqsədilə məsuliyyətin yaranması üçün hansı dərəcəli dəlillərin olmasını təhlil edir. Təməl qaydalara əsasən cəzanın faydalılığı və xərcləri arasındakı qarşılıqlı anlaşma mövcuddur və optimal sübut tələbi sübutetmə qaydasının üstünlüyünün və digər ənənəvi standartları təşkil edən amillərdən tamamilə fərqli faktorlar ilə müəyyən edilir. Nəticə olaraq, sübutetmə qaydalarını məlum olan digər meyarlarından fərqli olaraq bəzi maraq doğuran xüsusiyyətlərə də malikdir.

КЛЮЧЕВЫЕ СЛОВА:

Бремя доказывания, доказательственное бремя, истец, ответчик, заявитель, тактическое бремя, временное бремя, порядок доказывания.

АННОТАЦИЯ:

Бремя доказывания является центральной характеристикой всех систем вынесения судебных решений, но в этой области нормативный анализ был проведён в недостаточной мере. В этой статье рассматривается определения и уточнения доказательств для определения ответственности с целью максимизации социального обеспечения. Согласно базовым условиям существует компромисс между преимуществами наказания и затратами на осуществление этого наказания и оптимальное требование к доказательству определяется факторами, которые почти полностью отличаются от факторов, лежащих в основе преобладания правила доказывания и других традиционных стандартов. Как следствие, это знакомое бремя правил доказательства обладает некоторыми удивительными свойствами в отличии от общепризнанных правил.

INTRODUCTION:

The existing literature on the burden of proof has sought the rule's reason for existence solely within the court's problem of decision making under uncertainty. Although this search has yielded many insights, it has been less successful in providing a compelling explanation for why uncertainty in the court's final assessment should act to the detriment of one party rather than the other. By viewing the problem as one of

mechanism design, this article provides one explanation for the asymmetry. A rule resembling the burden of proof emerges from the optimal design of a system of fact-finding tribunals in the presence of: (i) limited resources for the resolution of private disputes; and (ii) asymmetric information—as between the parties and the court—about the strength of cases, before the court expends the resources necessary for a hearing. The article shows that if the objective in designing a trial court system is the accuracy of recovery granted, the "value" of having heard a case will depend in part on the certainty with which the court makes its final award. An optimally designed court system will then effectively filter out "less valuable" cases by precommitting to a recovery policy in which plaintiffs recover nothing unless they prove their cases with a threshold degree of certainty.

In both criminal and civil cases the phrase 'burden of proof' is commonly said to be used in two quite distinct senses. In one sense it means 'The peculiar duty of him who has the risk of any given proposition on which the parties are at issue — who will lose the case if he does not make this proposition out, when all has been said and done.[1]' The burden of proof in this sense has variously been termed 'the legal burden'[2] , 'the risk of non-persuasion',[3] 'the fixed burden of proof',[4] 'the probative burden',[5] and 'the burden of persuasion'.[6] The phrase 'the legal burden' is the most commonly used, and is the one that will be adopted in this article.

James Burdette Thayer defines the second sense in which the phrase 'burden of proof' is used as 'the duty of going forward in argument or in producing evidence; whether at the beginning of a case or at any later moment throughout the trial or the discussion'. Cross refers to this burden as: he obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue, due regard being had to the standard of proof demanded of the party under such obligation.[7] The phrase burden of proof refers to the obligation of a party who initiates a legal action (the "plaintiff") to prove his or her claims. If that party cannot prove sufficiently that the other party has committed a wrong, whether civil or criminal, he loses. The level or certainty to which the plaintiff must prove his case depends on the type of case. When an individual files a civil lawsuit against someone else, the burden of proof rests on his shoulders. When the parties go to court, they each have an opportunity to tell their side of the story. Of course, if that was all that was needed, nearly every case would end in a "he said / she said" situation. The party who filed the lawsuit, called the "plaintiff," or the "petitioner," must prove that the things alleged in the lawsuit are true, and that the other party, called the "defendant," or the "respondent," caused harm or damages.

The standard to which the plaintiff must prove his case in a civil lawsuit is quite different from the standard of proof required in a criminal case. In a civil case, it need only be proven by a preponderance of evidence, which means that it is more likely than not that the defendant's actions caused the plaintiff's damages. There are some types of civil cases that are considered to be more serious. These cases must be proven by clear and convincing evidence, which means that the evidence presented against the defendant must have a high probability of being true.

There is a significant difference in the formulations adopted by Thayer and by Cross, and this will be considered presently. This burden has been referred to as 'the evidential burden',[8] 'the duty of producing evidence satisfactory to the judge',[9] and 'the burden of proof in the sense of introducing evidence'.[10] The phrase 'the evidential burden' is the one that will be adopted in this article.

These two burdens are, of course, quite distinct and arise at different points in a trial. Where the question is whether a no case submission should be accepted, or whether a particular issue should be left to the jury or considered by the judge in a case tried by judge alone, it is the evidential burden which is in issue. Where the question is what should be done if, at the end of the day, the court is unsure where the truth lies, it is the legal burden that is in issue. Wigmore summarises the distinction between the two burdens as follows:

The risk of non-persuasion operates when the case has come into the hands of the jury, while the duty of producing evidence implies a liability to a ruling by the judge disposing of the issue without leaving the question open to the jury's deliberations.

Considerable confusion has arisen from a failure to distinguish adequately between these two burdens. Thus, appeals have been allowed because the trial judge directed the jury that the legal burden rested on a party whereas in fact only the evidential burden rested

upon that party.[11] On occasion appeal courts themselves discuss questions of burden of proof without making it clear whether they are talking about the legal burden or the evidential burden.[12]

A more subtle source of confusion, however, lies in the fact that the expression 'evidential burden' is commonly used to refer to two notions that are in fact quite distinct. In the first sense the evidential burden means the burden of adducing evidence on an issue on pain of having the trial judge determine that issue in favour of the opponent. This is the sense in which the expression 'evidential burden' is used in the passage quoted from Cross, above.

The second sense in which the expression 'evidential burden' is used includes the burden resting upon a party who appears to be at risk of losing on a given issue at a particular point in the trial. The party is under an evidential burden in the sense that if the party does not produce evidence or further evidence he or she runs the risk of ultimately losing on that issue. The passage from Thayer immediately preceding that from Cross incorporates this meaning into the concept of burden of proof.

Both judges[13] and academic commentators commonly treat the evidential burden as incorporating both these notions. Yet they are clearly distinct. The former involves a question of law, while the latter involves merely a tactical evaluation of who is winning at a particular point in time. Among commentators who in fact distinguish between these two concepts, the expression 'evidential burden' is commonly reserved for the former notion and the expression 'tactical burden'[14] or 'provisional burden'[15] is used to refer to the latter notion. The expression 'tactical burden' is the one that will be used in this article.

It is commonly said that the burden of proof 'shifts' during the course of a trial. Sometimes it is asserted that the evidential burden but not the legal burden may shift.[16] Sometimes it is asserted that both burdens may shift.[17] Such assertions involve, it is submitted, an inadequate analysis of the concept of burden of proof.

Any case, whether civil or criminal, involves a finite number of potential issues; a number of elements comprise each cause of action and each criminal offence, and a number of potential defences are available to the defendant or the accused. In respect of each of these issues, rules of law determine upon which party the legal and the evidential burden lies. The only burden that does shift in the course of a trial is the tactical burden. A failure to distinguish between the evidential burden and the tactical burden would appear to be responsible for most of the suggestions that the burden of proof shifts. At any given point in time a party who has the legal burden in respect of a particular issue may appear more or less likely to be able to discharge that burden. If that party appears likely to be able to discharge the legal burden, then the tactical burden shifts to the other party; the other party must produce contradictory evidence or run the risk of losing on that issue. If that other party produces such evidence, then the tactical burden may shift back to the party bearing the legal burden. Such swings of the forensic pendulum as a case progresses involve, however, no shift in either the legal or the evidential burden.

It is well known that the standard of proof in a civil case is proof on the balance of probabilities, and that this means that the party bearing the burden of proof must prove that her case is more probable than not. Indeed, the civil standard of proof appears to be one of the simplest concepts in the law of evidence, requiring little explanation or illustration. But scratch the surface of this most basic of evidentiary notions and an altogether more complex picture is reveald: the case law provides a range of conflicting interpretations of what the civil standard of prff requires in diffeent contexts. When an area of the law is this this confused, one starts to suspect that the problem lies in more than a failure by the apellate courts to resolve conflicting authorities and to lay dawn clear guidance (though this has certainly added to the difficulties in this area); one is dawn instead to the conclusion that the confusion lies at a deeper, conceptual level and that it is driven by the lack of a clear understanding of the basic building blocks of forensic proof.[18]

It is sometimes suggested that the operation of presumptions is to shift the evidential and even the legal burden of proof. However, this is not so. When one party establishes facts that give rise to a presumption, he or she merely shifts the tactical burden onto the other party in a particularly strong sense. The other party is faced not merely with the likelihood of losing on that issue unless contradictory evidence is produced, but is faced with the certainty of doing so. The operation of a presumption is that it is sufficient, unless rebutted, to satisfy the requirements of a burden. It is not to shift

a burden.

Law traditionally distinguished between "burden of proof" and "order of proof". Burden of proof determined which party to a suit had the responsibility for adducing evidence of one particular issue of fact (often referred to as the "evidentiary burden"). Order of proof, on the other hand, related to the sequence in which the facts or allegations had to be proven by one party or the other to the suit during the trial. This traditional distinction between burden of proof and order of proof was understood and applied in marine cargo claims as in other types of litigation.

In some cases several insurance companies will use the courts to determine which company is responsible for providing coverage. This situation occurs in circumstances in which the insured has several different policies covering similar or related risks. The insurers are required to demonstrate either that the loss was caused by an event that was not covered under the policy, or that another insurance company is responsible for the coverage. The courts may decide that a particular policy is responsible for providing coverage, but may also determine that the different insurers are responsible for a portion of the loss.

In a fair number of insurance cases that get to court, negligence is alleged. This has been defined as the failure to exercise reasonable care. Insurers will try to prove that the insured failed to do something a reasonable person would do, or conversely, did something a reasonable person wouldn't do. As in all civil cases, the ruling is based on a preponderance of the evidences more than 50% of the evidence must point to something. It's the stuff that lawyers bill millions of hours for every year.

The burden of proof requirement is designed to ensure that legal decisions are made based on facts rather than by conjecture. In insurance, it is used in the courts to determine whether a loss is covered by an insurance policy. Typically, the insured has the burden of proof to demonstrate that a loss is covered under the policy, while the insurer has the burden of proof to demonstrate that a loss was excluded under the terms of the policy contract.

CONCLUSION:

Burden of proof is a legal standard that requires parties to demonstrate that a claim is valid or invalid based on facts and evidence. Burden of proof is typically required of one party in a claim, and in many cases the party that is filing a claim is the party that must demonstrate that the claim is valid.

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8. Ibid; Heydon, Evidence: Cases and Materials, above n3 at 13.

9. Wigmore, above n4 at §2487; Cleary, above n7 at 783.

10. Purkess v Crittenden [1965] HCA 34; (1965) 114 CLR 164 at 168 (Barwick CJ, Kitto & Taylor JJ).

11. Eg, Sutton v Sadler [1857] EngR 738; (1857) 3 CB (NS) 87; Purkess v Crittenden [1965] HCA 34; (1965) 114 CLR 164; R v Guerin [1967] 1 NSWR 255; R v Joyce [1970] SASR 184; R v Hinz [1972] Qd R 272.

12. Eg Redpath v Redpath and Milligan [1950] 1 All

ER 600; Watts v Rake [1960] HCA 58; (1960) 108 CLR 158.

13. Purkess v Crittenden [1965] HCA 34; (1965) 114 CLR 164 at 167–168; Currie v Dempsey (1967) 69 SR (NSW) 116 at 125; Henderson v Henry E Jenkins & Sons & Anor [1970] AC 282 at 301.

14. Heydon, Cross on Evidence, above n3 at 197; Peter K Waight & Charles Robert Williams, Evidence: Commentary and Materials (6th ed, 2002) at 57.

15. Denning, above n3. Note also Poricanin v Australian Consolidated Industries Ltd [1979] 2 NSWLR 419.

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17. Heydon, Cross on Evidence, above n3 at 224–230.

18. Mike Redmayne, The Modern Law Review Vol. 62, No. 2 (Mar., 1999), pp. 167