



# Adoption of Clear Convincing Evidence in Hong Kong

Max Hua Chen

City University of Hong Kong, Hong Kong

## ABSTRACT

Drawing from overseas practices, namely the law in England & Wales (E&W) and the law in the United States (US), this article will critically discuss whether a higher standard of proof of 'clear and convincing evidence (CCE) should be adopted in non-criminal proceedings in Hong Kong (HK), and if so, in what types of cases. Consequently, because the 'balance of probabilities ("BOP") and 'beyond reasonable doubt' ('BRD') standards have themselves proved to be highly complex, and jurors have found these standards even more complicated to understand, the introduction of an intermediate CCE standard would invariably lead to even more complexity and misunderstanding in the current HK evidentiary system applicable to non-criminal proceedings. This is precisely the opposite of what the HK evidentiary system needs now. Whilst a higher CCE standard of proof could in principle be adopted within HK, for instance, in cases where due process principles may potentially be invoked, unless such standard is conceptually or empirically justified based on irreproachable evidence, it would represent an arbitrary re-allocation of evidentiary standards.

**Keywords:** Evidence, Comparative Law, Clear Convincing Evidence, Hong Kong

## INTRODUCTION

Drawing from overseas practices, namely the law in England & Wales (E&W) and the law in the United States (US), this article will critically discuss whether a higher standard of proof of 'clear and convincing evidence' (CCE) should be adopted in non-criminal proceedings in Hong Kong<sup>1</sup> (HK), and if so, in what types of cases.

## BURDEN OF PROOF AND STANDARD OF PROOF IN LEGAL PROCEEDINGS

Within the context of legal proceedings, the term 'burden of proof', also referred to as the legal burden, or persuasive burden, refers to the duty which requires that a party that asserts a proposition must prove such proposition to the satisfaction of the court.<sup>2</sup> To discharge this legal burden, a relevant party must adduce evidence to prove the facts in issue.<sup>3</sup> The term 'standard of proof', refers to the standard

to which a burden of proof must be discharged in order to prove the proposition asserted by such a party.<sup>4</sup> It derives from the principle *actori incumbit probatio* (the proof is on the plaintiff).<sup>5</sup>

A standard of proof is attached to each legal burden of proof, and so a relevant party is required to adduce sufficiently probative evidence in order to meet the required standard of proof.<sup>6</sup> By adducing sufficient evidence to meet the required standard of proof, a party is deemed to have discharged the required burden of proof.<sup>7</sup> Under English common law, there has been a division of evidential standards applied within criminal and non-criminal proceedings. In criminal proceedings, the standard of proof has been referred to as 'beyond reasonable doubt'<sup>8</sup> (BRD), whereas in non-criminal proceedings, the standard of proof has been referred to as being based on the 'balance of probabilities' (BOP).<sup>9</sup>

The BRD standard requires a proposition to be proved so

<sup>1</sup> The Hong Kong Special Administrative Region of the People's Republic of China.

<sup>2</sup> Nicola Monaghan, *Law of Evidence* (Cambridge University Press, 2015), 34, para [3.1.].

<sup>3</sup> *Ibid* 35, para [3.2].

<sup>4</sup> Jeremy Cooper, 'The Burden and the Standard of Proof', (Courts and Tribunals Judiciary, Spring-2008).

<sup>5</sup> Mojtaba Kazazi, *Burden of Proof and Related Issues, A Study on Evidence Before International Tribunals* (Kluwer Law International, 1995), 323.

<sup>6</sup> Nicola (n 2) 35 para [3.2].

<sup>7</sup> *Ibid*.

<sup>8</sup> *Woolmington v DPP* [1935] AC 462, 481 per Viscount Sankey LC; *Mat v Public Prosecutor* [1963] MLJ 263 (Malaysia); *Choy Hon Song v Public Prosecutor* [1967] 1 MLJ 210 (Malaysia).

<sup>9</sup> *R v Carr-Briant* [1943] KB 607; *R v Dunbar* [1958] 1 QB 1; *R v Podola* [1960] 1 QB 325; *Public Prosecutor v Yuvaraj* [1970] 2 WLR 226; *Re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563.

that no reasonable doubt remains in the mind of a reasonable person that a defendant is guilty.<sup>10</sup> The BOP standard requires sufficient evidence to be adduced to convince the court that it is more probable than not that the burden has been discharged<sup>11</sup>, or that the occurrence of an event was more likely than not.<sup>12,13</sup> HK has retained the same initial English common law approaches to evidential standards in relation to BRD<sup>14</sup> and BOP<sup>15,16</sup>. However, care must be taken as the BOP standard may also be used within criminal cases where the defendant falls under a duty to discharge a legal burden, or where preliminary facts must be established.<sup>17</sup>

## STANDARD OF PROOF: CLEAR AND CONVINCING EVIDENCE

Professor Fontham explains that in the US the two degrees of proof that are generally required in lawsuits are based on: (1) the 'preponderance of the evidence' (POE) standard used in most civil cases; and (2) the 'beyond a reasonable doubt' requirement that is imposed on the prosecution in criminal cases.<sup>18</sup> The Due Process Clause of the US Constitution has been held by the US Supreme Court to require a minimum standard of proof in criminal proceedings.<sup>19</sup> The POE standard in the US generally equates with the BOP standard in E&W and HK, which means that it seeks to serve the same underlying objective.

The POE in civil actions has been defined to mean '...the greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it'.<sup>20</sup> In the US, this burden of proof therefore requires a party to show that the version of facts proposed by that party is more likely to be true, than not true.<sup>21</sup> However, because the US is based on both a Federal system of law and state systems of law<sup>22</sup>, some states in the US

have followed a different standard of proof, namely the CCE standard.<sup>23</sup>

For example, the CCE standard is applicable to criminal defendants who have asserted an affirmative defense (e.g., alibi, coercion, consent, duress, entrapment, insanity, intoxication, necessity, self-defense), in which the defendant in some way attempts to explain, refute, or excuse the criminal conduct in question.<sup>24</sup> The US CCE standard is a higher standard than the POE standard, which means that the version of facts presented by a party is highly probable to be true.<sup>25</sup> It has been noted this third (CCE) burden of proof is sometimes imposed in court proceedings as an intermediate obligation in relation to particular legal points.<sup>26</sup>

For instance, it has been applied in US civil cases involving deprivations of individual rights, but which have not risen to the level of criminal prosecution, such as commitment to a mental hospital or facilities; denaturalisation; deportation; and termination of parental rights.<sup>27</sup> Also in California, § 3294 of the Civil Code<sup>28</sup> states that exemplary damages may be claimed in actions for breach of obligation not arising from contact, by proving that a defendant is guilty of fraud, malice, or oppression to the CCE standard.<sup>29</sup> Husseini observes that, in practice, the three basic evidentiary standards available in the US, namely POE, CCE, and BRD represent an evidentiary continuum.<sup>30</sup>

The least restrictive standard, POE, is applied in civil cases because of the interest that civil society has in the outcome of private suits.<sup>31</sup> The most restrictive standard, BRD, is applied to determine guilt in criminal cases because the standard of proof seeks to exclude, to the greatest extent possible, the likelihood of an erroneous judgment.<sup>32</sup>

<sup>10</sup> Jack B Weinstein and Ian Dewsbury, 'Comment on the Meaning of 'proof beyond a reasonable doubt'', (2006) 5 Law, Probability and Risk 167; Robert L Heilbronner, 'Beyond a Reasonable Doubt', Encyclopedia of Clinical Neuropsychology (2011), <[https://link.springer.com/referenceworkentry/10.1007%2F978-0-387-79948-3\\_844](https://link.springer.com/referenceworkentry/10.1007%2F978-0-387-79948-3_844)>, accessed 12 February 2021.

<sup>11</sup> *Mille v Minister of Pensions* [1947] 2 All ER 372, 374.

<sup>12</sup> *In re H (Minors)* [1996] 2 WLR 8, 23.

<sup>13</sup> Andrew L-T Choo, *Evidence* (5th edn, Oxford University Press, 2018), 47.

<sup>14</sup> *R v Hui Shing* [1967] HKLR 563; *Kwang Ping-bong* [1979] HKLR 1 (PC); Michael Jackson, *Criminal Law in Hong Kong* (Hong Kong University Press, 2003), 36-37.

<sup>15</sup> *A Solicitor (24/07) v Law Society of Hong Kong* (FACV No 24 of 2007); Andra le Roux-Kemp, *Hong Kong Law of Evidence* (Wolters Kluwer, 2019), 37.

<sup>16</sup> *HKSAR v David Ma Wai Kwan* [1997] HKCA 652

<sup>17</sup> *R v Chu Shek-kwa* [1984] HKLR 440.

<sup>18</sup> Michael R Fontham, *Trial Technique and Evidence* (4th edn, National Institute for Trial Advocacy, 2013), 142.

<sup>19</sup> Richard Husseini, 'The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof', (1990) 57 The University of Chicago Law Review 1387, 1395; *In re Winship* 397 US 358 (1970); *Mullaney v Wilbur* 421 US 684 (1975); *McMillan v Pennsylvania* 477 US 79 (1986), 84.

<sup>20</sup> *Hale v Department of Transportation Federal Aviation Administration*, 772 F.2d 882, 885 (Fed. Cir. 1985); Ruth A Butler, *Trade Cases Adjudged in the U.S. Court of Appeals for the Federal Circuit, Volume 12, October 1993 – September 1994* (U.S. Government Printing Office, Washington, 1995), 8.

<sup>21</sup> Neal R Bevans, *Criminal Procedure, An Introduction for Criminal Justice Professionals* (Wolters Kluwer, New York, 2021), 297.

<sup>22</sup> Bernard Schwartz, *American Constitutional Law* (Cambridge University Press, 1955).

<sup>23</sup> Sean P Sullivan, 'A Likelihood Story: The Theory of Legal Fact-Finding', (2019) 90 University of Colorado Law Review 1.

<sup>24</sup> Neal R Bevans, *Criminal Procedure, An Introduction for Criminal Justice Professionals* (Wolters Kluwer, New York, 2021), 296 and 298.

<sup>25</sup> *Ibid* 297.

<sup>26</sup> Michael R Fontham, *Trial Technique and Evidence* (4th edn, National Institute for Trial Advocacy, 2013), 142.

<sup>27</sup> Charles Tilford McCormick, John William Strong, and Kenneth S Broun, *McCormick on Evidence* (West Group, 1999), 516.

<sup>28</sup> California Office of Legislative Counsel, the Civil Code of California.

<sup>29</sup> Robin Meadow, 'Clear and Convincing Evidence: How Much Is Enough?', (May 1999) California Insurance Reporter 116, 116.

<sup>30</sup> Richard (n 19) 1406.

<sup>31</sup> *Ibid*; *Addington v Texas* 441 US 418 (1978), 423-424.

<sup>32</sup> *Ibid*.

According to the US Supreme Court in *Addington v Texas*<sup>33</sup>, the CCE standard is appropriate when the interests at stake are deemed, according to the Due Process Clause, to be more substantial than the loss of money, e.g., the loss of a person's liberty.<sup>34</sup>

## A CRITICAL ANALYSIS OF THE APPLICATION OF THE CCE STANDARD IN HK

The analysis of the three basic evidentiary standards in the US can be used to demonstrate the practical legal complexities of applying the CCE standard in non-criminal proceedings in HK. In the US, these standards of proof derive their authority from the US Constitution, and in particular the Due Process Clause. In practice, the CCE standard has been developed and interpreted by both US Supreme Court cases and jurisprudence at the local state level. It is therefore difficult to reconcile this combined jurisprudence in order to extract logical principles that can then be applied and potentially 'legally transplanted'<sup>35</sup> in order to function within the HK legal system.

This approach is made even more confusing owing to the different kinds of burdens of proof that have been distinguished in the literature, such as burden of persuasion, burden of production, and tactical burden of proof, applied in US states.<sup>36</sup> What is more, in HK it is recognised that the evidence that is required to prove a serious allegation according to the BOP standard, must be held to be commensurate with the seriousness of the allegation.<sup>37</sup> In *Wong Hon Sun v HKSAR*<sup>38</sup>, this was referred to by Bokhary PJ as the 'commensurate evidence approach'.<sup>39</sup>

The critical and complex question that arises, is how to identify what the policy underlying the commensurate evidence approach is. This is because, if the CCE standard were to be introduced in non-criminal proceedings in HK, it would be essential to identify and reconcile the underlying policies of both approaches. Not only that, but this reconciliation would also need to address *all* types of cases to which the CCE standard would apply in practice. Otherwise, this might lead to fundamental flaws being introduced into the HK evidentiary legal system.

Still, even if it is accepted that in principle the CCE standard could be adopted in non-criminal proceedings in HK, this would still require a range of legal and conceptual challenges to be addressed. To illustrate and frame these challenges, it is helpful to examine the BOP standard in civil cases first. In *Bater v Bater*<sup>40</sup> it was suggested by Lord Denning that there were 'degrees of probability depending upon the subject matter' of the case in question that existed.<sup>41</sup> Lord Denning reasoned that, although civil cases had to be proved based on a preponderance of probability, there could be degrees of probability that existed within the standard itself, depending on the subject-matter in question.<sup>42</sup> We will refer to this as the 'Degrees of Probability Theory' (DPT).

Lord Denning gave the example of a civil court considering a charge of fraud requiring a higher degree of probability than that which would be required to establish negligence; so too in cases of divorce, should a court require a degree of probability which is proportionate to the subject-matter.<sup>43</sup> However, this approach has not manifested under the law in E&W, and the standard of proof of fraud in civil cases has remained the same.<sup>44</sup> In *Bank St Petersburg PJSC v Vitaly Arkhangelsky & Ors*<sup>45</sup>, the English Court of Appeal reiterated that, whilst cogent evidence is still needed to prove an allegation of fraud, there was no intermediate standard of proof that existed, such as a requirement to prove fraud had occurred beyond all possible doubt.<sup>46</sup>

In *A Solicitor (24/07) v Law Society of Hong Kong*<sup>47</sup>, the court stated that it was misleading to speak of a degree of probability.<sup>48</sup> Technically this observation is true, because the court was referring to the extant law. Indeed, McConville and Dmitri acknowledge that Lord Denning's DPT has not been widely accepted<sup>49</sup>, however they do not explain *why* this is the case. It is submitted that, in actuality, it is not that this proposition is conceptually wrong, but simply that it would be highly complex and challenging to implement in reality. The civil BOP and criminal BRD standards applicable in HK are simply policy tools that have been implemented in order to provide an operational framework with respect to evidentiary standards.

In reality, these standards represent an amalgamation of

<sup>33</sup> *Addington* (n 31) 424.

<sup>34</sup> *Ibid* 420; Richard (n 19) 1406.

<sup>35</sup> Simin Gao and Qianyu Wang, 'The U.S. Reorganization Regime in the Chinese Mirror: Legal Transplantation and Obstructed Efficiency', (2017) 91 *American Bankruptcy Law Journal* 1; Wai Yee Wan and Gerald McCormack, 'Transplanting chapter 11 of the US bankruptcy code into Singapore's restructuring and insolvency laws: Opportunities and challenges', (2019) 19 *Journal of Corporate Law Studies* 69.

<sup>36</sup> Hendrik Kaptein, Henry Prakken, and Bart Verheij (eds), *Legal Evidence and Proof, Statistics, Stories, Logic* (Routledge, 2009), 223.

<sup>37</sup> Mike McConville and M A Dmitri, *Hong Kong Law of Evidence* (2nd edn, Blue Dragon Asia Ltd, 2014), 71.

<sup>38</sup> *Wong Hon Sun v HKSAR* (CFA, FAC11/2009);(2009) 12 HKCFAR 877.

<sup>39</sup> Mike (n 37) 72.

<sup>40</sup> *Bater v Bater* [1951], 35; *Hornal v Neuberger Products Ltd* [1957] 1 QB 247; *Blyth v Blyth* (No. 2) [1966] AC 643.

<sup>41</sup> Mike (n 37).

<sup>42</sup> *Bater* (n 40) 35, 37 per Lord Denning; Mike (n 37).

<sup>43</sup> *Ibid*.

<sup>44</sup> *Re B (Children)* [2008] UKHL 35; *Fiona Trust v Privalo* [2010] EWHC 3199.

<sup>45</sup> *Bank St Petersburg PJSC v Vitaly Arkhangelsky & Ors* [2020] EWCA Civ 408.

<sup>46</sup> Syedur Rahman, 'The Standard of Proof in Civil Fraud Claims', (Rahman Ravelli, 2 September 2020); *Re B (A Child)* [2008] UKHL 35.

<sup>47</sup> *A Solicitor (24/07) v Law Society of Hong Kong* (FACV No 24 of 2007).

<sup>48</sup> *Ibid* para [63].

<sup>49</sup> Mike (n 37).

law and policy choices. In principle each standard is supposed to reflect the most optimal standard suitable for each particular type of case. For the purposes of this discussion, these standards can be approximately numerically. Cheng applied probability thresholds with a view to explaining US burdens of persuasion, by stating that the civil POE standard requires a plaintiff to establish the probability of a claim to greater than 0.5%, whereas the criminal BRD standard requires a standard akin to a probability of greater than 0.9 or 0.95%.<sup>50</sup>

It is accepted for this purpose, that in reality it is difficult to precisely reconcile legal versus quantified definitions of standards of proof<sup>51</sup>, and furthermore that a range of significant differences exist between the mechanics of Bayesian probability analysis<sup>52</sup>, and likelihood analysis applied within the context of law.<sup>53</sup> However, viewed in this way by reference to approximate probability thresholds, each standard has been set to reflect the relevant primary objectives. In criminal cases, this is to correctly convict parties guilty of a criminal offence, and to ensure that innocent parties are not convicted, and are not wrongly convicted.

The criminal BRD standard has been set extremely high in order to ensure that these primary objectives are secured. However, the civil BOP standard has different objectives. That is why Lord Denning's DPT in theory may be correct. In reality, because the civil BOP standard is driven by different objectives, then in theory the standard *should* reflect the subject-matter in question. If this were made possible in real life, it would mean that civil burdens of proof would be more effective and efficient in practice, because they would be much more precise and realistic, and therefore more accurate overall.

The real challenge that would arise in practice, would be how to operationalise these different burdens within the context of non-criminal proceedings in HK. The civil BOP standard is in reality no more than a generalised approximation that has been adopted because it represents a workable compromise. If this proposition is doubted, then imagine if there was only one standard of proof applicable in all legal proceedings in HK, namely BRD applicable to all cases.

In reality, this would clearly be the preferred option because it significantly increases the probability that the final outcome of the case is the correct outcome. The problem with this, is that it would significantly complicate civil litigation, as well as significantly increase costs, which

would likely make the civil litigation system unworkable. In this situation the 'best' standard may not necessarily be the most 'optimum' standard. The civil BOP standard represents a deemed compromise, which balances certainty (i.e., the need for the civil system to ensure that the outcome of a case accurately reflects the truth), with a range of other policy factors.

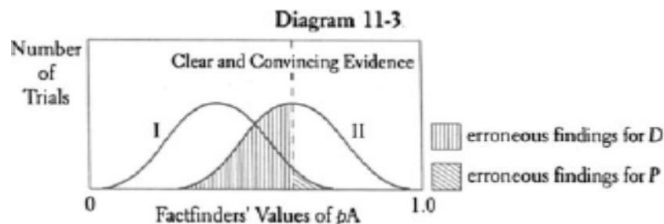


Figure 1: Graph depicting allocation of errors with the use of a CCE standard<sup>54</sup>

By introducing a CCE standard into civil cases, what is actually happening is that the burden of proof is raised, which when viewed visually, translates to mean that overall errors favouring defendants are increased, and errors favouring plaintiffs are decreased (**Figure 1**). Applied within the HK legal system, this would mean that the CCE standard could in theory be introduced in cases where due process rights are invoked, because although the case is civil in nature, due process rights are implicated. For example, McConville and Dmitri assert that this might be applicable in a civil case involving contempt of court, where an individual may be potentially subjected to committal to prison, i.e., it is quasi-criminal in nature.<sup>55</sup>

Allen argues that if reliable data could be obtained in relation to an issue, this could then be used to justify modifying the burden of persuasion in light of such information.<sup>56</sup> For instance, by reviewing data which shows too many errors favouring defendants in allegations of fraud, this would potentially enable a legal system to 'remedy' this error by lowering the burden of persuasion accordingly.<sup>57</sup> The potential implications of adopting a higher burden of persuasion in civil cases can be mapped visually below (**Figure 2**), where the shaded areas represents both plaintiff and defendant errors.<sup>58</sup>

<sup>50</sup> Edward K Cheng, 'Reconceptualizing the Burden of Proof', (2013) 122 Yale Law Journal 1254, 1256.

<sup>51</sup> Dorothy K Kagehiro and W Clark Stanton, 'Legal vs. quantified definitions of standards of proof', (1985) 9 Law and Human Behavior 159, 159.

<sup>52</sup> Richard D Friedman, ' "E" Is for Eclectic: Multiple Perspectives on Evidence', (2001) 87 Virginia Law Review 2029, 2045-2046.

<sup>53</sup> Sean P Sullivan, 'A Likelihood Story: The Theory of Legal Fact-Finding', (2019) 90 University of Colorado Law Review 1, 11; Henrik

Lando, 'When in the Preponderance of the Evidence Standard Optimal', (2002) 27 The Geneva Papers on Risk and Insurance 602.

<sup>54</sup> Ronald J Allen, 'Burdens of proof', (2014) 13 Law, Probability and Risk 195, 205.

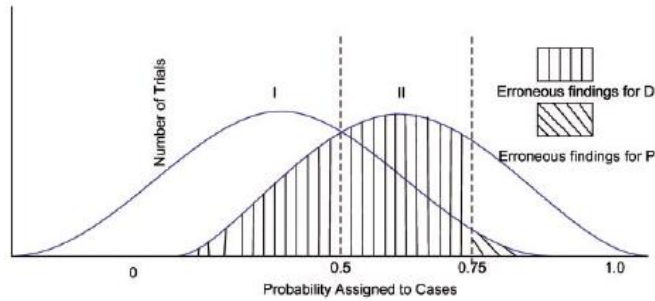
<sup>55</sup> Mike (n 37); *Re Bramblevale Ltd* [1970] Ch 128 (CA); *R (McCann) v Manchester Crown Court* [2003] 1 AC 787.

<sup>56</sup> Ronald (n 54).

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*





**Figure 2: Graph depicting allocation of errors with the use of a CCE standard<sup>59</sup>**

However, such a proposition is theoretically valid only if reliable data can be obtained, which at present is highly unlikely. The end practical result is that in reality, arguments can be made to support the adoption of a CCE standard in non-criminal proceedings. However, because such arguments relate, not to legal cases, but to changing the very fabric of the evidentiary system itself, they have to be either conceptually or empirically justified. This is where the complexities and challenges arise.

Burden of proof rules are based on *inter alia* theories of dispute resolution; underling conceptions of the appropriate role of government in the resolution of disputes; and political aspirations espoused within constitutional doctrines, e.g., rule of law and separation of

powers.<sup>60</sup> The US rules are based on and justified by reference to a completely different conceptual and legal framework compared to HK. The existing BOP and BRD evidentiary standards have proved incredibly challenging to implement and interpret in practice, and as noted by Vars, 'The whole question of which standard to apply is almost meaningless if jurors cannot differentiate among the standards, as appears presently to be the case.'<sup>61</sup>

## CONCLUSION

Consequently, in light of the fact that the BOP and BRD standards have themselves proved to be highly complex, and that jurors have found these standards even more complicated to understand, the introduction of an intermediate CCE standard would invariably lead to even more complexity and misunderstanding in the current HK evidentiary system applicable to non-criminal proceedings. This is exactly the opposite of what the HK evidentiary system needs at this current juncture in time. Whilst a higher CCE standard of proof could in principle be adopted within HK, for instance in cases where due process principles may potentially be invoked, unless such standard is conceptually or empirically justified based on irreproachable evidence, it would represent an arbitrary re-allocation of evidentiary standards.

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<sup>59</sup> Ibid.

<sup>60</sup> Ronald (n 54) 195, 196.

<sup>61</sup> Frederick E Vars, 'Toward a General Theory of Standards of Proof', (2010) 60 Catholic University Law Review 1, 45.

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