

Burden of Proof, Producing Evidence Have Distinct Roles

Focus Column

Criminal Law

By Daniel Lee Jacobson

"For many years the term 'burden of proof' was ambiguous because the term was used to describe two distinct concepts." *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994). Those two distinct concepts are "the burden of proof" and the "burden of producing evidence." Recognizing that these concepts are distinct is fundamental to understanding their different and vital roles in litigation.

In the terminology of the law of evidence in California, the "burden of proof" is synonymous with the "burden of persuasion," and the "burden of producing evidence" is synonymous with the "burden of going forward." *People v. Valverde*, 246 Cal.App. 318 (1966).

"Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." Evidence Code, Section 500. So, for instance, a plaintiff generally has the burden of proving all of the facts necessary to support each element of each cause of action, and a defendant generally has the burden of proving all of the facts necessary to support each element of each affirmative defense. *Morris v. Williams*, 67 Cal.2d 733 (1967).

"Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." Evidence Code, Section 115. Other degrees of proof that are commonly "otherwise provided by law" are mentioned in Section 115. Those degrees are "raise a reasonable doubt," "clear and convincing proof" and "beyond a reasonable doubt."

But, this list is nonexhaustive. For instance, the degree of proof required at a preliminary hearing is "strong suspicion," *Garabedian v. Superior Court*, 59 Cal.2d 124, 127 (1963); in other words, "sufficient cause," *Rogers v. Superior Court*, 46 Cal.2d 3 (1955).

The general rule is, "The burden of proof *does not shift* during trial - it remains with the party who originally bears it." (Emphasis in original.) *Sargent Fletcher Inc. v. Able Corp.*, 110 Cal.App.4th 1658, 1666 (2003). (Citing *Mathis v. Morrissey*, 11 Cal.App.4th 332, 346 (1992); and *Smith v. Santa Rosa Police Dept.*, 97 Cal.App.4th 546, 569 (2002).)

However, the state Supreme Court has said that courts are allowed to shift the normal allocation of the burden of proof upon consideration of "a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact." *Aydin Corp. v. First State Ins. Co.*, 18 Cal.4th 1183 (1998). And, as discussed later in this article, certain presumptions shift the burden of proof.

"Unlike the burden of proof, the burden of producing evidence *may* shift between plaintiff and defendant throughout the trial." (Emphasis in original.) *Sargent Fletcher Inc. v. Able Corp.*, 110 Cal.App.4th 1658 (2003). The burden of producing evidence is codified at Evidence Code, Section 550: "(a) The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence; (b) The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact."

Once the party with the burden of producing evidence, "produces evidence sufficient to make its prima facie case, the burden of producing evidence *shifts* to the other party to refute the prima facie case. (Citations). Even though the burden of producing evidence shifts to the other party, that party need not offer evidence in reply, but failure to do so risks an adverse verdict. (Citations.) Once a prima facie showing is made, it is for the trier of fact to say whether or not the crucial and necessary facts have been established. (Citations.)" (Emphasis in original.) *Sargent Fletcher Inc. v. Able Corp.*, 110 Cal.App.4th 1658 (2003). Witkin explains, "The burden of

producing evidence will *shift* to the other party if the party with that initial burden (a) proves a fact giving rise to a *presumption*, [internal citation omitted] or (b) produces *evidence of such weight* that a determination in that party's favor would necessarily be required in the absence of contradictory evidence." (Emphasis in original.) 1 Witkin *California Evidence, 4th Edition*, Burden Section 4(2).

"A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action." Evidence Code, Section 600(a). "A presumption is either conclusive or rebuttable." Evidence Code, Section 601. "A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption."

The Evidence Code contains a small nonexhaustive catalog of conclusive presumptions at Evidence Code Sections 622-624. (Facts recited in written instrument, Section 622; Estoppel by own statement or conduct, Section 623; and Estoppel of tenant to deny title of landlord, Section 624.) But, "all other presumptions declared by law to be conclusive, are conclusive presumptions." Evidence Code Section 620. (See, for instance, Civil Code Section 3440.) "Conclusive presumptions are not evidentiary rules so much as they are rules of substantive law." 7 Cal.L.Rev. Comm. Reports 1 (1965).

Over the years there has been a great deal of scholarly debate about the nature and function of rebuttable presumptions. Two schools of thought formed. One school claimed that a presumption is a preliminary assumption of fact that vanishes upon the introduction of evidence that is sufficient to overcome the assumed fact.

Under this view, it was thought that because certain conclusionary facts so often follow certain preliminary facts that proof of the preliminary fact should suffice for establishment of the conclusionary fact, absent contrary evidence. See Thayer, "Preliminary Treatise on Evidence," 313-352 (1898); 9 Wigmore, Evidence Sections 2485-2491 (3d ed. 1940); and Morgan, "Presumptions, 10," Rutgers Law Review 512, 516 (1956).

The other school of thought said that the creation of a presumption rests on policy considerations. If the underlying policy is deserving of a finding of the presumed fact in light of no contrary evidence, then it should be of sufficient import to require such a finding in light of evidence that is either of insufficient weight or is simply not believed. These underlying beliefs led to the conclusion that presumptions should shift the burden of proof. See McCormick, Evidence Section 317 at 671-672 (1954); and Morgan, "Some Problems of Proof 81" (1956).

California's view is that both schools of thought are correct, depending on the type of presumption. "A presumption affecting the *burden of producing evidence* is a presumption *established to implement no public policy* other than to facilitate the determination of the particular action in which the presumption is applied." Evidence Code, Section 603. (Emphasis added.) "A presumption affecting the *burden of proof* is a presumption *established to implement some public policy* other than to facilitate the determination of the particular action in which the presumption is applied ... " Evidence Code, Section 605. (Emphasis added.)

"The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence ... " Evidence Code, Section 604. "The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." Evidence Code, Section 606.

A long list of presumptions affecting the burden of producing evidence is at Evidence Code, Sections 631-647. (For example, Ownership of things possessed, Section 637; Letter received in ordinary course of mail, Section 641; and Res ipsa loquitur, Section 646.) Evidence Code, Sections 662-670 contain a list of presumptions affecting the burden of proof. (For example, Owner of legal title to property is owner of beneficial title, Section 662; Ceremonial marriage, Section 663; and Death of person not heard from in five years; Section 667.) But, both lists are nonexhaustive. Evidence Code, Sections 630 and 660.

Some older cases identify presumptions as evidence. See, for example *Smellie v. Southern Pacific Co.*, 212 Cal. 540 (1931). However, Evidence Code, Section 600, specifically overrules those case with the sentence, "A presumption is not evidence."

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