

# Evidence law - burden of proof



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BUSTER**

The legal or persuasive burden of proof is defined as the 'burden of persuading the tribunal of fact, to the standard of proof required and on the whole of the evidence, of the truth or sufficient probability of every essential fact in issue'.

In our scenario, the claimant will bear the legal burden of proving each element of his claim and this entitles him to call evidence first, giving evidence through witnesses, who will also be cross-examined. The legal burden of proof can only be judged in the light of all the evidence presented in a case, and this can only be done once the defendants have also presented their case. The prosecution has the legal burden to prove its case beyond reasonable doubt and to disprove beyond reasonable doubt the defences that an accused raises. In simple terms, there is an obligation of proving or disproving facts at issue. The burden is 'legal' in the sense that it is imposed by a legal rule and 'persuasive' in the sense that the party bearing the burden will lose on that issue if he fails to discharge the burden by persuading the tribunal of fact to the relevant standard. In *Jayasena*, Lord Devlin said that the prosecution discharges the evidential burden "". In *Ching*, reasonable doubt is described as a doubt to which you can give a reason as opposed to a mere fanciful sort of speculation.

The evidential burden of proof is the burden of adducing evidence fit for consideration by the jury and there is the need to adduce sufficient evidence to satisfy a judge that the matter can be left to the jury to decide. There is an obligation upon both prosecution and defence to present sufficient evidence in support of their case. If the defence fails to discharge the evidential burden, the judge relieves the prosecution from the burden of

disproving it. According to Lord Devlin, this requirement may be conveniently called 'evidential burden'. The prosecution does not have to disprove every possible defence in advance, so if a party has an evidential burden, it does not mean that they actually have to prove anything.

The prosecution discharges the evidential burden by establishing a prima facie case, that is enough evidence to entitle, but not compel, the tribunal to find in favour of claimant, had it been no further evidence. In this case, the claimant has thereby defeated a submission of 'no case to answer', while the defendant is not obliged to give evidence or call any witnesses. In established the principle of 'golden thread', according to which 'throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt'. Where the accused pleads one of the exceptions, insanity, he bears the persuasive burden which is discharged on a balance of probabilities. However, if the defendant's defence involves pleading issues, such as non-insane automatism, provocation or self-defence, the onus of disproving them rests on the prosecution. This formulation creates difficulties to juries as to the nature of reasonable doubt. As a result, a second formulation was put forward by Lord Goddard, the 'satisfied so that you feel sure'. In Summers he stated 'if the jury told that it is their duty to regard the evidence and see that it satisfies them so that they can feel sure when they return a verdict, that is much better than using the expression 'reasonable doubt'. When the defence bears the legal burden on an issue, they must prove it on balance of probabilities, as illustrated by Lord Denning in Miller.

As the prosecution must disprove the defence 'beyond reasonable doubt', the defendant is required to demonstrate to a judge that a jury might have a reasonable doubt as to whether his defence will be disproved by the prosecution. The evidential burden will have been discharged if the defence was 'a reasonable possibility' worth leaving to the jury to consider, but not if 'no reasonable jury, properly directed as to the law, could fail to find the defence disproved'. Therefore, the defendant must call witnesses or give evidence to substantiate any defence and then it is for the prosecution to illustrate beyond reasonable doubt that the defendant did not act in self-defence and acted with the necessary mental element.

## Question 2

a confession is defined as inclusive of any statement that partly or wholly adverse to someone who made it, whether made to someone in authority or not, or made in words or otherwise. A confession may be oral, in writing, by conduct or in any other way of communicating information. As stated in, if the defendant accepts an accusation made by the victim of the crime, or by someone else who is on an equal footing, then to the extent that he has accepted it, the statement becomes his own. However, any breach of the procedure may be used as ground for excluding a confession. First, as soon as a police officer has grounds to suspect that a person has committed an offence and wishes to question him, the necessary steps need to be followed, including access to legal advice, as anything said is considered as evidence under. The admissibility and relevance of a confession are questions to be decided by the judge, whereas the weight to be given to the confession is a question for the jury.

The defendant cannot be compelled to testify as this may be regarded as a breach of the legal procedure. If the witness is wrongly compelled to answer such a question, his answer may not be admitted as evidence against him at his later prosecution. Under the defence may represent to the court that the confession may to be obtained by suasion and should automatically excluded, even if it turns out to be true. As defined in the method of questioning may amount to oppression. For example, in the deliberate misuse of the truth about the defendant's mother health by the police could amount to harsh or improper treatment and therefore oppression. Finally, the Court of Human Rights restated the importance of the right to silence and privilege against self-incrimination under Article 6 ECHR regarding access to justice and fair procedure.

Pursuant, there is the legal advice privilege, according to which communications passing between lawyer and client, materials prepared for the purposes of litigation and advice given are privileged. To quote the words of Lord Taylor, “, being sure that nothing will be revealed without his consent. It arises out of a relationship of confidence between lawyer and client. Thus, the privilege must prevail over purely procedural subordinate legislation. The only limitations imposed are in relation to the relevant legal context as held in *Balabel and Three Rivers*. Finally, it is submitted that no breach of confidentiality and no loss of privilege is involved when they are present during interviews or involved in preparing or transmitting communications with the client.

Question 3

Opinion evidence is not admissible because it is for the tribunal of fact, and not for the witnesses, to form its opinion on the evidence. They must confine themselves to their personal perception of facts and not make any inferences from those directly observed facts. The opinion of expert-witnesses is helpful when the jury or the judge are unable to form an opinion based on bare facts and require additional expert assistance or when matters arise which concern other sciences or faculties. Although the ‘ helpfulness principle’ of an expert witness has been criticized, expert opinion evidence to be admissible it must be able to provide the court with information which is probably outside of jury’s or a judge experience and knowledge, but it must also be evidence which gives the court the help it needs in forming its conclusions.

There is no closed category where evidence cannot be placed before a jury, as ‘ it would be wrong to deny to the law of evidence the advances to be gained from new techniques and new advances in science’ . An expert’s opinion in order to be reliable it have to be illustrated by admissible evidence. In *Hodges* was held that part of an expert’s experience and expertise might lie in his knowledge of unpublished material and in his evaluation of it. In *R v Gilfoyle*, the court suggested that if an opinion given by an expert may not be independently reconsidered by any criteria, this may to hinder its admittance. This is why provides that a jury shall not to make a determination [on unfitness to be tried]...except on the written or oral evidence of two at least medical registered practitioners.

In our scenario, Dr. Khan’s opinion will not be admissible in evidence, because the method used is an innovative one, which cannot be

independently reviewed yet and in any case it is essential that another registered medical practitioner confirms Dr Khan's opinion.

#### Question 4

(a) provides that 'any person who without legal authority or presumable excuse and whereof the proof should lie on him, has into his possession any offensive weapon in any public area shall to be regarded guilty of violation ...'. In *R v Williams*, it was concluded that imposes a legal burden on the defendant and it was then for the prosecution to make the jury sure that the appellant was not aware and did not have any reason to be suspected that it was readily convertible.

Pursuant to an imitation weapon is one that looks as a such weapon; and it can be easily be converted into a weapon which a shot may be discharged. S. 1(6) mentions 'readily convertible' as requiring someone without special skills to converting it and for the work involved no tools or outfit other than such as are in common use by individuals performing manufacture and maintenance works in their own homes. The burden of proof on the defendant relies on the plea of diminished responsibility, as per section

William has the legal burden of proof and to establish, on the balance of probabilities, that he has not been aware that the imitation firearm could be converted to fire live ammunition and thus he had no intention to use it and thus he may be able to rely upon this defence at trial.

(b) In *Bowers*, it was held that clearly allows an adverse inference to be drawn from silence at a police interview where an accused had not given

evidence, as to hold otherwise would permit an accused to preclude the drawing of such inferences by choosing not to give evidence. permits conclusion to be assumed when a accused remain silent at the time he questioned. , the defendants' silent was inadmissible, but the jury had to conclude to an unfavorable conclusion because of defendants silence at charge according to section 34(1)(b). Subsequently, this section cannot be applied to William case.

In criminal proceedings, the general rule is that everybody has to be regarded innocent until guilty is proven. The prosecution has to illustrate that the defendant committed an offence by establishing ' beyond reasonable doubt' all elements of the violation. permits the jury and the court to conclude to such presumptions as may be regarded proper from the defendant failure or refusal to give evidence and answer any question without good reason. Conclusion is not permitted when the court understands that " the mental or physical condition of the defendant makes him undesirable to provide evidence. Based on the 5-step test established in Cowan , if jury's conclusion show that the silence only can appreciably be ascribed to the defendant's no answers or none that would stand up to cross-examination, they may conclude to an hypothetical presumption. Also in , it was held that a jury had not directed that reasons might be provided for not giving other evidence than the inability to explain or answer the prosecution case. Therefore, ay be able to be applied in our case.

(c)Where a suspect disputes identification, the prosecution will have to prove that the defendant is, beyond all reasonable doubt, the person who committed the offence. This is because it has not been clear so far whether



the statement that the accused person was the person who committed the offence is admissible as evidence, or merely evidence confirming the evidence of the identifying witness at trial. According to the admissibility of a witness statement about identification is based on whether the evidence are given to the best of his belief and he states the truth. Building on that, the Court of Appeal in Turnbull provided guidance regarding disputed identification evidence and specified that a mistaken witness possible can be persuasive, but notice is required if the prosecution depends fully on the regularity of the identification of the defendant which the defense claims to be incorrect. Also the jury must take into account all the conditions in which identification was made, such as distance, light, impediments, witnesses' previous accusations and the time between original observation and formal identification.

In our scenario, given the circumstances at the night of the crime, William can argue based on Turnbull that there is a high probability that the witnesses' statement may be not accurate as they cannot be absolutely sure about what they saw.