CED: An Overview of the Law

Evidence – Burden of Proof

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II: Burdens of Proof and Presumptions

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II.1: Introduction

See Canadian Abridgment: EVD.II Evidence — Proof

The objective of this part of the Title is to consider the framework under which evidence is proven within the common law adversarial trial. It focuses upon the burdens and standards of proof that are placed upon litigants and examines the manner in which these burdens can shift during the course of proceedings. These concepts are critical to an understanding of the law of evidence, as they explain who is responsible for adducing individual pieces of evidence and the cumulative standard of proof that must be met to decide a case. Additionally, this part of the Title will consider the role played by presumptions: legal mechanisms that resolve an evidentiary question in a particular manner in the absence of evidence demonstrating a contrary proposition.

II.2: Legal Burden of Proof

II.2(a): Burdens of Proof Generally

See Canadian Abridgment: EVD.II.1 Evidence — Proof — General principles

The term "burden of proof" refers to the obligation upon a party to establish contested facts in order to succeed in the action in question. The legal burden operates as a probability standard that guarantees a result even where the evidence is finely balanced on both sides. In civil trials, the plaintiff bears the ultimate burden of proof upon a balance of probabilities.[1] In criminal trials, it is the prosecution who must prove the facts alleged beyond a reasonable doubt.[2] Although these burdens exist in every case, specific burdens on individual issues may need to be met by a party depending upon the nature of the proceedings. For example, in a civil case, a party raising the defence of consent in an action for battery bears the burden of proving that such consent existed.[3]

The existence of a legal onus of proof also creates a procedural obligation that is often referred to as the evidentiary burden. Any party bearing a legal burden with respect to a particular issue must show that there is evidence supporting his or her position on this issue before the other party has any obligation to respond. If this evidential burden of proof is not satisfied, there is no need for a responding party to call any evidence with respect to the issue at all.[4]

Evidentiary burdens can also arise where a party does not actually bear the legal burden of proof. For example, the prosecution bears the burden of disproving most available and relevant defences in a particular trial, but is only required to do so where there is some reason to believe that the defence is actually in issue. In other words, the prosecution need not disprove a non-existent defence. It follows that the defendant bears an evidential burden to put the defence into play in a particular proceeding. This burden is much less onerous than a legal burden, and is discussed in greater detail below.[5]

II.2(b): The Evidential Burden of Proof

II.2(b)(i): Criminal Cases

See Canadian Abridgment: EVD.II Evidence — Proof

In a criminal trial, the prosecution is required to adduce all of its evidence before the defendant is called upon to answer.[1] Since the burden of proving the charges rests with the prosecution, the defendant is entitled to request that a verdict of acquittal be directed where the prosecution has not adduced sufficient evidence to warrant a conviction by the close of its case. The proper application of this power requires an understanding of the separate roles played by judge, as the decider of legal questions, and the jury, as the trier of fact. At this stage of the case, the prosecution need not show that the defendant is guilty beyond a reasonable doubt. Rather, to avoid a directed verdict of acquittal the prosecution must have produced evidence that, if unanswered, is sufficient to raise a prima facie case upon which the jury might be justified in finding a verdict.[2]

In deciding whether to direct a verdict of acquittal, the trial judge does not decide whether the evidence is believed or even believable. It is the task of the trier of fact alone to decide whether the evidence in question is worth believing, and consequently, it is improper for the trial judge to assess the credibility of witnesses, or direct a verdict on the basis that testimony should not be accepted. Effectively, the trial judge must conclude whether a reasonable trier of fact could find in the prosecution's favour on the basis of the evidence given in trial up to that point. The

judge does not decide whether the trier of fact will accept the evidence, but merely whether the inference that the prosecution seeks could be drawn from the evidence adduced, if the trier of fact chose to do so.[3]

Where there is sufficient direct evidence from witnesses regarding every element of the criminal charge, the motion for a directed verdict must be rejected.[4] Matters become somewhat more complex where the prosecution's case is premised on circumstantial evidence. The question then becomes whether the elements of the offence requiring circumstantial proof may reasonably be inferred from the evidence. Answering this question requires the judge to engage in a limited weighing of the evidence to assess whether such evidence is reasonably capable of supporting the inferences that the Crown is asking the jury to draw.[5]

On a successful motion of this type, the trial judge will dismiss the charge if trying the case alone. In a jury trial, the proper procedure is for the trial judge to withdraw the case from the jury and enter an acquittal.[6]

II.2(b)(ii): Civil Cases

See Canadian Abridgment: EVD.II Evidence — Proof

In civil cases, the plaintiff's case can be dismissed, or "non-suited", where there is a failure to call evidence on an essential ingredient of the case such that any judgment for the plaintiff would be wrong in law. As is the case in criminal trials, the focus is upon the nature, rather than the quality, of the evidence. For example, in a negligence case, the question is not whether negligence has been established, or ought to be inferred from the facts tendered, but whether negligence might be reasonably inferred.[1] In rendering this determination, the trial judge must assume the evidence tendered by the plaintiff to be true and must assign the most favourable meaning to evidence capable of giving rise to competing inferences.[2] The power to non-suit is a creation of the common law, and in the absence of any statutory power, cannot be requested in Quebec.[3]

The procedure governing a motion to non-suit varies by jurisdiction. In Alberta, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Saskatchewan, the Northwest Territories and Nunavut, the rules of court or civil procedure provide that a defendant may move for dismissal at the close of the plaintiff's case before electing whether to call evidence.[4]

In other jurisdictions, the courts are somewhat more reluctant to rule upon these kinds of motions, especially in non-jury trials. In Manitoba and British Columbia, the judge will first

carefully scrutinize whether the claim is one of "no evidence", or one of "insufficient evidence". If the argument is that there is no evidence on which a decision for the plaintiff can be supported in law, then the defendant need not elect. Where the claim is based on the alleged insufficiency of evidence, the motion should not be heard without an election being required. Any doubt as to whether a submission is based on no evidence or on its alleged insufficiency should be resolved in favour of putting counsel to an election.[5]

In Ontario and New Brunswick, there is no statutory power recognizing the power to grant a non-suit. In these provinces, when the defendant moves to dismiss at the close of the plaintiff's case, he or she must elect whether to call evidence at this stage.[6] If the defendant intends to call evidence, the trial judge will not decide the motion but will instead reserve the decision until all the evidence in the case has been adduced. This drastically reduces the usefulness of the non-suit motion in non-jury trials.[7]

In a jury trial in every jurisdiction, the trial judge should defer ruling upon a motion to dismiss until the jury has returned a verdict, but is permitted to grant a non-suit even after receiving the verdict, on the ground that the plaintiff's evidence, standing alone, was insufficient.[8] The reason for proceeding in this manner is that an appellate court may find that the case should not have been withdrawn from the jury, and if the judge renders a determination prior to the jury a new trial with its consequent expense and delay becomes inevitable.[9]

II.2(b)(iii): Evidential Burdens upon the Defendant

See Canadian Abridgment: EVD.II Evidence — Proof

Although the ultimate burden of proof rests upon the prosecution in a criminal case and the plaintiff in a civil case, the defendant in either forum will occasionally have an evidential burden to satisfy in relation to particular facts or issues. Burdens of this sort are especially significant in jury cases, where the trial judge has an obligation to delineate the issues to be determined by jurors, and has an obligation not to put matters before the jury that are not properly raised in the evidence.[1]

In civil cases, the defendant will often have the obligation to establish a particular defence. For example, it rests upon the defendant to establish a plea of justification in a libel case,[2] and the defence of consent in a civil action for battery.[3] As with evidential burdens placed on the plaintiff, the trial judge should withdraw a matter from the consideration of jurors if there is

insufficient evidence to demonstrate that a properly instructed jury could decide in the defendant's favour with regard to the issue in question.[4]

In criminal trials, it is more unusual for a defendant to bear the burden of proof, though in some circumstances, this will be the case. The special verdict of not criminally responsible by reason of mental disorder, for example, is explicitly restricted to situations where the defendant is able to convince a jury, on a balance of probabilities, that he or she is entitled to this verdict.[5] More common are the situations where the defence does not bear the legal burden of proof, but has a more limited onus to adduce sufficient evidence to bring the issue into play.[6] For example, in a murder trial it is not for the prosecution to disprove provocation unless there is some reason to believe that the defence is actually a possibility on the evidence.[7]

In these circumstances, it is often suggested that the defendant bears an evidentiary burden in relation to the defence or special verdict. This is somewhat misleading as a matter of terminology, as the defendant need not call any evidence in order to have the matter put to the jury, so long as evidence permitting the inference required to establish the defence arose from the prosecution's case. Still, before instructing a jury with respect to a particular defence the trial judge must decide whether or not the defence is available based on the facts. The trial judge is entitled to withdraw a defence from the jury where the evidence would not permit a reasonably instructed jury to acquit on the basis of the defence. Allowing speculative defences to be put before the jury would be confusing and would unnecessarily lengthen trials.[8]

The evidential burden placed on the defence is often described by resort to an "air of reality" standard, in that the judge must resolve whether there is an air of reality about the defence in question before putting it to the jury.[9] In keeping with the notion that the defence must only raise a reasonable doubt, this is not a high threshold, and is met whenever there is some evidence upon which a properly instructed jury could reasonably decide the issue in the defendant's favour.[10]

II.2(c): Ultimate Burden of Proof

See Canadian Abridgment: EVD.II Evidence — Proof

Once the evidence for both sides has been adduced and closing arguments completed, the trier of fact must decide the case having regard to the burden of proof. In civil cases, the governing standard is normally a balance of probabilities. While older authorities suggested that this

standard needed to be applied differently depending on the nature of the case,[1] the Supreme Court of Canada has now affirmed that the balance of probabilities is the sole standard of proof in civil proceedings unless altered by statute.[2]

Despite older cases that refer to different thresholds of proof, the balance of probabilities standard now also applies to disciplinary hearings involving findings of professional misconduct.[3]

There is no precise formula to describe what exactly constitutes a balance of probabilities, though it has been stated that a preponderance of evidence must support the plaintiff's case in order for it to succeed.[4] An alternative description is simply indicating that the trier of fact must believe that the plaintiff's version was more likely than not to have been true. In any situation where the defendant in a civil case bears the burden of proving a particular fact or issue, the standard of proof is also upon a balance of probabilities.[5]

In criminal proceedings, the prosecution bears the more onerous burden of having to prove guilt beyond a reasonable doubt. This principle has been famously described as the "golden thread" of English criminal law,[6] and is constitutionally enshrined in Canada.[7] The enhanced standard of proof reflects the need to ensure that the innocent are not convicted of criminal acts.[8]

Much like the civil standard, it is difficult to explain with precision what is required to establish proof beyond a reasonable doubt, though it clearly falls much closer to absolute certainty than does proof on a balance of probabilities.[9] More is required than proof that the defendant is probably guilty and a trier of fact who concludes only that the defendant is probably guilty must acquit. Still, proof beyond a reasonable doubt does not require proof to an absolute certainty or proof beyond any doubt. For the trier of fact to acquit, the doubt must not be imaginary, frivolous, or based upon sympathy or prejudice. It must be a doubt based upon reason and common sense and be connected to the evidence or absence of evidence.[10]

The burden of proof beyond a reasonable doubt is not applied to individual pieces of evidence, but to the case as a whole.[11]

In a few limited instances, the burden of proving a particular issue in a criminal case will fall upon the defendant.[12] Where this burden exists, the defendant need not prove the matter beyond a reasonable doubt, but merely on a balance of probabilities, and the jury, if any, must be instructed as such.[13]

II.3: Presumptions

II.3(a): General

See Canadian Abridgment: EVD.II.7 Evidence — Proof — Presumptions

The term presumption is used to describe a number of related concepts, all of which have the potential to affect the manner in which the trier of fact uses the evidence that has been presented in a case. One type of presumption is the legal burden of proof, which presumes a result in the absence of sufficient evidence to the contrary. That presumption is discussed elsewhere in this Title.[1] In this section, the focus shall be upon presumptions of fact, which assist the trier of fact in drawing an inference from the admission of a particular fact.

II.3(b): Presumptions of Fact

See Canadian Abridgment: EVD.II.7.f Evidence — Proof — Presumptions — Continuance of facts

A presumption of fact refers to an inference that is normally drawn from an established piece of evidence. In most circumstances, the presumption is permissive rather than mandatory, in that the trier of fact should draw the inference in question from proof of the established fact, but is not required to do so. For example, a well-established presumption is that a person intends the natural consequences of his or her conduct.[1] Another presumption is that all persons are of sound mind, and in testamentary cases, this presumption will normally operate to assist the propounder of a will in establishing the capacity of the testator, even when there is no surrounding evidence showing such capacity.[2] There are numerous such presumptions of fact in existence at common law.

II.3(c): Rebuttable Presumptions

See Canadian Abridgment: EVD.II.7.i Evidence — Proof — Presumptions — Miscellaneous

Rebuttable presumptions are a more significant and powerful manner of establishing a particular inference. The primary difference between a rebuttable presumption and a presumption of fact is that the former is not permissive, but instead compels a particular conclusion in the absence of evidence to the contrary. In other words, a rebuttable presumption provides for the proof of a fact or inference unless the opposing party displaces it. For example, a provision in the Criminal Code establishes that proof that a person broke and entered into a place is, in the absence of any evidence to the contrary, proof that the person

broke and entered with intent to commit an indictable offence.[1] Thus, proof of such breaking and entering establishes the intent needed to convict the defendant, unless the defence is capable of pointing to evidence demonstrating an alternative inference.[2]

Where the presumption is rebutted, it does not mean that the fact or inference desired is necessarily disproved. On the contrary, the proponent of the fact is simply left to prove the fact or issue in question without being able to rely upon the presumption.[3]

II.3(d): Presumptions and the Canadian Charter of Rights and Freedoms

See Canadian Abridgment: EVD.II.7.i Evidence — Proof — Presumptions — Miscellaneous

Certain presumptions, often referred to as "reverse onus" provisions, have the effect of imposing a legal burden of proof upon the defendant in a criminal case. Presumptions of this type may conflict with the Canadian Charter of Rights and Freedoms, and the constitutional right to be presumed innocent until proven guilty.[1] This right has been found to require the prosecution to prove every aspect of the case against the defendant beyond a reasonable doubt. A legislative clause requiring the defendant to establish an element of an offence or a defence conflicts with the Charter and must be justified in order to remain in force.[2] The Charter is also violated where a presumption permits proof of one element to satisfy proof of a related element, despite the fact that a reasonable doubt might be held in relation to the latter element.[3]

Lesser presumptions do not automatically violate the defendant's constitutional presumption of innocence. Where a statute merely creates a permissive presumption from which guilt may, rather than must, be inferred, the Charter is not implicated.[4] Nor is there difficulty with a presumption that allows proof of a fact to establish proof of an element of the offence, so long as it does not require the defendant to disprove the inference required by the presumption.[5] Placing an evidentiary burden upon the defendant to establish a defence, which merely requires the defendant to point to some evidence on the issue in order to have the matter considered by the jury,[6] does not violate s. 11(d) because it does not presume guilt.[7]

Despite conflicting with the defendant's right to be presumed innocent, a presumption may still be upheld as constitutionally valid where it is enacted to meet a pressing and substantial objective, the measure is rationally connected to the objective, and there is proportionality between the effects of the measure and the objective in question.[8] Where a substantial objective exists, the focus will normally be upon the rationality between the presumed fact and

the established fact, the nature of the burden imposed, and the extent to which the presumption advances the objective in question.[9]