NOTE TO USERS

Probability and Conviction

Irreconcilable Concepts or Two Sides of the Same Coin?

A Comparative Analysis of the Standard of Proof in Civil Matters

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Abstract

This thesis questions the widespread proposition that the civilian standard of proof in civil matters is considerably higher than the corresponding standard in the Common Law. Instead, it is argued here that the "odd differences" in the formulae employed to describe it "are merely a matter of words".

Conceptually, both legal traditions combine the subjective element of a belief in the truth with the objective requirement of warrant for this belief in the evidence presented. The trier's belief that a certain statement is true has to be reasonably inferable from the evidence. In both traditions the standard is not fixed in the sense that it depends on a variety of factors relevant to the specific case, such as whether evidence is amply available, or whether only testimonial evidence can be adduced.

This approach to the standard of proof is also followed by the Principles and Rules for Transnational Civil Procedure developed in 2002 by the American Law Institute (ALI) and UNIDROIT. Their treatment of the standard of proof appears to be a synthesis of the Common and Civil Law approaches.

Résumé

La présente thèse remet en question l'affirmation largement répandue selon laquelle le niveau de la preuve en matière civile est beaucoup plus élevé dans les juridictions civiles qu'en droit commun. La présente analyse essaie d'établir que les "différences" dans les formulations légales relèvent plus de l'ordre linguistique que de celui de la substance.

Le concept de preuve se compose dans les deux traditions légales d'un élément subjectif étant la conviction personnelle de la vérité et d'un élément objectif tenant à l'existence des faits qui corroborent cette conviction. Pour qu'une conviction soit valable, il est nécessaire qu'elle soit raisonnablement supportée par la preuve des faits en question. En droit commun comme en droit civil, le niveau de preuve est variable en ce qu'il dépend d'une variété de facteurs propres à l'espèce. Par exemple, la suffisante qualité des moyens de preuves fournis, la nécessité de témoignages, sont des questions à examiner au cas par cas.

L'approche adoptée quant à l'analyse du standard de preuve est également à la base des Principes et Règles de Procédure Civile Transnationale développés par l'Institut de Droit Américain (ALI) en 2002 ainsi que principes d'UNIDROIT en la matière. En effet, le concept du standard de preuve avancé dans ces deux projets semblent faire la synthèse des concepts de preuve en droit commun et droit civil.

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To bring my language on an appropriate level would not have been possible without the work of Victoria Hottenrott who undertook the tiresome and endless task of editing and proofreading. I remain, however, responsible for all mistakes.

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Introduction

The standard of proof in civil matters has attracted considerable attention in the Common Law as well as in the Civil Law world. In the Common Law, the discussion of this problem goes back to giants such as Bentham, Thayer, and Wigmore,[1] and has reached an impressive degree of depth and sophistication. In the Civil Law world, the law of evidence has never received the same amount of academic consideration. In Germany, however, legal scholars began to take serious interest in the subject about thirty-five years ago.[2] A recent example for a comparative approach to the topic is a paper by two U.S. American law professors, Kevin M. Clermont and Emily Sherwin.[3] They claim that on the issue of the standard of proof an "odd difference between common law and civilian procedures" exists in the sense that the Civil Law applies a much higher standard of proof.[4] The authors try to explain why "civilians can be so wrong" basically with the proposition that "(t)he civil law seeks the legitimating benefits of the myth that their courts act only on true facts and not on mere probabilities."[5]

This thesis questions the proposition that the civilian standard is indeed as high as it is depicted by Clermont and Sherwin and tries to establish the idea that the "odd difference" "are merely a matter of words"[6]. In this sense this thesis intends to be part of the civilian response, which Clermont and Sherwin have desired. We will try to reconcile the

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[1] For a brief overview of the history of the law of evidence in the Common Law see William Twining, in Enid Campbell & Gretchen Kewley, eds., *Well and Truly Tried* (Sydney: The Law Book Company, 1982) 211.

[2] Gerhard Kegel, "Der Individualanscheinsbeweis und die Verteilung der Beweislast nach überwiegender Wahrscheinlichkeit" in Kurt H. Biedenkopf, Helmut Coing & Ernst-Joachim Mestmäcker, eds., *Das Unternehmen in der Rechtsordnung - Festgabe für Heinrich Kronstein*, (Karlsruhe: C.F. Müller, 1967) 331.

[3] Kevin M. Clermont & Emily Sherwin, "A Comparative View of Standards of Proof" (2002) 50 Am. J. Comp. L. 243.

[4] *Ibid. at* 244.

[5] *Ibid. at* 274-5.

[6] Lord Denning in *Bater v. Bater,* [1950] 2 All E.R. 458 (C.A.) at 459 with respect to the debate about a flexible standard of proof. See also Dixon J in *Briginshaw v. Briginshaw* (1938), 60 C.L.R. 336 (H.C.A.) at 368.

seemingly different approaches of probabilities and conviction pursued in the two legal systems. Evidence for the proposition that these concepts are but two sides of the same coin are the Principles and Rules for Transnational Civil Procedure developed by the American Law Institute and UNIDROIT as well as the practice in international commercial arbitration.

Any comparative study has to be aware of the problem that "cross-cultural communication invites exchange of stereotypes."[7] Comparative legal scholarship always faces the danger to be misguided by the phraseology of a foreign jurisdiction. It is one of the comparatist's most important tasks to look behind the words and try to grasp the function and goals of a legal device or a doctrine.

To compare words rather than their meaning is particularly tempting with respect to the standard of proof. Even in times of increasing relevance of statistical evidence, fact-finding remains a highly intuitive process, which is hard to press in a formula. However, as a matter of legal certainty, all jurisdictions have developed phrases or metaphors to describe the standard of proof. But we must not mistake these formulae for the problem we try to describe with them. In order not to compare the labels but the things labelled, the legal tradition has to be taken into consideration. An accurate interpretation of any legal rule is possible only if the rule is put in its context.

The temptation to mistake a legal rule for the formula another legal system employs to describe it is particularly apparent when the foreign system uses a similar terminology. Let alone the problem of accurate translation, the comparatist has to be very careful not to interpret terms used in a foreign jurisdiction in the same way he interprets them in his own legal tradition. The way the discussion of the standard of proof in civil cases has developed on both sides of the Channel is a typical example of mutual distortions and misunderstandings that evolve if one assigns domestic notions to foreign concepts. Terms

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[7] William Twining, *Rethinking Evidence* (Oxford: Basil Blackwell, 1990) at 178.

such as "probability", "conviction", "persuasion", and "doubts" are used in the Common as well as in the Civil Law world to describe the standard of proof applicable in the adjudication of civil cases. In order to ascertain their meaning in their proper context we will have to carefully scrutinize the way they are conceived in the two legal traditions that shall be reviewed here.

To be sure, "the adoption of a standard of proof is more than a semantic exercise."[8] How difficult it is for a party to prove the facts essential to its case is a crucial question since it is decisive for the allocation of risks between the parties. The importance of the standard of proof and its inseparable sibling, the burden of proof, can probably not be expressed in a better way than James P. McBaine put it in 1944:[9]

> "No lawsuit can be decided, rationally, without the application of the commonplace concept of the burden of proof – the duty to persuade – or as is sometimes otherwise stated the risk of non-persuasion. Nor can any legal system be praised for practicability if there exists vagueness, uncertainty or confusion as to the scope or extent of the burden, or if the language commonly employed to describe its scope or extent is not easily comprehensible to those whose duty it is to determine whether the burden has been sustained."

In our comparison of the Common Law's and the Civil Law's approach to the standard of proof we will mainly concentrate on German Law as a prototypical example of the Germanic legal tradition which comprises Switzerland and Austria as well. Together with the Romanic traditions, these Germanic jurisdictions form the family of continental civilian jurisdictions.[10] As an example for a jurisdiction from a Romanic tradition we will choose the French law.

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[8] *Addington v. Texas* (1979), 441 U.S. 418, 425.

[9] James P. McBaine, "Burden of Proof: Degrees of Belief" (1944) 32 Cal. L. Rev. 242.

[10] See for this division Mary Ann Glendon, Michael Wallace Gordon & Christopher Osakwe, *Comparative Legal Traditions*, 2d ed. (St. Paul, Minn.: West Publishing, 1994) at 44.

These Civil Law jurisdictions employ the same formulae to describe the standard of proof in civil and in criminal matters. We will concentrate on civil cases, because here, the differences with the Common Law approach seem to be particularly apparent. For the purposes of this thesis, we will define civil cases as cases where two private parties litigate or cases to which the state is a party in a non-criminal context. The scope of civil cases thus spans from the ordinary claim for damages as a consequence of a tort to paternity and divorce matters. At times, however, we will also take a look at cases which are administrative in nature since here the state as an official authority with coercive power is a party to the trial.

Chapter 1 The Role of the Standard of Proof within the Procedural and the Substantive Law

The law of evidence is – perhaps like no other field – located at the intersection of substantive and procedural law.[1] Some of its features are clearly procedural, such as the handling of witnesses,[2] while others have a somewhat ambiguous nature that makes a clear assignment to one of the two fields impossible.[3] This is particularly true for the burden of proof, presumptions, and – the subject of this thesis – the standard of proof. Principles of evidence in general, and these problems in particular, cannot be understood properly without considering the procedural and substantive context in which they are applied. This interdependence is especially apparent in Quebec, where some parts of the law of evidence are regulated in the *Civil Code of Quebec* (C.C.Q.) and other parts (such as the examination of witnesses) in the *Code of Civil Procedure* (C.C.P.). Similarly, the German Civil Code, the *Bürgerliches Gesetzbuch* (BGB), has several provisions that deal with evidence-related matters[4], whereas the main part of the law of evidence – as little as there is in a continental jurisdiction – is incorporated in the Code of Civil Procedure (*Zivilprozessordnung*, ZPO).

I. Epistemic Framework for Proof

The law of evidence is a child of two worlds in yet another sense. It is the copula between historic reality and the trial taking place in the present. In almost every trial, the jury or the judge is confronted with the problem that a decision has to be made with respect to past or

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[1] Suggesting a broad definition of the law of evidence: Australian Law Reform Commission, *Evidence*, vol. 1 (interim report, 1985) at 13-16.

[2] Colin Tapper, *Cross & Tapper on Evidence*, 9th ed. (London, Edinburgh, Dublin: Butterworths, 1999) [Cross *on Evidence*] at 5.

[3] See Haimo Schack, *Internationales Zivilverfahrensrecht*, 3d ed. (Munich: Beck 2002) at 695 ff., who describes it as the most difficult conflict of (evidence-) laws problem whether the standard of proof should be derived from the lex fori or the lex causae. The former would be the case if the standard were a procedural matter the latter if it were substantive. The question is highly contested.

[4] See at 17, below.

present phenomena, which the trier of facts did not witness himself. The process of fact-finding, which is governed by the law of evidence, provides the method by which these events are made ascertainable within the judicial process. By collecting and weighing the evidence the trier of facts tries to find out what has happened, which allegations of fact are true. Thus, it is the intrinsic purpose of the law of evidence to ascertain the truth.[5] This is a common feature of all jurisdictions that shall be reviewed here. Rule 102 of the American Federal Evidence Rules for example, states that it is the goal of the law of evidence "that the truth may be ascertained".[6] The same ideal is expressed in § 286 of the German Code of Civil Procedure, which requires that the judge decided whether he "regards an allegation as true".

1. Truth in the Judicial Process

For the purposes of judicial fact-finding, and for the purposes of this thesis, the term "truth" is constructed as the correspondence between a statement and what exists in reality.[7] Some modern philosophers, however, suggest a post-modern conception of truth.[8] These authors recognize no other reality than whatever one chooses to make of it by means of language. If one so deconstructs the world outside of language, fact-finding – understood as the process of uncovering what has happened – becomes pointless. The very idea of fact-finding

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[5] Not all the rules of the law of evidence, however, actually facilitate the process of truth finding. Some rules, such as the privilege rules serve extrinsic purposes, such as the protection of family relations.

[6] For Canada see John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto and Vancouver: Butterworths, 1999) at 3. The same rule is in effect in Louisiana, a mixed jurisdiction. On mixed jurisdictions see William Tetley, "Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)" (2000) 60 Louisiana Law Review 677.

[7] Mirjan Damaška, "Truth in Adjudication" (1998) 49 Hastings L.J. 289 at 291; *Evidence Law Adrift* (New Haven & London: Yale University Press, 1997) at 94. See also Helmut Rüßmann, Alternativkommentar zur ZPO (Neuwied: Luchterhand, 1987) [Rüßmann in AK ZPO] at § 286 para. 14; Stelios Kousoulis, "Beweismassprobleme im Zivilprozess" in Peter Gottwald & Hanns Prütting, eds., *Festschrift für Karl Heinz Schwab zum 70. Geburtstag* (Munich: Beck, 1990) 276 at 280. Consequently, one can only speak of "true allegations" but not of "true facts". Facts or events simply exist. See Helmut Weber, *Der Kausalitätsbeweis im Zivilproezess* (Tübingen: Mohr, 1997) at 14. Truth is not a category that can be applied to them. I will use the term "real facts" if I refer to facts that are regarded as existing in reality.

[8] See, e.g., Hayden White, "The Burden of History" in *Tropics of Discourse* (Baltimore: John Hopkins University Press, 1978) at 45.

presupposes that there is a "reality beyond language"[9] that exists independently of human observations.[10] Post-modern conceptions of reality and truth cannot be reconciled with the premise inherent to the law of evidence that there is a real world, the events of which can be established by means of adducing and weighing evidence. Such approaches are therefore of little use with respect to the questions we are concerned with.

"Reality" in a society consists of more events than phenomena intrinsic to nature. Let us take the example of a car accident: whether the lights were red when the defendant's car crossed the street concerns a fact outside social construction, it is intrinsic to nature. But whether this happened on a Tuesday or on a Monday is a matter that exists only as a social construction. In our "correspondence" definition of truth, we use the term "reality" to refer to both kinds of phenomena. "Real" are not only events that take place in nature independently of social construction but also those phenomena which are constructed by social actors.

2. Objectivity and Knowledge in Fact-finding

To include social constructions in the definition of reality brings a subjective component into the process of fact-finding, since these constructions are subject to the views of the members of society. There can be no objective knowledge in the strong sense as to what reality is if reality consists (at least partly) of social constructions. As long as there is a unanimous consent within a society as to what counts as reality (days of the week) this does not create a serious complication as to the objectivity of judicial fact-finding. In this sense, an "ontologically subjective matter can be epistemically objective"[11]. But at times a case may concern an issue which is neither a matter intrinsic to nature nor subject to a unanimously consented construction of reality. This is especially likely in deeply split

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[9] Damaška, *supra* note 7 at 290.

[10] William Twining, *Theories of Evidence* (London: Weidenfeld & Nicolson,1985) at 13

[11] Damaška, *supra* note 7 at 292.

society, where normative standards are uncertain and necessarily affects the strength of the claim that the judgment is based on reality.[12]

The strength of this claim is furthermore affected by the limitations of human knowledge[13]. Since particularly our knowledge as to phenomena intrinsic to nature still is rather limited despite all scientific progress, we cannot be sure that our factual conclusions rest on true assumptions, neither in everyday life nor in judicial proceedings.

A last but very serious issue concerns the limitations of resources (time and money), which are available in judicial proceedings.[14] In some cases these limitations make it impossible to ascertain the events in question to a standard of mathematical certainty.[15] To adduce further evidence may be too time-consuming, too costly, or simply impossible. Since our belief as to past events is often based on incomplete evidence we have to be satisfied with a more or less close approximation to the truth.[16]

All these factors affect the degree of accuracy of judicial findings with respect to the truth of factual allegations. For these reasons we cannot in all circumstances determine with the same degree of persuasion the truth of the allegations to be proven. The degree necessarily varies according to the kind of allegation, the state of science with respect to the alleged

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[12] *Ibid.* at 293. *R.D.S. v. Her Majesty The Queen* (1997), 3 S.C.R. 484, however, is an example for not unanimously shared constructions of reality expressed by a trial judge. The issue in this case was whether a reasonable apprehension of bias arose from comments the Youth judge had made during the trial as to the credibility of a testifying police officer. From the headnote: "The Judge remarked in response to a rhetorical question by the Crown, that police officers had been known to mislead the court in the past, that they had been known to overreact particularly with non-white groups, and that that would indicate a questionable state of mind."

[13] See Ian H. Dennis, *The Law of Evidence*, 2d ed. (London: Sweet & Maxwell, 2002) at 98. We understand "knowledge" as the sum of statements that are accepted as being true in a society.

[14] These limitations are not only of economic but of legal nature as well, for some rules of admissibility follow an extrinsic policy.

[15] James P. McBaine, "Burden of Proof: Degrees of Belief" (1944) 32 Cal. L. Rev. 242 at 246.

[16] Gerhard Kegel, "Der Individualanscheinsbeweis und die Verteilung der Beweislast nach überwiegender Wahrscheinlichkeit" in Kurt H. Biedenkopf, Helmut Coing & Ernst-Joachim Mestmäcker, eds., *Das Unternehmen in der Rechtsordnung - Festgabe für Heinrich Kronstein*, (Karlsruhe: C.F. Müller, 1967) 331 at 335; V. C. Ball, "The Moment of Truth: Probability Theory and Standards of Proof" (1961) 14 Vand. L. Rev. 807.

fact, whether it is a past or existing phenomenon, whether evidence is amply available or evidence is sparse and according to many other factors.[17]

If we try to reconcile this result with the above proposition found in codes, cases, and commentaries, that truth is the intrinsic goal of fact-finding,[18] two solutions seem to be possible: we may either distinguish truth as the result of fact-finding from the "actual" truth or we may cling to the absolute understanding of truth and admit that absolute truth must often[19] remain an ideal in litigation.[20] If one constructs truth in the latter sense, the language of the codes would not be accurate or it would at least be pretentious since truth is the goal but not necessarily the result of judicial fact-finding.

The former approach would blur the conception of truth as an absolute term for we would have to distinguish between actual truth, which is not a reasonable goal for adjudication, and "judicial truth"[21] as the result of a judicial fact-finding process. "(W)hat is really true need not be square with what has been decided to be true."[22] But this approach, which philosophers call the "realist view of truth"[23], is able to maintain the claim that truth is the intrinsic goal and the result if not of adjudication in general at least of judicial fact-finding. For the purposes of this thesis we will therefore adopt this realist view of truth.[24]

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[17] Rüßmann in *AK-ZPO*, *supra* note 7 at § 286 paras. 20 – 22.

[18] See at 5, above.

[19] To be sure, in the bulk of cases it is possible to ascertain the actual truth without problems and without substantial doubts as to the objectivity of the finding.

[20] *Briginshaw v. Briginshaw* (1938), 60 C.L.R. 336, 360. John W. Strong, *McCormick on Evidence*, 5th ed. (St. Paul, Minn., 1999) vol. 2 § 339 at 423; Philippe Théry, "Finalités du droit de la preuve" (1996) 23 Droits 41 at 46.

[21] V. C. Ball, "The Moment of Truth: Probability Theory and Standards of Proof" (1961) 14 Vand. L. Rev. 807 at 808; The Shorter Oxford English Dictionary, 3d ed. (Oxford: Clarendon Press, 1944, reprint 1990).

[22] Damaška, *supra* note 7 at 295.

[23] See Alvin I. Goldman, *Epistemology and Cognition* (Cambridge Mass. and London, England: Harvard University Press, 1986) at 142 – 161.

[24] The "correspondence theory" of truth presupposes a realist view of truth since if one would adopt an absolute understanding of truth, not one statement would certainly be true. See Damaška, *supra* note 7 at footnote 13. A realistic stance has furthermore the advantage to detach the justification of a judgment

With this definition we may now turn again to the proposition that truth is the goal of fact-finding. As we have already seen, truth has a subjective component when it comes to phenomena that are socially constructed. Since no single member of a society constructs all facts in exactly the same way, we can require no more from him than to decide on the basis of what he believes is true, i.e. on statements that correspond with his construction of reality. If we required more, we would ask the judge to make too strong a claim for the purposes of adjudication. If it was required that the facts are true – independent of his belief – he would have to apply constructions of reality that are accepted by all subjects (or at least the majority) within the society. To ascertain these constructions would be an enormous and in nearly all of the cases a superfluous task.[25]

The mechanism the law uses to nevertheless ensure that the judge does not base his judgment on a rather metaphysical or superstitious construction of reality is the duty to give reasons for factual determinations.[26] Since subjectivity with respect to the fact-finding process cannot be fully eradicated the law at least requires the judge to disclose in which way his construction of reality has affected his factual determinations. If it should become apparent that he has obscure beliefs that do not count as reality in the view of the losing party the party may appeal the judgment. If the appellate court feels the same, the judgment has a "manifest, palpable error"[27] and will be reversed. Thus, the duty to give reasons warrants a minimum standard of objectivity in the otherwise inherently subjective process of the determination of the truth.

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from the truth. In particular in civil trials absolute truth is neither a necessary nor a sufficient condition for the justification of a judgment.

[25] In nearly all cases, however, the judge's construction will not differ from the commonly accepted construction.

[26] See for this duty § 286 S. 2 ZPO.

[27] See for this description of the standard of review for Canada: *Lapointe v. Hopital Le Gardeur* (No. 1), [1992] 1 S.C.R. 351 at 359. The judge's subjective beliefs can also raise reasonable apprehensions of bias and may provide grounds for an appeal. See *R.D.S. v. Her Majesty The Queen* (1997), 3 S.C.R. 484. In Germany, a "Revision" (appeal to the BGH) can be based on a violation of the "laws of logic and experience" by the lower court. See Heinz Tomas & Hans Putzo, *Zivilprozessordnung*, 25th ed. (Munich: Beck, 2003) at § 550 paras. 10 f.

II. The Standard of Proof in Civil Trials

With the "Standard of Proof" ("Beweismaß") or "Quantum of Proof" ("Beweisquantum"), the law describes the degree of belief or probability that is required to allow the trier of facts to regard a factual allegation as proved.

This preliminary and rather broad definition sheds light on a problem, which is sometimes not sufficiently appreciated: the term "standard of proof" is rather ambiguous as it can either describe the probability of a fact or it can refer to the degree of belief in the mind of the trier of facts.[28] The former is true for the formula of "Balance of Probabilities" which describes the standard of proof in civil cases in Common Law jurisdictions. The standard of "Beyond Reasonable Doubt" on the other hand as applied in criminal cases in the Common Law, is an example for a formula that refers to the degree of belief on the side of the trier of facts.[29] Similarly, the German law emphasises the grade of persuasion that a judge must gain from the evidence presented at trial.

Before the interpretations and implications of these standards are explored, it would be too early to attempt a reconciliation of these conceptually very different approaches. However, the fact that the term "standard of proof" is not completely unambiguous should at least raise awareness of the problems with respect to the comparability of the different standards and their descriptions by formulae.

In the sense that it is a question of the standard of proof how difficult it is for a party to prove an allegation the standard has the effect of distributing risks between the parties.[30] The higher the standard of proof, the more difficult it is to discharge the burden of proof and, consequently, the higher is the risk for the party bearing it to lose on this issue. It is for

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[28] See Ralph K. Winter, "The Jury and the Risk of Nonpersuasion" [1971] Law & Soc. Rev. 335 at 339.

[29] See at 24, below.

[30] See *Addington v. State of Texas* (1979), 441 U.S. 418 at 423; Reinhold Geimer, *Internationales Zivilprozessrecht*, 4th ed. (Köln: Dr. Otto Schmidt, 2001) [Geimer] at 2336.

this correlation that the standard of proof has such an important role for the manner in which a jurisdiction defines its approach to the assessment of evidence. Jurisdictions with a high standard of proof favour – at least theoretically – the defendant.[31] Thus, the status quo is protected. Reciprocally, jurisdictions that apply a low standard favour the plaintiff, since it is relatively easy for him to make his case. In such a jurisdiction the status quo can be altered more easily.

Sometimes the standard of proof is understood as the "test by which it may be ascertained whether a fact exists or does not exist."[32] This wording does not seem to be completely accurate for the trier of facts really has three and not only two choices: He can come to the conclusion a) that the fact exists, b) that it does not exists, or c) that he can not decide whether it exists or not. The latter situation is called a "non liquet" for it is "not clear" what the real facts are. If b) and c) are the outcome the party who has tried to prove the fact loses on this issue. But even though the results are the same, the two situations should be distinguished for in situation c) the verdict is based on the allocation of the burden of proof[33] whereas the trier of facts in situation b) has formed an actual opinion as to what has happened. If one tries to formulate a test that allows the trier of facts only two answers (yes or no) the question should be phrased with respect to the trier's mind, for example: "Do you believe, to an extent that meets the applicable standard of proof, that fact X exists?" It follows that a negative answer to this question can have two reasons: the trier of facts is either of the opinion that fact X does not exist or his positive belief that it does exist is not strong enough.

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[31] Provided the plaintiff bears the burden of poof. This is the default allocation, see at 18, below.

[32] See for example McBaine, *supra* note 15 at 244. A similar understanding can be found in the experiment conducted by Donald G. Hagman & Malcolm D. MacArthur, "Evidence: The Validity of a Multiple Standard of Proof" [1959] Wisc. L. Rev. 525 at 531. Here, the jurors seem to be faced with a question that only allowed the answers "Yes, the siren was on", or "No, the siren was not on". The form apparently did not provide the possibility of "I cannot decide as I am still in doubt".

[33] See at 18, below.

III. The Law of Evidence and its Links to the Procedural Law

The way and style in which a trial is conducted potentially influences the standard of proof. Not all of these procedural rules are pure formalities[34] and, comparing the Common and the (German) Civil Law, some differ considerably.

a) Adversarial v. Inquisitorial?

In one respect, however, the differences may not be as drastic as they are sometimes depicted: it is a widespread belief among Common Law scholars that the procedure in Civil Law traditions is inquisitorial rather than adversarial.[35] This is not the place to add another footnote to this debate but it shall be noted that there are serious doubts whether this is indeed true for German civil trials.[36] One of the most important principles of German civil procedure is the "Dispositionsmaxime" which implies that the trial – its beginning, its scope, the way it is conducted, and its termination – is to a large extent in the hands of the parties.[37] The court has neither the right nor the duty to collect evidence on its own,[38] and it is for the parties to suggest witnesses in support of their positions. In addition, even though

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[34] See Watson *et al., The Civil Litigation Process*, 5th ed. (Toronto: Edmund Montgomery Publications, 1999) at 287.

[35] This belief is probably rooted in the work of John H. Langbein, who describes the German law of civil procedure as indeed very inquisitorial. See John H. Langbein, "The German Advantage in Civil Procedure" (1985) 52 U. Chi. L. Rev. 823; "Legal Institutions: Trashing the German Advantage" (1988) 82 Nw. U.L. Rev. 763. For the influence Langbein had see for example Howard M. Erichson, "Mass Tort Litigation and Inquisitorial Justice" (1999) 87 Geo. L.J. 1983, who relies on Langbein and his assessment of the German procedural system.

[36] Kevin M. Clermont & Emily Sherwin, "A Comparative View of Standards of Proof" (2002) 50 Am. J. Comp. L. 243 at 266 argue that this belief is "largely mythical".

[37] See in English Burkhard Bastuck & Burkard Gopfert, "Admission and Presentation of Evidence in Germany" (1994) 16 Loy. L.A. Int'l & Comp. L.J. 609.

[38] In theory, however, the court has the possibility to seek expert evidence on its own motion, § 144 ZPO. In practice, no court would ever exercise this right. It seems that the assessment of the German system as prototypical example for an inquisitorial procedure is to a large part based on a rather theoretical study focussed exclusively on the text of the Code.

the judge begins the examination of the witness, each of the parties has the right to examine or cross-examine the witness.[39]

b) The Jury System

A large part of the law of evidence in the Common Law cannot be understood properly without reference to the jury system. Today, juries in civil trials are the exception rather than the norm: In England trials by jury are only possible – and indeed very rarely requested – where the claim involves fraud, libel, slander, malicious prosecution or false imprisonment.[40] In the United States only 1.8 % of all federal civil cases in 1995 were terminated using a jury.[41] In Common Law Canada trials with juries comprise a mere five percent of all cases,[42] and Quebec has abolished juries in civil cases completely in 1976.[43]

However unimportant the jury as the trier of facts in civil cases may be in practice, conceptually, the jury trial still is the model for Common Law civil procedure.[44] This orientation towards a jury as a trier of facts has many ramifications, of which two shall be noted for our purposes:

The impressive scope and elaborate structure of the rules on the admissibility of evidence are best explained by the concern of the Common Law to exclude unreliable or weightless

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[39] See e.g. Introduction to the ALI/UNIDROIT Principles and Rules for Transnational Civil Procedure, [2001] Unif. L. Rev. 1035 at 1043: "(T)hese differences are of degree, and the degrees of differences have diminished in the modern era."

[40] Supreme Court Act 1981, s 69. County Courts Act (1984) s 66.

[41] Ellen E. Sward, *The Decline of the Civil Jury* (Durham, North Carolina: Carolina Academic Press, 2001) at 13. This share is even declining over the last 50 years.

[42] Arthur J. Meagher & Ronald A. Meagher, *Civil Procedure Simplified* (Toronto: Butterworths, 1983) at 226.

[43] See John E. C. Brierley & Roderick Macdonald ed., *An Introduction to Quebec Private Law* (Toronto: Emond Montgomery Publications 1993) at 696.

[44] A nice example for this proposition is given by Watson, *supra* note 34 at 18. The authors acknowledge that trials before a judge are the norm but base their description of the trial nevertheless on a jury trial. Adrian Keane, *The Modern Law of Evidence*, 5th ed. (London, Dublin Edinburgh: Butterworths, 2000) at 27 states that "the division of functions between judge and jury, which dates from a time when jury trial was the norm in both civil and criminal proceedings, has left a deep impression on the modern law of evidence, even as it now applies in cases without a jury."

evidence in order to prevent the jurors from being unduly influenced by pieces of evidence with insufficient probative value.[45]

Since it is the province of the jury to decide whether factual allegations are proved and since the jury consists of laymen the judge has to explain the standard by which they shall determine the facts, the judge has to give the jurors an idea as to which degree of belief is requested in order to regard a fact as proved.[46] These instructions have to be comprehensible and precise at the same time. This may be a reason why the Common Law – from very early on – has developed definitions for the standard of proof whereas Civil Law lawyers never had to bother with explaining the standard of proof to persons outside the legal community. In Germany, for example, a critical analysis of the standard of proof was initiated by comparative studies of the matter in the sixties and seventies.[47]

c) Discovery Procedure

Another significant difference between continental jurisdictions and Common Law countries is the absence of a pre-trial discovery procedure in Civil Law jurisdictions. This procedure of disclosure allows parties access to evidence that they otherwise would not even be aware of. It is one of the principal purposes of discovery to do away with the element of surprise of litigation and to "make facts disclosed to the fullest practical extent".[48] Since the parties have better access to more evidence the evidence presented at trial is – at least theoretically – of higher probative value, which allows a closer approximation to the ideal of truth.[49]

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[45] See Keane, *ibid.* at 1.

[46] In this sense the standard of proof in jury trials has a communicatory function. See *Addington v. State of Texas* (1979), 441 U.S. 418 at 423.

[47] Kegel, *supra* note 16. Hans-Joachim Musielak, "Das Överviktsprincip - Zum Verhältnis richterlicher Überzeugung und Wahrscheinlichkeit" in Alexander Lüderitz & Jochen Schröder, eds., *Festschrift für Gerhard Kegel* (Frankfurt a.M.: Alfred Metzner Verlag, 1977) [Musielak, Överviktsprincip] 451.

[48] *United States v. Procter Gamble Co.* (1958), 356 U.S. 677.

[49] See David W. Loisell & Wally, "Modern California Discovery", 2d ed. (San Francisco: Bancroft-Whitney, 1972), at 2; Dennis, *supra* note 13 at 288.

This necessarily affects the standard of proof. If the evidence presented at trial is more reliable then it is more likely that the trier of facts can make correct inferences from it. If the trier of facts is able to ascertain the correct facts there is no need to base a decision on the burden of proof.

IV. Links to the Substantive Law

The substantive law is intertwined in more than one way with the law of evidence and, thus, is of great importance in particular to the standard of proof.

1. The Substantive Law Determines the Facts in Issue

The first and most obvious connection is that the substantive law determines the facts the claimant has to prove in order to succeed. Let us take the liability of a manufacturer as an example. The substantive law may define it as a matter of strict liability, to the effect that fault on the side of the manufacturer is not an issue at trial. Alternatively, the law could put the onus to prove non-fault on the defendant, or it could assign the burden of proof with respect of fault to the claimant/consumer, which would be in accordance with the principle that each party has to prove the facts that are essential to its case.[50]

To give another example: In accordance with the Roman principle that fault is a precondition to any liability no matter whether the claimant sues in contract or in tort, fault under German law is usually a precondition for a contractual claim. In the Common Law this is fairly different. Here the mere breach of a contract suffices.[51] Thus, it is easier for the claimant to win his case, since he only has to prove the breach, but not the fault, which could be very difficult. However, in practice the difference is not as impressive as one may

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[50] The allocation of the burden of proof is a matter of the substantive law, see at 18, below.

[51] See A. G. Guest, gen. ed., *Chitty on Contracts*, 27th ed. (London: Sweet & Maxwell, 1994) at ch. 26. For a comparative view on breach of contract: Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law*, trans. by Tony Weir, 2d ed. (Oxford: Clarendon Press, 1998) at 486.

think, because under German law it is for the defendant to prove that he was not at fault despite his breach.[52] Since he often enough fails to do so, chances for the claimant to win his case are not considerably lower in Germany than in Common Law countries once the breach itself is established.

2. The Substantive Law Requires a Different Standard of Proof

Scholars and courts from both legal traditions considered here discuss deviations from the usual standard of proof in specific situations.

In particular in the Common Law the reasons given in favour of a different (higher) standard of proof with respect to specific facts are rather substantive than procedural. It is usually either the gravity of the claim or the gravity of the consequences of a judgment in favour of the claimant that warrants a higher standard.[53]

In the German Civil Code, the BGB, one can find several provisions that allow compensation even though a loss was only probable. In the view of some authors this should be understood as a lower standard of proof with respect to the measure of damages.[54] Systematically speaking these provisions are substantive for they are located in the BGB. Teleologically, these rules are perhaps more procedural in nature since they help the claimant to overcome structural difficulties in proving a loss of this kind. In this sense they are designed for the specific situation of a trial.

Be this as it may, what cannot be contested is that a comparative study of the standard of proof would be incomplete without a reflection of the substantive law for these fields are subject to many mutual influences and therefore cannot be separated.

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[52] § 280 I S. 2 BGB. The same rule applies in French law, Article 1147, Code Civile.

[53] *Addington v. State of Texas* (1979), 441 U.S. 418 at 423; *Grogan v. Garner* (1990), 498 U.S. 279 at 286. For an overview see Rosemary Pattenden, "The Risk of Non-Persuasion in Civil Trials: The Case Against a Floating Standard of Proof", (1988) 7 Civ. Just. Q. 220.

[54] See at 50, below.

V. The Burden of Proof

One of the peculiarities that makes the law of evidence so fascinating is the interdependence not only of the law of evidence in general with neighbouring fields but the intertwinement of different features within the broad definition of the law of evidence. Hardly any evidence problem can be analysed sufficiently without considering related subjects within the law of evidence.[55] Above all, this is true for the standard of proof and its relation to the burden of proof.

1. Definition of the Burden of Proof

An analysis of the burden of proof with the methods of comparative law faces the problem that the respective jurisdictions have not yet developed a settled definition of the term. Especially in the Common Law world it is not entirely clear what exactly the term "burden of proof" refers to and whether the expression as such is meaningful at all.

a) Objektive Beweislast / Persuasive Burden

In the German law the common definition seems to be that the burden of proof ("objektive Beweislast") comes into play when the standard of proof is not met.[56] In such a "non-liquet"[57] situation the burden of proof decides which party loses on a specific issue.[58] Thus,

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[55] See *Cross on Evidence*, *supra* note 2 at 5.

[56] Hanns Prütting, *Gegenwartsprobleme der Beweislast* (Munich: Beck, 1983) at 14; Dieter Leipold, in Friedrich Stein & Martin Jonas, eds., *Kommentar zur Zivilprozessordnung, Band 3 §§ 253 – 299a*, 21st ed. (Tübingen: Mohr 1997) [Stein/Jonas/Leipold], § 286; Walther J. Habscheid, "Beweislast und Beweismaß" in Hanns Prütting, ed., *Festschrift für Gottfried Baumgärtel* (Cologne, Berlin, Bonn and Munich: Heymanns, 1990) 105 at 106.

[57] Latin for "It is not clear". Under Roman law, however, this meant that the judge had to refrain from deciding the case; today he has to decide it according to the allocation of the burden of proof. See Hanns Prütting, *ibid.*

[58] *Cross on Evidence*, *supra* note 2 at 106 points out that a burden of proof is always related to a specific contested issue. There is no general burden.

the significance of this burden is limited to cases in which the trier of facts is in doubt.[59] The burden of proof has to be distinguished from three other burdens, the "Behauptungslast", the "Darlegungslast" and the "subjektive Beweislast"[60] that amount to the burden to plead a certain fact and adduce evidence. Usually the burden of proof and the burden to plead a fact lie on the same party. However, the latter burden is antecedent in the sense that the discharge of the burden to plead a fact is a necessary but not a sufficient condition for the discharge of the burden of proof.

The burden referred to by the German term "Beweislast" corresponds to the so-called "persuasive burden" in the Common Law, though other expressions such as "legal burden"[61] or "probative burden"[62] are used as well. In both legal traditions the allocation of this burden is a matter of the substantive law[63] and it does not shift during the trial.[64] Usually the plaintiff has to bear this burden. In criminal trials this is explained with the presumption of innocence, which operates in favour of the accused.[65] The fact that also in civil trials[66] the plaintiff bears the risk of losing the case if the facts cannot be proven has been explained with the argument that it is the plaintiff who tries to upset the status quo.[67]

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[59] See Neil Orloff & Jery Stedinger, "A Framework for Evaluating the Preponderance-of-the-Evidence Standard", (1983) 131 U. Pal. L. Rev. 1159; McCormick, *supra* note 20 at 410.

[60] To the "subjektive Beweislast" some authors refer to as "Beweisführungslast". To avoid confusion, the term "Beweislast" will be used in this thesis to refer to the "objektive Beweislast". See for the distinction in detail Prütting in Münchener Kommentar ZPO, Band 1 §§ 1 – 354, edited by Lüke/Wax, 2d ed. (Munich: Beck, 2000) [Prütting in MüKo] at § 286 para. 96.

[61] Sopinka, Evidence, *supra* note 6 at § 5. 40; Gordon D. Cudmore, *Civil Evidence Handbook,* (Thompson Canada, 1999-Rel 5) at 3.2.

[62] *R. v. Bennett* (1978), 68 Cr. App. Rep. 168 (C.A.).

[63] John Henry Wigmore, *Wigmore on Evidence*, Volume 9, revised by James H. Chadbourn (Boston and Toronto: Little Brown and Company, 1981) § 2488; Ulrich Foerste, in Hans-Joachim Musielak, ed., *Kommentar zur Zivilprozessordnung*, 3d ed. (Munich: Franz Vahlen, 2002) [Musielak/Foerste ZPO] at § 286 para. 34; Prütting in MüKo, *supra* note 60 at § 286 para. 106.

[64] McCormick, *supra* note 20 at § 336; 9 Wigmore, Evidence § 2489; *Cross on Evidence*, *supra* note 2 at 111.

[65] See Dennis, *supra* note 13 at 373. On the power of the presumption of innocence in criminal trials see Patrick Healy, "Proof and Policy: No Golden Threads" [1987] Crim. L. Rev. 355.

[66] In civil trials a no-fault presumption usually does not exist.

[67] McCormick, *supra* note 20 at 412; Sopinka, Evidence, *supra* note 6 at § 5.42; Dieter Leipold, *Beweislastregeln und gesetzliche Vermutungen* (Berlin: Duncker & Humblot, 1966) at 48; Hanns Prütting, *Gegenwartsprobleme der Beweislast* (Munich: Beck, 1983) at 78.

In particular German authors tend to regard the plaintiff as the assailant who tries to upset the status quo to his benefit. They claim that the position he has brought himself into justifies putting a higher risk on him and thus making him bear the burden of proof.

This argument is questionable in at least two ways. For one, the "status quo" in a civil case is often enough unclear[68]: Was the contract indeed closed? Or was one of the parties legally incapable at the time of the transaction? Another counter-argument is that not in every trial (in fact only in very few cases) things are or were in a stable state. Usually the beginning of the trial is only one incident in a chain of events that have occurred before. It would be arbitrary to consider the moment before the claim was filed as the status quo and to infer any justification for risk allocation from this. The fact that a trial is merely a stage – and not necessarily the final one – in a sequence of actions and reactions makes it difficult to speak of a status quo, which could be upset.

Furthermore, the fact that in both legal traditions the persuasive burden usually rests on the plaintiff has been explained with the argument that it is she who seeks judicial aid from the court. The argument is that it needs justification to employ the coercive power of the state to the benefit of a private party.[69] It is held to be fair to put a higher risk on the plaintiff, who will only win if she can prove his case. To put the burden of proof by default on the defendant would evoke the danger that the state lends its coercive force to the enforcement of claims that have no sufficient factual basis.

Whatever the reasons for the allocation of the burden of proof may be, it is uncontested that it usually rests on the plaintiff with respect to issues that support her claim, and that the defendant has the persuasive burden regarding issues that she raises in her defence.[70] Thus, each party has to prove the issues that are essential for its own case.[71]

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[68] See Walter H. Rechberger, "Maß für Maß im Zivilprozess? Ein Beitrag zur Beweismaßdiskussion" in Hanns Prütting, ed., *Festschrift für Gottfried Baumgärtel* (Köln, Berlin, Bonn, Munich: Carl Heymanns, 1990) 471 at 485.

[69] *Ibid.* 486.

[70] In the Swiss law this is accurately expressed in Art 8 Code civil Suisse:

The correlation between the standard of proof and the persuasive burden is obvious and has already been addressed: The lower the standard of proof, the less important becomes the persuasive burden since less cases have to be decided according to its allocation.[72]

b) Evidentiary Burden

Part of the confusion in the Common Law world with respect to the term "burden of proof" stems from the problem that the term as such is not specific since it has been used to address not only the persuasive burden but also a duty which is related but clearly distinguishable. This duty is the "evidentiary burden"[73], sometimes referred to as the "burden of producing evidence".[74] This burden is a distinct feature of trials that are based on a jury system and is therefore unknown to civil law jurisdictions. It compels the plaintiff to adduce sufficient evidence to "pass the gauntlet of the judge"[75]. The question is whether the evidence produced by the party on whom the burden of adducing evidence bears (usually the same who has the persuasive burden) is worthy of consideration by the jury. This decision is for the judge. If he rules in the negative the case will never come into the hands of the jury and the jurors will not have to decide whether the burden of persuasion is met.[76] The evidentiary burden thus serves as a control-mechanism in order to prevent that a jury bases its decision on completely insufficient evidence.

"De la preuve
I. Fardeau de la preuve
Chaque partie doit, si la loi ne prescrit le contraire, prouver les faits qu'elle allègue pour en déduire son droit."

[71] See e.g. ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure P 18.2, at 86 ff., below.

[72] See Stelios Kousoulis, "Beweismassprobleme im Zivilprozess" in Peter Gottwald & Hanns Prütting, eds., *Festschrift für Karl Heinz Schwab zum 70. Geburtstag* (Munich: Beck, 1990) 276 at 279.

[73] *Cross on Evidence*, *supra* note 2 at 109.

[74] McCormick, *supra* note 20 at §§ 336, 338.

[75] 9 Wigmore, Evidence § 2487.

[76] There is, however, a rather startling paragraph in Sopinka, Evidence, *supra* note 8 at §5.16, suggesting that the judge should let the case go to the jury in any event even if he decides that the evidentiary burden has not been discharged. This procedure may have the advantage that it is not necessary to conduct a completely new trial if the judge's decision is reversed on appeal. For ordinary cases, however, such a way of proceeding is not advisable, since it requires an inconsistent behaviour from the judge.

The standard that has to be met in order to discharge the evidentiary burden is difficult to describe and unanimously accepted formula have not developed. According to McCormick it is required that "the evidence must be such that a reasonable person could draw from it the inference of the existence of the particular fact to be proved".[77] Others state that the burden is discharged if "the evidence, if believed, and if left uncontradicted and unexplained, could be accepted by the jury as proof."[78] These formulae express the inner correlation between the standard that has to be met to discharge the evidentiary burden and the standard of proof with respect to the persuasive burden. The higher the latter, the higher is the former. This consequently means that the prosecutor in a criminal trial has to adduce more and stronger evidence in a criminal trial in order to meet the evidentiary burden than the plaintiff in a civil case.[79]

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[77] McCormick, *supra* note 20 at § 338.

[78] *R v. Smith* (1865), 34 LJMC 153.

[79] *Jackson v. Virginia* (1979), 443 U.S. 307. McCormick, *supra* note 20 at § 338. See *R. v. Cinous*, [2002] S.C.C. 29 on the question which standard has to be met in a criminal case with respect to defences in order to put them to the jury. It was held that "this depends on whether the defence possessed an 'air of reality'".

Chapter 2 The Concept of Probabilities

The formula most frequently used to describe the standard of proof applied to civil cases in the Common Law is the "balance of probabilities" metaphor. Sometimes it is also referred to as "proof on a preponderance of evidence" or "proof on a preponderance of probabilities". These different phrases are synonymous and do not indicate a lower or a higher burden.[1]

Seemingly similar to this conception of the standard of proof is a doctrine developed by Swedish scholars called the "överviktsprincip" ("principle of preponderance"). Just as the "balance of probabilities" formula, the överviktsprincip uses the concept of probabilities to describe the degree of evidence required. This theory has been especially influential in Germany.

I. The Common Law World

There is a rich judicial authority in the Common Law that deals with the standard of proof and its application in practice. It seems, however, that the number of cases treating this issue explicitly has somewhat lessened in recent years. This might be due to the decline of the jury in civil cases throughout the Common Law world.[2] If a jury has to determine the facts, the jurors have to be instructed by the judge as to what standard of proof they are expected to apply. Therefore, the judge has to address this issue openly and has to explain to the jurors when they are supposed to regard a fact as proved.[3] These instructions given by the trial judge are a common source of grounds for appeal, which gives the appellate and eventually the Supreme Court the chance to express his thoughts on the standard. In today's

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[1] John Sopinka, *The Law of Evidence in Canada*, 2d ed. (Toronto and Vancouver: Butterworths, 1999) at 154.

[2] See Ellen E. Sward, *The Decline of the Civil Jury* (Durham, North Carolina: Carolina Academic Press, 2001).

[3] See at 14, above.

bench trials on the other hand the judge might rather resort to the traditional formulae no matter how meaningful and vivid they might be in order not to give the losing party any grounds for appeal.

1. Scope of Application

The application of the preponderance standard is limited to civil cases only, whereas in criminal cases the standard of "beyond reasonable doubts" applies. It is common ground that the standard of proof in criminal cases must be higher for it is held more acceptable 'that ten guilty persons should be acquitted than that one innocent person should be convicted.'[4] Therefore, a higher standard of proof applies in criminal cases to ensure that the number of 'false positives' (wrong convictions) is minimized.

There has been some contradiction among the authorities on the question which standard of proof applies to criminal issues in the context of a civil trial. An older line of cases held that issues such as fraud or libel, raised as a ground for a claim of compensation have to be proven beyond a reasonable doubt by the claimant.[5] Since the House of Lords' decision *Hornal v. Neuberger*[6], however, the courts in all Common Law countries agree that the beyond a reasonable doubt standard is distinctive of criminal procedure and thus inapplicable in civil trials.[7] In the *Neuberger* case the claimant based his claim on two

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[4] On the limits of this approach and its correlation to the presumption of innocence: Carleton Kemp Allen, *Legal Duties and Other Essays in Jurisprudence* (Oxford: Clarendon Press, 1931) at 286.

[5] *New York State v. Heirs of Phillips,* [1939] 3 All E.R. 952 (P.C.); *Issaias v. Marine Insurance C. Ltd.* (1923), 15 Ll. L. Rep. 186 (C.A.).

[6] [1957] 1 Q.B. 247.

[7] For the U.S. see references in John Henry Wigmore, *Wigmore on Evidence*, Volume 9, revised by James H. Chadbourn (Boston and Toronto: Little Brown and Company, 1981) at § 2498 note 3. For England: *Nishina Trading Co. Ltd. v. Chiyoda Fire and Marine Insurance C. Ltd.,* [1969] 2 Q.B. 449. For Canada: *Hanes v. Wawanesa Mut. Ins. Co.,* [1963] S.C.R. 154; *Continental Insurance Co. v. Dalton Cartage Co. Ltd. et al.,* [1982] 1 S.C.R. 164; *Mutual Life Assurance Co. of Canada v. Aubin,* [1979] 2 R.C.S. 298 at 303; for Quebec: *Rioux-Therrien v. L'Alliance et l'Assurancevie Desjardins,* [1974] C.A. 271; Ducharme, *Précis de la preuve,* 5th ed. (Montreal: Wilson & Lafleur, 1996) at 170.

grounds, fraud and breach of warranty. The court was persuaded that breach of warranty was proved on a balance of probabilities. With respect to fraud Lord Denning argued that

> "it would bring the law into contempt if a judge were to say that on the issue of warranty he finds that the statement was made, and on the issue of fraud he finds it was not made."[8]

With respect to its territorial scope of application, the balance of probabilities standard is not a doctrine exclusively applied in pure Common Law jurisdictions. Quebec, for example, as a mixed jurisdiction is in the peculiar situation to have a substantive law of civilian origins, whereas the procedural rules are generally taken from the Common Law.[9] As the law of evidence is partly substantive, partly procedural in nature,[10] both of these heterogeneous influences come into play.[11] With respect to the standard of proof, however, the Common Law has prevailed to the effect that in civil cases tried in Quebec facts have to be proven on a balance of probabilities.[12] In this sense, the standard of proof in Quebec and in Common Law Canada is essentially the same. With the enactment of the Civil Code of Quebec in 1991 the standard of proof has been codified in art. 2804 C.C.Q.:

> "Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof."

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[8] *Hornal v. Neuberger Prod. Ltd.*, [1957] 1 QB 247 at 258. One might add, however, that the alternative is not to find that it did not exist but that it was not proved. That the burden of proof is not discharged does not mean that the fact did not exist.

[9] John E. C. Brierley & Roderick Macdonald ed., *An Introduction to Quebec Private Law* (Toronto: Edmond Montgomery Publications 1993) at no. 821.

[10] See at 5, above.

[11] Léo Ducharme, *supra* note 7 at 20-24.

[12] See e.g. *Michaud c. Bergeron*, [1980] C.A. 246; *Mutual Life Assurance Co. of Canada v. Aubin*, [1979] 2 R.C.S. 298; Jean-Claude Royer, *La Preuve Civile* (Cowansville: Les Editions Yvon Blais Inc.,1987) at no. 166; Brierley & Macdonald, *supra* note 9 at No. 824.

The preponderance standard also applies in other mixed jurisdictions such as Scotland,[13] Louisiana[14] and South Africa.[15]

2. "Proof on a Balance of Probabilities" – the Construction of the Formula

Since the term "probability" has also a mathematical connotation it is necessary to point out that it is usually – expressis verbis or implied – understood in a specific judicial sense. Many authors distinguish the meaning of probability in a judicial context from its mathematical interpretation. Thus, we have to differentiate between Bayesian or Pascalian (mathematical) and Baconian (inductive) probabilities.[16] Baconian probabilities cannot be expressed in figures. To assign figures to the probability of a fact in a judicial context would only be possible if a party relied exclusively on statistical evidence since it is unfeasible to assign a figure to the probability of testimonial evidence.[17] Cases with purely statistical evidence, however, are still rare since usually at least the party itself will testify.[18]

The awkward consequences of attempts to apply statistical methods to non-statistical evidence become apparent in the famous case of *People v. Collins*.[19] Here, statistical

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[13] *Brown v. Brown,* [1972] S.C. 123; David Field, *The Law of Evidence in Scotland* (Edinburgh: W. Green, 1988) at 38; Fiona Riatt, *Evidence*, 3d ed. (Edinburgh: Sweet & Maxwell, 2001) at 2.22.

[14] Louisiana Code of Evidence Art 302.

[15] See, e.g., *Road Accident Fund v. Mungalo*, The Supreme Court of Appeal of South Africa, 02. 12. 2002, online: <http:wwwserver.law.wits.ac.za/scrtappeal/2002/48701.pdf> as of July 2003.

[16] See for further details William Twining, *Rethinking Evidence* (Oxford: Basil Blackwell, 1990) at 119; Jonathan Cohen, *The Probable and the Provable* (Oxford: Clarendon Press, 1977).

[17] See *Js a minor Re,* [1980] All E.R. 1061 at 1066; Colin Tapper, *Cross & Tapper on Evidence*, 9th ed. (London, Edinburgh, Dublin: Butterworths, 1999) [*Cross on Evidence*] at 155. See also Vern R. Walker, "Preponderance, Probability and Warranted Factfinding" (1996) 62 Brooklyn L. Rev. 1075; D. H. Hodgson J, "The Scales of Justice: Probability and Proof in Legal Fact-Finding" (1995) 69 Austr. L. Rev. 731.

[18] David Kaye, "The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation", [1982] Am. B. Found. Res J. 487 at 488; David Hamer, "The Civil Standard of Proof: Uncertainty, Probability, Belief and Justice" (1994) 16 Syd. L. Rev. 506 at 525; *Cross on Evidence, ibid* at 156. However, in today's mass tort litigation in particular with respect to toxic torts such as tobacco or asbestos claims, statistics play a more and more important role. See Richard L. Marcus, "Evidence: Discovery along the Litigation/Science Interface" (1991) 57 Brooklyn L. Rev. 381.

[19] (1968) 68 Cal.2d 319 (Sup. Ct. Cal.).

evidence was admitted for the identification of the accused with the perpetrators of the robbery in question. There was testimonial evidence that the guilty couple had six certain characteristics and there was statistical evidence that the likelihood of their being present in one couple was one in 12 million. On the basis of this evidence the jury found the accused couple, which possessed all of these characteristics, guilty. On appeal this verdict was reversed. The appellate court held that the use of statistical methods was mathematically inconsistent and that "it distracted the jury from its proper function of weighing the evidence on the issue of guilt".[20] One of the main arguments was that the prosecutor did not take into account the possibility that the witnesses had not correctly observed the distinctive features which were employed to link the defendants to the crime. The court expressed the view that no mathematical formula could ever establish the reliability of testimony beyond a reasonable doubt.[21]

The temptation to employ statistical methods for the evaluation of the evidence is particularly strong in civil cases since the use of the term "probability" seems to suggest a mathematical construction of the standard of proof. Similarly, the "preponderance of the evidence" formula addresses only the objective amount of evidence required to make proof of a fact.[22] As a consequence, an almost immeasurable number of papers has been written on the use of statistical methods, particularly the Bayes' Theorem, in the law of evidence with a view to rationalize the process of proof.[23] It would be well beyond the purposes of this thesis to go into this debate at great length.[24] It may suffice to say that the Pascalians,

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[20] *Ibid. at* 327, 38.

[21] For an example of admissible statistical evidence see *Brink's Inc. v. The City of New York*, 717 F.2d 700 (2d Cir. 1983).

[22] See e.g. V. C. Ball, "The Moment of Truth: Probability Theory and Standards of Proof" (1961) 14 Vand. L. Rev. 807 at 808.

[23] The attention that statistical methods have received was and is exceptionally strong in the United States. See e.g. the report of a symposium in [1986] 66 B. U. L. 337 with more than 500 pages or another in (1991) 13 Cardozo L. R. 253 with more than 800 pages. Purporting to reconcile the approaches of Baconian and Pascalian probabilities Hamer, *supra* note 18.

[24] For a brief description of the development of the debate see Twining, *supra* note 16 at 119 – 122. For arguments against the adoption of mathematical understanding see Walker, *supra* note 17 at 1097 – 110.

who have a mathematical understanding of probabilities, so far have failed to produce results which would assist the judge or the jury in their task to ascertain the truth.[25]

As we have seen, each decision as to historical facts made by humans necessarily rests on their beliefs and thus involves a subjective component.[26] When it comes to the standard of proof, what we are really concerned with is therefore the state of the mind of the trier of facts.[27] Which degree must his belief have, in order to regard a fact as proved? For criminal cases, this concern is adequately addressed by the "beyond a reasonable doubt" standard. The preponderance formula, however, diverts this attention to the amount of evidence.[28] But the evidence is nothing more than the instrument by which the trier's mind is influenced.[29] In this sense the two standards have "no logical or conceptual correlation".[30]

In order to prevent juries from being misled by the metaphorical description of "preponderance of evidence" into thinking they just had to "count" the evidence, jurors are usually instructed that 'preponderance' shall not depend on the number of witnesses testifying but rather on the credibility the jury attributes to their testimony.[31]

But the statement that the standard of proof is concerned with the state of the trier's mind with respect to the existence of a fact entails the question as to what it is specifically the trier of facts has to weigh against each other. The preponderance formula seems to suggest that it suffices if the trier of facts believes the evidence adduced by the party bearing the

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[25] See Ronald J. Allen & Brian Leiter, "Naturalized Epistemology and the Law of Evidence" (2001) 87 Va. L. Rev. 1491 at 1505; John W. Strong, *McCormick on Evidence*, 5th ed. (St. Paul, Minn., 1999) vol. 2 at § 339 note 13. See for the normative consequences if the temptations of statistical methods are not overcome Laurence H. Tribe, "Trial by Mathematics: Precision and Ritual in the Legal Process" (1971) 84 Harv. L. Rev. 1329.

[26] See at 7, above.

[27] James P. McBaine, "Burden of Proof: Degrees of Belief" (1944) 32 Cal. L. Rev. 242 at 247: "The degree of belief which should exist before it may be concluded that an assertion of fact is true is the element in the fact-finding problem which must be emphasized and made plain".

[28] See *Burch v. Reading Company*, 240 F.2d 574 (3d Cir. 1957) at 578.

[29] McCormick, *supra* note 25 at § 339.

[30] Wigmore, *supra* note 7 *ibid.*

[31] See *Burch v. Reading Company*, 240 F.2d 574 (3d Cir. 1957) at 578.

burden of proof was more believable than the evidence speaking against it.[32] The application of such a rule, however, would have the unfavourable result that even in cases where the evidence adduced by the claimant is completely improbable the claimant might still win, just because the evidence in favour of the defendant is even weaker.[33] In such a situation "no prudent man would act as to a matter of importance to him."[34] If the evidence leaves the trier of facts in doubt, the burden of proof is not discharged and the claimant loses his case.[35] Thus, "weighing the evidence" does not mean weighing the evidence adduced by the parties against each other.[36] But what does the trier of facts have to believe in if it is not the preponderance of the claimant's evidence over the defendant's? Does he have to believe that the facts exist or does it suffice if he believes that the facts probably exist?

It is widely accepted in the Common Law that the trier of facts bases his decision on his belief with respect to the probability of the truth as opposed to his belief with respect to the truth as such. Based on the principle that truth is not always ascertainable by means of judicial fact-finding, the Common Law pragmatically concludes that a belief in the probability of the truth has to suffice.[37]

Consequently, Lord Denning said in an oft-cited passage with respect to the degree required in civil cases:[38]

> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say:

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[32] See *McDonald v. Union Pacific Railroad Co.*, 167 P.2d 685 (Utah Sup. Ct. 1946) at 689; *Dunbar v. McGill*, 31 N.W. 578 (Mich. Sup. Ct. 1887). Cited according to McBaine, *supra* note 27 at 248 footnote 18.

[33] *Cross on Evidence*, *supra* note 17 at 144.

[34] McBaine, *supra* note 27 at 248. Against this view in the context of judicial decisions V. C. Ball, *supra* note 22 at 823.

[35] See *Rhesa Shipping Co SA v. Edmunds,* [1985] 2 All E.R. 712 (H.L.) at 718.

[36] See the example given by W. Trickett in 9 Wigmore, *supra* note 7 at §2498 on p. 421.

[37] See, e.g., Hodgson, *supra* note 17 at 732 f.

[38] *Miller v. Minister of Pensions,* [1947] 2 All E.R. 372 (K.B.) at 374.

> 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not."

Essentially, this interpretation of the balance of probabilities formula is shared by many courts and authors throughout the Common Law world.[39]

At times, however, the object of the trier's belief is described differently, as being the belief that the allegations are true. Most impressively this has been done by Dixon J. In *Briginshaw v. Brigingshaw* he said:[40]

> The truth is that, when the law requires the proof of any fact the tribunal must feel an actual persuasion of its occurrence or its existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality.

This "theory of persuasion" has attracted some support.[41] Similarly, some statutes require that the trier has to be "satisfied" that a fact exists.[42]

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[39] See *Ortiz v. Principi*, 274 F.3d 1361 (Fed. Cir. 2001) at 1365; *Burch v. Reading Company*, 240 F.2d 574 (3d Cir. 1957) at 579. McBaine, *supra* note 27 at 262; McCormick, *supra* note 25 at 422, Kevin M. Clermont & Emily Sherwin, "A Comparative View of Standards of Proof" (2002) 50 Am. J. Comp. L. 243 at 251; I. H. Dennis, *The Law of Evidence*, 2d ed. (London: Sweet & Maxwell, 2002) at 395; Adrian Keane, *The Modern Law of Evidence*, 4th ed. (London, Dublin and Edinburgh: Butterworths, 1996) at 88; Christopher B Mueller & Laird C. Kirkpatrick, 1 Federal Evidence § 65 (2d. ed.), Sopinka, *supra* note 1 at §5.43; Hodgson J, *supra* note 17.

[40] (1938), 60 C. L. R. 336 at 361.

[41] See for America: *Lampe v. Franklin*, 107 A.L.R. 465 (Mo. Sup. Ct. 1936) at 482: jury instructions to the effect that the jury should decide on the basis of what they find "more probable" are insufficient for the jury should decide "upon what they find to be facts". *Smith v. Rapid Transit*, 58 N.E.2d 754 (Mass. Sup. Jud. Ct. 1945) at 755: A 'proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there.' *Frazier v. Frazier*, 89 S.E.2d 225 (S. C. Sup. Ct. 1955) at 235: "A 'preponderance of the evidence' stated in simple language, is that evidence which convinces as to its truth." In the Canadian case of *Smith v. Smith*, [1952] 2 S.C.R. 312 the court adopted the reasoning of Dixon J in *Briginshaw*. This judgment seems to be the only support for this view in Canada. See for an overview Stanley Schiff, *Evidence in the Litigation*, 4th ed. vol. 2 (Scarborough: Carswell 1993) at 1618.

[42] E.g. (English) Matrimonial Causes Act, 1950, section 4.

This "persuasion of the truth" approach has been criticized as being fanciful but unrealistic.[43] Given the uncertainties of fact-finding it would be unreasonable to require from the trier a belief in the truth. However, one should not jump to the conclusion that such a standard would be 'too high' and would have the consequence that a claimant would hardly be able to prove his case since it is almost impossible to prove something as certainly true.[44] With respect to the standard of satisfaction the Privy Council has held that such a language does not in all cases indicate a higher standard of proof, namely not the criminal standard, as it "deals only with the incidence of proof, not with the standard of proof."[45] To deploy a raised standard is not what is intended by the decisions using the persuasion formula. It should rather be understood as an attempt to develop a phrasing of the standard which does not involve the problematic reference to the concept of probabilities[46] and its mathematical connotations.[47] The downside of such a formula is, however, that it does not explicitly point out the threshold that has to be met as it does merely describe the state of the trier's mind after he has stepped over it but not the conditions that have to be met before he may do so.

3. A Third Standard of Proof?

By now it is well settled throughout the Common Law world that in civil lawsuits the standard of beyond reasonable a doubt is inapplicable even if the allegations made are criminal in nature.[48]

A problem partly overlapping with this issue concerns the question whether with respect to cases of particular gravity or with respect to claims involving particularly strong

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[43] McBaine, supra note 27 at 250.

[44] But see McCormick, *supra* note 25 at 423.

[45] *Blyth v. Blyth*, [1966] A.C. 643 (H.L.) at 667.

[46] See for this concern 9 Wigmore, *supra* note 7 at § 2498 p. 432.

[47] Lord Denning himself cited *Briginshaw* favourably in *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.) at 459.

[48] See at 24 above.

reproaches a higher standard of proof should be applied. Today, the Common Law is divided on this issue. Only in the U.S. a third standard of proof can clearly be identified whereas in the Commonwealth the courts eventually have refrained from adopting a third standard of proof.

a) "Clear and Convincing Evidence" – The U.S. American Approach

In America this third standard requires "clear and convincing evidence", which is applicable to a limited range of claims and requires the party to establish a higher degree of persuasion.[49] Other formulae employed to describe this standard are "clear, convincing and satisfactory", "clear, cogent and convincing" and "clear, unequivocal, satisfactory and convincing". These phrases again refer only to the quality of the evidence but not to the required degree of belief on the part of the trier of facts. It has been suggested that this standard requires that the trier believes that the truth of a contention is highly probable.[50] Thus, the clear and convincing standard is higher than the ordinary civil standard of preponderance but not as high as the beyond a reasonable doubt standard.[51]

Its scope of application is very heterogeneous. It applies by virtue of the Constitution to administrative cases, if they involve the deprivation of a civil right such as commitment to a mental institution, denaturalization, termination of parental rights.[52] It is also commonly applied to civil cases when the allegations are particularly grave,[53] the outcome has severe consequences or the alleged facts seem on their face rather unlikely.[54]

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[49] McCormick, *supra* note 25 at 424.

[50] McBaine, *supra* note 27 at 263; McCormick, *ibid.* at 425.

[51] See e.g. McCormick, *supra* note 25 at 424; 9 Wigmore, *supra* note 7 at § 2498 p. 424.

[52] See e.g. *Addington v. State of Texas* (1979), 441 U.S. 418.

[53] E.g., charges of fraud or undue influence. For references see 9 Wigmore, *supra* note 7 at § 2498 note 13, 14.

[54] For a complete overview see McCormick, *supra* note 25 at 426, 427 and 9 Wigmore, *ibid.*

There has been some concern as to whether jurors are indeed able to understand the differences between the three standards and to apply them accurately.[55] An empirical experiment with randomly chosen groups, who had to decide on the basis of the same facts but using different standards of proof (beyond reasonable doubt, clear and convincing, and preponderance) not only showed that the decisions were almost the same, no matter which standard the jurors were supposed to apply.[56] The results also suggested that jurors had difficulties not only to remember which standard they were told to apply after the deliberations had ended, and that many of them failed to rank the clear and convincing standard correctly with respect to the other two.[57]

b) A Flexible Preponderance Standard Outside of the USA

Outside of the United States a third standard of proof has not been adopted. Instead, the leading case *Bater v. Bater* suggests that there are different degrees of proof within the same standard.[58] The degree is held to depend on the subject matter. Quite a few of the earlier decisions dealing with a higher standard of proof in certain circumstances concerned the problem of adultery as a ground for divorce. At the time adultery was held to be a charge so severe that the courts felt that the preponderance of the evidence formula was not appropriate.[59] Since adultery is socially no longer regarded as a very serious charge the cases in which the flexible approach is applied to civil actions concern criminal type conduct,[60] such as fraud,[61] testamentary incapacity,[62] the review of decisions by

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[55] See e.g. Burger C.J. in *Addington v. State of Texas* (1979), 441 U.S. 418 at 425.

[56] Donald G. Hagman & Malcolm D. MacArthur, "Evidence: The Validity of a Multiple Standard of Proof" [1959] Wisc. L. Rev. 525. The study is somewhat flawed in the sense that the participants did not have the option to declare that they are still in doubt and therefore would decide according to the burden of proof. They only had the option to choose the existence or the non-existence of the fact.

[57] See also Burger CJ in *Addington v. State of Texas* (1979), 441 U.S. 418 at 425.

[58] [1950] 2 All E.R. 458 (C.A.) at 459.

[59] *Gower v. Gower,* [1950] 1 All E.R. 804 (C.A.); *Davis v. Davis,* [1950] 1 All E.R. 40 (C.A.).

[60] In civil cases alleging a crime the beyond a reasonable standard is inapplicable. See at 24, above.

[61] *Continental Ins. Co. v. Daltin Cartage Co.,* [1982] 1 S.C.R. 164.

immigration officers in illegal entry cases,[63] or the review of interim care orders for children.[64,65]

The idea of different degrees of proof in civil cases has raised concerns that the adoption of different degrees of proof within one standard may be understood as allowing the judge to act with different degrees of care depending on the circumstances of the case.[66] Morris LJ addresses this argument when he says:[67]

> Though no court and no jury would give less careful attention to issues lacking gravity than those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed when deciding as to the balance of probabilities.

Similarly Cartwright J said in *Smith v. Smith*:[68]

> "I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and whether or not it will be so satisfied must depend upon on the totality of circumstances on which its judgment is formed including the gravity of the consequences of the finding."

The debate about a "floating standard of proof"[69] should not be exaggerated. All authorities agree that in any case the trier of facts has to be reasonably convinced of the

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[62] If there are suspicious circumstances in the execution of will, the evidence supporting the will must be carefully scrutinized. *MacGregor v. Ryan,* [1965] S.C.R. 757.

[63] *Khawaja v. Secretary of State,* [1984] A.C. 74 (H.L.) at 113.

[64] *Re H (Minors),* [1996] A.C. 563 (H.L.).

[65] In Quebec Art. 2804 C.C.Q. implies that there are cases where the law requires a higher standard of proof. This concerns decisions which severely affect the legal status of a person, such as a declaratory judgment of death before seven years after disappearance are over (Art. 92 s. 2 C.C.Q.). Here the death hast to be "certain" although an attestation of death cannot be drawn up.

[66] Allen, *supra* note 4 at 288.

[67] *Hornal v. Neuberger Products Ltd,.* [1957] 1 QB 247 at 266.

[68] [1952] 2 S.C.R. 312 at 331. See also *Briginshaw v. Brigingshaw* (1938), 60 C.L.R. 336 (H.C.A.) at 362.

existence of the alleged facts after he has weighed the evidence.[70] The weighing of the evidence, i.e. the process of determining its probative value, will be performed in every case as carefully as possible. The very nature of the allegations to be proved may, however, be so unlikely or exceptional that it takes evidence of very high probative value to convince the tribunal. In this sense the "flexible approach" is in accordance with common sense and the debate about differences in the standard of proof is "more a matter of words than anything else"[71].

II. The Swedish "Överviktsprincip"

In particular for the understanding of the debate as it has developed in Germany the Swedish law is of significant importance since it was the work of two Swedish scholars, Bolding[72] and Ekelöf,[73] that has triggered the discussion about the standard of proof in Germany.[74] Maybe prematurely, some German scholars embraced the idea that a related legal tradition[75] would use another concept of the standard of proof based on probabilities.

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[69] Rosemary Pattenden, "The Risk of Non-Persuasion in Civil Trials: The Case Against a Floating Standard of Proof" (1988) 7 Civ. Just. Q. 220.

[70] *Loveden v. Loveden* (1810), 161 E.R. 648 (Cons. C. of London) at 649, cited approvingly by Lord Denning in *Bater v. Bater,* [1950] 2 All E.R. 458 (C.A.) at 459.

[71] *Bater v. Bater*, *ibid.*.

[72] Per Olof Bolding, "Aspects of the Burden of Proof" (1960) 4 Scand. Stud. in L. 9.

[73] Per Olof Ekelöf, *Rättegång*, 2d ed. (Stockholm: Norstedts 1968); "Beweiswert" in Wolfgang Grunsky *et al.*, eds., *Festschrift für Fritz Baur* (Tübingen: J. C. B. Mohr 1981) [Ekelöf, Beweiswert] 342.

[74] The work of Ekelöf seemed to be widely miscontrued in Germany. (see e.g. Richard Motsch, *Vom rechtsgenügenden Beweis* (Berlin: Duncker & Humblot 1983) at 38 ff.) In fact he is not a supporter of the preponderance standard, for he explicitly states that the preponderance principle, as Bolding understands it, is not reconcilable with his conception of the freedom of the judge to weigh the evidence. Ekelöf, Beweiswert, *supra* note 73 at 351. Ekelöf himself is in his work far more concerned with the correct evaluation of the evidence than with the standard of proof. Thus, his theory is of little significance for the question we are concerned with here. Furthermore, there is some evidence for the argument that his theory is not at applicable to civil cases. See Christian Diesen, "Beyond Reasonable Doubt" (2000) 40 Scand. Stud. in L. 168 at 176.

[75] Though the Swedish procedural system is of an indigenous character, it is a continental legal tradition and has derived many ideas and stimulations from the German law. (Jan-Olof Sundell, „German Influence on Swedish Private Law Doctrine in 1870-1914" (1991) 35 Scand. Stud. in L. 236 at 238, 268).

The Swedish scholar Bolding proposed for the Swedish law the so-called "överviktsprincip". This doctrine appears to be similar to the Common Law approach of "preponderance of evidence" in the sense that according to the överviktsprincip a fact is proved if the trier of facts[76] believes that it is more probable than not.[77] But Bolding apprehended this only as a default rule, which is modified in cases when the gravity of a false positive[78] outweighs the consequences of a false negative decision. These modifications can stem from the substantive law[79] or be judge-made[80]. However, if the consequences are the same for both parties – as in most civil cases – the "överviktsprincip" comes into effect, which means that the judgment has to be based on the more probable circumstances.

The överviktsprincip was never meant to be an accurate description of the Swedish law, which has no explicit provision on the standard of proof.[81] In fact, Bolding himself acknowledged that he could not find one judgment in support of his theory.[82] Recent empirical studies suggest that Swedish judges in fact employ very high criteria for the sufficiency of the evidence, both in criminal and in civil cases.[83]

The överviktsprincip as a theory shares with the Common Law conception of the standard of proof the reference to the notion of probabilities. Ekelöf and Bolding, however, rely on a Pascalian understanding of the term.[84] In their view, proof is made if an allegation is true in

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[76] In Swedish civil procedure facts are always determined by a judge. See Ruth Bader Ginsburg & Anders Bruzelius, *Civil Procedure in Sweden* (The Hague: Martinus Nijhoff 1965) at 113.

[77] See Bolding, *supra* note 72 at 21.

[78] A false positive is a decision is a wrong judgment in favour of the plaintiff. A false negative is a wrong judgment that dismisses the claim.

[79] Ginsburg & Bruzelius, *supra* note 76 at 296 note 475.

[80] W. Enquist *et al.*, 1949 N.J.A. 144 cited by Bolding, *supra* note 72 at 21.

[81] Ginsburg, Bruzelius, *supra* note 76 at 297.

[82] Bolding, *supra* note 72 at 19.

[83] See Hanu Tapani Klami, Minna Hatakka & Johanna Sorvettula, "Burden of Proof. Truth or Law?" (1990) 34 Scand. Stud. L. 115 at 126. See furthermore Diesen, *supra* note 74 at 173.

[84] See e.g. Ekelöf, Beweiswert, *supra* note 73.

at least 51 out of 100 cases. This is essentially the approach of some American authors who translate the balance of probabilities formula into the mathematical term of >50%.[85] But as we have seen is the persuasiveness of this approach highly contested in the Common Law world for it is regarded as neither accurate[86] nor helpful[87]. Furthermore, there are few judgments that support this understanding of the standard of proof. The most commonly adopted phrase, 'more probably true that not', maybe misleading but it serves in the end no other purpose than to describe when the belief of the trier of fact is strong enough. It is the description of a specific state of mind but not the non-mathematical expression of a statistical formula. The reference to probabilities does thus not express the statistical frequency of the alleged fact but the degree of warrant which must exist in order to justify the trier's belief.[88]

In this sense the överviktsprincip is not another version of the preponderance standard as it is commonly understood and applied in practice in Common Law jurisdictions. The överviktsprincip is more accurately construed as a Scandinavian sister of some of the recent American evidence theory, which is concerned with the search for an algorithm for decisions at trial.

III. Conclusion

According to the standard of "preponderance of probabilities", in the Common Law the trier of facts has to believe that a fact is more probable true than not to regard it as proved. Here, preponderance does not mean that the evidence of the party bearing the burden of

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[85] This history of this theory goes back to Bentham and has attracted considerable interest in particular in America. For an overview see Dale A. Nance, "Naturalized Epistemology and the Critique of Evidence Theory" (2001) 87 Va. L. Rev. 1551.

[86] See e.g. Walker, *supra* note 17 at 1079.

[87] See Mirjan Damaška, "Free Proof and its Detractors" (1995) 43 Am. J. Comp. L. 343 at 354; Adrian A.S. Zuckerman, "Probability and Inference in the Law of Evidence" (1986) 66 B.U.L. Rev. 487 at 504; Allen & Leiter, *supra* note 25.

[88] Walker, *supra* note 17 at 1094.

proof is stronger than the evidence of its adversary but whether the evidence is of sufficient probative value to create a belief as to the probable truth of the asserted fact in the mind of the trier.

The notion of probabilities in this metaphor should not be misinterpreted as a reference to mathematical concepts. This is, however, the approach of some recent US-American scholars and of the överviktsprincip. Judicial cases rarely consist of facts occurring in exactly the same manner on a regular basis, and often the law is interested in propositions that are not amenable to statistical methods at all, such as knowledge or intent.[89]

Distinguishing as well as requiring different levels of probabilities is merely the device by which the Common Law articulates its axiom that there are different degrees of belief.[90] To have a belief is not a yes-or-no matter, but a matter of degree in the sense that the support available for the proposition may vary. And this is also, what makes different standards of proof in civil and in criminal cases possible.

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[89] *Ibid.*

[90] Jeremy Bentham, *A Treatise on Judicial Evidence,* (London: 1825) at 40. Note, however, that Bentham in this passage deals with degrees of belief in the truth of a testimony and not with degrees of belief as a basis for decision making.

How high the degree in civil matters exactly has to be is difficult to determine. At least in the Commonwealth the flexible approach of *Bater v. Bater*[91] has prevailed[92] to the effect that it depends on the subject-matter and a "whole range of other circumstances"[93]. If one nevertheless tried to develop a general formula one would probably be hard-pressed to find a more concrete wording than that the belief must be of a "reasonable degree"[94].

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[91] [1950] 2 All E.R. 458 (C.A.) at 459.

[92] The view held in *Bater v. Bater* is endorsed in many judgements throughout the Commonwealth: Canada: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 992; *Her Majesty The Queen and David Edwin Oakes*, [1986] 1 S.C.R. 103 at 137; *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164 at 170. Australia: *Re Kerrison* (1990), 101 A.L.R. 525 (F.C.A.); *Minister for Business and Consumer Affairs v. Evans* (1984), 54 A.L.R. 128 (Sup. Ct. N.S.W.). New Zealand: *Euro National Corporation Ltd. v. NZI Bank Ltd.*, [1992] 2 NZLR 739 (H.C. Auckland).

[93] *Hornal v. Neuberger Prod. Ltd.*, [1957] 1 Q.B. 247 at 266.

[94] *Bater v. Bater,* [1950] 2 All E.R. 458 (C.A.) at 459.

Chapter 3 The Civil Law World: The Concept of Conviction

In their analysis of the standard of proof in the Civil Law, Clermont and Sherwin[1] choose French civil law as their example of the continental approach. They maintain that the French judge has "to be convinced, without a shadow of a doubt, of a person's fault, be it civil or penal."[2] If this formula were a proper account of the continental standard of proof, this would indeed imply substantial and crucial differences between the Common and the Civil Law.

As we will see, however, this statement certainly does not represent an accurate description of the German standard in theory or in practice and there is some evidence for the proposition that it is not any more precise with respect to French Law.

I. German Law

German scholars have been debating the question of the standard of proof under German law with considerable intensity. Although the history of this debate is not as long as the respective discussion among Anglo-American scholars its depth is just as impressive and so is its lack of practical impact. Numerous books and papers have been written on the subject and yet so far the courts have paid very little attention to these literary efforts.

The standard of proof in civil cases is set out in § 286 ZPO and is called the "ordinary standard of proof" ("Regelbeweismaß"), which is relevant if no specific rules are applicable. Only a few of these specific rules, usually alleviations of proof, are set out in the Codes. Of equal practical importance are the doctrine of 'Anscheinsbeweis' and other devices developed by the judiciary. But it is not entirely clear to which extent these

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[1] Kevin M. Clermont & Emily Sherwin, "A Comparative View of Standards of Proof" (2002) 50 Am. J. Comp. L. 243 at 247.

[2] *Ibid.* at 250.

doctrines are exceptions to the ordinary standard of proof. For the purposes of this thesis, the most important question probably is how lower courts handle the standard of proof in the daily adjudication of cases. A combination of an extensive use of the loopholes and a rather generous application of the formula for the ordinary standard of proof as developed by the Bundesgerichtshof (BGH)[3] may after all convey quite a different impression of the standard of proof than one would get from looking at the commentaries alone.

1. The Ordinary Standard of Proof According to § 286 ZPO

According to § 286 ZPO the judge is free to weigh the evidence and to decide on this basis whether he holds a factual allegation to be true or not.

§ 286 (1) ZPO:

> "The court shall decide at its free conviction, by taking into account the whole substance of the proceedings and the results of any evidence taking, whether a factual allegation should be regarded as true or untrue. The grounds that prompted the court's conviction shall be stated in the judgment."[4]

Before we turn to the question of the standard of proof it may be interesting to point out that according to § 286 ZPO decisions as to the existence of facts do not only rely on the evidence adduced by the parties. The judge has to consider the whole substance of the proceedings, including statements and conduct of the parties. Thus, their incompetence as witnesses under German law, § 445 ZPO, has not as harsh consequences as it may seem at first sight since the judge is free to consider the parties' statements and conduct during the proceedings although they did not testify as witnesses.

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[3] German Federal Supreme Court.

[4] Translation by the author, inspired by Charles E. Stewart, *German Commercial Code & Code of Civil Procedure in English* (New York: Oceana Publications, 2001). Stewart, however, translates the crucial word "Überzeugung" ("conviction") with "discretion".

With respect to the standard of proof, the question is according to the wording of the code not whether the probability that an alleged fact exists is higher than that it does not exist but whether the judge is convinced that the allegation in issue should be regarded as true. Thus, the subjective component of the weighing of the evidence is emphasized.

a) The Construction by the BGH

The leading case for the question of the ordinary standard of proof in German civil trials is the so-called Anastasia case.[5] The plaintiff alleged to be the only member of the tsar's family that had survived the turmoil after the Russian Revolution 1917. In 1967 she sued to be recognized as the legitimate successor. The plaintiff lost in two instances because the Landgericht (LG, State Court) and the Oberlandesgericht (OLG, Superior State Court) found that the evidence she adduced was insufficient. In her appeal to the Bundesgerichtshof (BGH, Federal Supreme Court) she claimed that the standard of proof employed by the two lower courts was too high and that it should be sufficient if the alleged facts are probable. In a famous verdict the BGH rejected this view. The court held that the evidence is sufficient only if the judge has been able to gain from it a "personal certainty" that a given allegation is true.

> "The appellant is correct in claiming that a court may not require an insurmountable standard or an unalterable certainty that an allegation is true and proved. But she errs in asserting that a mere probability suffices. According to § 286 ZPO the judge has to decide whether he believes that an allegation is true, he must not be content with a mere probability. Apart from that § 286 ZPO only requires that the judge personally has gained the conviction that the statement is true. This personal certainty is essential for the decision and the trial judge is free to decide according to his conscience whether he can overcome possible doubts in order to convince himself of a certain set of facts as real. The judge's conviction does not need to be free from any doubts whatsoever. The

[5] BGHZ 53, 245

> decision depends on his conviction even if others may still have doubt or would decide differently. The judge may and has to be content with a degree of certainty ("Gewissheit") suitable for daily life, that silences the doubts without completely extinguishing them. It would be wrong to believe that this means that the judge can content himself with a probability bordering certainty since such a formula would disregard the importance of the judge's personal conviction of the truth."[6]

By pointing out that even a very high objective probability may not suffice, the court emphasises again the subjective component of the process of weighing the evidence. The BGH furthermore clarifies that the judge's conviction has not to be completely free from any doubts. Thus, the court acknowledges that a judge can find for the party bearing the burden of proof even though she has doubts. With respect to the necessary degree of conviction and the corresponding degree of acceptable doubts the court holds that it must be "suitable for daily life". This phrase is interesting in the sense that the standard we apply to decisions in daily life varies according to the consequences they will have on our lives.

b) The Construction of § 286 ZPO in the Literature

The correct interpretation of § 286 ZPO is the subject of a long and fierce debate among German academics working in the field of civil evidence. Many authors criticize the use of the words "personal certainty" by the BGH.[7] In their view, it is illogical as well as inconsistent to demand "certainty" and to allow at the same time that the doubts need not to

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[6] BGHZ 53, 245 at 256, translation by the author.

[7] Hanns Prütting, in Gerhard Lüke & Peter Wax, eds., *Münchener Kommentar zur Zivilprozessordnung, Band 1 §§ 1 – 354* (Munich: Beck, 200) [MüKo-Prütting] § 286 at para 18; Dieter Leipold, in Friedrich Stein & Martin Jonas, eds., *Kommentar zur Zivilprozessordnung, Band 3 §§ 253 – 299a*, 21st ed. (Tübingen: Mohr 1997) [Stein/Jonas/Leipold] at § 286 para. 3; Karl Heinz Schwab, "Das Beweismaß im Zivilprozess", in Richard Holzhammer, Wolfgang Jelinek & Peter Böhm, eds., *Festschrift für Hans W. Fasching* (Wien: Manzsche Verlags- und Universitätsbuchhandlung, 1988) 451 at 457; Dieter Leipold, "Wahrheit und Beweis im Zivilprozeß" in Andreas Heldrich & Takeyoshi Uchida, eds., *Festschrift für Hideo Nakamura* (Seibundo: Tokyo, 1996) 303 at 309.

be completely extinguished.[8] They maintain, that doubts and certainty cannot exist simultaneously.

Apart from this controversy, mainly three different conceptions[9] with respect to the ordinary standard of proof can be distinguished.

Most authors basically agree with the BGH on the proposition that the conviction of truth is the key criterion. However, in their view this conviction must not be understood completely subjectively. They argue that the standard of proof does not only have a subjective but also an objective component.[10] The trier of facts must not ignore logical or empirical rules[11] as he cannot base his decision on a fact that, objectively seen, is completely improbable. The main argument for this proposition is that according to § 286 I S. 2 ZPO a judge has to give reasons for his factual findings in the judgment. It is argued that it would be impossible to give rational and convincing reasons for a decision that is merely based on purely subjective beliefs and perhaps even superstitious of the judge.[12]

Some writers set the tone somewhat differently, as they read § 286 ZPO in a way that the judge's conviction of a very high probability is necessary and sufficient to make proof.[13] In

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[8] Stein/Jonas/Leipold, *ibid.*

[9] For this distinction see Christian Katzenmeier, "Beweismaßreduzierung und Probabilistische Proportionalhaftung", forthcoming in ZZP; for a more detailed distinction Prütting, *Gegenwartsprobleme der Beweislast* (Beck: Munich, 1983) at 63, [Prütting, Gegenwartsprobleme]?.

[10] Prütting, Gegenwartsprobleme, *ibid.* at 64 f.; Musielak/Foerste, ZPO at § 286 para. 17; Stein/Jonas/Leipold at § 286 para. 2;

[11] Hans-Joachim Musielak, *Grundfragen des Beweisrechts* (Beck: Munich, 1984) at para. 137 [Musielak, Grundfragen].

[12] MüKo-Prütting, *supra* note 7 at § 286 para. 21; Walter H. Rechberger, "Maß für Maß im Zivilprozeß? Ein Beitrag zur Beweismaßdiskussion" in Hanns Prütting, ed., *Festschrift für Gottfried Baumgärtel* (Köln, Berlin, Bonn, Munich: Carl Heymanns, 1990) 471 at 475.

[13] Hans-Joachim Musielak, "Das Överviktsprincip - Zum Verhältnis richterlicher Überzeugung und Wahrscheinlichkeit" in Alexander Lüderitz & Jochen Schröder, eds., *Festschrift für Gerhard Kegel* (Frankfurt a.M.: Alfred Metzner Verlag, 1977) 451 [Musielak, Överviktsprincip]; Michael Huber, *Das Beweismaß im Zivilprozeß* (Cologne, Berlin, Bonn and Munich: Heymanns, 1983); Rechberger, *supra* note 12 at 476; Rolf Bender, "Das Beweismaß", in Wolfgang Grunsky *et al.*, eds., *Festschrift für Fritz Baur* (Tübingen: Mohr, 1981) 247; Stelios Koussoulis, "Beweismassprobleme im Zivilprozess" in Peter Gottwald & Hanns Prütting, eds., *Festschrift für Karl Heinz Schwab zum 70. Geburtstag* (Munich: Beck, 1990) 276 at 277.

their view the object of the judge's conviction is not the truth but in fact a very high probability. This construction is not necessarily contravening the wording of § 286 ZPO, which refers to the truth of an allegation. For § 286 ZPO does not explicitly ask for the judge's conviction of the truth but for his conviction that a certain allegation should be "regarded as true" (for the purpose of deciding the case[14]). It is something else to regard something as true and to be convinced that it is true. In this sense it is not illogical to regard something as true if one is convinced of a very high probability. We already dealt with the main argument of the proponents of this opinion, as it is essentially the same which was adduced against the persuasion of the truth theory in the Common Law.[15] In many cases "truth" will remain an unachievable goal and thus asking for a proof that meets criteria of scientific truth would put up an insurmountable burden.[16] Since probability is the best we can get, demanding the conviction of the truth of an allegation as the ordinary standard of proof would make the enforcement of many claims impossible.

Both groups of authors, however, agree on the point that the standard of proof in German law is "rather high". The differences between the described approaches are, therefore, regarded as rather academic, for in the end they all lead to very similar results.[17] With the intent to distinguish the German approach from the Common Law approach all authors maintain that a mere preponderant probability would not suffice to make proof of a fact. It seems important, however, to point out that these statements usually rely on a Pascalian understanding of "probabilities" and thus state that the standard of proof is higher than a probability of more than 50%.

Only a few authors – mainly influenced by comparative studies of Anglo-American and Swedish law – argue for the adoption of a lower standard of proof, namely the

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[14] Huber, *supra* note 13 at 113.

[15] See above at 30, above.

[16] Musielak, Grundfragen, *supra* note 11 at recital 137.

[17] MüKo-Prütting *supra* note 7, § 286 34; Katzenmeier, *supra* note 9.

preponderance of the evidence standard.[18] Some concede that this is not in accordance with § 286 ZPO and consequently demand a reform of the code to the effect that the evidence is sufficient if the existence of a fact is more probable than its non-existence.[19]

For these authors the issue is, in the first place, a matter of substantive justice. In their view, a ruling based on the more probable facts is preferable compared to a non-liquet decision, which relies on the burden of proof, because the latter will be "correct" (meaning based on the real facts) merely by chance depending on the legislator's wisdom in allocating the burden. For the likelihood that the more probable facts are true can be considered to be higher than the likelihood that the abstractly allocated burden of proof leads to the correct result. The probability-assessment is the result of the weighing of the evidence adduced at this specific trial whereas the burden of proof is allocated generally by the law with respect to a great number of potential cases. In this sense the employment of the preponderance standard is held to promote justice.[20]

The proponents of the preponderance standard furthermore employ an economical argument: A lower standard of proof would reduce the number of wrong decisions[21] and thus not only lead to a just result in a greater number of single cases but also reduce social costs in general.[22] In this view each wrong decision entails social costs as it leads to an allocation of resources that is not consistent with the substantive law. Damages of this kind are minimised if the standard of proof is set in proportion to the potential costs of a wrong judgment (false negative or false positive). In civil cases, usually the costs of a false positive judgment equal the costs of a false negative: whether the claimant or the defendant

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[18] Gerhard Kegel, "Der Individualanscheinsbeweis und die Verteilung der Beweislast nach überwiegender Wahrscheinlichkeit" in Kurt H. Biedenkopf, Helmut Coing & Ernst-Joachim Mestmäcker, eds., *Das Unternehmen in der Rechtsordnung - Festgabe für Heinrich Kronstein*, (Karlsruhe: C.F. Müller, 1967) 331; Richard Motsch, *Vom rechtsgenügenden Beweis* (Berlin: Duncker & Humblot 1983).

[19] Bernhard Maassen, *Beweismaßprobleme im Schadensersatzprozeß* (Cologne, Berlin, Bonn and Munich: Carl Heymanns, 1976) at 52 ff.

[20] We will return to this argument on 76 f., below.

[21] They allege that the number of false negatives would sink when a lower standard of proof is applied.

[22] Bender, *supra* note 13 at 252; Motsch, *supra* note 18 at 82 ff.

wins a claim over a sum of money without in truth having a right to it is economically speaking the same. The standard of proof should appreciate this equilibrium and, therefore, be allocated at 50%. In exceptional cases, however, the costs of a false positive judgment may outweigh the costs of a false negative.[23] Here, the standard should be raised according to relation of the cost of a false positive to a false negative. Consequently, the authors favouring the preponderance standard argue for a flexible standard of proof, which varies according to the graveness of the consequences of a wrong decision.

A third argument adduced by the proponents of the preponderance standard is that a standard of proof that is related to probabilities rather than to a judge's subjective conviction (of the truth or of a high probability) is more likely to be accepted by the losing party since such a ruling is more transparent. In their view, it is in accordance with common sense to decide on the basis of the more probable facts what makes such a decision more comprehensible. Furthermore, it is possible to argue about how the objective probability of a certain fact must be assessed, whereas a personal belief cannot be made the object of rational reasoning and a communicative discourse.[24]

The proponents of the conviction standard adduce several counterarguments against this view. The first and most obvious point is that such an approach would violate § 286 ZPO for the law demands more, or rather something else, than a prevailing probability.[25]

Second, and part from this statutory argument, some authors maintain that it is in most cases impossible to assign an exact probability to a certain factual allegation. This argument is addressed against a Pascalian understanding of probabilities. The cases in which statistical evidence is of use may be more frequent today than they have been in the past but

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[23] This may be the case for example in paternity and child custody cases.

[24] Motsch, *ibid.* at 255.

[25] MüKo-Prütting *supra* note 7, § 286 40; Stein/Jonas/Leipold, *supra* note 7 at § 286 para. 5; Musielak/Foerste, ZPO, *supra* note 10 at § 286 para. 18; Katzenmeier *supra* note 9 with further references.

weighing the value of a testimony still is a highly intuitive process, which cannot produce anything other than a subjective conviction.[26]

Third, it has been argued that the preponderance standard does not necessarily lead to more just results. German law has developed a very elaborate and sophisticated system of rules as to the allocation of the burden of proof. Thus, the allocation of the burden is not a matter of chance but embodies a normative decision of the legislator. This body of rules would partly lose its function if the standard were to be lowered, as this would reduce the number of cases that have to be decided by the burden of proof.[27]

A fourth counterargument is that a low standard of proof would encourage claims on a dubious factual basis and eventually lead to situations in which the state lends its hand to the enforcement of judgments that are not based on the real facts.[28] The authors maintaining this argument find it less questionable for the state not to be of aid to a claimant who cannot prove his claim than to enforce a claim that has no factual basis. This conviction is connected with the view that the status quo should not be unsettled as long as a claim is merely probably justified.[29]

The last argument against the preponderance standard in German law deals with those situations in which special alleviations of proof are applicable. It has been argued that those provisions – insofar as they involve a lower standard of proof – would be rendered useless if the ordinary standard were already at such a low level that a slight preponderance of the

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[26] Helmut Weber, *Der Kausalitätsbeweis im Zivilprozess* (Tübingen: Mohr, 1997) at 141 ff.; Prütting, Gegenwartsprobleme, *supra* note 9 at 78; Musielak, Överviktsprincip *supra* note 13 at 468. Dissenting Heribert Hirte, Berufshaftung (Munich: Beck, 1996) at 477.

[27] Dieter Leipold, *Beweismass und Beweislast im Zivilprozess* (Berlin: Juristische Gesellschaft, 1985) [Leipold, Beweismaß und Beweislast] at 8; Schwab, *supra* note 7 at 455; Katzenmeier, *supra* note 9. For this nexus see at 21, above.

[28] See e.g. Walther J. Habscheid, "Beweislast und Beweismaß" in Hanns Prütting, ed., *Festschrift für Gottfried Baumgärtel* (Cologne, Berlin, Bonn and Munich: Heymanns, 1990) 105 at 118. Schwab, *supra* note 7 at 456; Katzenmeier, *supra* note 9 sub IV c) with further references.

[29] MüKo-Prütting, *supra* note 7 at § 286 para. 39. See for the correlation between the standard of proof and the protection of the status quo at 21, above. As we have seen it is somewhat questionable to take as the status quo the moment before the claim was filed.

evidence would suffice. Logically it would then be impossible to lower it even further.[30] Before dealing with this argument, however, we shall take a closer look at these rules and their function.

2. Rules as to the Facilitation of Proof

The goal to facilitate the proof of a certain fact, which is essential to the claimant's case, can be achieved by very different legal means. The lowering of the standard of proof is just one among several options found in the codes or developed by the courts.

a) Rebuttable Presumptions

The most effective way to help the claimant make his case are rebuttable presumptions. They have the effect that it is not the claimant who has to prove a fact, which is essential to his case, but the defendant who has to prove its absence. In this sense, they shift the burden of proof. This type of presumptions corresponds with the Common Law's rebuttable presumptions of law, sometimes referred to as 'legal presumptions'.[31]

There are many presumptions in the German Codes that put the onus to prove a certain fact on the party which, according to the general rule, would not have the burden of proof as the fact is essential to the other party's case. We already dealt with the proof of fault in

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[30] MüKo-Prütting, *ibid.* para. 36.

[31] See for this terminology Colin Tapper, *Cross & Tapper on Evidence*, 9th ed. (London, Edinburgh, Dublin: Butterworths, 1999) [*Cross on Evidence*] at 122. Rebuttable presumptions of law are sometimes also referred to as 'mandatory presumptions'. Besides rebuttable presumptions German Law knows irrebuttable presumptions of law and fictions. These two devices are often confused. A fiction ("Fiktion") feigns a fact that is in reality not existing. If, for example, a defendant is ordered in a judgement to perform a certain legal act, § 894 ZPO feigns that this act has been performed at the day the judgment comes into effect. § 894 Abs. 1 S. 1 ZPO: "In the event that the debtor is by judgement compelled to make a declaration of intention, the declaration shall be deemed as given as soon as the judgement became final." (Translation by Stewart, *supra* note 4.) In the case of irrebuttable presumptions ('conclusive presumptions') it is not clear whether the presumed fact exists or not. § 5 *Handelsgesetzbuch* (German Commercial Code, HGB) presumes that if a firm name is registered in the Commercial Register the operation conducted under the firm is a commercial business, which may in fact be true or not. Both, fictions and irrebuttable presumptions of law, however, have the effect that any evidence as to the (non-) existence of the presumed or feigned fact is inadmissible since for the law the fact is existing.

contractual cases,[32] other examples are the presumption of ownership for the lawful possessor (§ 1006 BGB). Here, the judge has to presume that the possessor is also the owner of the property.[33] Similarly, the good faith of the acquirer of a movable property with respect to the ownership of the person possessing it (§ 932 ZPO) is presumed, unless the property has been stolen. Furthermore, there are many statutes that put the risk of non-proof with respect to specific facts on the defendant for it is typically very difficult for the claimant to prove these facts, for example in the field of product liability.[34]

Apart from these statutory provisions the courts have developed many non-statutory rules that affect the burden or the standard of proof. With respect to product liability, for example, the courts have created a duty for the manufacturer to control all produced items and to document the results. If this duty is not performed the manufacturer has to prove that the single product, which was related to damage suffered, was not defective[35].

b) Standards with Respect to the Measure of Damages

§ 287 Abs. 1 ZPO[36] on the other hand is considered a real exception to § 286 ZPO in the sense that it defines a lower standard of proof for certain issues. In the first place, it applies to the determination of the amount of an alleged damage and does not require the "conviction of the truth" but the "free conviction of the judge". The BGH and most authors

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[32] See at 17, above.

[33] The Common Law knows the same presumption: John Henry Wigmore, *Wigmore on Evidence*, Volume 9, revised by James H. Chadbourn (Boston and Toronto: Little Brown and Company, 1981) § 2515; John W. Strong, *McCormick on Evidence*, 5th ed. (St. Paul, Minn., 1999) vol. 2 § 343 at 438.

[34] E.g. product liability (§ 1 Abs. 2 ProdHG) and liability for pharmaceutical products (§ 84 Abs. 2 ArzneimittelG).

[35] BGHZ 104, 323.

[36] § 287 Abs. 1 ZPO: "In the event that it is controversial between the parties whether any damage was caused or the extent of a damage or of a compensable interest, it shall be decided by the court in its free discretion by taking into consideration all the circumstances. It shall be left to the court whether and to what extent it should order a requested taking of evidence or procure sua sponte the expert opinion. The court may examine the party tendering the evidence with respect to the damages or interest; the provisions of § 452 (1) first sentence and 2 to 4 are applicable analogously." Translation by Stewart, *supra* note 4.

share the view that this wording indicates a lower standard of proof,[37] which is justified since it is typically very difficult to prove the exact amount of damages.

Similarly, "compensable economic loss" is defined by § 252 S. 2 BGB as such profit that the plaintiff could have *probably* expected in the ordinary course of events if the act for which the defendant is liable had not occurred.[38] Just as with § 287 ZPO, this provision is usually regarded as a lowering of the standard of proof with respect to the measure of damages.[39]

Whether these and similar provisions[40] in fact put forward a lower standard of proof seems questionable. When it comes to the measure of damages, German law – just like the Common Law[41] – employs a comparison between the actual state of things and the situation as it would be without the damage ("Differenzhypothese").[42] Therefore, a hypothetical situation has to be considered. But the term "proof" in its narrow and strict sense refers only to the establishment of facts. Facts are defined as phenomena that exist in the present or have existed in the past, but the term does not comprise hypothetical situations.[43] Thus, strictly speaking, it would be illogical if the law required "*proof* of damages".

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[37] BGH NJW 1972, 1515; BGH NJW 1993, 734; Stein/Jonas/Leipold *supra* note 7 at § 287 para. 1; MüKO-Prütting *supra* note 7 at § 287 paras. 3, 17. Dissenting Peter Gottwald, *Schadenszurechnung und Schadensschätzung* (Munich: Beck, 1979) [Gottwald, Schadenszurechnung] at 214; Helmut Rüßmann, Alternativkommentar zur ZPO (Neuwied: Luchterhand, 1987) [Rüßmann in AK ZPO] at § 287 para. 5.

[38] § 252 BGB: "The compensation shall also include lost profits. Profit is deemed to have been lost which could probably have been expected in the ordinary course of events, or according to the special circumstances, especially in the light of the preparations and arrangements made." Translation by Simon L. Goren, *The German Civil Code* (Littleton, Col.: Fred B. Rothman & Co, 1994).

[39] Dieter Medicus, in *Staudinger Kommentar zum Bürgerlichen Gesetzbuch, §§ 243 – 254*, 12th ed. (Berlin: Walter de Gruyter, 1983) [Staudinger-Medicus] at § 252 para. 20; Prütting, Gegenwartsprobleme *supra* note 9 at 81.

[40] For more examples of a lower standard of proof dictated by the substantive law see Prütting, Gegenwartsprobleme *ibid.*

[41] See *Hadley v. Baxendale* (1854), 9 Exch. 341.

[42] See e.g. Staudinger-Medicus, *supra* note 39 at § 249 para. 4.

[43] Black's Law Dictionary, ed. by Bryan A. Garner, 7th ed. (St. Paul, Minn.: West Group, 1999).

In this sense, § 252 S. 2 BGB and § 287 Abs. 1 ZPO do not represent exceptions to § 286 ZPO.[44] An application of § 286 ZPO with respect to the measure of damages would be impossible, for they cannot be proven in the strict sense. And the "conviction of truth", which is required by § 286 ZPO, is impossible to gain with respect to hypothetical situations. "Truth" again is a term that is applicable only with respect to factual allegations, since "truth" is understood as the agreement of thought and reality.[45] An allegation that refers to a situation, which has never occurred, may be convincing or probable, but it can never be true since it does not try to describe reality.[46]

Therefore, § 252 S. 2 BGB and § 287 ZPO should not be regarded as provisions that lower the standard of proof. Since proof of the issues dealt with in § 252 S. 2 BGB and § 287 ZPO is not possible, these provisions do nothing but accurately anticipate the uncertainties that are involved when one has to base a judgment upon a hypothesis.[47] With respect to a hypothesis the category of "truth" is inapplicable even as an ideal and probability has to be the standard.

c) The Standard of Plausibility – § 294 ZPO[48]

Under certain circumstances the law requires the plaintiff to make the facts essential to his case "plausible" ("glaubhaft").[49] The practical importance of this rule is limited to requests

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[44] Gottwald, Schadenszurechnung, *supra* note 37 at 218.

[45] See at 6, above.

[46] § 252 S. 2 BGB has a remarkable parallel in the U.S. Law see at 70, below.

[47] See for the treatment of future situations in the Common Law V.C. Ball, "The Moment of Truth: Probability Theory and Standards of Proof" (1961) 14 Vand. L. Rev. 807 at 815: "The future is uncertain, but man must act".

[48] § 294 Abs. 1: "The person who is required to prove the plausibility of an allegation may employ all means of evidence and may be allowed to give an affidavit as well." Translation by the author, inspired by Stewart, *supra* note 4.

[49] The translation of "glaubhaft" with "credible" as it is suggested by Stewart, *supra* note 4, is not apt to appreciate the differences between "glaubhaft", which refers to the grade to which a statement is believable and "glaubwürdig", which describes the degree of reliability of a witness as a person. "Credible" should be used to translate the latter.

for interim measures.[50] According to § 294 ZPO the party who has to make a certain fact plausible can do so by all ordinary means of proof plus affidavits.[51] The only restriction is that all pieces of evidence must be available at the day of trial;[52] no delay caused by the need to compel a witness etc. is tolerable.

Apart from this wider choice as to the potential means of proof, courts and most of the authors[53] read the rule in a way that it provides a lower standard of proof than § 286 ZPO at least in cases where no final decision is required. For the purposes of preliminary decisions with only interim force, such as attachments and injunctions, a preponderant probability is held to be sufficient to make proof.[54] This conclusion is not expressly formulated in the wording of the code. But in many, albeit not in all cases in which the plausibility standard is applicable, only one party has the chance to adduce evidence, for they take place in the context of an ex-parte procedure.[55] From one-sided evidence, which consists often enough only of affidavits, however, it is impossible to infer more than an assessment of its plausibility. With respect to preliminary decisions as to interim measures the intrinsic goal of fact-finding – truth – hast to step has to stand back behind the need to come quickly to a decision.

d) To Which Extent are these Devices Exceptions to § 286 ZPO?

After having reviewed the most important alleviations of proof we can return to the argument, that these devices would be useless if the ordinary standard of proof were lower

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[50] See § 920 Abs. 2 ZPO. For a complete overview as to the scope of the application of § 294 ZPO see Prütting, Gegenwartsprobleme, *supra* note 9 at 80.

[51] Under German law affidavits are not admissible if full proof of fact is required.

[52] § 294 Abs. 2 ZPO: "A taking of evidence that cannot ensue immediately shall be impermissible."

[53] Differing Gottwald, Schadenszurechnung, *supra* note 37 at 217.

[54] BGH NJW 1996, 1683; BGH FamRZ 1996, 408, 409; Stein/Jonas/Leipold, *supra* note 7 at § 294 para. 1; Prütting, Gegenwartsprobleme, *supra* note 9 at 80 f. In the rare cases where a decision would de facto be final, it has been argued that § 294 ZPO requires the same standard as § 286 ZPO.

[55] Stein/Jonas/Leipold, *supra* note 7 at § 294 para. 3.

than described by the proponents of the conviction of truth standard.[56] This reasoning implies that these devices are based on a lowering of the standard of proof.

Upon closer examination § 287 ZPO and related provisions do not appear to be exceptions to § 286 ZPO for they deal with hypothetical situations as opposed to facts. A hypothetical situation, however, can never be "true", which is why the formula in § 286 ZPO is inapplicable. In this sense § 287 ZPO is not an exception to § 286 ZPO.

§ 294 ZPO, on the other hand, indeed defines a different standard of proof in cases where no final decision is made. But since the context as well as the force of these decisions (ex-parte procedures and/or interlocutary judgments) is so specific and very distinct from final judgments, any comparison between the standards set out in § 286 ZPO and in § 294 ZPO will probably not lead very far. In any event, one should not try to make an argument that the standard of proof in ordinary cases has to be very high, just because § 294 ZPO defines a lower standard. § 294 ZPO deals with the specific situation that a judge has to base her decision on an incomplete amount of evidence. § 294 ZPO only tries to appreciate this specific situation by pointing out that truth is not the intrinsic goal of these procedures.

The main flaw of the argument we are concerned with here is that it presupposes that the ordinary standard of proof is fixed and does not change. It may in the end be more convincing to interpret provisions that state the standard of proof more specifically not as exceptions but rather as evidence for the proposition that the standard, even when no special provision is pertinent, is not the same for all cases. Special provisions such as §§ 287, 294 ZPO, § 252 S. 2 BGB are in this sense nothing more than specific instances in which the judge may content himself with a lower degree of proof. But this is not to say that these instances are conclusive in the sense that they are the only cases in which the standard of proof can be lower. The reason why the law addresses these instances particularly is merely that here a lower standard of proof is *typically* appropriate. When the

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[56] For this argument see at 48, above.

phenomena at issue are hypothetical, or when the decision has to be based on evidence from only one party and is only of preliminary force, it is *typically* reasonable to ask for a lower degree of warrant than in cases when facts have to be proven for the purpose of a final decision which relies on the evidence adduced by both parties. But even when none of the specific instances is pertinent the degree of proof is not always the same. This will become apparent if we consider the way the standard of proof is applied in practice by German courts.

3. The Standard of Proof in Practice

So far we have dealt exclusively with the academic interpretation of the formulae that the BGH has developed to describe the ordinary standard of proof and its exceptions. For the purposes of obtaining a fuller picture of the standard of proof it is at least as important to investigate how this standard is handled in practice.

a) Lip Service?

Several authors[57] have suggested that there is some evidence of lip service[58] in the application of this formula in particular by the lower courts and that the conviction of the truth standard is heeded only pro forma, while the judges in fact apply a lower standard of proof. As long as a court purports to apply the standard set out by the BGH, the BGH has no possibility to review the case because the weighing of the evidence cannot be made the subject of an appeal. It is the province of the judges in the lower courts who actually hear

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[57] Musielak, Överviktsprincip, *supra* note 13 at 466; Bender, *supra* note 13; Matthias Einmahl, "Zeugenirrtum und Beweismaß im Zivilprozeß", NJW 2000, 469; Mirjan Damaška, "Atomistic and Holistic Evaluation of Evidence: A Comparative View", in David S. Clark, ed., *Comparative Private International Law*, (Berlin: Duncker & Humblot, 1990) 91 at 98. Slightly different: Leipold, Beweis und Wahrheit, *supra* note 5 at 313, 317.

[58] 'Lip seervice' is suggested as an explanation for the differences between the continental European and the Common Law system also by Clermont & Sherwin, *supra* note 1 at 261.

the evidence presented at trial to weigh it.[59] Thus, the BGH has relatively few opportunities to deal with the question as long as lower courts formally apply the BGH formula. Thus, their judgment would be "appeal-proof" with respect to their assessment of the evidence, even though they in fact may take a different approach.

Particularly in cases where the only evidence available is testimonial evidence judges seem to be rather generous. This hypothesis is supported by a study of in total 1749 cases that involved 645 cases with only one witness. In a mere 3 % of these cases the court did not believe this witness.[60] In other words: uncontradicted testimonial evidence will almost always meet the standard lower courts apply in these cases. This is especially striking given that testimonial evidence is by far the most unreliable kind of evidence.[61] Let alone that the witness may be lying intentionally, her or his reception of the incident is often not accurate. Testimonial evidence of lay-witnesses is particularly unreliable when it comes to the estimation of velocities and distances.[62] Furthermore, the witness' memory may have been blurred over time or due to emotional excitement triggered by the incident. Finally, the influence of third parties, especially suggestive questions, may lead the witness to – typically unconsciously – make his story sound more believable.[63]

Given these structural uncertainties of parole evidence, one may doubt that courts are indeed able to derive a conviction of truth – understood as a high standard of proof – from the examination of a single witness. Thus, some authors suggest that the courts should not

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[59] § 550 ZPO states that only the wrong application of a law can be reviewed by the BGH. Thus, the application and interpretation of § 286 ZPO can be appealed but not the weighing of the evidence by the lower court itself.

[60] Bürkle, *Richterliche Alltagstheorien im Bereich des Zivilrechts* (1984) at 139, cited by Einmahl, *supra* note 57 at 473.

[61] This is the reason why in the Common Law under certain circumstances testimonial evidence has to be corroborated by other evidence in order to be conclusive. See McCormick, *supra* note 33 at 328.

[62] In an experiment judges prosecutors and police officers were asked to ascertain the velocity of vehicles. The deviations amounted up to 300%! See Einmahl, *supra* note 57 at 471, note 23.

[63] Such suggestive questions are of course not permissible during an examination in court. However, the witness has usually told his story to somebody else (family, one of the parties, lawyer). Such stories have a tendency to become more and more complete the more often they are told.

hide the standard they are in fact applying behind formulae which are rather meaningless. They should instead openly admit that their verdict is based on evidence, which varies in its strength from cases to case depending among other factors on the quality of the evidence available.[64]

Whether the practice of lower courts is in the end rightly characterized as 'lip service' depends on how the standard set out by the BGH is construed. We will see in Chapter Four[65], that the traditional view, which holds that the BGH asks for a rather 'high" standard, may have to be revised.

b) 'Anscheinsbeweis'

The judiciary, however, often uses another mean of "making the requisite proof easier"[66] which is the ample use of 'Anscheinsbeweis' or 'prima-facie Beweis'.[67] In cases where 'Anscheinsbeweis' is admissible the party bearing the burden of proof is allowed to make proof by proving not the fact in issue itself but other circumstantial facts ('Hilfstatsachen'). These facts must be such that they allow the trier of facts to draw conclusions as to the existence of the actual fact in issue. In this sense the German 'Anscheinsbeweis' is similar to the Common Law *res ipsa loquitur* maxim.[68] However, the scope of application of 'Anscheinsbeweis' seems to be wider than that of *res ipsa loquitur* since it is not confined to

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[64] Rüßmann in AK ZPO, supra note 37 at § 286 paras. 14-21; Gottwald, Schadenszurechnung, *supra* note 37 at 200 ff.

[65] See at 69, below.

[66] Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law*, transl. by Tony Weir, 2d ed. (Oxford: Clarendon Press, 1998) at 651.

[67] See for this translation Dieter Giesen, *International Medical Malpractice Law*, (Tübingen: Mohr, 1988) at paras. 1059 ff.

[68] 'Anscheinsbeweis' has also similarities with the Common Law's 'presumptions of fact' (sometimes also referred to as 'permissible inferences'). Both of these doctrines do not shift the burden of persuasion (for the Common Law see *Cross on Evidence*, *supra* note 31 at 122) and they may both be rebutted by proving extraordinary circumstances. 'Anscheinsbeweis', however, must not be confused with the Common Law's 'prima-facie case'.

negligence cases nor restricted to cases in which the defendant had exclusive control over the cause of injury.[69]

'Anscheinsbeweis' is particularly important for the proof of negligence with respect to car accidents as well as in malpractice cases where direct evidence is often not available.[70] Instead of proving the defendant's negligence the claimant can prove for example that the defendant did not obey a traffic sign. Absent any extraordinary circumstances, this finding allows the judge to draw the conclusion that the defendant acted negligently.[71]

'Anscheinsbeweis' can in the view of the BGH only be conclusive if it proves such facts that typically occur in connection with the fact in issue.[72] The connection between the facts has to be such that the judge by using her experience is able to draw from the proven facts the conclusion that the disputed fact has happened ("If Y then X, with 'X' being the fact in issue").

It is an open question whether proof by 'Anscheinsbeweis' involves a lower standard of proof.[73] Thus, it is not clear whether the rules as to 'Anscheinsbeweis' constitute an exception to the ordinary standard of proof or whether it leads to the full conviction of the judge as required by § 286 ZPO. As we will see, however, the general admissibility of 'Anscheinsbeweis' is yet another support for the proposition that the standard set out in § 286 ZPO is not fixed.

The application of 'Anscheinsbeweis' rules necessarily involves an element of probability since the connection between Y and X rests on empirical knowledge and common

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[69] See *ibid.* at § 41 note 38; Kötz & Zweigert, *supra* note 66 at 651 ff.

[70] MüKo-Prütting *supra* note 7 at § 286 para. 47. If operation material (pads etc.) remains in the body after an operation the judge can infer negligence on the part of the surgeon. BGH VersR 1957, 768. See for medical malpractice cases in particular at 81 f., below.

[71] MüKo-Prütting *supra* note 7 at § 286 para. 58.

[72] *Ibid. at* 48; Leipold, Beweismaß und Beweislast, *supra* note 27 at 11.

[73] For a lower standard of proof: Leipold, Nakamura Festschrift, *supra* note 7 at 12; Leipold, Beweismaß und Beweislast, *supra* note 27 at 13 with further references. For the application of § 286 ZPO: MüKo-Prütting *supra* note 7 at § 286 para. 52.

experience.[74] With respect to a single fact empirical knowledge logically allows not more than a statement of probability. Therefore, the decisive question is how strong the connection between Y and X has to be in order to be considered conclusive.

A formula frequently used by the BGH is that the connection between Y and X has to be such that it allows the judge to gain the "full conviction" of the fact in issue.[75] This wording allows two inferences: in the opinion of the court 'Anscheinsbeweis' is not an exception to the ordinary standard of proof for in both cases the judge has to be fully convinced. And, more interestingly, the BGH apparently does not regard it as contradictory to ask for the judge's full conviction derived from 'Anscheinsbeweis', even though this necessarily rests on a probability statement. Therefore, the conviction required in § 286 ZPO can be based – at least in the case of 'Anscheinsbeweis' – on a (high) probability.[76]

In particular with respect to questions of causation, however, courts tend to apply the 'Anscheinsbeweis'-rules not very strictly.[77] As a consequence, the strength of the empirical rule employed by the court to draw a conclusion from one fact to another varies and is sometimes rather weak.[78] The BGH at times employs empirical rules, which cannot establish more than a preponderant probability that fact Y has caused fact X. It has been suggested that this extensive acceptance of 'Anscheinsbeweis' is in fact a hidden application of a lower standard of proof as to questions of causation.[79] Be this as it may, what can

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[74] Leipold, Beweismass und Beweislast, *supra* note 27 at 12. Gottwald, Schadenszurechnung, *supra* note at 212.

[75] BGH NJW 1998, 79 at 81.

[76] For criminal matters, however, the German Constitutional Court (Bundesverfassungsgericht, BVerfG) has decided that Anscheinsbeweis cannot be conclusive. BVerfGE 84, 82, 87.

[77] Kegel, *supra* note 18 at 331.

[78] See e.g.; BGHZ 11, 227. In BGH NJW 1954, 1119, the court decided on the basis of a prima-facie conclusion that the death of a man, who was found dead in a pool, and who could not swim, was caused by drowning, even though other guests had neither heard cries for help nor splashes. Other causes (stroke etc.) were ruled out.

[79] MüKo-Prütting, *supra* note 7 at § 286 para. 47.

hardly be contested is that the strength of 'Anscheinsbeweis' varies from case to case since there is no absolute minimum as to how strong an empirical rule has to be.

The standard of proof is in fact flexible in both ways in the sense that sometimes an unusually high degree of proof is required. The best example for this proposition is another famous decision by the BGH[80]: In this case, the decisive question was whether the defendant had received a letter posted by the plaintiff. The plaintiff could prove not only that he indeed had posted this letter but also that only 0.2% of all letters never reach their recipient. Nevertheless, the BGH refused to take this circumstantial evidence as conclusive proof or as 'Anscheinsbeweis' of the actual reception of the letter by the defendant. At a first glance, this is particularly striking given that the BGH in other cases has admitted 'Anscheinsbeweis' of far lower strength. Nevertheless, the decision is impeccable. The crucial point is that the claimant could have sent the letter by registered mail. This would have avoided all doubts whether the defendant had received it or not. In this sense it was the pre-trial conduct of the party bearing the burden of proof that has led to the evidentiary problem. Just as the destruction of evidence by the other party can lower the standard of proof[81], the negligent omission of the creation of evidence can raise it.

II. The Standard of Proof in French Law

The intrinsic goal of the French law of evidence is – just as for the Common and for the German law – the truth.[82] Thus, several provisions in the French *Code Civil* (CC) and in the Code of Civil Procedure (*Noveau Code de Procédure Civile*, NCPC) refer to the truth as the goal of fact-finding.[83]

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[80] BGHZ 24, 308 at 313.

[81] Helmut Rüßmann, Alternativkommentar zur ZPO (Neuwied: Luchterhand, 1987) [Rüßmann in AK ZPO, *supra* note 37 at § 286 para. 27.

[82] Philippe Théry, "Finalités du droit de la preuve" (1996) 23 Droits 41 at 47.

[83] See e.g. Article 10 CC and Art. 181, 218, 231 NCCP.

But there is no explicit or implicit definition of the standard of proof in civil cases. Only with respect to criminal cases, Article 427 I of the Code of Criminal Procedure (*Code de Procédure Pénale*, CPP) states that the judge decides according to his "innermost conviction":

> "Hors les cas où la loi en dispose autrement, les infractions peuvent être établies par tout mode de preuve et le juge décide d'après son *intime conviction*."

Generally the French civil law is characterized by a tendency of "fact-avoidance"[84] in the sense that French courts tend to avoid the examination of witnesses. Written proof is generally preferred over original testimonial evidence.[85] Just as in the German law, presumptions play a very important role in French civil law. Whether they are non-rebuttable or simply shift the burden of proof, they substantially lighten the judge's evidentiary task so he does not have to descend too deeply into the muddy waters of facts.

Furthermore, questions of fact-finding and in particular the problem of the standard of proof do not seem to be a field, which has been discussed as intensely among French scholars as is the case among their Anglo-American colleagues. If French authors address the issue at all, they often mention the phrase that "proof is made if the existence of a fact seems certain".[86] In this context "certainty", however, must not be mistaken with the objective reality or even with historic truth, for the authors agree on the point that the result of legal proof is the conviction of the judge.[87] In this sense proof constitutes the means to create the conviction of the judge or the court.[88]

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[84] James Beardsley, "Proof of Fact in French Civil Procedure", (1986) 34 Am. J. Comp. L. 459 at 470.

[85] See Art. 1315 – 1348 CC.

[86] Marcel Planiol, *Traité élémentaire de droit civil* (Paris 1926) T. II no. 2; Paul Foriers, "Introduction au droit de la preuve" in *La Preuve en droit* (Brussels: Bruylant, 1981) 7 at 18.

[87] Jean-Denis Bredin, "Le doute et l'intime conviction" (1996) 23 Droits 21 at 24; Théry, *supra* note 82 at 46; Claude Giverdon, "The Problem of Proof in French Civil Law" (1956) 31 Tul. L. Rev. 29 at 38.

[88] Planiol, *supra* note 86, no. 2.

In their study of French civil procedure Herzog and Weser suggest that "French authors usually state that the conclusions reached do not need to be absolutely true, but that it is sufficient if they are probable".[89] Even though the reference given for this proposition could not be verified, this suggestion seems to be accurate in the sense that in the passages where the issue is addressed at all in the French literature, all authors expressly distinguish between historic truth and the conviction of the judge as the outcome of legal fact-finding.[90] Here, the judge's conviction (in civil and in criminal proceedings) is conceived to be neither different in nature nor in degree from the conviction on which important decisions outside of the courtroom are based.[91] Thus, the conviction of the judge does not need to be (and in fact cannot be) completely free of any doubt.[92] That the term "conviction" in a judicial context cannot be understood as excluding any doubts becomes particularly apparent if several judges sit on the bench and eventually do not come to a unanimous decision. Bredin uses the example of a 3 to 2 decision.[93] Even though in this situation only three of the five judges weigh the evidence in favor of the party bearing the burden of proof, the court as a deciding body can form a conviction. Giverdon, finally, pushes the argument a little further and argues that "judicial proof comes down to a simple probability; the party who gains the better position in the argument wins the process."[94]

The French law of evidence addresses above all the subjective side of the evaluation of proof. It is not the end of fact-finding to create an objective probability but to convince the court. This, however, does not mean that the court must not have any doubt whatsoever in order to find in favour of the party bearing the burden of proof. Far from purporting that judicial decisions are always based on the truth, French authors readily acknowledge the

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[89] Peter Herzog & Martha Weser, *Civil Procedure in France* (The Hague: Nijhoff, 1967) at 310.
[90] Théry, *supra* note 82 at 48.
[91] Bredin, *supra* note 87 at 27.
[92] Giverdon, *supra* note 87 at 38.
[93] Bredin, *supra* note 87 at 27.
[94] Giverdon, *supra* note 87 at 38.

problem of uncertainty and the impossibility to ascertain the truth by means of judicial proof.

III. Conclusion

Both jurisdictions, France and Germany, have a somewhat reluctant attitude when it comes to factual problems.[95] But since no jurisdiction can avoid the collection and the evaluation of evidence completely, they have to take a stand on the question of the standard of proof. Both laws focus on the conviction of the judge in their description of the applicable standard. An allegation is proved if the judge is (fully) convinced. But as we have seen, this is to be understood primarily as an emphasis of the importance of the subjective side of evaluating the evidence. German scholars in particular discuss whether this is in fact a convincing way to phrase the required quantum of proof, or whether objective elements, i.e. probabilities, should be addressed more clearly.

The French term "intime conviction" as well as the German formula of the judge's "free conviction that factual allegations should be regarded as true", however, do not entail that this conviction must be "without a shadow of a doubt". Not even the interpretation of the German BGH goes that far. On the contrary, our analysis of the theoretical and the practical treatment of the standard of proof has shown that the continental law of evidence does not deny the deficiencies of judicial means when it comes to ascertaining the truth. According to the continental approach, a court can be convinced, even though doubts remain. Thus, conviction and doubt are not two irreconcilable concepts in a judicial context.

The assessment by Clermont and Sherwin[96] cited in the introduction seems to be somehow distorted if not biased. Their interpretation implies an understanding of the term "conviction" that does not take the judicial procedural context into account and allows

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[95] For the German law see Bender, *supra* note 13.

[96] See at 40, above.

room for conviction only if doubts are absent. The authors have failed to appreciate the main difference between the formulae used to describe the standard of proof on the Continent and in the Common Law world. It lies in the focus on the subjective side of evidence evaluation on the Continent as opposed to the emphasis on the objective side in the Common Law tradition.

Chapter 4 The Common Concept and the Synthesis of the Formulae

After having reviewed in Chapter One the epistemic and the legal framework of the standard of proof, and in Chapters Two and Three the formulae and their application for the standard of proof in the Common and in the Civil Law, we will now set out to actually compare and try to reconcile the "probability" with the "conviction" approach.

In the course of this exercise it will become apparent that the different ways to phrase the standard of proof both rely on the same concept, which encompasses objective as well as subjective criteria. Furthermore, both systems take a flexible approach with respect to the question how high the required degree of belief or warrant for the statement to be proven has to be. In this sense the standard of proof is not "higher" in the Civil Law. To support this proposition the arguments for a "high standard of proof" adduced in the discussion in Germany will be reviewed. Further support for the thesis that the standard of proof is essentially the same in both systems can be derived from the practice in international arbitration, at which we will look briefly.

The recently developed Principles and Rules for Transnational Civil Procedure by the ALI and UNIDROIT and their treatment of the standard of proof appear to be the synthesis of the Common and of the Civil Law formulae. The fact that scholars from both legal traditions have agreed on one formula apparently without engaging in fierce arguments is further – and arguably the best (circumstancial) evidence – for the proposition of a common concept.

I. The Common Concept

1. A Combination of Subjective and Objective Elements

As we have seen in Chapter One, the common starting point for both systems is the truth as the intrinsic goal of fact-finding. Each system has rules that serve other purposes, such as the privilege rules, but the law of evidence in general is designed as an instrument to

ascertain the truth in the sense of finding out which factual statements correspond best with reality. It is, however, in many cases impossible to determine the objective truth by judicial means since "reality" itself includes phenomena that are subject to social construction. Since not all members of a given society construct these phenomena in the same way, and therefore the determination of what is real necessarily involves a subjective element and cannot be detached from the person determining it. This epistemological axiom is essentially accepted in both reviewed systems. Hence both systems emphasize the importance of a belief of the truth on the part of the trier of facts and do not require the objective truth of the facts.[1] So far, any difference between the systems is slight.

Continental authors tend to be misled by the notion of probability into depicting the Common Law standard of proof as a purely objective concept.[2] The preponderance of probability formula seems to address only the objective side of fact-finding due to its reference to the model of a scale, the notion of probabilities, and their mathematical connotation. This reference to probabilities, however, is merely the Common Law's way to express the notion that a belief in the truth of a proposition can be held in different degrees. Most Common Law courts and authors[3] understand the term not in a mathematical but rather in a metaphorical way. In this sense "probability" is not an attribute of the phenomenon in question but of the status of the trier's mind or of the warrant for the statement.

The wording of the ordinary standard of proof in § 286 ZPO in the German law does not expressly acknowledge the existence of different degrees of belief. But just as Common

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[1] See above 29 and 64, above.

[2] Karl Heinz Schwab, "Das Beweismaß im Zivilprozess", Festschrift für Fasching (Wien: Manzsche Verlags- und Universitätsbuchhandlung, 1988) 451 at 457; Walther J. Habscheid, "Beweislast und Beweismaß", Festschrift für Baumgärtel (Heymann: Cologne, Berlin, Bonn, Munich, 1990) 105 at 118; Christian Katzenmeier, "Beweismaßreduzierung und Probabilistische Proportionalhaftung" forthcoming ZZP II.2. a) (2).

[3] See above Apart from the American proponents of a mathematical conception of probabilities with respect to judicial fact-finding. See 27, above.

Law courts, the BGH in its construction of the provision does not state that the trier can only come to a conviction or a belief if he has no doubts at all with respect to the truth of a fact in issue. Thus, both systems agree on the point that absolute certainty, "without a shadow of a doubt", is not required. In the sense that doubts can be of different degrees, also the German law acknowledges that the strength of a conviction can vary.

Neither the Common nor the Civil Law, however, employs a purely subjective test. Since fact-finding is part of judicial proceedings it involves the exercise of an authority which is exclusively vested in the state. Therefore, evidentiary decisions have to be justifiable from an objective point of view. In so far the belief of the truth is a necessary but not a sufficient condition for proof.[4] Just as "knowledge" is defined by epistemologists as "justified true belief"[5] legal fact-finding requires justification. The judge's belief that a statement is true has to be warranted in the sense that it must be coherent, consistent, and reasonably inferable from the evidence.[6] An inference that is based on metaphysical or superstitious beliefs is not justifiable and thus not acceptable for the purposes of judicial fact-finding.

In the German civil law this requirement is transformed in the judge's duty to give reasons for his factual determinations, which is expressed in § 286 I S. 2 ZPO. Since it is impossible to give reasons for a finding which is not in accordance with the laws of nature and logic a judge must not come to a conclusion which would violate these principles.[7]

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[4] See Mirjan Damaška, "Atomistic and Holistic Evaluation of Evidence: A Comparative View", in David S. Clark, ed., *Comparative Private International Law*, (Berlin: Duncker & Humblot, 1990) 91 at 97.

[5] Alvin I. Goldman Epistemology and Cognition (Cambridge, Mass.: Harvard University Press, 1986) at 4; Vern R. Walker, "Preponderance, Probability and Warranted Factfinding" (1996) 62 Brooklyn L. Rev. 1075 at 1081; Mirjan Damaška, "Truth in Adjudication" (1998) 49 Hastings L.J. 289 at 294-97; Ronald J. Allen & Brian Leiter, "Naturalized Epistemology and the Law of Evidence" (2001) 87 Va. L. Rev. 1491 at 1494.

[6] Walker, *ibid.* at 1092.

[7] See e.g. Hanns Prütting, in Gerhard Lüke & Peter Wax, eds., *Münchener Kommentar zur ZPO*, 2d ed. (Munich: Beck, 2000) [MüKo-Prütting] at § 286 para 11; Schwab, *supra* note 2 at 457.

In the Common Law the urge to stress that judicial fact-finding also has an objective side is not so strong since this view has never been contested and has always been common ground among courts and authors. The Common Law has essentially two remedies to prevent or to correct factual findings which are not sufficiently warranted. These are the evidentiary burden and the review of factual determinations on appeal. The trial judge will allow a motion for non-suit if the evidence adduced is not strong enough "to satisfy a reasonable trier of fact on the balance of probabilities."[8] The criterion of reasonableness warrants that a case in which the facts in issue can be established only by employing superstitious beliefs shall not come in the hands of the jury. Correspondingly, even though an appellate court generally not interferes with the factual findings by the trial court, it would in exceptional cases vacate a judgment if it has a "manifest error"[9] and will reverse the trial judge in his factual findings if "it could be shown that the evidence reasonably could not result in justifying the conclusion made by the trial judge."[10] This dual test of reasonableness makes sure that only those findings prevail that are sufficiently warranted.

After all this, the common concept of the Common and the Civil Law with respect to fact-finding is apparent: making proof of a fact requires to create a justified belief in the trier's mind that the respective statement is true. The formulae developed in the Common Law world put more emphasis on the element of (objective) justification[11] with their reference to probabilities whereas in the Civil Law world the requirement of personal persuasion on the part of the trier of facts is stressed. But neither unwarranted conviction nor a mathematical

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[8] Colin Tapper, *Cross & Tapper on Evidence*, 9th ed. (London, Edinburgh, Dublin: Butterworths, 1999) [*Cross on Evidence*] at 140. *Metropolitan Railway Co. v. Jackson* (1877), 3 App. Ca. 193 at 197. Adopted for Canada by the Supreme Court in *R. v. Morabito,* [1949] S.C.R. 172 at 174. John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto and Vancouver: Butterworths, 1999) at 138 note 9 with further references.

[9] *Lapointe v. Hopital Le Gardeur,* [1992] 1 S.C.R. 351 at 352.

[10] *Joseph Brant Memorial Hospital v. Koziol,* [1978] 1 S.C.R. 491 at 504, cited approvingly in *Lapointe v. Hopital Le Gardeur, ibid. at* 358.

[11] This problem has been impressively addressed by W. Trickett cited in John Henry Wigmore, *Wigmore on Evidence*, Volume 9, revised by James H. Chadbourn (Boston and Toronto: Little Brown and Company, 1981) § 2498 at p. 421.

probability, which does not create an actual belief, is sufficient on their own to make proof. In fact, both systems combine subjective and objective elements. In this sense probability and conviction are merely two sides of the same coin.

2. Degrees of Belief – A Floating Standard of Proof?

But even if we cannot detect any conceptual differences between the approaches in the Common and in the Civil Law in the sense that both systems employ a combination of subjective and objective criteria, there is still room for deviations with respect to the "key question" of the standard of proof: When is the belief strong enough or when is the degree of warrant sufficient to regard a fact as proven?[12] Here, according to the stereotypes, the Civil Law has a high standard of proof, whereas the requirements in the Common Law are said to be considerably lower.

As we have seen in Chapters Two and Three this is right and wrong at the same time, in the sense that in neither one of the two systems the standard of proof is preset for every case and for every legal question. For numerous practical, legal as well as epistemic reasons the required degree (of belief or of warrant) cannot always be the same. It is necessarily influenced by the nature of the fact in issue as well as by other circumstances: Is it a still existing or is it a past event? Is it a fact in the real world, a connection between two events (causation), or is it the state of mind of a person? Is ample evidence available or is evidence scarce? What are the consequences of a false positive or a false negative? Has one party destroyed[13] or negligently failed to produce evidence? This list of factors is by no means

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[12] The position most widely accepted in the Common Law seems to be that belief comes in degrees according to the probability for a given statement. *Cross on Evidence*, *supra* note 8 at 141. Vern R. Walker, "Preponderance, Probability and Warranted Factfinding" (1996) 62 Brooklyn L. Rev. 1075, however, suggests that the variable is the amount of warrant that can be relied on for a certain belief. For our purposes it may suffice to state that there is agreement in the Common Law on the proposition that the standard of proof is a matter of degree.

[13] See on this problem Richard D. Friedman, "Dealing with Evidentiary Deficiency", 18 Cardozo L. Rev. 1961 at 1971.

exhaustive and could easily be extended. A sophisticated legal system cannot lump all cases together and ignore the specific characteristics of the case to be adjudicated.

At least in the Commonwealth part of the Common Law world the proposition of a floating standard of proof is widely accepted since Lord Denning's famous words in *Bater v. Bater* "that there is no absolute standard in either (criminal and civil law) case", but "(t)he degree required must depend on the mind of the reasonable and just man who is considering the particular subject-matter."[14]

In the United States, however, this flexible approach has not been explicitly followed. Instead, the standard of clear and convincing evidence has been adopted.[15] This third standard may cover some of the cases in which a stronger degree of belief seems appropriate but it can certainly not provide for all the various circumstances which may affect the standard of proof. The need to adapt the standard of proof becomes apparent in particular with respect to the proof of damages as there is a line of cases in the U.S. which suggests that the applicable standard of proof is more relaxed depending on the evidence available for the claimant.[16] As early as 1863 Christiancy J. said in *Allison v. Chandler*[17]:

> "And when, from the nature of the case, the amount of the damages can not be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit."

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[14] [1950] 2 All E.R. 458 (C.A.) at 459, parenthesis added.

[15] See 32, above.

[16] See *Bigelow v. RKO Radio Pictures, Inc.* (1946), 327 U.S. 25; *Eastman Kodak Co. v. Southern Photo Materials Co.* (1927), 273 U.S. 359.

[17] (1863) 11 Mich. 542 at 555.

In *Story Parchment Co. v. Patterson Parchment Paper Co.* this approach was pushed further for cases "(w)here the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty".[18] It was held that

> "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."[19]

In this sense the U.S. American law acknowledges, too, that the standard of proof is not the same for all cases but is influenced by external factors, such as the conduct of the defendant at lest where the proof of damages is in issue.[20]

For German law, with respect to the question how strong the doubts and respectively the belief have to be, the BGH holds that the "conviction ('Überzeugung') has to be of a grade of certainty suitable for daily life, that silences the doubts without completely extinguishing them."[21] The word "Überzeugung", which is also used in § 286 ZPO, may indeed indicate a high degree of belief at least if translated into English as "conviction". But one should not

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[18] (1931), 282 U.S. 555 at 563.

[19] *Ibid.*

[20] See for further details on this problem Friedmann, *supra* note 13 at 1968-75; Ariel Porat & Alex Stein, "Liability for Uncertainty: Making Evidential Damage Actionable" (1997) 18 Cardozo L. Rev. 1891.

[21] BGHZ 53, 245 at 256. The phrase used by the BGH in the same case, that a judge may "not content himself with a probability bordering to certainty," is often interpreted as requiring a high degree of conviction or belief. It seems to be more convincing to understand this wording as an emphasis of the proposition that the objective probability of the truth of a statement does not suffice to regard the fact as proved as long as it does not create a respective personal belief in the judge's mind.

[21] *Ibid.*

try to read more into it than the proposition that the judge has to base his decision on the burden of proof if he still remains in doubt after the weighing of the evidence.[22] The German word for "belief" ("Glaube") has a strong notion of religious views, which would best be translated into English by the word "faith". The point is that the German word "Überzeugung", other than "conviction" in English, does not necessarily indicate a high degree of belief but only a personal view of a certain degree. Be this as it may, if we indeed tried to infer from the use of the word "Überzeugung" a high standard of proof in the German law, we would be guilty of mistaking labels for the things labelled. After all, as Morris L.J. said in *Hornal v. Neuberger*: "words ... are the servants but not the masters of meaning."[23] If we tried to look beyond the formulae we would find the proposition that the degree of belief is considerably higher in the civil law not endorsed by the practice of the German courts.[24]

In particular the extensive application of 'Anscheinsbeweis' shows that German courts are willing to accept facts as proven even if doubts remain. 'Anscheinsbeweis' relies on the employment of a statistical rule, such as "in a% of all cases where Y exists, X also exists". Therefore, the court may infer X from Y. No matter how strong this correlation is it can logically not produce a degree of belief as to the existence of X which is higher than the statistical connection it is based on.[25] And in any event doubts as to the existence of X remain possible as long as the statistical correlation is not 100%.[26]

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[22] Helmut Rüßmann, *Alternativkommentar zur ZPO* (Neuwied: Luchterhand, 1987) [Ruessman AK ZPO] at § 286 para. 20.

[23] [1957] 1 Q.B. 147 at 266.

[24] Statistics as to the percentage of unsuccessful trials do not exist in Germany and they would in any event be without any meaning for our purposes, since a higher standard of proof would probably have an ex-ante effect and prevent potential claimants from bringing their case to court unless they are very sure about the evidence they can rely on.

[25] Rüßmann-AK ZPO, *supra* note 22 para. 15.

[26] Some German scholars may object against the reliance on 'Anscheinsbeweis' since in their view 'Anscheinsbeweis' is an exception and hence cannot be relied while interpreting the ordinary standard of proof.[26](Dieter Leipold, *Beweismass und Beweislast im Zivilprozess* (Berlin: Juristische Gesellschaft, 1985) at 12; Bernhard Maassen, *Beweismaßprobleme im Schadensersatzprozeß*, (Cologne, Berlin, Bonn, Munich: Heymanns, 1976) at 66; Rolf Bender, "Das Beweismaß", Festschrift für Baur (Tübingen: Mohr,

That the required degree of belief varies from case to case nevertheless is a proposition shared by only a few German scholars.[27] This is surprising given that the BGH itself has never expressed the view that the same standard applies to all cases apart from the fact that the belief or the conviction of the judge is in any event indispensable. The sparse judicial authority there is on this point suggests in fact that the trial judge is not constrained by strict rules in the decision whether he is sufficiently convinced or not. The BGH says that "the trial judge is free to decide according to his conscience whether he can overcome possible doubts in order to convince himself of a certain set of facts as real."[28] In a paternity case the court has held furthermore that it is the province of the trial judge to decide which risk of error is acceptable and that "it would violate the principle of the free evaluation of the evidence if a threshold for the acceptable risk of error would be imposed on the trial judge".[29]

The arguments put forward by many German scholars against a flexible standard of proof are twofold. Some writers suggest that a flexible standard of proof is not reconcilable with § 286 ZPO for this provision always requires the judge's conviction ("Überzeugung").[30] This argument rests on an understanding of conviction which does not leave room for doubts and equates conviction with certainty. But as we have seen, an understanding of conviction which does not allow for the possibility of doubts is inappropriate for judicial fact-finding and its limited means. And, as soon as we admit that conviction and doubts are

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1981) 247 at 259.) But this exception-argument is rather weak given that courts admit 'Anscheinsbeweis' wherever they see fit and not only where "empirical principles"[26] exist or an "ordinary course of events" is alleged. In this sense 'Anscheinsbeweis' is not an exception to the ordinary standard of proof but a mean to establish a fact according to this standard. See MüKo-Prütting, *supra* note 7 at 52.

[27] Peter Gottwald, *Schadenszurechnung und Schadensschätzung* (Munich: Beck, 1979) [Gottwald, Schadenszurechnung]; Peter Gottwald, "Das flexible Beweismaß im englischen und deutschen Zivilprozeß" in Peter Gottwald, Erik Jayme & Dieter Schwab, eds., *Festschrift für Dieter Heinrich* (Bielefeld: Vahlen 2000) 163; Rüßmann-AK ZPO, *supra* note 22 Para. 20.

[28] BGHZ 53, 245 at 256. In this sense, two judges may draw very different conclusions from the evidence presented without that one of them is necessarily wrong.

[29] BGHZ 61, 165 at 172-3, translation by the author.

[30] Dieter Leipold, in Friedrich Stein & Martin Jonas, eds., *Kommentar zur Zivilprozessordnung, Band 3 §§ 253 – 299a*, 21st ed. (Tübingen: Mohr 1997) [Stein/Jonas/Leipold] at § 286 para. 5a.

neither opposites nor mutually exclusive, we recognize that conviction or belief can be of different degrees, for doubts can be of different strengths.

The other argument adduced against a flexible standard of proof is similar to the main critique of *Bater v. Bater*. Many scholars argue that this flexibility forces the trier of facts to determine anew the appropriate degree of persuasion for each case. The law would not provide one standard for all cases, but an infinite number of standards. It has been argued that this would create considerable uncertainty as to what the law is,[31] a situation particularly unsatisfying for continental Civilians. They demand that the standard of proof has to be set out in a statutory provision[32] and must not be subject to the idiosyncrasies of the trial judge.

This argument is convincing in so far as it addresses the necessity to apply the same care and diligence in every case, no matter how small the sum claimed is. In a society, in which the authority to enforce private claims is vested exclusively in the state, it is arbitrary and unjustifiable to distinguish between important cases, which have to be handled with greater care and others that can be decided more casually.[33] This, however, is not what a flexible standard of proof is concerned with. To modify the necessary degree of belief with respect to each case does not mean to apply lesser or greater care. It would be wrong to think that in the Common Law the trier of facts in criminal cases scrutinizes the evidence with greater care just because the standard of proof is higher.[34] The evaluation of the evidence has to be done with the greatest diligence possible, independent of the standard of proof. A flexible degree of belief only appreciates the epistemic reality that the facta probandi in judicial

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[31] See Rosemary Pattenden, "The Risk of Non-Persuasion in Civil Trials: The Case Against a Floating Standard of Proof" (1988) 7 Civ. Just. Q. 220.

[32] MüKo-Prütting, *supra* note 7 at § 286 para. 17.

[33] Sir Carleton Allen, *Legal Duties and Other Essays in Jurisprudence* (1931) at 288.

[34] See *Hornal v. Neuberger,* [1957] 1 Q.B. 147 at 266.

fact-finding are "actually a jumble mixture of unequal ontological status, with an unequal degree of accessibility to our cognitive nature".[35]

The uncertainty, which is brought into the standard of proof by making it flexible, is thus not the result of the theory we apply but a feature intrinsic to the reality of fact-finding. In this sense we do not have the option to avoid it but are faced with the challenge to deal with it. This requires identifying our uncertainty and admitting the relativity of the degree of belief, conviction or persuasion achievable. The next step would be to develop guidelines to assist the judge in determining the appropriate degree for the particular case before her.[36] All that can generally be said about the required degree is that it has to be "reasonable".

The amount of discretion for the trial judge and, respectively, the amount of uncertainty for the parties with regard to the interpretation of what is reasonable, however, does not seem to be excessively high. The substantive law frequently employs rather vague terms such as "negligence", "good faith", "necessary measures", or "recklessness" and judges and scholars together have over time developed fairly accurate interpretations for them. It is not apparent at all that this should be impossible with respect to the standard of proof. It might even raise the degree to which a factual determination is predictable if we more clearly identify the applicable criteria.

II. Further Support for the "Common Concept Thesis"

Since the result of our comparative study is contrary to the view that the standard of proof is "lower" in the Common Law, as expressed by Clermont and Sherwin and also prevalent among German scholars, it seems necessary to adduce further evidence for this proposition

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[35] Damaška, *supra* note 5 at 299.

[36] Asking for this from a Civil Law Rüßmann-AK ZPO, *supra* note 22 at § 286 para. 20. See for thoughts on how to develop a theory of warrant for legal fact-finding Walker, *supra* note 12 at 1096.

by showing that neither the procedural nor the substantive law of each legal tradition presupposes a certain standard of proof.

Each of the issues we will deal with would deserve a far more detailed treatment than possible within the limits of this thesis. For our purposes, however, it may suffice to explore them to a degree sufficient to support our hypothesis.

1. Inferences from the Rules as to the Allocation of the Persuasive Burden?

German scholars support the proposition of a high standard by arguing that the sophisticated and elaborate system as to the allocation of the burden of proof is more apt to produce a just result than a judgment based on facts that are merely probable.[37] It is held that the burden of proof is not allocated by chance, but that its allocation is the result of a normative decision of the legislator.[38] To lower the standard of proof would render this body of rules to a large part meaningless, for the judge would have to base his decision in far fewer cases on the burden of proof.

For Anglo-American lawyers this way of reasoning must seem odd since in the Common Law the argument is usually reversed. Here, we find a general reluctance to enter a verdict based on the persuasive burden[39] and a high standard of proof in civil trials is largely perceived as being unjust because it potentially discriminates the plaintiff and produces biased results.[40]

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[37] Schwab, *supra* note 2 at 456; Dieter Leipold, "Wahrheit und Beweis im Zivilprozeß", in Festschrift für Nakamura (Seibundo: Tokyo, 1996) 303 at 313; Christian Katzenmeier, "Beweismaßreduzierung und Probabilistische Proportionalhaftung", forthcoming in ZZP at IV. 3 b).

[38] Katzenmeier, *ibid.*

[39] See *Rhesea Shipping Co. SA v. Edmunds,* [1985] 2 All E.R. 712 (H.L.) at 718: "No judge likes to decide cases on the burden of proof if he can legitimately avoid so". See also *Cross on Evidence, supra* note 8 at 108.

[40] See e.g. Ralph Winter, "The Jury and the Risk of Nonpersuasion" [1971] Law & Soc. Rev. 335 at 337.

To avoid any misunderstandings it is in the first place necessary to point out that the civilian way of allocating the burden of proof is by no means superior to the approach of the Common Law. In both legal traditions much effort has been made to develop a consistent theory as to the persuasive burden[41] and, nevertheless, the law of both systems is not very well settled in many cases.[42] A higher standard of proof could therefore not be "justified" with the allegedly more accurate theory of the Civil Law when it comes to the allocation of the burden of proof.

Furthermore, such an argument would not only be factually mistaken, it would also be logically inconsistent. To determine the appropriate standard of proof by reference to the allocation of the burden confuses categories since the first concept is an epistemological problem whereas the latter is a normative decision. Just as we have stressed the correlation between the standard and the burden of proof,[43] it now seems equally important to emphasize their functional differences:[44] The standard of proof is a device to ascertain the truth whereas the burden of proof is a device to make decisions by employing normative criteria when the truth cannot be ascertained.[45] In this sense there is a logical barrier between the two devices and it would not be sensible to ask whether a decision based on the burden of proof is more just than a decision that is based on factual determinations. Each device has its own specific justifications: if a decision is based on facts the justification is derived from its warrant by the evidence, if it is based on the burden of proof it is derived from the normative criteria that were applied to allocate the burden. Therefore,

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[41] For the German law see e.g. Gottfried Baumgärtel ed., *Handbuch der Beweislast*, (Cologne, Berlin, Bonn, Munich: Heymanns, 1987-2003) in five volumes. For the Common Law see e.g. C. R. Williams, "Placing the Burden of Proof", in Enid Campbell & Louis Waller, eds., *Well and Truly Tried* (Sydney: The Law Book Company, 1982) 271.

[42] Particularly with respect to product liability and medical malpractice cases the state of the German law is not satisfying at all. Not even judges sitting at the appellate level can be expected to allocate the burden of proof properly at all times according to the system developed by the BGH.

[43] See 57, above.

[44] Hanns Prütting, *Gegenwartsprobleme der Beweislast* (Munich, Beck, 1983) at 85.

[45] Winter, *supra* note 40 at 339.

it is not feasible to infer anything regarding the appropriate standard of proof from the body of normative rules employed with respect to the burden of proof. The burden of proof may be allocated as carefully as possible, but this does not allow us to require more proof than reasonable with respect to ascertaining the truth.

2. Differences in the Substantive Civil Law

In Chapter One the correlation between the standard of proof and the substantive law was emphasised.[46] By defining certain facts that have to be proven if the claimant wants to make his case (e.g. a contract, fault, negligence or causation), the law establishes its own reality in the sense that only the truth of those statements matters, which concern these issues. The more complex this "procedural reality" is and the more facts a claimant has to establish, the harder it is for him to make his case. A "lower" standard of proof could work here as a counterbalance.

Comparative studies of the substantive law, however, do not support the proposition that the Civil and the Common Law differ from each other in the sense that the Common Law requires more facts or facts that are more difficult to prove. With respect to damages for breach of contract it is in fact the other way around, in the sense that the Civil Law requires fault on the part of the debtor whereas the Common Law regards all contractual duties as guaranteed.[47] In particular with respect to the law of torts, where problems of proof are particularly pertinent, the concepts of the two traditions may differ, but the facts a claimant has to prove to make his case are very similar in the end. And even where the substantive laws of both systems differ substantially (e.g. regarding trusts and property) it would be a serious distortion of these differences to understand them as divergences in terms of how

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[46] See 13 ff., above

[47] Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law*, transl. by Tony Weir, 2d ed. (Oxford: Clarendon Press, 1998) at 510 f. It is, however, for the debtor to prove that he was not a fault, see 17, above. The burden of proof is reversed.

difficult it is to prove a right. When and under which conditions the substantive law gives a right is in the first place a normative question that is independent of factual considerations. The law would render itself incoherent if these normative decisions were levelled by a looser or a stricter standard of proof. The standard of proof as an epistemological problem cannot influence and cannot be influenced by normative considerations. In this sense the standard of proof is autonomous.

3. Facilitations of Proof

The Civil Law acknowledges, as does the Common Law, that there are certain situations where it is particularly difficult for the party bearing the burden of prove to adduce conclusive evidence. Hence, wherever it seems just and fair both laws employ facilitations of proof. For our purposes the instances where proof is facilitated are particularly interesting since if the standard of proof in the Common Law was indeed lower these facilitations should be less important and less frequent in the Common Law. The necessity to help the party make its case would not be that pressing because it is easier to prove the facts in issue if the standard of proof is low. However, in the most important instances where the German law alleviates the burden of proof the Common Law not only recognizes the need for facilitations of proof as well but also grants those alleviations in a very similar manner.

a) Product Liability

In all Common Law jurisdictions and throughout continental Europe the evidentiary position of a consumer who is injured by a product has received close attention.[48] The main difficulty for the consumer with respect to his claim for damages are his limited means to prove the negligence of the manufacturer, the existence of a defect in the product, and the

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[48] Werner Lorenz, "Some Thoughts About International Product Liability" in Peter Cane & Jane Stapleton, eds., *The Law of Obligations* (Oxford: Clarendon Press, 1998) 319.

causal nexus between the damage and the defect. The consumer's problems to prove these facts are regarded to be so fundamental that all jurisdictions grant respective alleviations of proof. For the Common Law John G. Fleming has held that "(i)n no other context has the tendency towards relaxed standards of proof taken such dramatic strides".[49]

Within the European Community these strides have eventually led to the adoption of a Directive on Product Liability[50] which was implemented in England under Part 1 of the *Consumer Protection Act* 1987 and in Germany as the *Produkthaftungsgesetz* (ProdHG). The Consumer Protection Act imposes a strict liability on the manufacturer and the importer of a defective product if this has caused death or personal injuries.[51] The rationale of the European Directive on Product Liability was partly based on the experience in the U.S. where manufacturers are strictly liable under *Restatement (Second) of Torts* § 402A.[52]

Thus, the victim does not have to prove fault on the part of the manufacturer; she has, however, to prove the defect itself and causation of the damage by the defect.[53] In England[54], Canada[55] and in the U.S.[56] the victim may prove the defect and causation by

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[49] John G. Fleming, *An Introduction to The Law of Torts*, 2d ed. (Oxford: Clarendon Press, 1985) at 84.

[50] 85/374 EEC from July 25 1985.

[51] It shall be mentioned that it is not completely accurate to speak of the manufacturer's "strict liability" since he has the defence of sect. 4. (1) (c) that "the state of scientific and technical knowledge at the time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect". In this sense, the manufacturer's liability is based technically speaking on a presumption of fault.

[52] For more details see David Fischer & William Powers Jr., *Products Liability Cases and Materials*, (St. Paul, Minn.: West Publishing, 1988) Ch. 1.

[53] For the Consumer Protection Act 1987: Anthony M. Dugdale, gen ed., *Clerk & Lindsell on Torts*, 18th ed. (London: Sweet & Maxwell, 2000) at 9-28. For the ProdHG: Heinz Thomas in *Palandt BGB*, 60th ed. (Munich: Beck, 2002) ProdHG § 1 at 25.

[54] Fleming, *supra* note 49 at 148.

[55] See e.g. *Varga v. John Labatt Ltd.*, [1956] O.R. 1007. For further references see Allen M. Linden, *Canadian Tort Law,* 7th ed. (Toronto and Vancouver: Butterworths, 2001) c. 16 para. 7.

[56] See e.g. *Coca Cola Bottling Works v. Ponder*, 443 S.W.2d 546 (Tex. Sup. Ct. 1969); *Kirkland v. General Motors*, 521 P.2d 1353 (Okl. Sup. Ct. 1974).

making a *res ipsa loquitur* case and relying on circumstantial evidence.[57] Some courts are rather generous in their inferences from the presented evidence to the extent that they have inferred from the occurring of a damage the defect of the product involved unless the manufacturer could prove that the damage possibly had a different cause.[58]

In Germany facilitations of proof for the victim not only comprise 'Anscheinsbeweis'[59] but even take the form of a reversal of the burden of proof if the defendant cannot prove that the product was flawless at the time it had left his sphere of control.[60] In this sense, the manufacturer has a duty to control the products leaving his factory for defects, a duty to archive the results, and finally a duty to warn consumers if defects appear later on. If he does not meet these obligations, it is for the manufacturer to prove that the product was flawless or that the defect did not cause the damage.[61]

The differences between the Common Law and the German law in the means they choose to alleviate proof for the consumer are minor and probably rather theoretical. For our purposes it is far more important to note that the Common just as the German Law obviously has a need to facilitate proof in matters of product liability. If the ordinary standard of proof in the Common Law were already lower, such further lowering would either not be possible – or at least not as pressing as perceived in the German law.

b) Malpractice Cases

The similarities of the issues discussed in the Common and in the Civil Law with respect to problems of proof in malpractice cases are even more striking. Both jurisdictions are faced

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[57] The contrary view expressed in *Donoghue v. Stevenson,* [1932] A.C. 562 (H.L.) at 622 has not been followed.

[58] *Osmond v. Sears Canada Inc.* (1988), 220 A.P.R. 75; *Coca Cola Bottling Works v. Ponder* (1969), 443 S.W.2d 546 (Tex. Sup. Ct. 1969).

[59] BGHZ 51, 91 at 104.

[60] BGHZ 104, 323.

[61] For an overview see Karl Schaefer, in *Staudinger Kommentar zum Bürgerlichen Gesetzbuch, §§ 823-832,* 12th ed. (Berlin: Walter de Gruyter, 1986) [Staudinger-Schaefer] at § 831 paras. 170-205.

with the problem that the patient's case often suffers from a structural lack of conclusive evidence. In both legal systems under review, the courts have hence developed means to alleviate the patient's proof requirements. The need to help the patient prove the facts essential to his case is apparently felt with the same strength in both systems.[62] If the standard of proof was indeed lower in the Common Law one would expect to find that the problem of proof alleviations for the patient is an issue of minor importance here than it is in the Civil Law with its allegedly high standard, for here it would be even more difficult for the patient to discharge the burden of proof.

In yet another sense, medical malpractice law provides valuable evidence for our thesis that the Civil Law and the Common Law share a common concept with respect to the standard of proof. Under certain conditions, the German BGH expressly grants to the plaintiff "alleviations culminating in reversing the burden of proof",[63] suggesting that the proof requirements are on a sliding scale and not the same for all cases. Such a way of phrasing the proof requirements makes evident that in the German courts the standard of proof is not fixed but in fact subject to the circumstances of the specific case. This is in complete accordance with the approach in *Bater v. Bater*[64] and the Common Law doctrine of a flexible standard of proof.

But the systems do not only face the same problem; they also solve it in a similar way. The courts in both legal traditions basically employ two different devices to help the suing patient to overcome the difficulties in making his case. The first mean is to generously allow circumstantial evidence[65] if direct, substantial evidence is not available to the effect

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[62] For a comparative study of evidentiary question in medical malpractice law with abundant references from Common Law jurisdictions and from the German Law see Dieter Giesen, *International Medical Malpractice Law*, (Tübingen: Mohr, 1988) at § 41.

[63] BGHZ 72, 132 at 136; BGH NJW 1988, 2949 at 2950.

[64] [1950] 2 All E.R. 458 (C.A.).

[65] The Common doctrine of *Res ipsa loquitur* and the German doctrine of 'Anscheinsbeweis' are similar but not identical. See at 57, above.

that the patient can make his case by proving such (circumstantial) facts that enable the court to infer the facts in issue.[66]

The other more rigid way, which is, however, rather common in the Civil Law in particular, is to reverse the onus of proof. Over time a number of typical circumstances, such as risk increase due to the treatment, a physician's gross negligence, the interference with medical records, or organizational failure were established in the Common as well as in the Civil Law under which the burden of proof is shifted to the sued physician or hospital.[67] This is not the appropriate place to analyse whether a reversal of the burden of persuasion is indeed the best way to solve the problems for the patient to adduce conclusive evidence. What we are concerned with here is exclusively the fact that in both legal traditions the patient's position with respect to evidentiary questions is perceived as unsatisfactory and that both systems try to resolve these issues by deploying similar devices. This suggests that the Common and the Civil Law share a common concept with respect to the standard of proof and that this standard is not considerably lower in the Common Law world.

4. International Arbitration

If the standards employed to determine when a fact is proved indeed differed in the Common and in the Civil Law one would, furthermore, expect that this question would be an issue in international litigation and arbitration. Since a higher standard of proof usually favours the defendant[68], the standard of proof influences the allocation of the risks of a

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[66] Giesen, *supra* note 62 at paras. 1059-67.

[67] See *ibid. at* paras. 1068-90. See furthermore from the perspective of the German law e.g. BGHZ 85, 212; BGHZ 85, 327 at 330. For a discussion of this problem in Canada: *St-Jean v. Mercier*, [2002] S.C.C. 15 at 107 ff.

[68] With respect to a contract of sale for example, the sued party is statistically usually the seller. If, however, the buyer fails to pay the price, the buyer should not have any problems to prove his claim, for he can rely on documentary evidence (contract and receipt for delivery of the goods). A claim for breach of contract by the buyer is on the other hand potentially much more difficult to prove as he has to prove that the goods were not in proper shape.

transaction. In this sense the standard of proof could either influence the choice of law, the place of arbitration, or the adoption of a certain set of arbitration rules.

With respect to the substantive law, the parties usually resolve choice of law problems by means of a choice of law clause in their contract. With respect to the procedural law the law of the place of arbitration as the lex fori has to be heeded. Here, many countries have adopted the UNCITRAL Model Law on International Commercial Arbitration.[69] The rules of the Model Law, however, are not very detailed and leave a lot of procedural issues to the parties[70]. Since drafting their own rules is very difficult and expensive for the parties, they either tend to adopt a set of standard arbitration rules – such as the UNCITRAL Arbitration Rules[71] – or refer their case to an organization that administers the proceedings and provides a set of standard arbitration rules. The most common rules for administered arbitration are the Arbitration Rules by the International Chamber of Commerce[72], the Rules of the London Court of International Arbitration[73], and the Rules by the American Arbitration Association[74]. But in particular with respect to questions of fact-finding these bodies of rules are relatively imprecise. The ICC Rules for example deal with evidentiary matters in Art. 20. 1 in rather broad terms when they hold that the "Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means." None of the said sets of rules, however, has a provision on the standard of proof.

In order to enable parties and arbitrators to conduct the evidence phase of international arbitration proceedings in an efficient and economic manner the International Bar Association has issued in 1999 "Rules on the Taking of Evidence in International

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[69] Online: <http://www.uncitral.org/en-index.htm as of May 2003>.

[70] Art. 19 Model Law.

[71] Online: <http://www.uncitral.org/en-index.htm>.

[72] Online: < http://www.iccwbo.org/court/english/arbitration/rules.asp>.

[73] Online: < http://www.lcia-arbitration.com/lcia/arb/>.

[74] Online: < http://www.adr.org/index2.1.jsp?JSPssid=15747>.

Commercial Arbitration".[75] These rules provide a lot more details with respect to fact-finding in international arbitration, such as provisions on the production of documents in advance, on the testimony of witnesses, and on the admissibility of evidence. But not even these more elaborate rules contain a word on the applicable standard of proof.

And neither do parties take the standard of proof into account when they choose the place of arbitration or the substantive law,[76] nor do they incorporate a special clause on this issue in their arbitration agreement even though this would be highly advisable and easily feasible if the differences in standards were of importance to them.[77]

It seems safe to infer from all this that the standard of proof is a non-issue in international arbitration. Even the reported awards rarely address the question of the applicable standard.[78] This is further evidence for our proposition that the deviations in the wording of the formulae employed by the Civil and the Common Law do not result in any (practical) differences. If it were otherwise, parties to international proceedings would feel the need to address this issue.

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[75] Online: <http://www.ibanet.org/pdf/rules-of-evid-2.pdf>.

[76] Whether the standard of proof is part of the lex causae or of the lex fori is "the most difficult questions of the conflict of evidence laws" (Heimo Schack, *Inernationales Zivilverfahrensrecht*, 3d ed. (Munich: Beck, 2002) at para. 696.

[77] Factors that play a role in the choice of a lex contractus are the familiarity of the parties with this law or their belief that it governs the contractual relation most suitably. (Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 2d ed. (London: Sweet & Maxwell, 1991) at 102). The choice of the place of arbitration is influenced by many factors since it affects the lex fori, the validity of the arbitration agreement, the enforceability of the award, and the accessibility of the hearings for the parties. (Mauro Rubino-Samartano, *International Arbitration,* 2d ed. (The Hague/London/Boston: Kluwer Law International, 2001) at 566)

[78] Only one case could be found in which the arbitrator actually expressed the standard he applied. ICC award no. 5622 of 1988.

III. ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure

Arguably the strongest substantiation for the thesis that the standard of proof is conceptually the same in the Common and in the Civil Law can be derived from recent efforts towards the harmonization of international civil procedure. The driving forces behind this undertaking are the Rome based institute UNIDROIT and the American Law Institute, ALI. In 2001, a joint working group set up by these organizations has drafted the "Principles and Rules for Transnational Civil Procedure".[79]

The standard of proof is addressed in Principle 18.1 and in the corresponding Rule 27.2:

Principle 18. 1:

> *Facts are considered proven when the court is reasonably convinced of their truth,* regardless of who presented the evidence.

With a slight modification this approach is carried further in Rule 27.2:

> The court must determine factual issues according to the principle of free evaluation and upon *being reasonably convinced on the basis of the evidence.*[80]

This formula combines objective and subjective elements in the sense that it requires the conviction as well as the reasonableness of this conviction. Therefore, the standard of proof put forward by the Principles is neither the truth nor the absolute conviction of the truth nor an objective mathematical probability. They acknowledge that the judge may have doubts after the presentation of the evidence and may nevertheless decide an issue in favour of the party bearing the burden of proof. Beyond this, the word "reasonable" also indicates that the degree of conviction required is not the same for all cases. What is reasonable in one

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[79] ALI/UNIDROIT, "Principles and Rules of Transnational Civil Procedure", [2001] Unif. L. Rev. 1035 [UNIDROIT, Principles and Rules] at 1058, online: <http://www.unidroit.org/english/procedure/study/76-10-e.pdf> as of May 2003.

[80] Italics added.

case may mean asking for too much in the other case. The wording of P 18.1 and R 27.2 gives the judge the discretion to adapt the standard of proof to the circumstances of the specific case.

As of now the standard put forward by the Principles and Rules has received little attention. Scholars from both legal traditions have so far concentrated on the allocation of the burden of proof, which is addressed in P. 18.2 and 18.3.[81] This is coherent with the fact that the question of the standard of proof apparently has not upset the participating lawyers from either side. To the contrary, the official comment to P 18.1 suggests that the standard of "reasonable conviction" is in substance applied in most legal systems and may be essentially functionally the same as the "preponderance of the evidence" standard applied in American jury trials.[82]

The wording chosen in P. 18.1 is almost identical to the way Lord Denning has phrased the standard of proof in *Bater v. Bater*.[83] The fact that not only lawyers from the Commonwealth, where this formula is generally accepted, but also U.S. American and continental scholars have agreed on this wording without much argument, indicates, that the differences between the traditions are indeed merely semantic but not conceptual.

In this sense the wording of P. 18.1 appears to be a very elegant and concise way of expressing the core factors of fact-finding in judicial proceedings and their role with respect to the standard of proof: truth, belief, and objective justification for this belief. One might argue that the term "reasonable" is too vague in order to give the trier a clear guideline in her decision. But as we have seen earlier, the factors which influence the required degree of justification are so manifold that it is simply impossible to address them all in advance in a

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[81] See e.g. Jean-Paul Béraudo, "Reflexion sur les Principles ALI/UNIDROIT à propos de la preuve", [2001] Unif. L. Rev. 925 ; Aída Kemelmajer de Carlucci, " La charge de la preuve dans les Principes et Règles ALI/UNIDROIT relatifs à la procédure civile transnationale" [2001] Unif. L. Rev. 915.

[82] P-18A, UNIDROIT, Principles and Rules at 1058.

[83] [1950] 2 All E.R. 458 (C.A.).

statute or a code. Reality and our uncertainties with respect to its perception are too complex and too diverse in order to press them all into one formula. However, through the application of the rule by the courts a more sophisticated understanding of what is reasonable will eventually evolve, which will in turn improve the predictability of the required degree.

The only valid objection against the wording of P 18.1 seems to be that it refers to the "truth of facts". This is incoherent for facts can neither be true nor false, they simply exist. "Truth", however, is a criterion that can sensibly only be applied to statements in order to describe their correspondence with reality.[84] Hence, P. 18.1 would be more accurately phrased if it read:

> *Factual claims* are considered proven when the court is reasonably convinced of their truth, regardless of who presented the evidence.

[84] See 6 f., above.

Conclusions

The differences between the standards of proof as they are applied in civil cases in Civil and in Common Law jurisdictions have proven to be largely a question of rhetoric. The formulae employed by the Civil Law may to the Common Law lawyer sound pretentious at times, while the Common Law's preponderance standard may suggest a higher degree of objectivity than achievable. In the end the Civil Law standard is not "higher" than the Common Law's and it is surely not as "unrealistic, potentially unfair and inefficient"[1] as one might think who, coming from a Common Law jurisdiction, exclusively considers the words employed to describe the standard of proof rather than the concept.

In the sense that the determination of unknown historical or current phenomena is not specifically a judicial problem it would in fact be surprising if the systems indeed came to conceptually different solutions given that the Common just as the Civil Law regards the truth – understood as the correspondence of a statement with reality – as the intrinsic goal of the law of evidence.[2]

In particular Mirjan Damaška's work has shown impressively how careful one has to be in trying to import procedural devices and doctrines from one legal tradition to another.[3] As we have seen in Chapter One, the procedural law and the law of evidence are embedded in so many ways in the social and legal system of a society that the pure surgical implantation of a single device – as useful as it might be in one system – may cause considerable harm to

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[1] Kevin M. Clermont & Emily Sherwin, "A Comparative View of Standards of Proof" (2002) 50 Am. J. Comp. L. 243 at 259.

[2] Peter Gottwald, "Das flexible Beweismaß im englischen und deutschen Zivilprozeß" in Peter Gottwald, Erik Jayme & Dieter Schwab, eds., *Festschrift für Dieter Heinrich* (Bielefeld: Vahlen 2000) 163 at 175.

[3] Mirjan Damaška, *The Faces of Justice and State Authority*, (New Haven and London: Yale University Press, 1986) [Damaška, Faces of Justice], *Evidence Law Adrift* (New Haven & London: Yale University Press, 1997); Mirjan Damaška, "The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments" (1997) 45 Am. J. Comp. L. 839.

another system in the sense that the foreign device may be completely alien to this jurisdiction.[4]

With respect to the standard of proof, however, these reservations are unjustified. At a closer look, the standard of proof appears to be a question of common sense rather than a legal problem. How much and how persuasive evidence is necessary is an epistemological question which is largely independent of any normative values a jurisdiction pursues beyond the determination of the truth. Therefore even exporting the Common Law's standard of proof to the Civil Law (or vice versa) would not give rise to insurmountable difficulties and deteriorating frictions. In fact the standards in the two jurisdictions are so similar that such transplantation would probably not cause any significant changes with respect to the outcome of trials.

Corresponding with the epistemological definition of "knowledge" as "justified true belief"[5] the Common and the Civil Law combine the subjective element of a belief in the truth with the objective requirement of warrant for this belief in the evidence presented. The trier's belief that a certain statement is true has to be reasonably inferable from the evidence. This is why the German judge has to give reasons for his factual findings and this explains the function of the evidentiary burden and the standard of review with respect to factual determinations by appellate courts in the Common Law.

Furthermore, both legal families acknowledge that the degree of conviction that can be achieved varies among different cases. This is most obvious in the case of

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[4] Oscar G. Chase, "Some Observations on the Cultural Dimension in Civil Procedure Reform" (2002) 50 Am. J. Comp. L. 243.

[5] Alvin I. Goldman, *Epistemology and Cognition* (Cambridge, Mass.: Harvard University Press, 1986) at 4; Vern R. Walker, "Preponderance, Probability and Warranted Factfinding" (1996) 62 Brooklyn L. Rev. 1075 at 1081; Mirjan Damaška "Truth in Adjudication" (1998) 49 Hastings L.J. 289 at 294-97; Ronald J. Allen & Brian Leiter, "Naturalized Epistemology and the Law of Evidence" (2001) 87 Va. L. Rev. 1491 at 1494.

'Anscheinsbeweis', which is – with slight modifications – admissible in both systems. Here the feasible degree of conviction varies with the strength of the empirical rule applied.

The Common Law, however, has been somewhat more honest with respect to the flexibility of the standard of proof due to its "preponderance of probability" formula, which refers to the model of a scale. Weighing two things against each other is a relative process and does as such not allow a statement as to the absolute weight of one of the things weighed. When the process of judicial fact-finding is depicted as a process of weighing the evidence it becomes obvious that the outcome can be no more than a relative result. The doctrine of a flexible standard of proof developed in *Bater v. Bater*,[6] hence, is not a variation of the preponderance formula but an accurate interpretation of the metaphor in the sense that *Bater v. Bater* addresses the fact that the absolute weight of the things compared with each other can differ considerably from one case to another.

In Germany the idea of a floating standard of proof is not as broadly and openly accepted. According to the dominant view among authors, § 286 ZPO puts forward a fixed standard of proof which applies unless one of the statutorial or judge-made "exceptions" putting forward a lower standard of proof is pertinent. It is, however, probably more convincing to understand these alleviations as examples or instances in which the law explicitly addresses the question of how much warrant is required to consider a fact proven. In this sense these provisions and judge-made rules are not "exceptions" to a fixed ordinary standard of proof but rather interpretations for specific circumstances. Due to the reluctance of a majority among the German authorities to admit that not in all cases the factual determinations can be made with the same degree of conviction, German Law has gone too far in some cases where the need to establish alleviations of proof is felt to be particularly pressing: here, the

[6] [1950] 2 All E.R. 458 (C.A.).

courts have in some situations reversed the burden of proof instead of requiring a lesser quantum of proof, which would arguably have been more appropriate.[7]

The factors influencing the standard of proof are manifold and further research is necessary to explore how they can be categorized in order to give juries and judges guidelines on how to deal with them. As of now one basic distinction seems helpful: One should differentiate between factors which affect the quality or the quantity of the evidence available and such factors that affect the degree of persuasion necessary. Speaking in terms of the scale metaphor, we have to differentiate between factors that go to the weight of the things on the scale and factors that go to the question whether a simple preponderance is sufficient or a higher degree is required. With respect to the first group we will find that in a tort case where evidence is often sparse the judge might content himself with pure oral evidence, even though it is often unreliable, whereas in a contract case between two corporations she might require written proof of a contract.

Factors from the latter category explain the distinction between the standard of proof in civil and in criminal cases. Since a wrong conviction is held to be worse than a wrong acquittal the degree of certainty required for a conviction is higher. In this sense the consequences of a wrong decision influence the standard of proof. This factor is distinct in the sense that it involves a normative decision to determine whether a false positive is worse than a false negative. Therefore, normatively based differences between the systems may (theoretically) be possible. With respect to civil cases, however, we do not find evidence for this proposition. In the vast majority of all cases the consequences of a false positive and a false negative are equally high. As long as the civil law is concerned with

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[7] Hans-Joachim Musielak & Max Stadler, *Grundfragen des Beweisrechts. Beweisaufnahme – Beweiswürdigung – Beweislast*, Munich: Beck, 1984)at para. 273, Helmut Weber, *Der Kausalitätsbeweis im Zivilprozess* (Tübingen: Mohr, 1997) at 233 f., Holger Fleischer, "Schadensersatz für verlorene Chancen im Vertrags- und Deliktsrecht" JZ 1999, 766 at 773 f.

corrective justice[8], external factors such as the consequences for one of the parties with respect to their reputation cannot be considered. Only where the goal of the proceedings can be described differently than in terms of corrective justice – for example in custody cases where the benefit of the child is paramount – the weight assigned to the consequences may differ and thus lead to the application of a higher standard. Since the areas of law where other goals than corrective justice are pursued may differ from one jurisdiction to another also the applicable standard of proof may differ. With respect to the Common Law world and continental jurisdictions, however, there is agreement on the point that the cases in which corrective justice is not the intrinsic goal of the adjudication of civil cases are in any event exceptional and rather rare. By no means has this potential deviation any influence on the standard of proof applicable to the ordinary civil law suit between two private parties.

Given that the Civil and the Common Law pursue the same intrinsic goal in judicial fact-finding, and that they both apply the same epistemological concept with respect to the standard of proof, one cannot but wonder why the formulae employed to describe the standard are so very different. Trying to explain the semantic differences takes the analysis back to its starting-point, to the various legal, historical, and social factors, with which the law of evidence is intertwined, and which have influenced the approaches adopted in each legal tradition.

The most obvious explanation for the way the metaphors employed to describe the standard of proof have evolved in the Common Law is the jury system.[9] If laymen are supposed to determine the facts in issue the judge has to instruct them in an intelligible manner as to the criteria according to which they have to make their decision. Hence the judge has to address the standard of proof explicitly in her instructions. To describe the

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[8] For the importance of corrective justice for civil law relationships see Ernest L. Weinrib, *The Idea of Private Law* (Cambridge, Mass. and London, England: Harvard University Press, 1995) at 56 ff.

[9] See Clermont & Sherwin, supra note 1 at 257 f.

strength of the required belief in terms of probabilities is possibly a vivid and graspable metaphor to explain this correlation to laymen.[10]

In German civil procedure on the other hand laymen play a subordinate role only.[11] Therefore, a necessity to further elaborate on the standard of proof does not exist. The judge can thus decide as to what she thinks is true without having to justify or to reflect upon the standard she is applying. As long as she presents her findings as being in accordance with her conviction, she meets the requirements of the law.

The importance of the need to formulate the standard explicitly becomes apparent when one considers the standard thar is applicable to the evidentiary burden in Common Law trials. The decision whether the evidentiary burden is discharged is within the province of the judge. Therefore, it is not necessary to address the respective standard explicitly neither in the jury instructions nor in the final judgment. This has had the effect that unlike with respect to the burden of persuasion commonly accepted formulae with respect to the evidentiary burden have not been developed.[12]

Historically, the influence of Jeffrey Gilbert, Lord Chief Baron of the Court of Exchequer from 1722 to 1726, on the law of evidence and in particular on the wording of the standard of proof in the Common Law world must not be underestimated. Gilbert's love of mathematics strongly influenced the language he adopted to describe his theory of the law of evidence in the sense that he established various degrees of evidence and graded them in terms of probabilities.[13] Even though this approach was later fiercely contested by

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[10] It is, however, a completely different matter, how well these instructions are indeed understood by the jurors. See Donald G. Hagman & Malcolm D. MacArthur, "Evidence: The Validity of a Multiple Standard of Proof"" [1959] Wisc. L. Rev. 525.

[11] Only commercial matters in first instance are at times decided by one professional judge sitting with two laymen, who are experienced in the field of commercial law. § 105 I *Gerichtsverfassungsgesetz* (GVG).

[12] Colin Tapper, *Cross & Tapper on Evidence*, 9th ed. (London, Edinburgh, Dublin: Butterworths, 1999) at 138.

[13] Jeffrey Gilbert, *The Law of Evidence* (London: W. Clarke, 1801) at 1 ff.

Bentham[14], a "baneful influence"[15] has prevailed and is still apparent today in the employment of the concept of probabilities to describe the standard of proof.

The continental law of evidence on the other hand is historically strongly influenced by the ideas and values of the French Revolution.[16] Consequently, the principle of free evaluation of the evidence was embraced in the late eighteenth and early nineteenth century and the old system of legal proof was abolished at least for criminal trials. But this "apotheosis of free proof" also influenced the law of civil procedure and particularly its rhetoric adornment.[17] In this sense it was not in vogue to establish strong constraints on the judge and his search for the truth. Imposing strict guidelines and rules on the judge as to how strong the evidence has to be, maybe even expressing them in a numerical probability, would have undermined the tendency to put an end to legal proof. The consequences of this emphasis of free proof on the standard of proof are still strongly felt in the German law, where in § 286 ZPO the standard of proof and the principle of free proof are inseparably intertwined within one single sentence.[18]

Finally the style of judicial procedures influences the attitude of the trier of facts towards the wording of the sufficiency standard. The commonly used dichotomy to describe the differences between Common and Civil Law procedure is *adversarial* versus *inquisitorial*. To which extent these categories allow an accurate portrayal of German civil procedure is at least questionable, but it cannot be contested that the styles of administering justice differ considerably in the Common and in the Civil Law world. Damaška has tried to explain

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[14] Jeremy Bentham, 6 *Works*, ed. by John Bowring (Edinburgh: W. Tait 1843) at 142-5, 183-7.

[15] See William Twining, in Enid Campbell & Gretchen Kewley, eds., *Well and Truly Tried* (Sydney: The Law Book Company, 1982) 211 at 217.

[16] See Mirjan Damaška, "Atomistic and Holistic Evaluation of Evidence: A Comparative View", in David S. Clark, ed., *Comparative Private International Law*, (Berlin: Duncker & Humblot, 1990) [Damaška, Atomistic and Holistic Evidence] 91 at 97.

[17] Damaška, Atomistic and Holistic Evidence, *supra* note 16 at 103.

[18] For an overview as to the historic development of the law of evidence and its influence in the wording of the standard of proof in continental and Anglo-American jurisdictions see Mirjan Damaška, "Free Proof and its Detractors" (1995) 43 Am. J. Comp. L. 343 ff.

these differences with "variations in the structure of the judicial apparatus" and with "divergent ideas about the function of government, including its role in the judicial process."[19] He depicts continental European states as being traditionally more oriented towards an active model, in which the relationships among the citizens are partly managed by the state, whereas Anglo-American states traditionally play a more reactive role, to the effect that the state is more constrained with respect to its involvement in the bi-polar relationships between citizens. This model may explain why the Civil Law addresses the conviction of the judge who is the representative of the state, and thus emphasises the involvement of the state in the proceedings. The Common Law's formula on the other hand focuses on the evidence, which is adduced by the parties, and thus depreciates the engagement of the state while the importance of the parties is accentuated.[20]

A further and more elaborate analysis as to the differences in the wording of the standard of proof and how they have developed, may very well generate interesting results about the "cosmological radiation" in our respective procedural systems. In any event we should no longer confuse "labels with the things that are labelled"[21] and rather concentrate on the concept of the standard of proof and how it is applied in specific cases or groups of cases.

The Principles and Rules of Transnational Civil Procedure developed by the American Law Institute and UNIDROIT may offer a great opportunity to begin this discussion across the boundaries of legal traditions. The carefully chosen words in the Principles and Rules will hopefully put an end to the controversy about the correct wording of the standard of

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[19] Damaška, Faces of Justice, *supra* note 3 at 90.

[20] Damaška himself, however, seems to presume that the standards of proof in the Common Law and in the Civil Law substantively and not only semantically differ. Consequently, he employs his distinction as to reactive and active states to explain the allegedly divergent degrees of required sufficiency. *Ibid.* at 119 ff.

[21] Email from Honourable Justice Yves-Marie Morissette to the author (17 December 2002).

proof to the effect that Common Law Lawyers and Civilians do not talk past each other any longer and stop wondering rudely how the others can be so wrong[22].

[22] See Clermont & Sherwin, *supra* note 1 at 244.

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