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BURDEN OF PRODUCTION OF EVIDENCE: A FUNCTION OF A BURDEN OF PERSUASION

John T. McNaughton *

SINCE the days of James Bradley Thayer great emphasis has been placed on the difference between the "duty of bringing forward" evidence and the burden of persuasion of a jury. Professor Thayer disentangled these two meanings of "burden of proof."¹ In 1898 he quoted with approval a discerning judge who had written that they are "two very different things."² The purpose of this Comment is to suggest that "duty of bringing forward evidence" is *not* so very different from "burden of persuasion." The thesis is that the duty of bringing forward evidence, or burden of production of evidence, is a derivative function of the burden of persuasion of a jury, albeit the relevant jury is a hypothetical reasonable jury rather than the real one.

This Comment was inspired by dissatisfaction with the diagram Dean Wigmore used to illustrate the "duty to produce evidence."³ That diagram is reproduced below (Diagram 1). New diagrams based on the thesis of the Comment will illustrate the "amount" of evidence required to satisfy the burden of production (Diagram 3), and the effect of the "credibility factor" on the burden of production (Diagram 4). In conclusion, two situations will be mentioned in which application of the thesis appears to be troublesome. One is the case in which the applicable degree of persuasion is greater than "by a preponderance of the evidence." The other is the case in which no evidence is adduced.

DEFINITIONS

Burden of Persuasion. One party, it is said, has the burden of persuasion as to the existence of a fact. This in recent years has been interpreted to mean that one party has the risk of nonper-

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¹ Thayer, *The Burden of Proof*, 4 HARV. L. REV. 45, 48 (1890).

² THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 355 (1898), citing *Central Bridge Corp. v. Butler*, 68 Mass. (2 Gray) 130, 132 (1854).

³ 9 WIGMORE, EVIDENCE § 2487, at 283 (3d ed. 1940) (hereinafter cited as WIGMORE).

suasion to some predetermined degree of probability, the degree always being in excess of 50 per cent. But a jury determination of the degree of probability of the existence of a fact necessarily implies a simultaneous determination of the complementary degree of probability of the nonexistence of the fact. Does it not follow that both parties have risks of nonpersuasion as to an issue? With respect to a normal issue in a civil case, one party loses if the jury does not believe that existence of the fact is more probable than its nonexistence. As for the same issue, the other party loses if the jury does not believe that nonexistence of the fact is as probable as its existence. With respect to a normal issue in a criminal case, the state loses if the jury does not believe that existence of the fact is so highly probable "as to dissipate all reasonable doubt."⁴ As for the same issue, the defendant loses if the jury does not believe that nonexistence of the fact is sufficiently probable to permit reasonable doubt. In both instances the first-mentioned party has been allocated the *greater* risk of nonpersuasion. Thus the customary statement that one party, called Proponent, has the risk of nonpersuasion really means that of the two parties Proponent has been allocated the greater risk of nonpersuasion. In this Comment, the phrase "burden of persuasion" will apply to the lesser risk imposed upon Opponent as well as to the greater risk imposed upon Proponent.

Burden of Production. Burden of production has two meanings. In its first meaning, burden of production describes a standard: evidence which would justify a reasonable jury in finding the existence or nonexistence of the fact must be adduced if a judicial ruling for the other party is to be avoided.⁵ The standard, as in the case of the burden of persuasion, applies to both parties. It describes the risk of nonpersuasion of the judge that the burden of persuasion of a reasonable jury may have been fulfilled. In its second meaning, burden of production describes the onus cast upon one party or the other during the trial by a comparison of the above standard with the evidence actually adduced. The onus can of course be on only one party at a time.

⁴ Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 67 (1933). See also McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 246 (1944).

⁵ Dean Wigmore, for example, defined "insufficiency of evidence" as follows: [It] means that the evidence thus far offered on a specific fact-in-issue, if believed, would not justify a jury of rational and impartial persons in finding the fact-in-issue in favor of the party having the burden.

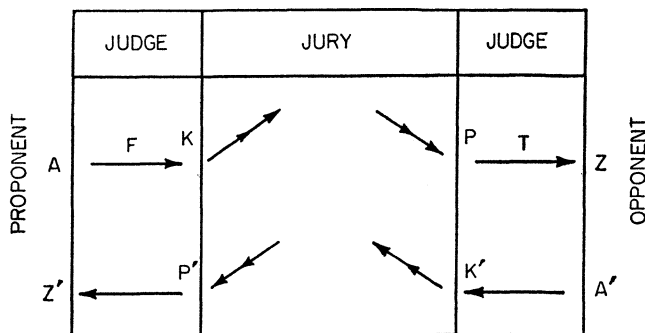
9 WIGMORE § 2498a, at 336.

THE WIGMORE DIAGRAM

Dean Wigmore used the following diagram to illustrate the "duty to produce evidence":⁶

DIAGRAM I

Duty to Produce Evidence
(Wigmore Diagram)



Dean Wigmore assumed that the duty to produce evidence is first on the party with the greater risk of nonpersuasion.⁷ He called that party the "proponent." Proponent starts at point A. He puts in evidence:

[A]t any point between A and K he is subject to a ruling of the judge defeating him for lack of sufficient evidence. After reaching K, and obtaining a judicial ruling in his favor as to sufficiency of evidence, he is now free from his duty of producing evidence to the judge, and has only his risk of non-persuasion of the jury. But he may be able to reach with his evidence the point P, and invoke again the control of the judge, thus shifting to the opponent the duty of producing evidence.⁸

Opponent then may go through the process, starting at A' and working toward Z'. If at the close of all the evidence the case is between points K and P or K' and P', the parties are "in the field of the jury."⁹ Otherwise one or the other of the parties "is liable to a judicial ruling defeating him on that issue."¹⁰

The diagram is misleading.

⁶ 9 *Id.* § 2487, at 283.

⁷ *Accord*, MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 181 (1947).

⁸ 9 WIGMORE § 2487, at 283-84.

⁹ 9 *Id.* at 284.

¹⁰ *Ibid.* For the sake of simplicity, such a judicial ruling will be referred to hereafter as "directed verdict."

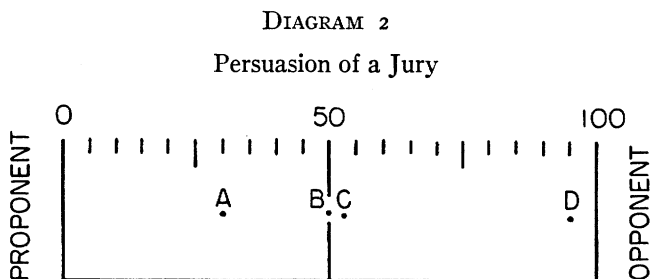
It implies that the burden of production is satisfied when the existence (or nonexistence) of the fact appears to be 20, 30, or some other small per cent probable.¹¹ That is not so. The 50 per cent point, not the 20 or 30 per cent point, is the crucial one in the normal civil case. The burden of production is satisfied by Proponent when the judge believes that there is a possibility that a reasonable jury will believe that existence of the fact is 50-plus per cent probable. It has been satisfied by Opponent when the judge believes that there is a possibility that a reasonable jury will believe that nonexistence of the fact is 50 per cent probable. The burden of production is thus a function of the burden of persuasion of a reasonable jury.

THE FUNCTION

Can such a function be diagrammed?

Yes. But first, burden of persuasion should be depicted.

The jury must be persuaded in the normal case that the existence of Proponent's fact is supported "by a preponderance of the evidence." "Preponderance of the evidence" is defined in different ways by different courts.¹² A definition stated in terms of raw probabilities is probably the best one.¹³ At least it is easiest to understand. It will be used in the illustration:



Probability of the existence of the fact is measured from the left side of Diagram 2. Probability of the nonexistence of the fact

¹¹ A minor objection to the diagram is that it implies, by the use of two sets of arrows, that Proponent's evidence and Opponent's evidence are independent of each other. In fact, evidence adduced by one party interacts with evidence adduced by the other party. The parties are after all contesting the same issue. Except to the extent that questions of credibility distort the picture, Proponent and Opponent at any moment are at the same place horizontally on the diagram. The effect of questions of credibility is treated in Diagram 4 *infra*.

¹² See Annot., 147 A.L.R. 380 (1943) (examples of charges to juries).

¹³ See Morgan, *supra* note 4, at 66-67; MORGAN, BASIC PROBLEMS OF EVIDENCE

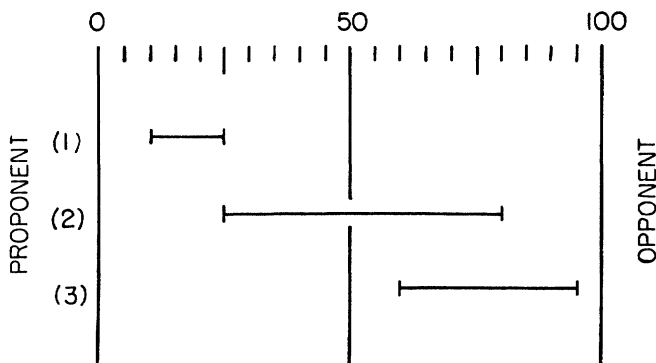
is measured from the right side. Proponent by definition has been allocated the greater risk of nonpersuasion. For him to win, the jury must believe that existence of the fact is more probable than its nonexistence. For Opponent to win, the jury must believe that nonexistence of the fact is at least as probable as its existence. A jury should find that the fact does not exist if it believes the probabilities to be as indicated by Points A or B on Diagram 2. It should find that the fact does exist if it believes the probabilities to be as indicated by points C or D.¹⁴

It is more difficult to plot the burden of production of evidence than it is to plot the burden of persuasion, because the burden of production involves not just a determination of the probabilities of a fact by a jury. It involves also an estimate by the judge as to the limits within which such determinations might fall. The judge in whose mind the "reasonable jury" exists is a reasonable judge, and he has had experience with many real juries; but what, he must ask, would a "reasonable jury" believe the probabilities to be? What is the maximum reasonable probability? What is the minimum reasonable probability? The judge's estimate therefore is not a single point — a single probability value. It is a range of probability values falling between two points. Three examples will illustrate the concept:

DENCE 22 (1954); MODEL CODE OF EVIDENCE rule 1(5) (1942) (omitted from UNIFORM RULES OF EVIDENCE rule 1(8) (1953)). *But see* 9 WIGMORE § 2498a, at 336 (burden not met if "after considering all the evidence on that issue . . . [the jury] cannot affirm their belief in respect to the fact in issue . . ."); *Sargent v. Massachusetts Acc. Co.*, 307 Mass. 246, 250, 29 N.E.2d 825, 827 (1940) ("not enough that mathematically the chances somewhat favor a proposition to be proved . . ."); *Lampe v. Franklin Am. Trust Co.*, 339 Mo. 361, 384, 96 S.W.2d 710, 723 (1936) ("verdict must be based upon what the jury finds to be facts rather than what they find to be 'more probable'").

¹⁴ It is of course unreal to describe by a single point the probabilities assessed by a jury. All jurors on a given jury are not persuaded to exactly the same degree. Every one of the jurors required for a verdict must believe that existence of the fact is more than 50% probable if Proponent is to win. For Opponent to win, every required juror must believe that nonexistence of the fact is at least 50% probable. For example, if Point C represents the minimum probability constituting a "preponderance of the evidence," then that point necessarily marks the degree of probability assessed by the *least* convinced of the required jurors. A jury disagreement cannot be depicted by a single point on this diagram. Points B and C, if they represented respectively the degrees of persuasion of the least and of the most convinced of the required jurors on a given jury would depict a disagreement. See MORGAN, BASIC PROBLEMS OF EVIDENCE 20-21 (1954).

DIAGRAM 3
Persuasion of a Reasonable Jury
(Judge's View)



The three ranges in Diagram 3 have the following meanings, assuming that the applicable degree of persuasion, indicated by the line at the 50 per cent point, is "by a preponderance of the evidence": (1) Opponent's motion for a directed verdict should be granted and Proponent's motion denied with the state of the evidence as described by range 1. The range is entirely in the No zone. No reasonable jury, estimates the judge, would believe that existence of the fact is less than 10 per cent probable.¹⁵ Nor would any reasonable jury believe that existence of the fact is more than 25 per cent probable. These limits necessarily imply that no reasonable jury would believe that nonexistence of the fact is more than 90 or less than 75 per cent probable. (2) Neither party's motion for a directed verdict should be granted with the state of the evidence as described by range 2. The estimated range of reasonable probabilities extends from 25 to 80 per cent. It lies partly in the Yes and partly in the No zone. This indicates that a reasonable jury could find against Proponent. It could also find against Opponent. (3) Proponent's motion for a directed verdict should be granted and Opponent's motion denied if the state of the evidence is as indicated by range 3. The 60 to 95 per cent range of probabilities is all in the Yes area. No reasonable jury could find for Opponent.

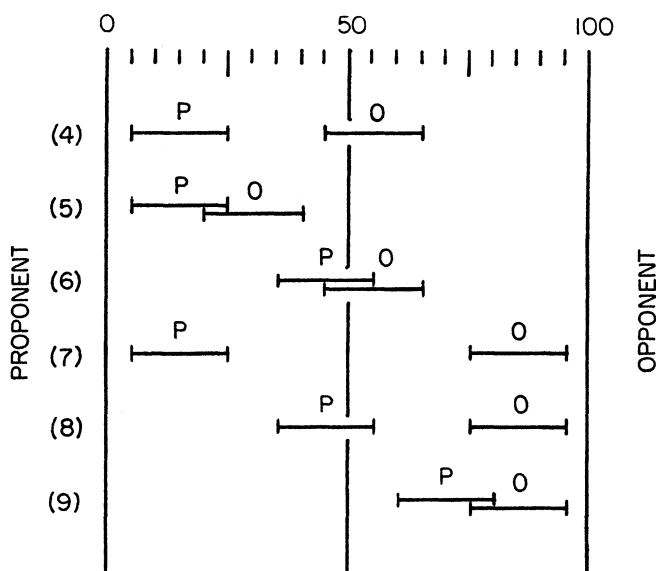
¹⁵ Probabilities assessed by a jury may or may not be susceptible to numerical description. Percentages are used in this Comment as a convenient and understandable mode of expression.

CREDIBILITY FACTOR

The "credibility factor" has thus far been ignored. It must be accounted for. Questions of credibility are, with some exceptions, left to the jury. This means that, for purposes of the burden of production of evidence, such questions must be resolved against the party moving for the directed verdict. In any case involving credibility, therefore, the evidence at any moment gives rise to two ranges. The range applicable on Opponent's motion is not the one applicable on Proponent's motion. See Diagram 4. The line at the 50 per cent point again indicates that the applicable degree of persuasion is "by a preponderance of the evidence."

DIAGRAM 4

Persuasion of a Reasonable Jury
(Credibility Factor)



Range 4(P) above might, in the judge's view, depict the limits of reasonable probability applicable on Proponent's motion. The judge estimates that, with questions of credibility resolved against Proponent, no reasonable jury would believe the existence of the fact to be more than 25 or less than 5 per cent probable. Range 4(O) might describe the limits applicable at the same moment on Opponent's motion. With questions of credibility resolved against Opponent, no reasonable jury would believe the existence of the

fact to be more than 65 or less than 45 per cent probable. With fewer credibility questions to be resolved against Opponent, the two sets of limits might be as indicated by the overlapping ranges 5(P) and 5(O). On the other hand, if fewer questions of credibility had to be resolved against Proponent, the two sets of limits might be as indicated by ranges 6(P) and 6(O). The other possible combinations of ranges are illustrated by cases 7, 8, and 9. Notice that only in cases 5 and 9 is the state of the evidence such that a burden of production, in the sense of an onus to avoid a directed verdict, has been imposed on a party.

EFFECT OF DEGREES OF PERSUASION

If this analysis is sound, would it not require a different sufficiency-of-evidence test for each different degree of persuasion? The answer logically is yes.

Turn back to Diagram 2. "Beyond a reasonable doubt" may not have a quantitative equivalent. For purposes of illustration, however, let us define it as 90 per cent probability. If this degree-of-persuasion test applies, a jury may have to find that a fact does not exist even though persuaded by normal standards that the fact does exist. Existence of the fact is not established — *i.e.*, nonexistence of the fact is established — if the jury believes existence of the fact to be as probable as indicated by points A, B, or C. Of the four points, only point D represents a probability justifying a finding that the fact exists. Now turn to Diagram 3. Look at range 2. The upper limit of that range is 80 per cent. The judge believes that a reasonable jury could believe the existence of the fact to be 80 per cent probable at the most. Hence a reasonable jury might find existence of the fact proved "by a preponderance of the evidence." And, if that test is applicable, the judge should send the issue to the jury. But no reasonable jury could find the proposition proved "beyond a reasonable doubt." If that test is applicable, does it not follow that the judge should not send the issue to the jury?

The courts are in disagreement. Mr. Justice Cardozo, when a judge on the New York Court of Appeals, said yes.¹⁶ Judge Learned Hand said no.¹⁷ Professor Maguire said that "the Fed-

¹⁶ *Susquehanna S.S. Co. v. A. O. Andersen & Co.*, 239 N.Y. 285, 296-97, 146 N.E. 381, 385 (1925).

¹⁷ *United States v. Feinberg*, 140 F.2d 592, 594 (2d Cir. 1944).

eral Courts . . . apparently have one rule in criminal prosecutions and another in some civil cases where 'clear, unequivocal, and convincing evidence' is required."¹⁸ Perhaps the best judicial discussion favoring the "logical" position is Mr. Justice Traynor's dissenting opinion in *Beeler v. American Trust Co.*¹⁹

Several good reasons can be given against the adoption of the logical view. One, stated by Judge Hand, is that it requires the drawing of a line "too thin for day to day use."²⁰

NO EVIDENCE ADDUCED

The examples discussed thus far have all assumed that some evidence has been adduced — enough to permit a reasonable jury to have a belief as to the degree of probability of the existence of the facts. What if no evidence is adduced? Dean Wigmore's diagram implies — by having both parties start at a "zero point" — that the burden of production of *first* evidence is not a function of burden of persuasion.²¹ Both parties at that time have adduced no evidence. Both or neither have failed to persuade a reasonable jury. How do we determine who has the onus of producing evidence? The answer on Dean Wigmore's hypothesis is that the burden of production is allocated to one party or the other for external reasons. That may be the most sensible answer. Another answer, consistent with the thesis of this Comment, might be that the parties start not from a "zero point" but from an "equilibrium point." A reasonable jury is expected to consider existence and nonexistence of the fact as equally probable until evidence is adduced. With such a 50-50 starting point, Opponent has sustained his burden. Proponent has not. The burden to produce first evidence is thus on Proponent. When evidence is produced, probabilities may be assessed in the normal way at whatever value justified by the evidence.

CONCLUSION

Thus, burden of production of evidence in both of its meanings is a function of burden of persuasion. Persuasion — or belief, or

¹⁸ MAGUIRE, *op. cit. supra* note 7, at 182. See also Note, 60 HARV. L. REV. 111 (1946).

¹⁹ 24 Cal. 2d 1, 33, 147 P.2d 583, 600 (1944). See also Comment, *Evidence: Clear and Convincing Proof: Appellate Review*, 32 CALIF. L. REV. 74 (1944).

²⁰ United States v. Feinberg, 140 F.2d 592, 594 (2d Cir. 1944).

²¹ Accord, Morgan, *The Law of Evidence, 1941-1945*, 59 HARV. L. REV. 481, 491

probability — is the basic ingredient of both burden of production and burden of persuasion. What is needed is further analysis of the relationship between evidence and persuasion.²²

(1946): "The situation at the opening of the trial is the same as if evidence conclusive, if uncontradicted, of . . . [nonexistence of the fact] had been received"

²² Useful works on the subject of judicial proof include Michael & Adler, *The Trial of an Issue of Fact*, 34 COLUM. L. REV. 1224, 1462 (1934); MICHAEL & ADLER, *THE NATURE OF JUDICIAL PROOF* (1931); WIGMORE, *THE SCIENCE OF JUDICIAL PROOF* (3d ed. 1937). See also KEYNES, *A TREATISE ON PROBABILITY* (1920).