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dispute a factual precondition must satisfy an initial evidential burden before the privilege-holder is called upon to satisfy the legal burden (i.e. by allowing inspection of the contested documents or facing cross-examination).¹¹

(d) Conflicting presumptions

Presumptions may conflict with each other. Often they will simply neutralise each other, leaving the matter to be determined as if no presumptions applied. It is necessary to identify whether the conflicting presumptions are of the same type (rebuttable or irrebuttable, fact or law) and whether they relate to the same issue.¹²

6-05

2. BURDEN OF PROOF IN CIVIL CASES

(a) General rule

So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issue.¹³ Where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegations rests on that party.¹⁴ If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him.¹⁵ This is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons.¹⁶ The service of a notice to prove documents pursuant to CPR r.32.19 does not shift the burden of proof.¹⁷

6-06

This rule is adopted principally because it is just that he who invokes the aid of the law should be the first to prove his case; and partly because, in the nature of things, a negative is more difficult to establish than an affirmative. The burden of proof is fixed at the beginning of the trial by the state of the pleadings, and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleadings place it, and never shifting.

In deciding which party asserts the affirmative, regard must be had to the substance of the issue and not merely to its grammatical form; the latter the pleader

¹¹ cf. *Westminster Airways Ltd v Kuwait Oil Co Ltd* [1951] 1 K.B. 134; *Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners (No.2)* [1972] 2 Q.B. 102; *West London Pipeline & Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm); [2008] 2 C.L.C. 258 at [86]; *Eso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 C.L.R. 1. For a detailed examination of this, and other burdens of proof during interim judicial fact-finding, see Rosemary Pattenden: "The proof rules of pre-verdict judicial fact-finding in criminal trials by jury" (2009) L.Q.R. 79 at 79–97.

¹² The attitude of the courts has thus varied according to the presumptions in question and the circumstances in which the attempt was made to rely on them. See, for example, *Monckton v Tarr* (1930) 23 B.W.C.C. 504 CA; *Taylor v Taylor* [1965] 1 All E.R. 872, Cairns J; *R. v Willshire* (1881) 6 Q.B.D. 366 CCR. There is a helpful discussion in Keane, *The Modern Law of Evidence*, 10th edn (Oxford: Oxford University Press 2014). See also *Blackstone's Criminal Practice* (Oxford: Oxford University Press, 2013), para.F3.73.

¹³ *Robins v National Trust Co* [1927] A.C. 515 at 520; *Huyton-with-Roby UDC v Hunter* [1955] 1 W.L.R. 603.

¹⁴ *Emmanuel v Avison* [2020] EWHC 1696 (Ch) at [54].

¹⁵ *Pickup v Thames Insurance Co* (1878) 3 Q.B.D. 594 at 600; *Wakelin v L & SW Railway* (1886) 12 App. Cas. 41 at 45.

¹⁶ *Constantine Line v Imperial Smelting Corp* [1942] A.C. 154 at 174, per Lord Maugham.

¹⁷ *Emmanuel v Avison* [2020] EWHC 1696 (Ch) at [57].

can frequently vary at will.¹⁸ Moreover, a negative allegation must not be confused with the mere traverse of an affirmative one. The true meaning of the rule is that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on him.¹⁹ An alternative test, in this connection, is to strike out of the record the particular allegation in question, the onus lying upon the party who would fail if such a course were pursued.²⁰

In all but the simplest cases, the burden of the issues will be divided, each party having one or more cast upon him.

However not every decision made by a judge during or in preparation for a trial is susceptible to analysis in terms of the burden and standard of proof.²¹ Many decisions in and before trials involve weighing competing factors and the judge exercising evaluative judgment.

(b) Deciding cases on the burden: cases where no findings are possible and/or all explanations are improbable

6-07

While a judge or tribunal of fact should make findings of fact if it can, in exceptional cases it may be forced to the conclusion that it cannot say that either version of events satisfies the balance of probabilities. In such a case the burden of proof may determine which party succeeds.²² The judge or tribunal of fact may only dispose of a case on this basis if it cannot reasonably make a finding one way or the other on a disputed issue.²³ A judge should only do this where the state of the evidence is so unsatisfactory that no other course was open to them.²⁴

Where there are two improbable theories, the elimination of one does not automatically lead to the acceptance of the other, equally improbable, theory.²⁵ The judge is not bound always to make a finding one way or the other.²⁶ He has open to him the third alternative, saying that the party on whom the burden of proof lies in relation to any fact has failed to discharge that burden.²⁷

The judge must be satisfied on the evidence that a particular fact or state of af-

¹⁸ *Soward v Leggatt* (1836) 7 C. & P. 613.

¹⁹ *Abrath v North Eastern Railway* (1883) 11 Q.B.D. 440 at 457, per Bowen LJ; *Doe v Johnson* (1844) 7 M. & Gr. 1047, per Tindal CJ; *Toleman v Portbury* (1870) L.R. 5 Q.B. 288; *Williams v East India Co* (1802) 3 East 192.

²⁰ *Mills v Barber* (1836) 1 M. & W. 425 at 427.

²¹ *Misick v R.* [2015] UKPC 31; [2015] Cr App R 23. That was a criminal appeal. The same propositions apply equally in civil trials.

²² *Morris v London Iron & Steel Co Ltd* [1972] 2 All E.R. 496; cf. *Baker v Market Harborough Industrial Co-op Society Ltd* [1953] 1 W.L.R. 1472; *Bray v Palmer* [1953] 1 W.L.R. 1455; *Stephens v Cannon* [2005] EWCA Civ 222; [2005] C.P. Rep. 31 at [38]–[46]. *Cooke v Watermist Ltd* [2014] EWHC 125 (Pat) is a good example of a case decided on the burden of proof. A hearing officer concluded that, due to lack of documentary evidence and credible witnesses, he was unable to make findings of fact and dismissed the claim for co-inventorship on the basis that the claimant had failed to discharge the burden of proof. The High Court held that he was entitled to do so, applying *Stephens v Cannon* (ibid).

²³ *Stephens v Cannon* [2005] EWCA Civ 222; [2005] C.P. Rep. 31 at [46].

²⁴ *A (Children)* (Care Proceedings: Burden of Proof) [2018] EWCA Civ 1718; [2018] 4 W.L.R. 117.

²⁵ *Rhesa Shipping Co SA v Edmund (The Popi M)* [1985] 1 W.L.R. 948; *Plater v Sonatrach* [2004] EWHC 146 (QB), Nelson J, 4 February 2004; cf. *Alexander v Midland Bank Plc* [2000] I.C.R. 464.

²⁶ Compare *Woodhouse v Webster* [2009] I.C.R. 818 at [36]–[37], per Mummery LJ.

²⁷ Lord Brandon, *Rhesa Shipping Co SA v Edmunds (The Popi M)* [1985] 1 W.L.R. 948. Lord Brandon also stated that: "No judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence

fairs is more likely to have occurred than not. If a judge concludes that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not does not accord with common sense.²⁸

Elimination of an improbable theory may of course lead to the acceptance of a competing theory that is not improbable where the available evidence supports this.²⁹

However a judge should not aggregate percentages of unlikely events, to find that it is more likely than not that one of those unlikely events occurred. Such an aggregation of percentages is not a proper approach to the judicial function of the simple application of the balance of probabilities.³⁰ A court had to look at each possibility, both individually and together, with the evidence before deciding whether a matter more probably occurred than not.

(c) Examples

Some examples of the incidence of the persuasive burden in civil cases are as follows:

6-08

- (a) *contract*: in actions on contract, the burdens of proving the existence of the contract,³¹ breach and damages are all on the claimant; while the defendant has the onus of facts pleaded in confession and avoidance, e.g. infancy, release, rescission, accord and satisfaction, fraud;
- (b) *negligence*: the burden is on the claimant to assert negligence, but where the defendant alleges contributory negligence the burden lies on him³²;
- (c) *causation*: it is for the claimant to prove causation of loss³³;
- (d) *mitigation*: on the other hand, the burden is on the defendant to show that the claimant failed to mitigate his loss³⁴;
- (e) *bailment*: in bailment cases, the burden is on the bailee to disprove negligence once the claimant has proved the bailment.³⁵ The rule applies to gratuitous bailment in the same way that it applies to bailment for reward³⁶;

or otherwise, deciding on the burden of proof is the only just course for him to take" (approved in *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC; [2011] 2 A.C. 229 at [193]).

²⁸ Lord Brandon, *The Popi M* [1985] 1 W.L.R. 948.

²⁹ *Ide v ATB Sales Ltd* [2008] EWCA Civ 424; [2009] R.T.R. 8; *Datec Electronic Holdings v UPS* [2007] UKHL 23; [2007] 1 W.L.R. 1325; *ACE European Group Ltd v Chartis Insurance UK Ltd* [2013] EWCA Civ 224 at [35].

³⁰ *A (Children) (Care Proceedings: Burden of Proof)* [2018] EWCA Civ 1718; [2018] 4 W.L.R. 117.

³¹ In the case of ordinary commercial express agreements, it is not normally necessary to prove that there was an intention to create legal relations: *Chitty on Contracts*, 31st edn (London: Sweet & Maxwell, 2012), para.2-162.

³² *Wakelin v L & SW Rwy* (1886) 12 App. Cas. 41; *Gokal v Nand* [1939] A.C. 106; *White v Barry Railway* 15 T.L.R. 474; *Wood v LCC* [1941] 2 K.B. 232; *Moore v R Fox & Sons* [1956] 1 Q.B. 596; *Eso Petroleum Co Ltd v Southport Corp* [1956] A.C. 218; *Walsh v Holst & Co Ltd* [1958] 1 W.L.R. 800; *Fowler v Lanning* [1959] 1 Q.B. 426; *Dixon v Cementation Co* [1960] 1 W.L.R. 746; *Fraser v BN Furman Productions* [1967] 2 Lloyd's Rep. 1; *Radburn v Kemp* [1971] 1 W.L.R. 1502 at 1507.

³³ *The Solholt, Sotiros Shipping v Shmeiet Solholt* [1983] 1 Lloyd's Rep. 605.

³⁴ *Roper v Johnson* (1873) L.R. 8 C.P. 167; *Garnac Grain Co v Fauré & Fairclough* [1968] A.C. 1130 at 1140; *Lombard North Central Plc v Automobile World (UK) Ltd* [2010] EWCA Civ 20 at [72].

³⁵ *Coldman v Hill* [1919] 1 K.B. 443; *Houghland v RR Low (Luxury Coaches)* [1962] 1 Q.B. 694; *Schwarzschild v Harrods Ltd* [2008] EWHC 521.

³⁶ *Port Swettenham Authority v TW Wu and Co* [1979] A.C. 580 at 590.