

## Louisiana Law Review

---

Volume 28 | Number 3

*The Work of the Louisiana Appellate Courts for the  
1966-1967 Term: A Symposium*  
April 1968

---

# The Anatomy of Proof in Civil Actions

Joe W. Sanders

---

### Repository Citation

Joe W. Sanders, *The Anatomy of Proof in Civil Actions*, 28 La. L. Rev. (1968)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol28/iss3/3>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

## THE ANATOMY OF PROOF IN CIVIL ACTIONS

Joe W. Sanders\*

The judges of the circuit court of appeal sat in conference. Under consideration was an appeal from the trial court's judgment for plaintiff in a workmen's compensation suit.

Judge Firm asserted, "I am of the view the judgment must be reversed. Plaintiff has failed to prove his case to a legal certainty. Courts cannot base a judgment on probabilities."

Addressing Judge Firm, Judge Trufair replied, "I disagree. The Preponderance of Evidence Rule means the evidence must show that the existence of a disputed fact is more probable than not. In fact finding, courts have always relied on probabilities."

In his most authoritative voice, Judge Firm rejoined, "We have said in several decisions that proving a fact probable is insufficient. I reject probabilities."

So the discourse continued.

Judge Jerome Frank amply demonstrated that fact finding is the main hinge of justice.<sup>1</sup> His philosophy of fact skepticism is an important contribution to legal theory.<sup>2</sup> But the teaching of this distinguished jurist also challenges judges, lawyers, and jurors to deal efficiently and fairly with evidence. The embattled litigant deserves the best fact finding attainable under our judicial procedure.

For efficient fact finding, a clear understanding of the burden of proof, or more precisely the standard of persuasion, is essential. This is especially true in Louisiana, where appellate courts review the facts in civil cases. Trial and appellate judges need complete agreement on the controlling standard. In the absence of a clearly defined standard, judges and jurors flounder in uncertainty.

This paper will attempt to analyze the standard of persuasion in ordinary civil actions, to compare it with other standards of proof, and to examine the use of the standard in Louisiana

---

\* Associate Justice, Supreme Court of Louisiana.

1. See J. FRANK, *COURTS ON TRIAL* 14-61 (1950).

2. See generally *CONFRONTING INJUSTICE, THE EDMOND CAHN READER* 283 (1966).

courts. The purpose throughout is to clarify the standard so that it may be used with greater ease in the judicial process.

In ordinary civil actions, the plaintiff must establish essential facts by a preponderance of the evidence.<sup>3</sup> Much confusion has persisted concerning the meaning of this requirement.<sup>4</sup> Judge Wannamaker of Ohio found that jurors had more difficulty understanding "preponderance of the evidence" than any other legal concept.<sup>5</sup> Recent appellate decisions indicate that Louisiana courts have not escaped the smog that has surrounded this standard of proof.

In the recent case of *Wright Root Beer Co. v. Fowler Products Co.*,<sup>6</sup> the First Circuit Court of Appeal announced the following proof requirement:

"The jurisprudence is well settled that one entitled to recovery must make and establish his claim to a legal certainty. It does not suffice for the plaintiff to make out a case that is merely probable; he must establish his claims to a legal certainty by a reasonable preponderance of the evidence."

In another recent case, *Southern Farm Bureau Cas. Ins. Co. v. Florane*,<sup>7</sup> however, the Third Circuit Court of Appeal stated:

"Proof by a preponderance of the evidence requires that the evidence as a whole show that the fact sought to be proved is more probable than not."

Accepting the court's language at face value, the first definition measures as insufficient evidence that reasonably convinces the trier of fact the existence of a disputed fact is more probable than its non-existence. It rejects probability and demands a higher degree of proof. Contrariwise, the second definition measures as sufficient evidence showing that the existence of a fact is more probable than not. Without recourse to the evidence, one cannot say that the result reached in either case is wrong.

---

3. *Town of Slidell v. Temple*, 246 La. 137, 164 So.2d 276 (1964); *Iennusa v. Rosato*, 207 La. 999, 22 So.2d 467 (1945); *Perez v. Meraux*, 201 La. 498, 9 So.2d 662 (1942); 30 AM. JUR. SECOND, *Evidence* § 1163, at 337 (1967); 32A C.J.S., *Evidence* § 1019, at 637 (1964).

4. F. JAMES, *CIVIL PROCEDURE* 250-51 (1965); McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 246 (1944).

5. 11 U. CIN. L. REV. 191-95 (1937).

6. 196 So.2d 615, 618 (La. App. 1st Cir. 1967).

7. 173 So.2d 545, 548 (La. App. 3d Cir. 1965).

Moreover, each of the proof statements has jurisprudential support.<sup>8</sup> The cases do demonstrate, however, that the content of the Preponderance Rule should be exposed to a clearer view.

#### ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE

When the phrase "preponderance of the evidence" is considered narrowly and alone, it may be defined as evidence of greater weight, or convincing force.<sup>9</sup> As Maguire,<sup>10</sup> Morgan,<sup>11</sup> James,<sup>12</sup> and other authorities have noted, the definition has its shortcomings. It focuses upon the abstract quality of the evidence and, seemingly, ignores the degree of belief produced. The outcome of the case is determined by an objective balance system. If plaintiff's evidence weighs more than that of the defendant, the plaintiff wins, regardless of the degree of belief generated in the mind of the trier of fact. Under the strict balance system, the detection of a preponderance of the evidence is quite consistent with want of belief.<sup>13</sup>

The state of mind of the trier of fact demands recognition. Testimony has no intrinsic significance in the judicial process. It gains importance only when it is filtered through the mental processes of the trier of fact, actuating belief.<sup>14</sup> Hence, the

---

8. Evidence showing existence of fact as *probable* insufficient to satisfy preponderance of evidence rule: *Johnson v. Kennedy*, 235 La. 212, 103 So.2d 93 (1958); *Jackson v. Beling*, 22 La. Ann. 377 (1870); *Smith v. Thielen*, 17 La. Ann. 239 (1865); *Skipwith v. His Creditors*, 19 La. 198 (1841); *Star Sales Co. v. Arnoult*, 169 So.2d 178 (La. App. 4th Cir. 1964); *Litton v. Parker*, 106 So.2d 776 (La. App. 2d Cir. 1958); *Murff v. Louisiana Highway Comm'n*, 146 So. 328 (La. App. 2d Cir. 1933).

Evidence showing existence of disputed fact is more probable than not is sufficient to satisfy burden of proof: *Town of Slidell v. Temple*, 246 La. 137, 164 So.2d 276 (1964); *Perkins v. Texas & New Orleans R.R.*, 243 La. 829, 147 So.2d 646 (1962); *Dixie Drive It Yourself System v. American Beverage Co.*, 242 La. 471, 137 So.2d 298 (1962); *Kemp v. Wamack*, 2 La. 272 (1831); *Dupre v. Roane Flying Service, Inc.*, 196 So.2d 835 (La. App. 3d Cir. 1967); *Duhon v. Cormier*, 186 So.2d 645 (La. App. 3d Cir. 1966); *Dunphy v. Liberty Mut. Ins. Co.*, 177 So.2d 610 (La. App. 3d Cir. 1965); *Bryant v. Hartford Acc. & Indem. Co.*, 158 So.2d 260 (La. App. 4th Cir. 1963); *Michaels v. Gravier Improvement Co.*, 158 So.2d 263 (La. App. 4th Cir. 1963); *Williams v. Harris*, 77 So.2d 744 (La. App. 1st Cir. 1955); *Cook v. M. J. Walsh Boiler Scaling Co.*, 40 So.2d 655 (La. App. Or. Cir. 1949).

9. See *Edwards v. Shreveport Creosoting Co.*, 207 La. 699, 21 So.2d 878 (1945).

10. J. MAGUIRE, *EVIDENCE: COMMON SENSE AND COMMON LAW* 180 (1947).

11. E. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 22 (1954).

12. F. JAMES, *CIVIL PROCEDURE* 250 (1965).

13. 9 J. WIGMORE, *EVIDENCE* § 2498, at 327 (3d ed. 1940); see also F. JAMES, *CIVIL PROCEDURE* 250 (1965).

14. Cleary, *Evidence as a Problem in Communicating*, 5 VAND. L. REV. 277, 291 (1952).

Preponderance Rule finds more meaningful expression in terms of probability.<sup>15</sup>

As a starting point for definition in terms of belief, one must frankly concede that certainty is generally unattainable from testimony produced in court.<sup>16</sup> Witness deficiencies in observation, memory, and descriptive ability usually bar it from the courtroom. For example, in a recent case,<sup>17</sup> a fact issue arose as to whether plaintiff had obstructed traffic by opening the door of his car across the travel lane of the highway. The testimony clashed on this issue. The trial court found that plaintiff had not obstructed the highway; the court of appeal found that he had; the Supreme Court, agreeing with the trial court, found that he had not. No court that considered the question could be certain as to what had happened. As to the past event, certainty was unattainable.

To the common witness deficiencies must be added witness bias and perjury from time to time. These shortcomings increase the fact finding difficulties of the court.

Speaking for the Fourth Circuit Court of Appeal in *Bryant v. Hartford Acc. & Indem. Co.*,<sup>18</sup> Judge Regan recently observed:

"Law, like other inexact social sciences, must be content to test the validity of its conclusions by the logic of probabilities rather than the logic of mathematical certainty."

Professor J. P. McBaine wrote:

"The courts, too often, fail to realize that certainty as to what has happened cannot be ascertained from the testimony of witnesses or other evidence of acts. The frailty of man is such that certainty in the field of fact finding is impossible. An attempt to find out what has transpired involves correctness of perception, reliability of memory and

---

15. Good has amply demonstrated the interrelationship of degrees of belief and probability. C. GOOD, *PROBABILITY AND THE WEIGHING OF EVIDENCE* 1-4 (1950); see also McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242 (1944); Morgan, *Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 64-67 (1934).

16. See *Bryant v. Hartford Acc. & Indem. Co.*, 158 So.2d 263 (La. App. 4th Cir. 1963); 1 B. JONES, *THE LAW OF EVIDENCE* § 4, at 6 (1958); Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807 (1961); McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 246 (1944); Morgan, *Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 62 (1934).

17. *Ginlee v. Helg*, 251 La. 261, 203 So.2d 714 (1967).

18. 158 So.2d 263, 265 (La. App. 4th Cir. 1963).

ability to describe what was seen or heard. There are also certain generic human traits respecting testimony which affect its probative value such as the age, sex, intelligence, character, temperament, emotion, bias, experience, etc., of the witness. Man's imperfections, which everybody knows exist make absolute perfection or certainty unattainable in the field of fact finding. Those who administer the judicial process are not in the favorable position which scientists sometimes occupy in some realms of the physical sciences. The chemist and the physicist in many areas of knowledge can accurately ascertain facts. Judges and juries, however, must be content with less than complete accuracy in the realm of fact finding."<sup>19</sup>

If certainty is unattainable in the ordinary case, a realistic standard of persuasion must be found—a standard that will reduce the likelihood of factual error, yet permit the litigation to be terminated in favor of one of the parties.

The quest of such a standard returns one to the fully stated rule: The plaintiff must establish a disputed fact by a preponderance of the evidence. It is in a broader definition of this rule that a realistic standard of proof has been found. More and more authorities have broadly construed the rule to mean that a plaintiff must prove that the existence of the disputed fact is more probable than its non-existence.<sup>20</sup>

The rule does not require a party to prove a contested fact "beyond doubt," "beyond dispute," "beyond question," "conclusively," or to a "certainty."<sup>21</sup> When the greater likelihood of the existence of a fact is reasonably determined from the evidence, the judge or jury finds the fact. The fact is accepted as true for purposes of the litigation. In short, it becomes a "juridical truth."

As early as 1831, in *Kemp v. Wamack*,<sup>22</sup> the Supreme Court of Louisiana said:

19. McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 246 (1944).

20. See cases cited second paragraph, note 8 *supra*; see also *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 26 S.W.2d 442 (1947); *Tucker v. Pearlstein*, 334 Mass. 33, 133 N.E.2d 489 (1956); *Cook v. Michael*, 214 Ore. 513, 330 P.2d 1026 (1958); F. JAMES, *CIVIL PROCEDURE* 250-51 (1965); 1 B. JONES, *THE LAW OF EVIDENCE* § 4, at 6 (1958); C. McCORMICK, *LAW OF EVIDENCE* § 319, at 677 (1954); ALI MODEL CODE OF EVIDENCE Rules 1(5), 75 (1942).

21. See *Hayward v. Carraway*, 180 So.2d 758 (La. App. 1st Cir. 1965), and 32A C.J.S. *Evidence* § 1020, at 643-44 (1964).

22. 2 La. 272, 273 (1831).

"It is true, that a majority of the witnesses introduced on this subject, thought otherwise: and the judge a quo seems, by counting them, to have acquiesced in the opinion of that majority. Numeration is certainly the easiest mode by which judges can arrive at conclusions on matters of fact, supported alone by the testimony of witnesses; but the law of evidence requires that their testimony should be weighed by probabilities, and its truth be rather ascertained in this manner, than by counting numbers."

In *Perkins v. Texas & New Orleans R.R.*,<sup>23</sup> the Supreme Court described the normal burden of persuasion as follows:

"The burden of proving this causal link is upon the plaintiff. Recognizing that the fact of causation is not susceptible of proof to a mathematical certainty, the law requires only that the evidence show that it is more probable than not that the harm was caused by the tortious conduct of the defendant."

More recently, in *Town of Slidell v. Temple*,<sup>24</sup> the court amplified the rule:

"In the trial of civil cases, therefore, the concern is not for proof beyond a reasonable doubt but, rather, the requirement of proof may be satisfied with a preponderance of probabilities reasonably to be inferred from physical facts clearly established."

The American Law Institute adopted the probability rule for its *Model Code of Evidence*, by providing:

" 'Finding a fact' means determining that its existence is more probable than its non-existence."<sup>25</sup>

Doctrinal writers strongly support a formulation of the Preponderance Rule in terms of probability.

McCormick states:

"The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its non-existence. Thus, the prepon-

---

23. 243 La. 829, 836, 147 So.2d 646, 648 (1962).

24. 246 La. 137, 144, 164 So.2d 276, 278 (1964).

25. Rule 1(5) (1942).

derance of evidence becomes the trier's belief in the preponderance of probability. Some courts have boldly accepted this view."<sup>26</sup>

In Jones' work on evidence,<sup>27</sup> the author observes:

"Questions presented for judicial determination are inherently controversial, and the issues are so framed that it is rarely possible to resolve them with absolute certainty. The real or autoptic type of evidence tells its own story and something like absolute verity may be achieved within the scope of what it reveals. But this type of evidence more often has a circumstantial bearing on the real issue to be determined, and the litigant must rely on all sorts of circumstantial and testimonial evidence to persuade the trier of the fact that his proposition is true.

"Thus, since the controversy must be resolved, when all is said and done, the judge or the jury charged with the necessity of deciding the issue must, in the absence of certainty, resort to a comparison of probabilities.

"It is elementary that in civil cases a mere preponderance of the proof of a demonstration, not of certainty, but of *greater* probability, is all that is necessary to sustain a burden of proof or persuasion."

In their study of logic and scientific method,<sup>28</sup> Cohen and Nagel describe judicial fact-finding as follows:

"We have already examined the historian's procedure in evaluating the testimony of documents and remains. An essentially similar procedure is followed in the courtroom when the testimony of witnesses is weighed and judged. For the fact to be proved in a court is of the past, while the testimony or the evidential facts are of the present.

"The law distinguishes between two degrees of proof: one in which a proposition is established simply with a probability of over  $\frac{1}{2}$ , and which is called *preponderance of evidence*; the other requiring a degree of probability differing from certainty by so little, that anyone who acts upon

---

26. C. McCORMICK, LAW OF EVIDENCE § 319, at 677 (1954).

27. 1 B. JONES, THE LAW OF EVIDENCE § 4, at 6 (1938).

28. M. COHEN & E. NAGEL, AN INTRODUCTION TO LOGIC AND SCIENTIFIC METHOD 347 (1934).



that difference would be regarded as unreasonable—this degree of probability is called *proof beyond reasonable doubt*. The first degree of probability is sufficient in civil cases, while proof in criminal law requires the second.”

Thus, the Preponderance of Evidence Rule requires the burdened litigant to persuade the trier of fact by sufficient evidence that the existence of a disputed fact is more probable than its non-existence. Merely stating the rule in this manner clarifies the standard of persuasion. But more can be done. It can be compared to other standards.

#### COMPARISON OF PREPONDERANCE OF EVIDENCE WITH OTHER STANDARDS OF PERSUASION

In Louisiana, as elsewhere, the law recognizes three standards of persuasion: (1) by a preponderance of the evidence, (2) by clear and convincing evidence, and (3) beyond a reasonable doubt.<sup>29</sup>

The law requires that certain facts in civil cases be established by clear and convincing evidence. For example, this higher standard applies to proof of fraud<sup>30</sup> and proof of the separate status of property purchased by the wife during marriage.<sup>31</sup> Like the preponderance standard, the “clear and convincing evidence” standard seems to focus upon the objective quality of the evidence, rather than upon the degree of belief. Quite clearly, the standard requires a higher degree of proof than a preponderance of the evidence. This standard of proof is an intermediate one, between a preponderance and proof beyond a reasonable doubt. Here again the standard can be more easily understood if converted into terms of probability. The standard requires that the existence of the disputed fact be highly probable, that is, much more probable than its non-existence.

Statute makes the heaviest burden of persuasion known to law applicable to the proof of guilt in criminal cases: proof beyond a reasonable doubt.<sup>32</sup> Justification for this heavy burden

---

29. See *Perez v. Meraux*, 201 La. 498, 9 So.2d 662 (1942); Uniform Rules of Evidence rule 1(4) (National Conference of Commissioners on Uniform State Laws 1953).

30. *Perez v. Meraux*, 201 La. 498, 9 So.2d 662 (1942).

31. *Succession of Smith*, 247 La. 921, 175 So.2d 269 (1965); *Monk v. Monk*, 243 La. 429, 144 So.2d 384 (1962).

32. LA. CODE CR. P. art. 804 (1966); LA. R.S. 15:803, 804, 804A (Supp. 1967).

may be found in the grave consequences to life, liberty, and reputation arising from a conviction of crime.<sup>33</sup>

Unlike the Preponderance of Evidence Rule, this standard focuses upon the degree of belief of the trier of fact, usually the jury. For conviction, the trier of fact must be convinced of guilt beyond a reasonable doubt.

Under this standard, guilt must be so highly probable as to banish all reasonable doubts. The evidence must eliminate any fair doubt based upon reason arising from the state of the evidence. The trier should believe that defendant's guilt is *almost* certain. Although the standard of proof is high, its demand falls short of certainty.

The court may, but is not required to, define "reasonable doubt."<sup>34</sup> "Reasonable doubt" seems to be more intelligible to a lay jury than many other concepts with which they deal. Hence, it is doubtful that definition assists the jury in the performance of their duties.<sup>35</sup>

Having defined the Preponderance of Evidence Rule in terms of probability and compared it to the other standards of persuasion, it is necessary to turn to several specific subjects that require special consideration.

## CAUSATION

### A. *In Delict, or Tort, Actions*

The principle that one can complain of the conduct of another only if he has been harmed by that conduct is fundamental. It pervades the law, This principle divides human conduct into two classes, conduct that harms and conduct that does no harm. A defendant should suffer no liability for his harmless conduct. Conversely, harmful conduct may produce liability. To find a

33. C. McCORMICK, LAW OF EVIDENCE § 321, at 681 (1954).

34. LA. CODE CR. P. art. 804 (1967).

35. Compare the instruction given in France to the jury in criminal cases: "The law does not ask judges for an accounting as to the means by which they are convinced. It does not prescribe for them any special rules on which they shall make the fullness and sufficiency of the proof depend; it requires them to interrogate themselves in silence and reflection, and to seek to determine in the sincerity of their conscience what impression the proofs brought against the accused, and his defense, have made on their reason. The law only asks of them this single question, which encompasses the full measure of their duty: 'Have you an inner conviction?' " See Pugh, *Administration of Criminal Justice in France*, 23 LA. L. REV. 1, 27 (1962).

defendant's conduct harmful and hence actionable, courts must determine whether it in fact caused plaintiff's harm.

When the defendant's conduct has been intentional, causation rarely presents a problem. In such cases, the sequence of cause and effect is normally quite clear: the defendant struck plaintiff, and plaintiff sustained a broken jaw.

When the defendant's conduct has been unintentional or negligent, however, troublesome problems of factual causation frequently arise. The sequence of cause and effect may be obscure and difficult to trace.

In general, the usual burden of proof applies to the issue of causation in tort actions. The plaintiff has the burden of proving the causal link by a preponderance of the evidence. This means the evidence should convince the trier of fact that more probably than not defendant's conduct was a substantial factor in bringing about plaintiff's harm. Defendant's conduct, of course, need not be the sole cause of the harm.<sup>36</sup>

The so-called "but for" rule has unusual appeal in testing causation. The rule, however, must be applied with care. In some factual situations, it is unreliable. In most cases, however, the rule may be used at least as an auxiliary test of causation. If plaintiff's harm would have occurred irrespective of defendant's conduct, the conduct must be excluded as a causative factor.<sup>37</sup>

A possible exception to the plaintiff's normal burden of persuasion as to causation is found in damage actions based upon the failure to provide fire escapes required by statute.<sup>38</sup> In *Dotson v. Louisiana Central Lumber Co.*,<sup>39</sup> a widow sought damages for the death of her husband in a fire which destroyed the sawmill where he was employed. She based her case partly on the failure of the defendant to provide fire escapes as required by Act 171 of 1914. On the issue of causation, the Supreme Court said:

---

36. *Gassiott v. Gordey*, 182 So.2d 170 (La. App. 3d Cir. 1966); *Town of Slidell v. Temple*, 246 La. 137, 164 So.2d 276 (1964); *Perkins v. Texas & New Orleans R.R.*, 243 La. 829, 147 So.2d 646 (1962); *Dixie Drive It Yourself System v. American Beverage Co.*, 242 La. 471, 137 So.2d 298 (1962); W. PROSSER, *LAW OF TORTS* § 41, at 245-46 (3d ed. 1964).

37. *Perkins v. Texas & New Orleans R.R.*, 243 La. 829, 147 So.2d 646 (1962); W. PROSSER, *LAW OF TORTS* § 41, at 245-46 (3d ed. 1964).

38. See *Dotson v. Louisiana Central Lumber Co.*, 144 La. 78, 80 So. 205 (1918); *Lee v. Carwile*, 168 So.2d 469 (La. App. 3d Cir. 1964).

39. 144 La. 78, 88, 80 So. 205, 209 (1918).

“. . . But we must assume that the proximate cause of Dotson's death was the negligence of defendant in not providing him with the means of saving himself by fire escapes as required by the provisions of the act of 1914. Defendant might contend that, even if there had been fire escapes, Dotson would have lost his life. That may be true, but its negligence in not erecting the fire escapes, as required by law, imposed upon it the burden of showing beyond doubt and with reasonable certainty, which it has failed to do, that the proximate cause of Dotson's death was other than its negligence in not performing that duty. We therefore conclude that defendant is liable in damages for the death of Dotson.”

As to fire escapes, the decision has support elsewhere.<sup>40</sup> Ample reasons exist to require the violating building owner to produce evidence that escape was improbable even if he had fulfilled his statutory duty in providing fire escapes.<sup>41</sup>

Some authorities have construed the *Dotson* decision as applying to the failure to provide any statutory safety device.<sup>42</sup> The Supreme Court, however, has not as yet extended the holding beyond fire escapes. It has passed up at least one opportunity to extend it to other safety devices.<sup>43</sup>

### B. In Workmen's Compensation Proceedings

In workmen's compensation cases, the plaintiff must prove that the employment accident caused the injury or disability for which he seeks compensation. Frequently, proof of causation depends upon medical testimony. Since medicine is an inexact science, such testimony regularly falls below the level of certainty.

In Louisiana, as in most jurisdictions, the testimony as a whole must show that the employment accident more probably than not caused the injury, disability, or death.<sup>44</sup> If the testimony leaves the probabilities equally balanced at best, the

40. *Burt v. Nichols*, 264 Mo. 1, 173 S.W. 681, L.R.A. 1917E 250 (1915).

41. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 79 (1956).

42. See, e.g., *The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Torts*, 26 LA. L. REV. 510, 519 (1966).

43. See *Home Gas & Fuel Co. v. Mississippi Tank Co.*, 246 La. 625, 166 So.2d 252 (1964).

44. W. MALONE, *LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE* § 252, at 293-94 (1951), and the authorities cited; 3 AM. JUR. *Proof of Facts* 161-63 (1959).

plaintiff has failed to carry the burden of persuasion.<sup>45</sup> Likewise, the plaintiff's case must fail if the evidence shows only a possibility of causal relation or leaves the relation to speculation or conjecture.

#### CIRCUMSTANTIAL EVIDENCE

A fact in issue may be established by circumstantial evidence or by a combination of circumstantial and direct evidence.<sup>46</sup>

When the evidence is wholly circumstantial, a split of authority exists as to whether the usual standard of persuasion applies or whether the evidence must also exclude all reasonable hypotheses other than the one relied on with a fair amount of certainty.<sup>47</sup>

Louisiana decisions in the intermediate appellate courts are divided. The larger number of decisions support the rule that circumstantial evidence must exclude other reasonable hypotheses with a fair amount of certainty.<sup>48</sup> However, a substantial number hold to the contrary.<sup>49</sup>

The Exclusion of Reasonable Hypotheses rule can perhaps be traced to the criminal law, where it has been used for more than two centuries in determining guilt.<sup>50</sup> R.S. 15:438 requires for conviction of crime that circumstantial evidence exclude every reasonable hypothesis of innocence. Whether this principle should be applied in civil actions is debatable. The decisions

45. *Hinton v. Louisiana Central Lumber Co.*, 148 So. 478 (La. App. 2d Cir. 1933).

46. 29 AM. JUR. SECOND, *Evidence* § 264, at 312 (1967): "The basic distinction between direct and circumstantial evidence is that in the former instance the witnesses testify directly of their own knowledge as to the main facts to be proved, while in the latter case proof is given of facts and circumstances from which the jury may infer other connected facts which reasonably follow, according to the common experience of mankind."

47. See 32A C.J.S. *Evidence* § 1039, at 748 (1964); 30 AM. JUR. SECOND *Evidence* § 1091, at 250-52 (1967).

48. *Gassiott v. Gordey*, 182 So.2d 170 (La. App. 3d Cir. 1966); *American Employers Ins. Co. v. Schoenfeld*, 144 So.2d 595 (La. App. 4th Cir. 1962); *Lanza Enterprises, Inc. v. Continental Ins. Co.*, 142 So.2d 580 (La. App. 3d Cir. 1962); *Hollins v. Jefferson Oil Co.*, 124 So.2d 629 (La. App. 3d Cir. 1961); *O'Pry v. City of Opelousas*, 124 So.2d 333 (La. App. 3d Cir. 1960); *Sollberger v. Walcott*, 101 So.2d 483 (La. App. 1st Cir. 1958).

49. See *Chas. A. Kaufman Co. v. Gregory*, 178 So.2d 300 (La. App. 4th Cir. 1965); *Michaels v. Gravier Improvement Co.*, 158 So.2d 260 (La. App. 4th Cir. 1963); *Holder v. Lockwood*, 92 So.2d 768 (La. App. 2d Cir. 1957); *North River Ins. Co. v. H. H. Bain Roofing Co.*, 30 So.2d 139 (La. App. 2d Cir. 1947).

50. 9 J. WIGMORE, *EVIDENCE* § 2497, at 317 (3d ed. 1940).

rejecting the reasonable hypotheses rule do so on the ground that the statute applies only to criminal cases, and no good reason exists for importing the principle into civil cases.

The Supreme Court has not as yet squarely passed upon this question. Two recent cases refer to the rule: *Naquin v. Marquette Cas. Co.*,<sup>51</sup> and *Town of Slidell v. Temple*.<sup>52</sup> In the *Naquin* case, the plaintiff conceded in brief that circumstantial evidence must exclude other reasonable hypotheses shown by the evidence with a fair amount of certainty. In the *Town of Slidell* case, the plaintiff raised no question concerning the correctness of the rule. Hence, as to the Supreme Court, the question appears to be one for future resolution.

If the evidence is only partly circumstantial, that is, if there is a combination of direct and circumstantial evidence, the usual probability rule applies. Other reasonable hypotheses need not be excluded.<sup>53</sup>

#### THE LANGUAGE OF CERTAINTY AND THE PREPONDERANCE RULE

Although dealing with probabilities, many Louisiana appellate decisions still cling to the language of certainty. In some instances, the court's pronouncement appears to be a matter of formality. For example, opinions often recite that essential facts must be established with "legal certainty." This word combination can only mean that certainty required by law. Quite clearly, the court's language requires no certainty in its true sense. Hence, it is delusive.

In his treatise on workmen's compensation, Malone wrote:

"The term 'legal certainty' adds nothing but confusion to a difficult problem. It would seem that if the most plausible explanation of the accident is that it occurred while the employee was engaged in his duties, this should be enough. Certainly it would not be contended that a compensation suit requires stricter proof than an ordinary suit for dam-

51. 244 La. 569, 153 So.2d 395 (1963).

52. 246 La. 137, 164 So.2d 276 (1964).

53. See *Lambert v. State Farm Mut. Auto. Ins. Co.*, 184 So.2d 107 (La. App. 4th Cir. 1966); *State v. Brent*, 248 La. 1072, 184 So.2d 14 (1966); *Marcel v. DePaula Truck Line*, 70 So.2d 772 (La. App. 1st Cir. 1954); *State v. Allen*, 129 La. 733, 56 So. 655 (1911); *State v. Kelly*, 50 La. Ann. 597, 23 So.2d 543 (1898).

ages; yet a damage claim need be proved only in terms of probabilities.<sup>54</sup>

Other decisions recite that "conjecture, speculation, and even unsupported probability" fail to satisfy the burden of proof. One will quickly note, of course, that the pronouncement rejects only *unsupported* probability. In the final analysis, unsupported probability is no probability at all. So, here again, the language is delusive.

In some decisions, if the court's language is taken at face value, the court rejects proof to a probability, or greater likelihood, often classifying it with conjecture.<sup>55</sup> Such a statement of the burden of persuasion is, of course, erroneous. A rule of law that rejects such probability in civil cases is unrealistic. If it were consistently applied, most litigants would be barred from judicial relief. In such a state of affairs, society would be "set on edge."

Some authorities suggest that the words used in judicial opinions concerning the burden of persuasion are of little importance. What is important, they intimate, is the *idea*, of which the language is only a verbal conveyance. Such a position seems untenable. An *idea* is always a verbal form.<sup>56</sup>

Clinging to the magic words of certainty in judicial opinions impedes the healthy trend toward a full and frank disclosure of the judicial process to public view. Opinions get better when they truly depict how judges arrive at their decisions. To speak of certainty when one is dealing with probability masks the judicial process.

#### CONCLUSION

Much confusion surrounds the burden of persuasion in ordinary civil actions. Commonly called the Preponderance Rule, this burden is in daily use in both trial and appellate courts. Judicial efficiency requires that the burden of persuasion be made quite clear for ready and effective use.

Numerous recommendations have been made to remove the confusion. McBaine has contended that the only way out of the wilderness is through legislation.<sup>57</sup> He recommended statutes de-

---

54. W. MALONE, *LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE* § 176, at 218 (1951).

55. See, e.g., the cases cited in the first paragraph of note 8 *supra*.

56. See H. OVERSTREET, *INFLUENCING HUMAN BEHAVIOR* 90 (1925).

57. McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 259 (1944).

fining the three burdens of persuasion: preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt.<sup>58</sup> The Model Code of Evidence attempted to solve the problem through definition of "finding a fact."<sup>59</sup>

Statutory definition of the burden of persuasion would bring improvement in Louisiana. The Louisiana State Law Institute had been preparing a Code of Evidence,<sup>60</sup> a project now discontinued. In the event this effort is revived, the Code could include clear definitions of the burdens of persuasion, especially "preponderance of the evidence." A simple definition, such as the following, would suffice:

"Proof by a preponderance of the evidence requires the burdened litigant to persuade the trier of fact by sufficient evidence that the existence of a fact in issue is more probable than its non-existence."

In the absence of a statutory enactment, however, we can refine our formulations of the burden of persuasion in civil cases. In the interest of clarity, we can discard the delusive language of certainty in judicial opinions and briefs. We can couch the burden of persuasion in terms of probability. In refining our language, we will refine our thought.

---

58. *Id.* at 261-68.

59. ALI MODEL CODE OF EVIDENCE rule 1(5) (1942): " 'Finding a fact' means determining that its existence is more probable than its non-existence."

60. See Papale, *Editorial: Reflections on the Proposed Louisiana Code of Evidence*, 12 LOYOLA L. REV. 51 (1966).