

PROOF

Standard of Proof: The degree to which an issue must be proved -

1. **balance of probabilities** or
2. **Beyond reasonable doubt.**

Burden of Proof: Who has the onus of proving a particular issue?

1. Evidential burden: Is there **sufficient evidence** for the issue to go before the jury?
2. Legal burden: Has the issue been **proved to the requisite standard**?

BURDEN OF PROOF

The burden of proof is regulated by common law principles.

Cases for evidential burden:

Sheldrake v DPP [2004] UKHL 43

R v. Acott [1997] UKHL 5

Bratty v Attorney General of Northern Ireland [1961] UKHL 3

R v. Director of Public Prosecutions, Ex Parte Kebeline and Others [1999] UKHL 43

WHO BEARS BURDEN

1. Are the elements of the offence being considered in the evidence being assessed?
 - a. No → go to Q3
 - b. Yes → prosecution bears both the evidential and legal burden

DEFENCE

1. Is the defendant arguing a general defence?
 - a. No → go to next Q
 - b. Yes → defendant bears evidential burden, but prosecution bears legal burden
 - Defendant party must introduce evidence to support his claim that he was acting in defence (e.g. self-defence) in order to satisfy the evidential burden of proof.
 - the prosecution will have to convince the jury that the evidence is not persuasive

Example: The prosecutor might make the following statement during their closing address: “The evidence introduced by the accused cannot lead to the conclusion the he was acting in self-defence, for the following reasons...”
2. Is the defendant arguing an affirmative defence (e.g. mental impairment)?
 - a. No → go to next Q
 - b. Yes → defendant bears both the evidential and legal burden
3. Did the defence make a ‘no case’ submission?
 - a. No → go to next Q
 - b. Yes → it needs to be made after the prosecution finished presenting its evidence. Also, the submission needs to be decided by the judge
 - i. → Did the judge find that the prosecution has adduced insufficient evidence?
 - a) No → the case is still standing as the defence of ‘no submission’ failed and the evidential burden is satisfied. Therefore the legal burden arises. Go to Q3
 - b) Yes → then the case is over as the evidential burden is not satisfied. Therefore the legal burden does not arise.

SUFFICIENT EVIDENCE (EVIDENTIAL BURDEN)

1. Is there sufficient evidence for the issue to go before the jury?

Note: Consider the volume and weight of evidence and decide whether there is enough.

- a. No → if evidence is insufficient then there the jury will not consider the argument in their deliberations. Go to next Q.
- b. Yes → evidential burden is satisfied. Go to next Q

JURY

1. Is there a jury?

- a. No → The legal burden is to be decided by the judge. Go to next Q
- b. Yes → The legal burden is to be decided by the jury. Go to next Q

2. Did the prosecution review the evidence in their closing argument and tell the jury that it leads to one conclusion?

Note: It is during a closing address that the prosecution will arrive at a conclusion that is based on the evidence that it has presented - this is an argument - an argument is a conclusion that is supported by evidence or reasons.

Example: The accused is guilty / innocent

- a. No → The legal burden is very closely connected to the closing address that each party delivers at the end of the trial after all the evidence has been presented. Go to next Q

- b. Yes → The jury will listen to the argument and decide whether it is persuasive. Go to Q8

REQUISITE STANDARD (LEGAL BURDEN)

1. Does the prosecution bear the legal burden of proof?

- a. No → go to next Q
- b. Yes → Does the prosecution's argument satisfy the standard of proof - proves the case beyond a reasonable doubt? (*s 141(1)*)

Note: The legal burden on the prosecution is stricter. The claims or allegations they make must not give rise to a reasonable doubt.

Note: Consider next section 'Standard of Proof'

- i. No → The legal burden is not satisfied. The evidence did not yield a persuasive argument to prove the case beyond a reasonable doubt, and therefore the judge or jury will reject the argument. Go to Q6
- ii. Yes → The legal burden is satisfied. The evidence did yield a persuasive argument to prove the case beyond a reasonable doubt, and therefore the judge or jury will accept the argument. Go to Q6

2. Does the defendant bear the legal burden of proof?

Note: Consider next section 'Standard of Proof'

- a. No → go to Q11
- b. Yes → Does the defendant's argument satisfy the standard of proof - proves the case beyond the balance of probabilities? (*s 141(2)*)

Note: Proving something on the balance of probabilities means to prove that it is more likely to have happened than not (i.e., a 51% chance).

- i. No → The legal burden is not satisfied. The evidence did not yield a persuasive argument to prove the case beyond a balance of probabilities, and therefore the judge or jury will reject the argument. Go to Q6
 - ii. Yes → The legal burden is satisfied. The evidence did yield a persuasive argument to prove the case beyond a balance of probabilities, and therefore the judge or jury will accept the argument. Go to Q6
3. Are both the evidential and legal burden questions answered?
- a. No → the burden of proof cannot be discharged
 - b. Yes → the burden of proof can be discharged

STANDARD OF PROOF

The standard of proof, unlike the burden of proof, does appear in the Evidence Act.

The standard of proof provides jurors with a guideline that is supposed to help them determine if an allegation has been proven.

The courts have created guidelines to promote consistency amongst jury members and judges so that they apply a similar standard of proof. Both standards are defined in the Evidence Act:

- Criminal Standard: **section 141**
- Civil Standard: **section 140**

BEYOND REASONABLE DOUBT – JURY QUESTIONS

1. Does the judge seek the power to elaborate somewhat on the meaning of "beyond reasonable doubt"? (*s 64 of Jury Directions Act 2015*)
 - a. No → next section
 - b. Yes → Did the jury ask a direct question about the meaning of the phrase, or a question that indirectly raises the meaning of the phrase, "proof beyond reasonable doubt"? (*s 64(1)*)
 - i. No → the judge cannot comment on it
 - ii. Yes → pursuant to legislation the judge can comment on it
→ *Example*: they can refer to the presumption of innocence; and the prosecution's obligation to prove that the accused is guilty (*s 64(1)(a)*)
2. Did the prosecution only persuade the jury that the accused is probably guilty or very likely to be guilty? (*s 64 (1)(b)*)
 - a. No → possibility of persuasion beyond reasonable doubt to be achieved
 - b. Yes → the argument is not persuasive enough to prove the case beyond reasonable doubt
→ the judge can indicate this to the jury if the jury asks
3. Did the prosecution prove anything with absolute certainty when reconstructing past events? (*s 64 (1)(c)*)
 - a. No → persuasion beyond reasonable doubt can still be established since it is almost impossible to prove anything with absolute certainty when reconstructing past events
→ the judge can indicate this to the jury if the jury asks
 - b. Yes → go to Q4
4. Does the jury have a reasonable doubt about whether the accused is guilty? (*s 64 (1)(d)*)
 - a. No → go to Q5

- b. Yes → the jury cannot be satisfied that the accused is guilty if the jury only has a reasonable doubt about whether the accused is guilty
 - the judge can indicate this to the jury if the jury asks
- 5. Does the jury have an imaginary or fanciful doubt or an unrealistic possibility about whether the accused is guilty? (*s 64 (1)(e)*) (*Green v The Queen (1971)*) (*Keil v The Queen (1979)*)
 - a. No → go to Q6
 - b. Yes → a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility
 - the judge can indicate this to the jury if the jury asks
- 6. Did the trial judge adapt their explanation of the phrase "proof beyond reasonable doubt"? (*s 64 (2)*)
 - a. No → go to Q7
 - b. Yes → the trial judge is allowed to do this to respond to the particular question asked by the jury
- 7. Was assessing the question of whether there is a reasonable doubt a subjective one? (*Green v The Queen (1971)*) (*R v Southammavong (2003)*)
 - a. No → go to Q8
 - b. Yes → the question is a subjective one to be determined by each individual juror
- 8. Did the judge describe "the words 'beyond reasonable doubt' as ordinary everyday words in the ordinary English usage, mean exactly what they say and that is how the jury should understand them? (*R v Southammavong (2003)*) (*R v GWB (2000)*)
 - a. No → go to Q9
 - b. Yes → the trial judge can respond to a jury request for clarification

EVIDENCE LAW

WEEK 2: VERBLE EVIDENCE
