

THE FACT-FINDING PROCESS AND BURDEN OF PROOF DURING LITIGATION

by

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ABSTRACT

This dissertation investigates the manner in which facts are proven with specific emphasis on the role which the concept of 'probabilities' plays in achieving the 'burden of proof. It is illustrated that the concept of 'probabilities' plays a central role throughout the process of determining the accountability of a litigant, including fact-finding during the evaluation of the adduced evidence and the application of the burden of proof. This study distinguishes between the findings of *individual facts*, as opposed to the finding of whether *the case of a party*, as reflected by the cumulative effect of the individually proven facts, has been proven. It is submitted that, despite traditionally perceived views, the concept of 'probabilities' is *applied* in exactly the same manner to both these aspects of a legal dispute, the only variable being the *degree* of probabilities as determined by a specific stage and nature of the litigation. The research focuses on both criminal and civil cases. The dissertation is based on current South African practices as reflected in judgments in different law reports and, to some extent, on English and American legal practices.

'To experienced lawyers it is commonplace that the outcome of a lawsuit - and hence the vindication of legal rights - depends more often on how the fact-finder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedure by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied.' (*Spencer v Randall* 357 US 513).

CHAPTER 1

Introduction and definitions

1.1 General introduction

1.2 Point of departure

1.3 Methodology

1.4 Structure

1.1 General introduction

A person's right to a fair trial is enshrined in chapter 2¹ of the Constitution of the Republic of South Africa.² One of the constitutional rights, not expressly mentioned in the Bill of Rights, is the right of a person to have a case proven against him/her according to the applicable burden of proof which rests on the opposing party, whether in criminal or civil proceedings, and forms part of the law of procedure and evidence.³ The law of evidence, which is the field of study of this research, forms part of the procedural machinery of the law as it deals with the proof of facts in court. In seeking for a definition, Schmidt and Rademeyer⁴ question whether the law of evidence can be

¹ Referred to as the 'Bill of Rights'.

² Act 108/1996:sec 35(5).

³ Dhlamini 1998:324-424.

⁴ 2006:1.

defined with accuracy by one single definition.⁵ They suggest that the reason for this is that too many unequal topics resort under this division of the law. Zeffertt *et al*⁶ are of the opinion that the construction of definitions is a game which any number of writers can play, but that it is not usually of much practical significance. They also hold, in so far as the law of evidence is concerned, that it does not usually matter whether a particular rule is described particularly as a rule of evidence, as long as one knows *what the rule is*. Judicial attempt to define the law of evidence has also largely been avoided. Definitions in the law of evidence therefore seem to provide some challenges to both authors and legal practitioners.

It may be more conducive towards a definition of the law of evidence if it is described in terms of the *role* which it fulfils. The main function of the law of evidence is to facilitate the determination of facts admissible to proving the facts in issue, but in the same token it also determines the method of adducing evidence, the rules for weighing the cogency of the evidence and the burden of

⁵ Van Appeldoorn 1963:1, 44 years ago, aptly discussed the problematic nature of definitions of legal concepts, referring to a search for a hard and fast definition for the law in general, where he states 'Nu hebben definities zeker haar waarde ... maar hiertegenover staat, tenminste wat het recht betref, een veel groter nadeel ... want 't is onmogentlik een definitie te geven, welke inderdaad beantwoordt aan de werkelijkheid. Er is dan ook, hoewel de mensen sinds een paar duizend jaren bezig zijn daarnaar te zoeken, nooit een bevredigende gevonden. Wat Kant meer dan 150 jaren geleden schreef: 'Noch suchen die Juristen eine Definition zu ihrem Begriffe von Recht', geldt nog altijd'.

⁶2003:3.

proof to be discharged before a party to litigation can succeed.⁷

Schwikkard and van der Merwe⁸ are of the opinion that the main function of the law of evidence is to determine what evidence is legally receivable (admissible), in order to prove the facts in issue in a legal dispute. They argue further that the law of evidence also determines in which manner evidence should or may be adduced, which evidence may lawfully be withheld from a court of law, which rules should be taken into account in assessing the weight or cogency of evidence and, lastly, what standard of proof should be satisfied in a given situation, before the party bearing the burden of proof can be successful. *Tregea v Godart*⁹ is regarded as the only case in which a serious attempt was made to define the law of evidence, where it was held that it is that portion of the law by means of which facts are proven. Schmidt and Rademeyer¹⁰, however, criticise this definition as being too narrow. They further describe the *task* of the law of evidence as primarily to prescribe what evidence may be conveyed to a court to prove a fact, as well as how and by whom the presentation of that evidence may be adduced.¹¹

This research focuses, as one of the stages of the process of fact-finding, in the broad sense, on the concept of the 'burden of proof.' The debate on the meaning of the two

⁷ Dhlamini 1998:423-424, referring specifically to the criminal burden of proof, namely 'beyond a reasonable doubt'. It is submitted that this argument equally applies to the civil burden of proof, namely 'on a balance of probabilities'.

⁸ 2005:2.

⁹ 1939 AD 16.

¹⁰ 2006:1.

¹¹ 2006:1.

types of burdens of proof, namely *beyond a reasonable doubt* in criminal proceedings and *on a balance of probabilities* in civil proceedings, has a history of healthy differences between authors, courts and legal practitioners internationally. The two main opposing streams as far as defining these concepts seem to be, on the one hand, those who are of the opinion that a hard and fast definition of these standards are impossible to achieve and is best left alone (or falls within the area of common sense, experience and logic and should not be legally defined) and, on the other hand, those who advocate that ongoing attempts for a hard and fast definition of these concepts should vigorously be pursued.¹²

Whichever school of thought may ultimately prevail will remain to be seen. The reality is, however, that the concept of the 'burden of proof', whether by means of definition or intuition, finds application in every case and is applied to those facts of a dispute *which have been proven during the course of the litigation*. Without the facts of a case having been proven, the burden of proof standard is of no use. Fact-finding therefore precedes the application of the burden of proof. It can thus be stated that proving the elements of a specific offence or delict (the substantive law) which is applicable to a specific case is primarily achieved through the presentation of evidence, whereafter the burden of proof is applied to the proven facts in order to determine whether a party to the litigation had been successful in proving his/her case, or

¹² See chapter 4 of this research.

not, which is why the procedure by which the facts of the case are determined assumes an importance fully as great as the substantive law applied in litigation.¹³

1.2 Point of departure

In both civil and criminal proceedings, a party who wishes to prove an issue to the court bears the burden of proof on that issue. Idealistically, a presiding officer over a legal dispute would have to his/her disposal the *full facts and the truth of such facts*, in which event it would be a fairly easy task to find whether a party to a legal dispute is liable for the wrong to the other party and then order a suitable punishment or compensation. Reality, however, dictates that evidence is sometimes untruthful and/or inadequate, which presents the presiding officer with a much more difficult task.¹⁴ As a party to a legal dispute is usually entitled to an outcome (finding/ruling) in a case (due to the principle of finality)¹⁵ such finding often has to be arrived at irrespective of the difficulty of deficiencies in the evidence which was presented to the court by the respective parties.¹⁶

A presiding officer is tasked with *finding facts* on the one hand and *applying the substantive law to these proven facts*, on the other hand. It is the concept of the 'burden of proof' which assists decision-makers in such conditions

¹³ *Spencer v Randall* 357 US:513-520.

¹⁴ *Tredoux et al* 2005:159.

¹⁵ Schwikkard and van der Merwe 2005:254.

¹⁶ Schwikkard and van der Merwe 2005:524.

of uncertainty in the fact-finding process.¹⁷ Ultimately, a decision must be made as to whether a party to a dispute was successful or not in a dispute, which outcome will depend on whether the relevant burden of prove on that party to the dispute was satisfied. This concept finds application after the evaluation of proven facts has taken place. In *S v Thomo*¹⁸ it was described as follows from a criminal law perspective:

'It is of importance first to determine what conduct was established ... Having thus determined the proper factual basis, the court can then proceed to consider what crime (if any) has [been] committed. The former enquiry is one of fact, the latter essentially one of law.'

The fact-finding process in litigation, in the broad sense, may be categorised to find application in mainly three phases, namely:

- (1) the fact-finding process (phase) *before* the presentation of evidence;
- (2) the fact-finding process (phase) *during* the presentation of evidence; and
- (3) the fact-finding process (phase) *after* the presentation of the evidence where, *inter alia*, the application of the relevant *burden of proof* to the proven facts resulting from the fact-finding process as a whole, is applied. The evaluation of the evidence adduced also forms part of this phase.

¹⁷ Schwikkard and van der Merwe 2005:524.

¹⁸ 1969 1 SA 385 (A):394C-D. It is submitted that the same, applies to a civil law dispute.

This research does not include a discussion of the pre-trial process (first phase) of the civil law (pleading-phase) or of the criminal law (plea-phase)), nor a discussion of the process of presentation of evidence. Though related and very important topics, the investigation of these procedures are perceived as a separate study falling outside the ambit of this dissertation. The reason for this is that the 'plea-phase' and 'presentation of evidence phase', as referred to above, do not strictly form part of 'evidence'¹⁹ within the specific context of this research, but rather resorts under a different classification, namely the *determination of the 'facts in issue'* (before the presentation of evidence) and an *'exclusion of evidence phase'*. The evaluation of, and the weight which *can be attached to the evidence* (in the narrow sense), is ultimately what is subjected to the test of the 'burden of proof'.²⁰ The third phase above can thus be further sub-divided into the last mentioned two phases.

A trier of fact must therefore first determine the factual basis (by means of the process of fact-finding)²¹ of a case before pronouncing on the rights, duties and liabilities of the parties engaged in a dispute,²² and only then is the

¹⁹ The word 'evidence' is interpreted narrowly in this sense.

²⁰ See Cross and Tapper (1990:61) where they conclude that questions concerning the admissibility of evidence must be distinguished from those relating to its weight. They also explain that the former is a matter of law for the presiding officer, whereas the weight of the evidence, on the other hand, is a question of fact. The authors do, however, acknowledge that the weight of the evidence may sometimes affect its admissibility as it is to some extent dependant on the degree of relevancy of the matter under consideration.

²¹ See chapter 3 of this research.

²² Schwikkard and van der Merwe 2005:494.

evidence 'tested' and 'weighed' against the relevant burden of proof.

It will be argued that throughout the whole process of fact-finding, with specific reference to the evaluation of evidence, the concept of 'probabilities' plays the central role. This view is proposed notwithstanding the acceptance that due consideration must be had to other concepts which play an important role in establishing facts and ultimately the possible liability of a party to a dispute, such as the concepts of 'beyond a reasonable doubt', 'reasonably possibly true' and 'balance of probabilities' which is trite in the application of the burden of proof.

Apart from investigating the definitions of the respective burdens of proof in criminal and civil cases, this research thus focuses in particular on the role which the concept of 'probabilities' play in the process of fact-finding. The question posed is whether its role is not, perhaps, underrated in legal practise in many instances. Take the following hypothetical situation. Motor vehicle A (plaintiff/complainant) collides with motor vehicle B (defendant/accused) at an intersection on a public road. The driver of motor vehicle A testifies that the robot was green and he/she had the right of way and that the road was dry. The driver of motor vehicle B testifies that the robot was green for him/her at that stage and that he/she, in fact, had the right of way and that the road was wet. The question posed in this research is whether the concept of 'probabilities', apart from the fact that the degree

thereof is different, is to be *applied differently* in the following instances, which the trier of fact is faced with:

- (1) Was the road dry or wet?
- (2) Is there sufficient evidence to find that the driver of motor vehicle B is liable for the damages sustained by motor vehicle A and that he/she is thus civilly liable (on a balance of probabilities)?
- (3) Is there sufficient evidence to find that the driver of motor vehicle B is criminally liable for his/her actions (beyond a reasonable doubt) and should be punished accordingly?

It is submitted that in (1) the concept of 'probabilities' will determine whether a trier of fact would accept (as the truth for the purposes of the case) whether the road was dry or wet. In (2) the same concept of 'probabilities' will determine whether one of the versions of the opposing parties (on the case as a whole) will be more acceptable (probable) than the other, which will then determine whether the driver of motor vehicle A or B would be the successful party. If the probabilities of the versions are equal, the defendant will succeed as the plaintiff carries the burden of proof. In (3) the same concept of probabilities would determine whether the version of the state (carrying the burden of proof) is so probable (the degree thereof so high) that its version is not only the most probable, but also so probable that it can be said that the version is probably beyond a reasonable doubt. But the state can only succeed on this basis if, at the same time, the probabilities are not such that it can be

said that the version of the accused is so probable that it can be said to be reasonably possibly true.

In the above-mentioned scenarios, the definitions (or lack of hard and fast definitions of the concepts of 'beyond a reasonable doubt' and 'on a balance of probabilities') create problems.²³ It is submitted that the whole process, as discussed above, has one aim, namely to arrive at the truth of a dispute in order to determine the rights and liabilities of the parties to a dispute. However, as highlighted in chapter two, it illustrates that the actual truth is not attainable by mankind. Although attempts had been made in the past to ascertain the arrival at the actual truth, the most successful and currently applied test, is that of the burden of proof. It reflects the quantity of proof required in order for the party carrying the burden of proof to be successful, in an attempt to come as close as possible to the actual truth.

The question thus posed in this research is: how is the fact-finding process and burden of proof achieved during litigation? It will be argued that the answer to this question is namely 'by applying the concept of 'probabilities', to some or other degree. In other words, probabilities always remain the crucial factor at determining the proven facts and/or outcome of a case.

²³ See chapter 4.

1.3 Methodology

Mainly literary sources, namely legislation, reported cases, books and journal articles are utilised in this research. A comparative analysis is also conducted in chapter four of this dissertation as much may be gained from determining how other countries address the process of the application of the burdens of proof. The law of England and the United States of America prove to be especially conducive to an insight in the application of the concept of the 'burden of proof' in South Africa.

The method of citation followed in this research is based on the method used by the *Journal for Juridical Science*, save for the bibliography.²⁴

1.4 Structure

This research consists of five chapters. Following the introduction in chapter one, the second chapter contains a discussion of the fact-finding process in general terms. It includes a brief analysis of the importance of the concept of 'truth' as the idealistic purpose of the fact-finding process.

Chapter three is devoted to a discussion of the evaluation of evidence. In order to ultimately understand the rationale and meaning of the burden of proof an

²⁴ The *Journal for Juridical Science* is a legal publication of the Faculty of Law of the University of the Free State. The manner of citation in this dissertation is as reflected in the 2002:27(2) edition.

understanding of this phase (the evaluation of evidence-phase) of the fact-finding process is paramount. It reflects the manner in which a court arrives at the finding of which facts are accepted as proven and sets the stage for the burden of proof to be applied to the proven facts. This chapter includes a summary of the manner in which evidence has practically been evaluated in a *capita selecta* of recent Supreme Court of Appeal cases.

Chapter four is devoted to a discussion of the application of the respective burdens of proof. The chapter critically evaluates the concepts of 'beyond a reasonable doubt' and 'on a balance of probabilities', the rationale of these concepts, as well as the practice and problems encountered in the utilisation thereof. It also seeks an answer to the question whether attempts to define these problematic concepts are conducive to sound jurisprudence, or not.

The research is concluded in chapter five with a suggested model of fact-finding based primarily on the importance of the concept of 'probabilities'.

CHAPTER 2

The historical development of the fact-finding process

2.1 Introduction

2.2 A brief history of the fact-finding process

2.2.1 The concept of 'evidence'

2.3 Systems of fact-finding

2.3.1 The accusatorial system

2.3.2 The inquisitorial system

2.4 Conclusion

2.1 Introduction

The concept of fact-finding has ideologically, as its aim, a search for the 'truth'. 'Truth', in this context is the determination of what *actually* (in fact) gave rise to a specific dispute as well as what *actually* happened during the course of that dispute. Phrased differently, what was *actually* said and done during the course of the dispute? The reason why this is of importance is because the function of the presiding officer (also referred to as 'trier of fact') over a legal dispute is ideologically to apply the law to the *factual* situation of a dispute in order to determine whether the rights of a person were infringed in the process and whether the injured party is

entitled to have the imbalance caused to him/her rectified by law. In a criminal case the state (as the representative of the community) is entitled to have a criminal punished. In a civil case the plaintiff would typically be the injured party and entitled to be compensated for the imbalance by the defendant. In practice, it is however virtually impossible to find the *actual* facts of a dispute, which situation has resulted in the creation of certain procedures and/or rules in an attempt to determine the 'truth'. These procedures and/or rules can very broadly be referred to as the rules of litigation, embracing the criminal procedure, civil procedure and the law of evidence from the consultation stage to the final remedy of appeal or review.

Thus, finding the *actual* truth of a legal dispute by means of the fact-finding procedure is the ideal outcome for any legal dispute.²⁵ It is therefore naturally conducive to the fact-finding process of the courts that witnesses speak the truth, as the decision of the presiding officer is virtually solely dependent on the evidence adduced before him/her before being able to come to a finding. In an attempt to ensure that witnesses speak the truth, the courts require them to take an oath that the evidence they will give will be the truth. If a person has a valid reason to object to the taking of such oath, for instance a religious reason, then he/she will be expected to affirm (affirmation to tell the truth) that such evidence, he/she will give, will be true. The penalty for lying under such

²⁵ Dhlamini 1998:424.

circumstances can be severe. But it is common knowledge that witnesses deceive courts frequently.

Hahlo and Kahn²⁶ reflect on the aspect of truth as being an 'elusive goddess'. Eggleston²⁷ accepts that the majority of people lie in court:

'Few people will tell the whole truth. In my experience, judges tend to overrate the propensity of witnesses to tell the truth ... One's experience is that people (including oneself) are not always entirely truthful.'

The other school of thought is to view the deceiving nature as mankind as not necessarily intentional. Wellman²⁸ is of the opinion witnesses sometimes deceive courts due to honest mistakes, rather than intentionally:

'... which side is telling the truth? Not necessarily which side is offering perjured testimony, there is far less intentional perjury in the courts than the inexperienced would believe. But which side is honestly mistaken, - for, on the other hand, evidence itself is far less trustworthy, than the public usually realises. The opinions of which side are warped by prejudice or blinded by ignorance? Which side has had the power of opportunity of correct observation?'

Spence²⁹ explains the reality of the fact that witnesses deceive, by reflecting on the *meaning* of the concept of 'truth'. According to him truth is what a person accepts out of his/her history, and therefore what is *accepted as true*. In addition, he distinguishes between three types of

²⁶ 1973:105

²⁷ Eggleston 1994:159.

²⁸ Wellman 1997:27.

²⁹ 1995:194.

truths, namely, firstly, truth in the form of a revelation: that which a person already knows, but has never heard in words before. Secondly, truth in the form of discovery: which is what a person already knows, but has never before been confronted with and thirdly truth in the form of a judgment: which is a product of a person's experience. As illustration to the third type of truth, the following example may be used: To a child with an abusive father, the truth is that men are monsters who can never be trusted. To a child with a loving father, the truth about men is the opposite. In the same manner, to some God is the truth, to some Mohammed and to some Buddha. This implies that when a person announces something as a 'truth', that person has merely made a 'choice' of their own truths. Spence³⁰ concludes that therefore people choose truths which are applicable in their own lives in their own particular circumstances (and/or makes them feel comfortable).

The only deduction which can be made from the foregoing is that to find (and even tell), the *whole* truth is impossible to attain by mankind. Zeffertt *et al*³¹ acknowledges this by stating that

' ... an evidentiary system contains legal rules relating to 'evidence', as that concept happens to be defined in a particular system. However, even though this statement is obviously true as far as it goes, it is not the *whole* truth. Legal rules are not, for a start, absolute and unchecked in a constitutional system such as ours. They do not, furthermore, operate in a

³⁰ 1995:194.

³¹ 2003:33.

vacuum, since they crystallise out of a legal mindset that, depending on its expansiveness or receptiveness to the influence of cognate disciplines and ideas, defines the relationship between the rules of evidence and the science of proof itself'.

What intensifies this dilemma is that the act of deliberate deception is difficult, if not impossible, to detect, especially if there is no evidence to evaluate it apart from an utterance, or enactment of the utterance of the person who is busy deceiving. It is this difficulty of *detecting* the act of deception that makes deception such an effective and persuasive behaviour on the one hand, and so deceiving during a judicial fact-finding process, on the other hand.³² This is probably the fact which lead Schwikkard³³ to conclude that factual (actual) innocence plays a minimal role in modern law, the inquiry rather focusing on legal guilt (legal truth), to counter for the fact that the search for actual truth by mankind is illusive to mankind as yet.

It is submitted that the crux of the distinction between the mentioned *actual* guilt and *legal* guilt lies in the concept of the 'burden of proof'. The word 'guilt' in the abovementioned context can synonymously be used as 'accountability' or 'liability' in both the criminal and civil law. *Actual* accountability would entail a finding of a one hundred percent truth about the facts in a legal dispute. On the other hand, *legal* accountability would entail that in a criminal case a person can be found

³² Tredoux *et al* 2006:1-2.

³³ Schwikkard 1999:2.

accountable for his/her actions if a case is proven against him 'beyond a reasonable doubt' (*vis-à-vis* 'one hundred percent or beyond *all* doubt'). The same principle applies in a civil case which is proven 'on a balance of probabilities'.

The fact-finding process, in its current form, is a relatively modern approach. This process has undergone changes over the centuries and its history is rich in controversy which is illustrated in the next paragraph.

2.2 A brief history of the fact-finding process

In Roman law there existed no formal rules as far as the burden of proof was concerned between the litigants.³⁴ The trier of fact had a vast amount of discretion as far as the presentation of evidence and the admissibility of evidence were concerned. There existed, however, a general notion that the party who makes allegations had to prove his/her case, which is still true in modern law, in principle.

The medieval history of the process of fact-finding (the search for 'the truth') consists of mainly three stages, namely the primitive stage, the formal stage and the rational stage.³⁵ During the primitive and formal stages the focus fell mainly on rigid procedures where human reason and argument played a minimal role, if any role at all. Fact-finding was based on the results of certain procedures which were followed in order to determine whether a person was guilty, or not, of the alleged

³⁴ Van Zyl 1977:379.

³⁵ Schwikkard and van der Merwe 2005:2.

wrongdoing. It was only during the rational stage where the tribunal no longer merely verified procedural formalities that reasoning powers in the fact-finding process were employed.³⁶

The primitive stage was also called the religious stage. It amounted to an appeal to God (or the gods) to decide a factual dispute. The accused was expected to perform certain tasks (usually called 'ordeals'), of which a variation existed, which would 'determine' whether he/she is guilty of the offence charged, or not. An example hereof is that an accused was required to swallow a dry morsel of bread, accompanied by a prayer that the accused should choke if he/she was guilty.³⁷ Tredoux *et al*³⁸ describe similar techniques, which were used in some of the Asian countries where a suspect was, for instance, required to hold rice in his/her mouth for a few minutes. If the rice then emerged dry, the suspect was deemed to have lied about the fact that he denies having done wrong, whereafter execution would follow. In India, a red-hot iron would be applied to the suspect's tongue. If it burned the tongue, he/she would be found guilty. In Rome the test for chastity, for instance, was that the names of potential lovers would be recited out loud, in front of the suspect, whilst the pulse rate would be monitored. A sudden increase in pulse rate would indicate guilt. The premise of all of this was that the body will reveal the truth through involuntary uncontrollable processes. This very premise is still the underlying principle of, for instance,

³⁶ Schwikkard and van der Merwe 2005:2.

³⁷ Schwikkard and van der Merwe 2005:3.

³⁸ 2006:160.

the polygraph test, which has limited application in modern litigation. Similarly, the demeanour of a witness still plays a role in modern fact-finding, in that a presiding officer may make certain deductions from the manner in which a witness conducts himself/herself in the witness box.

The formal stage developed during the twelfth century, when an emphasis on human reason evolved and old irrational methods were abandoned. During this stage so-called 'compurgators' became very popular, especially in England. The compurgators were not eye-witnesses but merely people who were prepared to state under oath that the oath of one of the parties should be believed, and the party who was able to summons the largest number of compurgators 'won' the case. This practice was regarded as decisive, but did still not entail that the tribunal required weighing evidence ('reason' about it).³⁹

During the rational stage, these compurgators were called upon to act as adjudicators, largely because of their knowledge of the events. Interestingly this is also the manner in which *trial by jury* developed, which was the period during which jurors determined the facts and the judge deciding manners of law, originated. Trial by jury was also known in the South African law, but was abolished in civil law in 1927 and in criminal law in 1969. After its abolition, South Africa retained the evidentiary system designed for jury trials, which still has an impact on the

³⁹ Schwikkard and van der Merwe 2005:4.

South African law of evidence today.⁴⁰ It is an important aspect of fact-finding, in that, most of our exclusionary rules in the law of evidence can be attributed directly to the trial by jury.⁴¹ What is of importance during this phase for the purposes of this research is the fact that the human factor was brought into the system of fact-finding most prominently. The reasoning of a person, as opposed to reliance on certain processes, to determine truth, was now utilised in order to find facts, together with a realisation that the *actual* truth is unattainable. The significance of reasoning and argument were thus born in this phase and have been utilised until now.

In conclusion it can be said that the historical attempts to find truth have also fallen short of a cardinal rule in that although the truth is important, it should not be established by resorting to improper means.⁴² Dhlamini⁴³ argues that people should be treated as human beings, because in the past, internationally, people have been subjected to inhumane treatment by those more powerful than them in an attempt to arrive at the truth.

⁴⁰ See Hahlo and Kahn 1973:128 where they explain that our law of evidence is largely the same as English law: in its efforts to save time and limit the issues to be investigated in particular to limit the tribunal's attention to vital points and prevent being led astray by prejudice or pre-perceived opinions, the law of evidence has become to be very technical and intricate. There are many who believe that with the disappearance of the jury in civil trials and its extremely limited use in criminal trials, there is no need to confine the court's attention so narrowly by blinkers of this sort. The exclusionary rules of evidence, it is sometimes said, resulted in valuable evidence being withheld, and in marked big contrast to the liberal attitude taken in most Continental countries.

⁴¹ Schwikkard and van der Merwe 2005:13-14.

⁴² Dhlamini 1998:424.

⁴³ 1998:425.

The question which now arises is what the current fact-finding process consists of, the main element thereof being the concept of 'evidence'. It is therefore important to understand what the concept of 'evidence' entails in order to understand that it is evidence which has always formed the most important ingredient of the fact-finding process.

2.2.1 The concept of 'evidence'

Firstly it is of importance to emphasise that there exists a distinction between the concept of 'evidence' and the concept of 'probative material'. 'Evidence' essentially consists of oral statements made in court under oath, affirmation or warning, although it also includes documentary evidence and exhibits produced and received in court as evidence. Schwikkard and van der Merwe⁴⁴ are of the opinion that the meaning of 'evidence' depends on the specific context in which the word is used as it does not always bear the same meaning. Types of evidence are, for instance, 'oral evidence', 'documentary evidence', 'real evidence' and 'machine-generated evidence'.⁴⁵

The law determines that evidence is to be given under oath.⁴⁶ 'Probative material', as opposed to 'evidence', refers to more than oral, documentary real and machine-generated evidence. It is clear from *S v Mjoli*⁴⁷ that, for instance, admissions made by an accused in terms of

⁴⁴ Schwikkard and van der Merwe 2005:13-14.

⁴⁵ Schwikkard and van der Merwe 2005:19.

⁴⁶ If it is not given as such, for instance a statement from an accused from the dock in the court it is not regarded as *evidence*, but as some other form of *evidential material*.

⁴⁷ 1981 3 SA 1233 (A):1247-8.

section 115 of the Criminal Procedure Act⁴⁸ may also be regarded as 'probative material', even though it does not qualify, in the strict sense, as 'evidence', but may be utilised by the presiding officer during the evaluation of the evidence in the fact-finding process. Schwikkard and van der Merwe⁴⁹ submit that the term 'probative material' is a convenient term to include not only oral, documentary and real evidence, but also includes concepts such as formal admissions, judicial notice, presumptions and statements in terms of section 115 of the Criminal Procedure Act.⁵⁰

In order to significantly elaborate on the term 'evidence' for the purposes of this research, a brief discussion of the concept *prima facie* proof is necessary in order to prevent confusion when discussing the broader concept of the 'burden of proof' hereunder. Broadly the concept *prima facie* proof means *provisionally proven*. It is, strictly speaking, not a standard in the true sense of the word. It is a term which reflects what the aim of the state is (as the party saddled with the burden of proof) in a criminal case in order to ensure that the accused has a case to answer, in that the state is to endeavour to prove all the facts in dispute before it closes its case. In *S v Ndlovu*⁵¹ it was held that when the accused strives to create *reasonable doubt*, during the presentation of its case, it will be in an attempt to prevent a *prima facie* case from becoming conclusive. The stronger the state

⁴⁸ Act 51/1977.

⁴⁹ 2005:19.

⁵⁰ Act 51/1977.

⁵¹ 1986 1 SA 510 (N).

case, the greater the expectation that the accused must furnish an explanation. The weaker the state case, the less value can be attached to the accused's failure to testify.⁵² Furthermore, a *prima facie* case can be proven with *viva voce* evidence or other evidential material such as presumptions.

The aspect of *prima facie* evidence is therefore of importance when considering whether an accused has, at the end of the state case, a case to answer as well as what the effect of his/her decision of exercising his/her right to silence (and thus not to testify) would be at that stage in criminal proceedings which impacts on the fact-finding procedure. Section 174 of the Criminal Procedure Act⁵³ makes provision for an application for discharge of the accused after the state case has been closed. Interestingly, its provisions reflect its own requirements and it is clear from the terminology that the concept *prima facie* in that regard should not be applied in the sense that the *test which the court has to apply* at that stage of the proceedings is whether the state had made out a *prima facie* case, or not.⁵⁴ Although this process at this stage in criminal proceedings does, in fact, bear the *consequence* that *prima facie* evidence may in certain circumstances become conclusive evidence, the test which is provided for which the court must apply in terms of this section of the Act is whether a reasonable court would be able to convict

⁵² See *S v Letsoko* 1964 4 SA 768 (A):776 and *S v Motloba* 1992 2 SACR 634 (B).

⁵³ Act 51/1977.

⁵⁴ *S v Dladla* 1961 3 SA 921 (D).

the accused on the evidence which had been adduced by the state.⁵⁵

In South Africa the application of the law of evidence and the manner in which evidence is adduced are dealt with in an *adversary* manner. The next paragraph briefly illustrates the difference between the various systems of fact-finding.

2.3 Systems of fact-finding

Schwikkard and van der Merwe⁵⁶ state that there are basically two types of legal systems in this regard, namely the Anglo American systems (also referred to as the strict or common law systems) and the Continental systems (also referred to as the free or civil law systems). The South African legal system belongs to the Anglo-American family, which is mainly adversarial and accusatorial of nature. The Continental legal systems, on the other hand, are based on inquisitorial principles and are the so-called 'free system of evidence'. It is important for the purposes of this research to understand that the procedural and evidential differences between these systems reflect nothing more than the fact that there are more than one solution to the problem of fact-finding.⁵⁷ The main difference between these two systems is the functions of the presiding officer, the prosecution and the defence.⁵⁸ In criminal law both systems recognize the principle that

⁵⁵ *S v Khanyapa* 1979 (1) SA 824 (A):838F.

⁵⁶ 2005:6.

⁵⁷ Schwikkard and van der Merwe 2005:14.

⁵⁸ Joubert *et al* 2005:19.

'it is better to acquit a guilty person than to condemn the innocent', which principle was also the seed of the 'presumption of innocence' in criminal proceedings.⁵⁹

2.3.1 The accusatorial system

In accusatorial systems⁶⁰ the presiding officer plays the role of an independent 'referee' who does not enter the arena in the 'duel' between the parties involved in litigation, with a view of protecting his/her independent function between the adversarial parties. In criminal cases, the police represents the primary investigation authority, who gathers evidence in the form of a docket (which contains the total of the gathered evidence) who then hands over the docket to the prosecution, who in turn, decides whether to prosecute a suspect or not. The prosecution is therefore *dominus lites*.⁶¹ Similarly, in civil law, the accusatorial nature of the proceedings is found in the passive role which the presiding officer plays, as well as in the strict rules for the admissibility of evidence.⁶² Schmidt and Rademeyer⁶³ add that further characteristics of an accusatorial system include the accused's right to refuse to answer questions and the inadmissibility of certain types of evidence, despite the fact that it is relevant.

The South African criminal and civil procedural systems have historically always been mainly accusatorial. Its

⁵⁹ Schwikkard 1999:1.

⁶⁰ Anglo-American Systems, including South Africa, is an example.

⁶¹ Joubert *et al* 2005:19-20.

⁶² Schmidt and Rademeyer 2006:12.

⁶³ 2006:12.

accusatorial nature is a legacy of its Anglo-American roots.⁶⁴ It is however important to take note as pointed out by Terblanche⁶⁵ that although the South African choice has fallen predominantly on an accusatorial system, it is furthermore generally accepted that South Africa, in actual fact, has a mixed system. In support of this argument Terblanche⁶⁶ refers to *R v Hepworth*⁶⁷ where it was observed by the court, referring specifically to criminal cases (but is logically also applicable to civil cases) that a trial is not a game where the one side, in litigation, is entitled to claim the benefit of any omission or mistake made by the other side and that a presiding officer's job is not merely to be an umpire to see that the rules of the game are observed by both sides. The function of a presiding officer is much rather that the presiding officer is an administrator of justice in that he is not only to direct and control the proceedings according to rules and procedures, but also to see that justice is done. However, in the process, he/she is sometimes obliged to follow inquisitorial procedures. As, illustration, Joubert *et al*⁶⁸ list some instances where inquisitorial elements are, in fact, utilised in the South African law namely when:

- (1) The presiding officer calls witnesses⁶⁹
- (2) The examination of a plea of not guilty takes place in terms of section 115 of the Criminal Procedure Act⁷⁰

⁶⁴ Terblanche 2007:88.

⁶⁵ 2007:89.

⁶⁶ 2007:89.

⁶⁷ 1928 AD 265:277-278.

⁶⁸ 2005:20.

⁶⁹ Criminal Procedure Act 51/1977:sec 167.

⁷⁰ Act 51/1977.

(3) The examination by the court during a plea of guilty in terms of section 112 of the Criminal Procedure Act⁷¹ is conducted.

2.3.2 The inquisitorial system

Joubert *et al*⁷² state that in inquisitorial systems⁷³ the judge, as opposed to the *public prosecution* (in accusatorial systems), is *dominus litis* in the sense that he/she actively drives and controls the search for truth in playing the most important role in the questioning of the witnesses, including the accused, in criminal matters. The investigating judge will, for instance, after the arrest of an accused, primarily question the accused, (rather than the police). The same applies during the trial.

Inquisitorial systems dominate most of European continental systems. Terblanche⁷⁴ states that it is often claimed that inquisitorial systems are more effective in arriving at the so-called *material* truth and that and the accusatorial system can only achieve formal truth. The notion of this claim is that the findings in terms of the accusatorial systems are based only on that information which the parties *choose* to present to the court. Terblanche⁷⁵ however argues that, on the other hand, one of the major objections which may be brought against the inquisitorial system is that the presiding officer cannot remain

⁷¹ Act 51/1977.

⁷² 2005:19.

⁷³ France is a prominent example of the inquisitorial system.

⁷⁴ 2006:89.

⁷⁵ 2006:89.

impartial and the accused or defendant may often perceive the presiding officer as an opponent.

2.4 Conclusion

Fact-finding is equally as important as the evaluation of evidence and the application of the burden of proof. The distinction between the first phase of a trial as far as the presentation of the evidence is concerned, namely fact-finding, and the second, namely the evaluation of evidence and the application of the relevant burden of proof must be understood in context.

It has been established in this chapter that the process of fact-finding takes place before, during and after the presentation of evidence. The initial phase of fact-finding may be regarded as the 'sifting process' and the second phase as the 'weighing process', of the adduced evidence which is further sub-divided into the 'evaluation of evidence phase' and the 'burden of proof phase', which is cumulatively referred to as the third phase of fact-finding.

Both the accusatorial and inquisitorial fact-finding systems should be regarded as true and honest attempts to find the elusive 'actual truth', although the accepted reality is, however, that the search in modern law is, in fact, for the 'legal truth'.

The next chapter of this study will focus on the manner in which evidence is evaluated in order to arrive at fact-

finding to which the burden of proof can ultimately be applied.

CHAPTER 3

The evaluation of evidence

- 3.1 Introduction
- 3.2 Factors which may be taken into account when evaluating evidence
 - 3.2.1 Introductory remarks
 - 3.2.2 Corroboration
 - 3.2.2.1 Cautionary rules
 - a. Accomplices
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- 3.3 A discussion of a *capita selecta* of recent Supreme Court of Appeal cases in South Africa, with reference to the evaluation of evidence thereof
 - 3.3.1 Introduction
 - 3.3.2 The version of the accused must be considered on its own but against the

background of all the evidence in
totality, regardless of contradictions

3.3.3 The credibility of witnesses

3.3.4 Probabilities

3.4 Conclusion

3.1 Introduction

The evaluation of evidence adduced is a crucial phase in the fact-finding process. It has been mentioned that a court should first determine the factual basis of a case before pronouncing on the rights, duties and liabilities of the parties engaged in the dispute which is determined by evaluating all the probative material admitted during the course of the trial. The weight of the evidence is determined during this process of fact-finding in order to determine whether the party carrying the burden of proof has proved its allegations in accordance with the applicable standard of proof.⁷⁶

The weighing process is aptly summarised in *S v Mattioda*:⁷⁷

'The proper approach in a criminal case is to consider the totality of the evidence, that is to say, to examine the nature of the state case, the nature of the defence case, the probabilities emerging from the case as a whole, the credibility of all the witnesses in the case, including the defence witnesses, and then to ask oneself, at the end of all this, whether the guilt of the accused has been established beyond a reasonable

⁷⁶ Schwikkard and van der Merwe 2005:494.

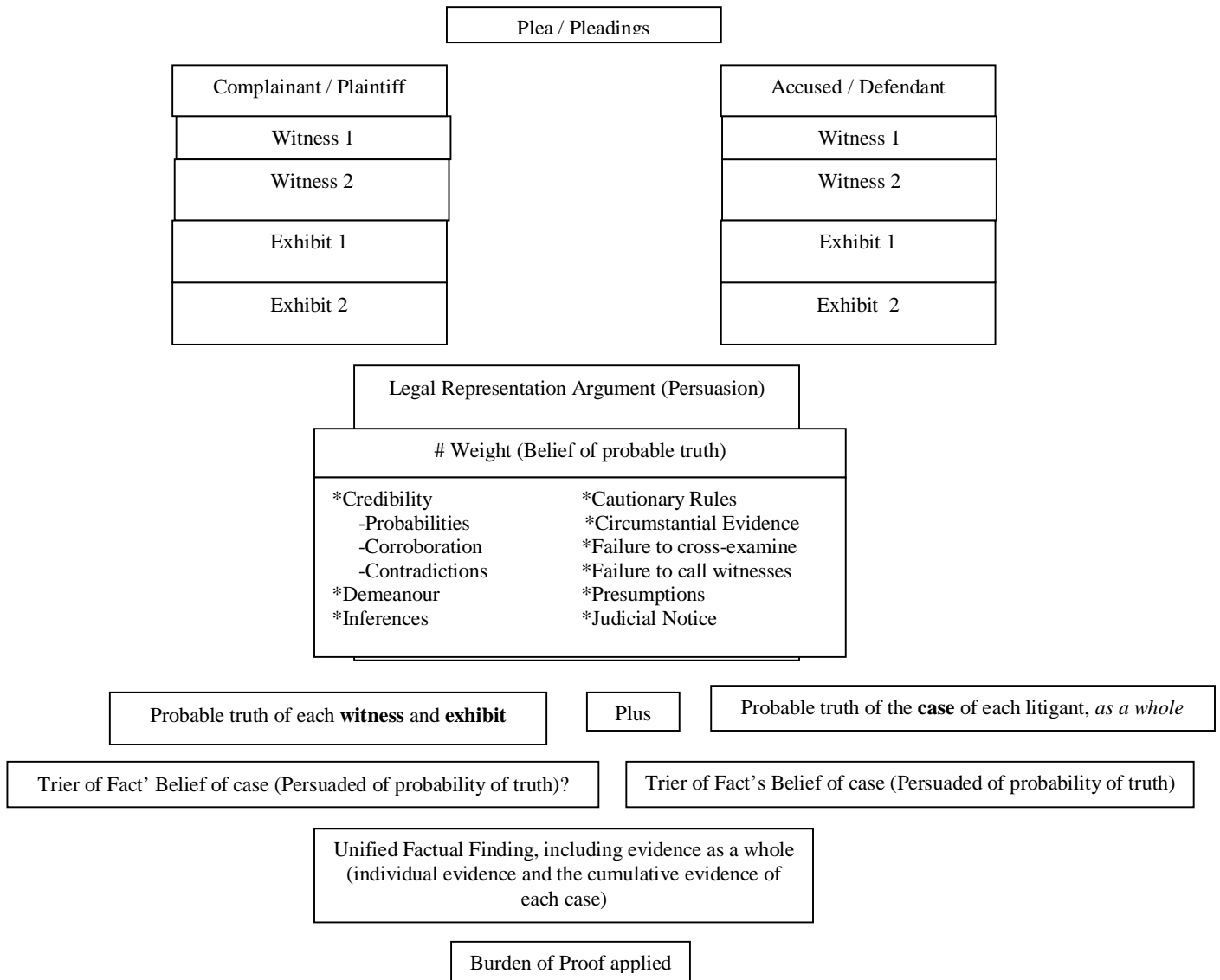
⁷⁷ 1973 (1) PH H 24 (N):49.

doubt. It is not a proper approach to hold that, because a court finds that the state witnesses have given evidence in a satisfactory manner the defence evidence must be rejected as false.⁷⁸

The author is of the opinion that the above-mentioned approach is also applicable to civil cases.

In order to aid the understanding of the complexity of the application of the probabilities to both *individual facts* and the *case as a whole*, the following illustration reflects schematically the whole process of evaluation of evidence.

⁷⁸ See also *S v Singh* 1975 1 SA 227 (N):228G.



<p>Criminal case</p> <ul style="list-style-type: none"> -Is the version which the accused tendered so probably the truth (in view of all the evidence) that it can be said that his/her evidence is reasonably possibly true? <ul style="list-style-type: none"> -if yes, acquit -if no, then ask: -Is the State case so believable (in view of all the evidence) that it can be said that it is beyond a reasonable doubt the truth (degree of probable truth so high that it can be said (much higher than in civil case)) <ul style="list-style-type: none"> -if yes – convict (accused accountable) -if no – acquit <p>Civil case</p> <ul style="list-style-type: none"> -Is the Plaintiff's case more believable (feasible/probable) than that of the defendant (degree of probable truth so high that it is more probable than that of the defendant) <ul style="list-style-type: none"> -if yes, find in favour of plaintiff (defendant accountable) -if equal, find in favour of defendant (defendant not accountable) -if no, find in favour of defendant (defendant not accountable)

The illustration reflects that the evaluation process is a process where the trier of fact first considers the weight of each individual piece of evidential material. At this stage the burden of proof is not yet applied and the evidence is considered in view of what the trier of fact *believes*. In other words, does the trier of fact regard the individual evidence as probably the truth (as the whole truth is unattainable), or not. The concepts of 'beyond a reasonable doubt', 'reasonably possibly true' and 'balance of probability' are not yet utilised. After having determined whether the individual facts are the probable truth, or not, the trier of fact then decides equally whether the case of a litigant (all the individual evidence cumulatively taken together) is the probable truth (believable), or not. In this manner the trier of fact will be able to come to a finding of fact of what the probable truth of a case is. The law and burden of proof is now applied to this factual finding. In criminal cases the question will be whether the probabilities in the case are so highly in favour of the state that it can be said that the state had proven its case beyond a reasonable doubt. (It has to be borne in mind that this will only be the case when the probabilities are not such that it can be said that the accused's case is not reasonably possibly true). In civil cases the question will be whether the probabilities in the case are such that it can be said that the plaintiff's case is more plausible/probable than that of the defendant and that the plaintiff had therefore proven its case on a balance of probabilities.

It is submitted that the afore-mentioned is indicative of the fact that the concept of 'probabilities' is the central feature of the fact-finding process, with specific reference to the evaluation of evidence. Probabilities thus play a role in determining whether a fact is proven, as well as whether a case (cumulative effect of the facts cumulatively of a party) is proven 'beyond a reasonable doubt' or 'on a balance of probabilities', depending on the nature of the case to be determined.

It should be mentioned here that sometimes a proven fact may not necessarily have an influence on whether a case will ultimately be proven or not. If negligence, for instance, in a motor vehicle accident is to be determined, the degree of probabilities will depend on whether it is a criminal or civil case during which the negligence is to be determined. However, if one of the *facts* in dispute is whether the road was dry or wet during the incident, this fact will also be determined by means of the evidence which is adduced, but the fact-finding process whether the road was wet or dry will not necessarily be conclusive as to whether a party be successful in proving its case, or not.

It is also submitted that when dealing with individual facts (which make out a part of a case) it is not necessary that the individual fact be proven 'beyond a reasonable doubt' or on a 'balance of probabilities', depending on the nature of the case. The individual fact is either 'proven', or not. It can therefore be argued that when dealing with the proof of individual facts, the

trier of fact is to 'feel sure that the fact did, or did not, exist.' This degree has not been defined, but is supported by the *dicta* in *R v de Villiers*⁷⁹ where it was said that it is not required for each and every fact to be proven beyond a reasonable doubt in a criminal case or on a balance of probabilities in a civil case. This reflects that this test is seemingly a test which is applied subjectively by the trier of fact in that he/she must be convinced that a fact either exists, or not. This argument is also supported by *Schoonwinkel v Swart's Trustee*⁸⁰ where it was held that it is not sufficient for the trier of fact to say 'I believe this witness and I did not believe that witness.' It was stated that the court of appeal expects a trier of fact when he/she finds that a witness cannot be believed to state reasons why the witness cannot be believed, such as inherent improbabilities, contradictions or demeanour, but reflecting simultaneously that an individual fact or witness is either *believed or not*. Schwikkard and van der Merwe⁸¹ make it clear that the court should first determine the factual basis of a case before pronouncing liability, for instance, and that it is this factual basis which is determined by evaluating the probative material adduced during the course of the trial. The question which follows logically is, in which manner is evidence evaluated? The discussion in paragraph 3.2 below provides this answer.

⁷⁹ 1944 AD 493:508.

⁸⁰ 1911 TPD 397.

⁸¹ 2005:494.

3.2 Factors which may be taken into account when evaluating evidence

3.2.1 Introductory remarks

It is submitted in this research that the most important constant in the evaluation of evidence-phase in the fact-finding process is the application of the concept of 'probabilities'. This submission is supported by the following *dicta* in *S v Van Rij*:⁸²

'The importance of the effect of probability or credibility, as visa versa, does not require elaboration. The grosser the 'improbability' is determined to be, the greater its impact upon credibility is likely to be. On the other hand, if, credibility is once established beyond question, an improbable version testified by the credible witness may be accepted and preferred to the probable version testified to by a lying witness. In the ultimate result, however, and particularly so in a criminal trial, credibility must almost invariably operate with decisive effect. For that reason findings regarding credibility should only be made upon a full and fair consideration of the various factors relevant thereto.'

Schwikkard and van der Merwe⁸³ identify two basic principles which should be kept in mind whenever evidence is evaluated, namely that evidence must be weighed in its totality (and therefore not in a piece-meal fashion)⁸⁴ and secondly that 'probabilities' must be distinguished from

⁸² 1968 1 PH H 170 (A).

⁸³ 2005:495.

⁸⁴ *S v Sacco* 1958 2 SA 349 (N):353.

'conjecture or speculation'. A very prominent role is therefore attached to the concept of 'probabilities' here.

In the evaluation of evidence there are a few legal rules, largely created by precedent, which may assist a trier of fact in evaluating the adduced evidence. But according to Schwikkard and van der Merwe⁸⁵ the difficult mental task of sifting through the falsehood, of determining credibility, of relying on probabilities and of inferring unknown facts from the known is by and large a matter of common sense, logic and experience, rather than strictly following the legal rules. They further refer to the statement by van Heerden J in *S v van Wyk*⁸⁶ to the effect that in the process of adjudication two factors are constant, namely what must be proved and to what degree of persuasion, but that the third factor, namely the quantum and quality of the probative material required so to persuade the court, is subject to great variety.

Regardless of the lack of a wealth of legal rules when evaluating evidence, it is of importance to take note that there exist some guidelines as to the evaluation of evidence. Although not a closed list, the following are factors which may assist a trier of fact in evaluating evidence.

3.2.2 Corroboration

When evidence is being substantiated, which substantiation is independent of the evidence being substantiated, it is

⁸⁵ 2005:494.

⁸⁶ 1977 1 SA 412 (NC) 414E-F.

'corroborated'.⁸⁷ Corroboration is, however, to be regarded as nothing but an aid or measure in the process of evaluating evidence in aspects such as credibility, truthfulness and consistency, rather than an additional requisite in bridging the barrier of proof.⁸⁸

Corroboration is described by *DPP v Kilbourne*,⁸⁹ as follows:

'The word 'corroboration' is not a technical term of art, but a dictionary word bearing its ordinary meaning ... Corroboration is therefore nothing other than evidence which 'confirms' or 'supports' or 'strengthens' other evidence ... It is, in short, evidence which renders other evidence more probable. If so, there is no essential difference between, on the one hand, corroboration and, on the other, 'supporting evidence' ...'

The concepts 'corroboration' and 'cautionary rules' are often used as synonyms in practice, the reason being that corroboration is usually the solution to a cautionary rule. If there is corroboration, the cautionary rule is usually satisfied

In practice corroboration is ordinarily found in *viva voce* evidence, but it is not restricted thereto. All kinds of evidential material may serve as corroboration. Documentary and real evidence may thus also constitute corroboration.⁹⁰ Corroboration can also be found in formal

⁸⁷ *S v Bergh* 1976 4 SA 857 (A):864G and *S v Khumalo* 1991 4 SA 310 (A):327I-328C.

⁸⁸ *S v Van As* 1976 2 PH H205 (A).

⁸⁹ 1973 ALL ER 440:447H.

⁹⁰ *S v Sikosana* 1960 4 SA 723 (A).

admissions,⁹¹ informal admissions,⁹² section 115⁹³ admissions and even admissions which are included in a question during cross-examination.⁹⁴ Once section 113⁹⁵ of the Criminal procedure Act has been applied to plea proceedings, even the allegations which were made in terms of section 112(1)(b)⁹⁶ may also serve as corroboration.

It should be borne in mind that corroboration is not synonymous with cautionary rules but merely one of the aids which may be used to overcome a cautionary rule. In relying on such evidence the court will have to look at other aids to determine its reliability. Once there is corroboration for the evidence of a single witness, for instance, such a witness is not a single witness anymore.

Corroboration may also be found in admissions by the accused, albeit in conduct or words. Here the accused corroborates himself by means of admissions.⁹⁷ The version of an accused may also corroborate that of state witnesses, if it tends to confirm their versions.

Whenever corroboration is present it would be easier to conclude that the required standard of proof has been satisfied, although not formally required⁹⁸ by law,⁹⁹ as a

⁹¹ Criminal Procedure Act 51/1977:sec 220.

⁹² Criminal Procedure Act 51/1977:sec 217.

⁹³ Criminal Procedure Act 51/1977.

⁹⁴ *S v W* 1963 3 SA 516 (A); *S v Mjoli* 1981 3 SA 1233 (A) and *S v Rossouw* 1994 1 SACR 626 (EC).

⁹⁵ Criminal Procedure Act 51/1977, where a plea of guilty is converted by the court into a plea of not guilty.

⁹⁶ Criminal Procedure Act 51/1977.

⁹⁷ See *S v Mjoli* 1981 3 SA 1233 (A).

⁹⁸ Which was the case before the 1977 Criminal Procedure Act for some offences such as treason. See Schmidt and Rademeyer 2006:119. In order to convict on a confession, however, there has to be either

court cannot base its findings on unreliable evidence. The court would thus, when evidence is suspect, evaluate such evidence carefully and seek whether it is corroborated by other evidence.¹⁰⁰ Schmidt and Rademeyer¹⁰¹ define corroboration as 'corroborative evidential material outside the evidence which is corroborated'. It is of importance to remember that self-corroboration is not admissible.¹⁰²

Cautionary rules are the so-called rules of practice which have developed over the years. It serves as an aid in the evaluation of certain types of evidence.¹⁰³ The reason for the cautionary rules according to Schwikkard and van der Merwe¹⁰⁴ is that it serves as a constant reminder to courts that the facile acceptance of the credibility of certain witnesses may prove dangerous. They include the evidence of an accomplice,¹⁰⁵ identification,¹⁰⁶ children,¹⁰⁷ a single witness,¹⁰⁸ traps, spies and informers¹⁰⁹ and handwriting.¹¹⁰ The cautionary rule which applied to complainants in sexual cases was abolished in *S v Jackson*.¹¹¹ These rules

confirmation or evidence *aliunde* the confession that the offence has been committed. 'Confirmation' in this sense means 'some other evidence indicating that the confession was true in a material respect'. See Zeffertt *et al* 2003:794.

⁹⁹ Schwikkard and van der Merwe 2005:497.

¹⁰⁰ Schmidt and Rademeyer 2006:119.

¹⁰¹ 2006:119.

¹⁰² Schmidt and Rademeyer 2006:119.

¹⁰³ Schmidt and Rademeyer 2006:121.

¹⁰⁴ 2005:513.

¹⁰⁵ Schwikkard and van der Merwe 2005:518 and Zeffertt *et al* 2003:801.

¹⁰⁶ Schwikkard and van der Merwe 2005:519.

¹⁰⁷ Schwikkard and van der Merwe 2005:519 and Zeffertt *et al* 2003:806.

¹⁰⁸ Schwikkard and van der Merwe 2005:519 and Zeffertt *et al* 2003:799.

¹⁰⁹ Zeffertt *et al* 2003:808.

¹¹⁰ Schwikkard and van der Merwe 2005:522.

¹¹¹ 1998 1 SACR 470 (SCA):476E-F.

are briefly discussed hereunder for the purposes of completeness:

3.2.2.1 Cautionary rules

The nature of the cautionary rules are defined by Schwikkard and van der Merwe¹¹² by stating that the court is obliged to consciously remind itself to be careful in considering evidence which practice has taught should be viewed with suspicion, and secondly that the court should seek some or other safeguard reducing the risk of a wrong finding based on suspect evidence. They however haste to comment that the exercise of caution should not be allowed to displace the exercise of common sense.

Although cautionary rules are not rules of law, they possesses the character of legal prescription and, should they be ignored, it may lead to a setting aside of the finding by the court.¹¹³ It is more important to correctly apply a cautionary rule than merely being able to identify it. Triers of fact are constantly warned by the appeal courts not to pay mere lip-service to cautionary rules. Further, compliance with the cautionary rule must appear from the manner of evaluation of the evidence and that proper evaluation of the evidence may indicate that a cautionary rule was considered, even though that rule was not identified by name.¹¹⁴

¹¹² Schwikkard and van der Merwe 2005:513.

¹¹³ *S v Solani* 1987 4 SA 203 (NC).

¹¹⁴ See *S v F* 1989 3 SA 847 (A).

It is further of importance to note that corroboration is not the only manner in which the cautionary rule can be satisfied as any factor which can in the ordinary course of human experience reduce the risk of a wrong finding will suffice.¹¹⁵

a. Accomplices

Schmidt and Rademeyer¹¹⁶ states that this type of evidence is regarded as suspect for at least two reasons, in that firstly he/she may think that he/she will be acquitted by placing the blame on a co-accused or that he/she will receive a lighter sentence and secondly that he/she is in a position to colour the offence such that his/her version sounds probable, due to the specific knowledge he/she has about the offence, having been there. There is no statutory prerequisite that the evidence of an accomplice has to be corroborated, as was the case in the past in both English and South African law, but the rule of practise that a cautionary rule applies, has taken its place.

b. Identification

Evidence of identification must be approached with caution.¹¹⁷ As far as observation-powers are concerned, it was said in *S v Mthetwa*:¹¹⁸

¹¹⁵ Schwikkard and van der Merwe 2005:513-514.

¹¹⁶ 2006:129.

¹¹⁷ Schwikkard and van der Merwe 2005:515.

¹¹⁸ 1972 3 SA 766 (A):768A-C.

'Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; the opportunity for observation, both as to time and the situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait and dress; the result of the identification parades, if any; and, of course the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities ... '

The court in the important case of *S v Mputing*¹¹⁹, per Boshoff J, provides guidelines as far as identification at an identification parade is concerned:

'Die vraag ontstaan hoe uitkenningsgetuienis benader moet word. Hierdie vraag lewer moeilike probleme op want die proses van herkenning is 'n werking van die onderbewussyn. 'n Persoon besit die vermoë om akkuraat te herken sonder dat hy bewus is van enige kenmerke of omstandighede wat hom help met die herkenning. In baie gevalle is dit bloot 'n assosiasie wat hom in staat stel om 'n ander persoon te herken. In die praktyk is daar gevolglik so vele gevalle waar 'n getuie alleen kan sê dat hy 'n beskuldigde persoon aan sy gesig herken sonder dat hy na enige besondere kenmerk, eienskap of omstandigheid kan verwys. Hierdie vermoë om akkuraat te

¹¹⁹ 1960 1 SA 785 (T):787D-E.

herken word beïnvloed deur 'n groot verskeidenheid van omstandighede.'

In *R v Masemang*¹²⁰ van den Heever AJ remarks that an honest witness will quite often identify the wrong person with certainty that it is the correct identification as there is an innate and instinctive desire that there shall be retribution. In *R v Shekelele*¹²¹ the presiding officer held that an acquaintance with the history of criminal trials reveals that gross injustices are frequently done through honest but mistaken identifications as people often resemble one another and that strangers are sometimes mistaken for old acquaintances.

'Dock-identification' in court, although it takes place in many cases as a matter of logic, is of little significance when identification is in dispute, as it is expected of an accused to point out the person in the dock. The formal identification parade is somewhat differently perceived as a court will more readily accept such evidence. The rules of practice have formalised this exercise to an exercise of fairness. A court needs to, however, be persuaded that there were no irregularities during the identification parade.¹²²

The use of photographs for the purposes of identification is dangerous due to the perception it may create at the actual identification.¹²³ The various factors which a court should take into account with this type of identification is

¹²⁰ 1950 2 SA 488 (A):493.

¹²¹ 1953 1 SA 636 (T):638G.

¹²² Schwikkard and van der Merwe 2005:516.

¹²³ Schwikkard and van der Merwe 2005:516.

reflected by the judgment in *S v Moti*.¹²⁴ When assessing an alibi defence, five principles were identified which must be adhered to in *S v Malefo*¹²⁵ namely:

- (1) There is no burden of proof on the accused to prove his/her alibi¹²⁶
- (2) If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt
- (3) An alibi must be assessed in view of the totality of the evidence and the court's impression of the witnesses
- (4) If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reasonable
- (5) The ultimate test whether the prosecution has furnished proof beyond a reasonable doubt and in this regard a court may take into account the fact that the accused had raised a false alibi.

Voice identification must also be treated with caution.¹²⁷ It is considered extremely poor evidence in absence of prior acquaintance.¹²⁸

¹²⁴ 1998 2 SACR 245 (SCA).

¹²⁵ 1998 1 SACR 127 (W).

¹²⁶ It is sufficient that it is reasonably possibly true. See Zeffertt et al 2003:151. They further argue that it does not mean that the court must consider this probability in isolation by illustrating with the following example: 'If someone says he was in bed at midnight and no other evidence may be considered, it would be difficult to say that it could not reasonably be true, but if there is sufficiently strong evidence to show that he was in fact breaking into a shop, the court may consider that his story can safely be rejected'.

¹²⁷ *S v M* 1972 4 SA 361 (T):364F.

¹²⁸ *S v Mavuso* 1969 2 PH H 168 (Swaziland).

c. Children

The two main reasons for the caution (and even suspicion)¹²⁹ to be applied to the evidence of children has been said to be their imaginativeness and suggestibility.¹³⁰ It is also required that the court take into consideration the age of the child witness and/or his/her mental abilities and development. The ultimate question is whether the evidence of the child can safely be relied upon.¹³¹

d. The single witness

Schwikkard and van der Merwe¹³² state that in the Roman law the principle was that more than one witness was required to prove a case. In the thirteenth century, for instance, the amount of witnesses, as a rule, required in the Netherlands to prove a case were three. In modern law the evidence of one witness is sufficient in both civil and criminal cases.

It was held in *S v Sauls*¹³³ that there is no rule-of-thumb test or formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of the single witness and should consider its merits and demerits and, having done so, should decide whether it is satisfied that

¹²⁹ It is ever important to remember that the cautionary rule does not necessarily require corroboration.

¹³⁰ *R v Manda* 1951 3 SA 158 (A).

¹³¹ Schwikkard and van der Merwe 2005:519.

¹³² Schwikkard and van der Merwe 2005:123. See also Criminal Procedure Act 51/1977:sec 208.

¹³³ 1981 3 SA 172 (A):180E.

the truth has been told despite shortcomings, defects or contradictions in its evidence. In *S v Webber*¹³⁴ the court went one step further where it was found that the evidence of a single witness should not necessarily be rejected merely because the single witness happens to have an interest or bias towards the accused, the correct approach being to assess the intensity of the bias and to determine the importance thereof in the light of the evidence as a whole.¹³⁵

e. Handwriting

*S v van Wyk*¹³⁶ provides that evidence about handwriting, of both lay-persons and experts¹³⁷ are to be treated with caution.

3.2.3 Demeanour

The demeanour of a witness impacts on his/her credibility. It includes aspects such as a witness' behaviour in the witness-box, the character and personality of the witness and the impression which they create.¹³⁸ Schmidt and Rademeyer¹³⁹ add that the aspect of whether a witness can be believed, which includes aspects such as, whether his/her evidence is consistent throughout, whether his/her evidence is corroborated by other witnesses and whether his/her evidence seems to be the truth, is to be viewed in

¹³⁴ 1971 3 SA 754 (A):758H.

¹³⁵ Schwikkard and van der Merwe 2005:519.

¹³⁶ 1998 2 SACR 363 (W):375g-h.

¹³⁷ Including the court making its own comparison. See Schwikkard and van der Merwe 2005:88.

¹³⁸ Schwikkard and van der Merwe 2005:502.

¹³⁹ 2006:104.

the light of all the circumstances (the probable truth/legal truth). Furthermore, whether the witness created the impression of a sharp, truthful witness, whether he/she has a good sense of observation, has testified straightforward and with ease and confidence.¹⁴⁰ Le Roux¹⁴¹ mentions the following important factors which may also play an important role in evaluating the demeanour of a witness:

- (1) Convincing, as opposed to unconvincing
- (2) Calm, as opposed to moody
- (3) Respectful, as opposed to arrogant
- (4) Direct, as opposed to evasive manner of answering questions
- (5) Logical nature of evidence, as opposed to illogical description of events
- (6) Openness, as opposed to embarrassed
- (7) Trustworthy, as opposed to untrustworthiness
- (8) Honest, as opposed to dishonest
- (9) Assurances in furnishing information, as opposed to unwillingness to furnish information
- (10) Objective, as opposed to a prejudiced nature of evidence
- (11) Clear evidence, as opposed to unclear evidence
- (12) Independent, as opposed to involved in the dispute due to some or other interest the witness has in the case.

It follows that the impression that the witness makes as a 'story-teller' is important. This concept is aptly

¹⁴⁰ Schmidt and Rademeyer 2006:104.

¹⁴¹ 1992:47.

discussed in *S v Kelly*¹⁴² although the court warned that a crafty witness can sometimes simulate an honest demeanour and that a bold witness, who is lying, may sometimes deceive the observer into believing that he is telling the truth. In *S v Pretorius*¹⁴³ Harms J remarks that there is no relation between sophistication and honesty. Care must thus be exercised that a finding is not solely based on the demeanour of a witness alone,¹⁴⁴ although it is clear that demeanour may sometimes even play a decisive role in determining the credibility of a witness.¹⁴⁵ In *R v Abels*¹⁴⁶ it was held that it is regarded as steeled law that the demeanour of a witness while testifying is in many cases the determining factor in the search for truth. Furthermore, it seems that a court of appeal is reluctant to interfere with the findings of a court *a quo* which is based on the observation of the demeanour of a witness.¹⁴⁷ In *Koekemoer v Marais*¹⁴⁸ it was held, however, that excessive weight is not to be attached to a witnesses' credibility in this sense and that a court of appeal is not necessarily bound thereto. The Constitutional Court¹⁴⁹ has also pointed out the danger of assuming that 'all triers of fact have the ability to interpret correctly the behaviour of a witness, notwithstanding that the witness may be of a different culture, class, race or gender and

¹⁴² 1980 3 SA 301 (AD).

¹⁴³ 1991 2 SACR 601 (A).

¹⁴⁴ *R v Momokela* 1936 OPD 23:24. See also *R v Masemung* 1950 2 SA 488 (A) and *S v Civa* 1974 3 SA 844 (T).

¹⁴⁵ Schmidt and Rademeyer 2006:105.

¹⁴⁶ 1948 1 SA 706 (O):708.

¹⁴⁷ Schmidt and Rademeyer 2006:105. See also *Motor Vehicle Assurance Fund v Kenny* 1984 4 SA 432 (OK).

¹⁴⁸ 1934 1 PH J27 (C).

¹⁴⁹ *President of the RSA v SARFU* 2000 1 SA 1 (CC):79.

someone whose life experience differs fundamentally from that of the trier of fact’.

According to *R v Momekela*¹⁵⁰ the concept of ‘probabilities’ also play an important role in addition the demeanour of a witness in that:

‘In addition to the demeanour of the witness one should be guided by the probability of his story, the reasonableness of his conduct, the manner in which he emerges from the test of his memory, the consistency of his statements and the interest he may have in the matter under inquiry’.

3.2.4 Presence in court before testifying

The presence of a witness in court prior to his/her testimony does not render such witness incompetent to testify, but it may have a detrimental effect on his/her credibility.¹⁵¹

3.2.5 Failure to cross-examine

Although it cannot be held against an unrepresented or illiterate litigant, the failure to cross-examine may be indicative of the fact that it is an acceptance of the version of a witness, in that it is not disputed.¹⁵²

¹⁵⁰ 1936 OPD 23:24.

¹⁵¹ Schwikkard and van der Merwe 2005:508.

¹⁵² Schwikkard and van der Merwe 2005:508.

3.2.6 Failure to testify

Although an accused in a criminal case has a constitutional right to remain silent in terms of the Bill of Rights, the failure to testify may, depending on the circumstances of each case, have the effect that a *prima facie* case which is left uncontradicted, becomes of such weight when evaluating the weight thereof, that it becomes proof *beyond a reasonable doubt*.¹⁵³ The underlying principle is that a party endangers itself that the version of his/her opponent will be believed if he/she does not present evidence on a fact in dispute.¹⁵⁴

But in *Meyer v Kirner*¹⁵⁵ it was held that the evidence of one party would normally, in the absence of any contradictory evidence, be accepted as being *prima facie* true, but that it does not follow that *because* the evidence is uncontradicted, *therefore* it is true as the evidence may be so improbable in the light of all the evidence that it cannot be accepted. In civil cases, the same would apply if the party to the dispute merely denies the opponent's version without adducing evidence.¹⁵⁶

3.2.7 Failure to call available witnesses

A party's failure to call witnesses, *who are available*, does not necessarily, in itself, warrant a negative

¹⁵³ Schwikkard and van der Merwe 2005:512.

¹⁵⁴ *Brand v Minister of Justice* 1959 4 SA 712 (A).

¹⁵⁵ 1974 4 SA 90 (N):96C-D.

¹⁵⁶ *Van der Westhuizen NO v Kleynhans* 1969 3 SA 174 (O).

inference.¹⁵⁷ But in *Samson v Pim*¹⁵⁸ it was however held that if a witness is able to corroborate the version of a party, and such witness is available, and not called as witness, the deduction may be made that the evidence of that witness would have been unfavourable to that party.

3.2.8 Lying nature of a witness

It is logical that the honest witnesses' credibility will exceed that of a lying witness. Where a witness, for instance, contradicts himself/herself by giving conflicting statements in his/her evidence, it is a fact that only one of statements can be true.¹⁵⁹ The court in *S v Oosthuizen*¹⁶⁰ adds that not every error made by a witness will affect his/her credibility adversely. The nature of the contradictions, the importance and the quantity thereof are however also to be taken into account when making a credibility finding of the witness. It follows that there is no reason in logic why the mere fact of a contradiction (or even several contradictions) necessarily leads to the rejection of the whole of the evidence of the witness. Further that:

' ... Where a witness has been shown to be deliberately lying on one point, the trier of fact may (not must) conclude that his evidence on another point cannot safely be relied upon. The circumstances may be such that there is no room for honest mistake in regard to a particular piece of evidence: either it is true or it

¹⁵⁷ It may be the case in exceptional circumstances. See Schwikkard and van der Merwe 2005:513.

¹⁵⁸ 1918 AD 675:662.

¹⁵⁹ *S v Oosthuizen* 1982 3 SA 571 (T):576G.

¹⁶⁰ 1982 3 SA 571 (T):576A.

has been deliberately fabricated. In such a case the fact that the witness has been guilty of deliberate falsehood in other parts of his evidence is relevant to show that he may have fabricated the piece of evidence in question.¹⁶¹

3.2.9 Observation powers and memory

When the finding of liability in a case is dependent on the observation powers of a witness, care should be exercised and the evidence is to be scrutinised carefully.¹⁶²

In *S v Mputing*¹⁶³ Boshoff J points out that the accuracy of memory depends upon the following factors:

- (1) The ability and importance to remember specific happenings.
- (2) The impression that the observation had on the observer.
- (3) The time lapse after such observation.
- (4) The inferences that the observer has drawn after making the observation.
- (5) The ability of the observer to distinguish between what he/she actually remembers and what he/she infers from the observation he/she made.

3.2.10 Contradictions between witnesses

In *S v Oosthuizen*¹⁶⁴ it was held that where statements by different witnesses are contradictory, the contradiction

¹⁶¹ *S v Oosthuizen* 1982 3 SA 571 (T):577B-C.

¹⁶² *S v Mthetwa* 1972 (3) SA 766 (A).

¹⁶³ 1960 (1) SA 785 (T) 788 B - E.

in itself proves only that one of the statements is erroneous. It does not prove which one and that it therefore follows that the mere fact of the contradiction does not support any conclusion as to the credibility of either of the witnesses. Seemingly, a long list of contradictions (save for when they are material contradictions) between witnesses is not necessarily a sign of their untrustworthiness.

3.3 A discussion of a *capita selecta* of recent Supreme Court of Appeal cases in South Africa, with reference to the evaluation of evidence thereof

3.3.1 Introduction

The cases of the Supreme Court of Appeal hereunder have been selected to illustrate the manner in which this court has evaluated some of its recent cases. The selection was based on the cases where the evaluation of evidence played a crucial role in determining the outcome of the cases. The discussion reflects the most recent cases of the last two years. The fact that virtually all the cases happen to be criminal cases does not detract from the fact that the same evaluation process will apply to the determination of facts in civil cases as well. It has to be borne in mind, with reference to the schematic illustration in paragraph 3.1 above, that determining the existence (fact that it was proven) of a case, or not is different as opposed to determining whether the party, bearing the burden of proof had been successful.

¹⁶⁴ 1982 3 SA 571 (T):576C.

The evaluation of the cases hereunder proved to be consistent in its reference to two aspects, namely firstly the fact that the version of the accused must be considered on its own *but* against the background of all the evidence in totality, regardless of minor contradictions and secondly the credibility of the witnesses. These two aspects do not reflect all the factors which can be taken into account when considering the evidence of witnesses, and as argued elsewhere in this research, there are few legal rules when it comes to the evaluation of evidence, but the constant factor being logic and common sense. It is however submitted that it is significant that the Supreme Court of Appeal placed much emphasis on the above-mentioned two aspects will be discussed hereunder. Lastly, the importance of the concept of 'probabilities' is illustrated.

3.3.2 The version of the accused must be considered on its own but against the background of all the evidence in totality, regardless of minor contradictions

*In Dlepu v The State*¹⁶⁵ the complainant was robbed of his bakkie by two assailants and his briefcase containing his identity document, a Nokia cell phone, a set of keys, letters and forty rand cash. The police was informed to be on the lookout for the bakkie and in the process they came across a gold Audi with a number of passengers inside and became suspicious. They saw a person running from a house and getting in the Audi's back seat. As it drove

¹⁶⁵ [2007] SCA 81 (RSA).

off the police stopped it. In the car the police found a revolver, ammunition, a cheque book, letters, a Nokia cell phone and the complainant's identity document. A set of motor keys, which later turned out to be able to start the complainant's bakkie, was found in the garage of the house in front of which the Audi was parked. The engine was still hot. The passengers were then arrested. The complainant was unable to identify any of the five arrested persons at the identification parade. The court *a quo* found the appellant guilty in that his version was not reasonably possibly true, which was the issue before the Supreme Court of Appeal.

It is settled law that in the assessment of circumstantial evidence *to determine whether the only inference justified by the evidence is one of guilt*, the court *must*, in the same assessment, consider the version presented by the accused for the reason that a court must be in a position to say that in the light of all the evidence that the version of the accused is not reasonably possibly true hence the only inference to be drawn from all the evidence is one of guilt.¹⁶⁶ The court also held in this appeal that it is *prudent* to consider the version presented by the appellant.

The appeal court¹⁶⁷ noted that the court *a quo* viewed the appellant's version and those of the other accused's as one, and concluded that those versions differed and that therefore their credibility was adversely affected, which led the court to find that the appellant's version is

¹⁶⁶ [2007] SCA 81 (RSA):[16].

¹⁶⁷ [2007] SCA 81 (RSA):[23].

improbable. This approach by the regional court was found to have been a misdirection (in that it applied the incorrect test) because though charged with others, the appellant presented an individual version, in that he was an innocent passenger.

The appellant's version was that he was not involved or knew anything about the robbery. He ran a shebeen from his house. On the day of the incident in question two of the other accused came past his house and it was agreed that he could use the Audi, in question, to buy stock for the shebeen, later the day. When he later travelled with them they left the car at one stage, but he (the appellant) stayed in the car. They later pick up the other accused. One of them had a briefcase with him. They then stopped in front of a house and drove off again, whereafter the police stopped them. The appeal court noted that this version was not contradicted by the state witnesses, nor by the other accused. The regional court was required to view the appellant's version *on its own* and to investigate, in the light of all the evidence, whether it could be reasonably possibly true.

In an equally recent decision of the Supreme Court of Appeal in *Cornick & Kinnear v The State*¹⁶⁸ referring to *S v van Aswegen*,¹⁶⁹ an exception to the above approach is seemingly that if the state case is so convincing that it excludes the possibility that the appellants are innocent, no matter that their evidence might suggest the contrary when viewed in isolation, then the state case is proven

¹⁶⁸ [2007] SCA 14 (RSA):[42].

¹⁶⁹ 1986 4 SA 712 (V).

beyond a reasonable doubt. However, in *Nonyane v The State*¹⁷⁰ referring to *S v Ipeleng*¹⁷¹ it was held that even if the court believes the state witnesses, it does not automatically follow that the appellant must be convicted, because what still needs to be examined is whether there is a reasonable possibility that the evidence of the appellant might be true:

‘Even if the evidence of the State is not rejected, the accused is entitled to an acquittal if the version of the accused is not proved to be false beyond reasonable doubt.’

In *Dlepu v The State*¹⁷² the court of appeal came to the conclusion that it cannot be said that the version of the appellant is not reasonably possibly true and hence that he was an innocent passenger in the vehicle. The magistrate had thus come to an incorrect finding. The court of appeal remarked that the accused’s version can only be tested whether it is reasonably possibly true against *proven facts* and formulated the test as follows:¹⁷³

‘In the final analysis I am persuaded that taking the totality of the evidence and considering the probabilities and improbabilities on the State’s and on the appellant’s side that the balance weighs heavily in favour of the appellant and his version is reasonably possibly true ...’

¹⁷⁰ [2006] SCA 23 (RSA):[6].

¹⁷¹ 1993 2 SACR 185 (T):189B-I.

¹⁷² [2007] SCA 81 (RSA).

¹⁷³ [2007] SCA 81 (RSA):[31].

The court however also refers to *S v Schackell*,¹⁷⁴ in that the accused's version cannot be rejected *simply* because it is improbable. In *S v Nkamane*¹⁷⁵ Vos J makes reference to the following remarks made in *Estate Kaluza v Braeuer*:¹⁷⁶

'A case cannot always be decided only by its probabilities, the human element is an all important factor, for men do sometimes act unprudently and contrary to what one would expect.'

It is lastly significant to note that in *Dlepu v The State*,¹⁷⁷ the court held that the version of the accused should have been found as reasonably possibly true regardless of the fact that the appellant contradicted himself in one or two respects. Contradictions as these, in itself, cannot be found a basis to conclude that the appellant was also involved in the robbery.

3.3.3 The credibility of witnesses

The facts of *Vhengani v The State*¹⁷⁸ were briefly that the complainant was walking close to a village in Venda when she encountered four men and was raped by the appellant. She managed to escape and the assailants did not pursue her. The next day she reported the rape. The accused's version was one of an alibi, which was confirmed by his mother. The court *a quo* rejected the appellant's version as not reasonably possibly true. The court of appeal stated that it was not because of convincing reasons that

¹⁷⁴ 2001 (2) SACR 185 (SCA).

¹⁷⁵ 1980 (1) PH H 4 (C):45.

¹⁷⁶ 1926 AD 243:263.

¹⁷⁷ [2007] SCA 81 (RSA).

¹⁷⁸ [2007] SCA 76 (RSA).

the trial court rejected this version. However, for the purposes of the judgment the appeal court assumed that the version was correctly rejected. It is therefore considered, as the central issue, before the appeal court, whether the evidence of the complainant was sufficient.

The court observed¹⁷⁹ that the complainant was a single witness, burdened with the cautionary rule. The cautionary rule for single witnesses is formulated in *S v Sauls*¹⁸⁰ in that there is no rule of thumb, but that the trier of fact will weigh his/her evidence, consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the evidence or contradictions in the evidence, the trier of fact is satisfied that the truth has been told. The court of appeal found the evidence of the complainant unsatisfactory¹⁸¹ in a number of respects. The factors which contributed to this credibility finding were:

- (1) The complainant alleges that she was attacked at 19:30 and reached her home at 22:00, without explaining what happened during the intermediate period of two and a half hours.
- (2) The complainant stated that the appellant's companions did not touch her but then later changed to say that they held her before the appellant undressed and raped her.

¹⁷⁹ [2007] SCA 76 (RSA):[7].

¹⁸⁰ 1981 3 SA 170 (A):180E.

¹⁸¹ It is interesting to note that the court seemingly use the word 'satisfactory', as a synonym for 'credibility'.

- (3) She was inconsistent about certain answers she gave about not reporting the rape to the first person she saw.
- (4) She could not give a plausible explanation for not going home before her mother left for work the next day, after having spent the night at the neighbour's house.
- (5) The visibility was poor.
- (6) The opportunity for observation was not good.

According to the court of appeal this diminished her credibility as a witness and led to the appellant being acquitted on appeal.

In contrast, the court made a favourable finding in similar circumstances as far as credibility of the witness is concerned in *Cornick & Kinnear v The State*,¹⁸² which case was also about a single witness in a rape case. The regional court found the single witness to be credible and the court of appeal agreed. This was against the background of some contradictions in the evidence of the complainant and some contradictions between the complainant and one of the other state witnesses. They were regarded as insignificant insofar as the overall finding of credibility is concerned. This view is supported by *Sithole v The State*¹⁸³ where it was observed that not every error made by a witness will affect his/her credibility. Theron AJA, referring to *S v Safatsa*,¹⁸⁴ further states in

¹⁸² [2007] SCA 14 (RSA).

¹⁸³ [2006] SCA 126 (RSA).

¹⁸⁴ 1988 1 SA 868 (A):890F-G.

the *Sithole*-case¹⁸⁵ that it does not follow that two witnesses must be regarded as untruthful or unreliable simply because there are differences in their observation as experience has shown that two or more witnesses hardly ever give identical accounts of the same incident¹⁸⁶ referring specifically to the difference between material and non-material (detailed) aspects of the incident.¹⁸⁷

3.3.4 Probabilities

As argued above, probabilities play the most important role in the fact-finding process. It is submitted that the Supreme Court of Appeal in *Muholi v The State*¹⁸⁸ supports this view in that it was held that it may be said that the accumulation of facts from which the inference of guilt is drawn makes it *probable* that the appellant committed the offence. Further, each of the facts relied upon in order to draw the inference of guilt leads to another reasonable inference. The concept of 'probabilities' also played a prominent role in *Mlenze v The State*¹⁸⁹ where the court observed that a material improbability of the account of the appellant's version is that the appellant wants the court 'to accept' that the slightly built Dumisani - who was in fact unarmed and totally defenceless - having seen

¹⁸⁵ [2006] SCA 126 (RSA):[8].

¹⁸⁶ See also *S v Bruinders* 1998 1 SACR 432 (SE):439E-F.

¹⁸⁷ In this regard see the remarks made by Muller JA in *S v Magerman* 1981 1 PH H 17 (A) and Diemont JA in *S v Nyembe* 1982 1 SA 835 (A):842G. In the last mentioned case, amongst other things the presiding judge stated that he is always surprised that witnesses can, or think they can, after a passage of weeks or months, recollect what route they travelled and at what time they reached their venue and that he is not surprised that they contradict one another.

¹⁸⁸ [2006] SCA 44 (RSA):[18].

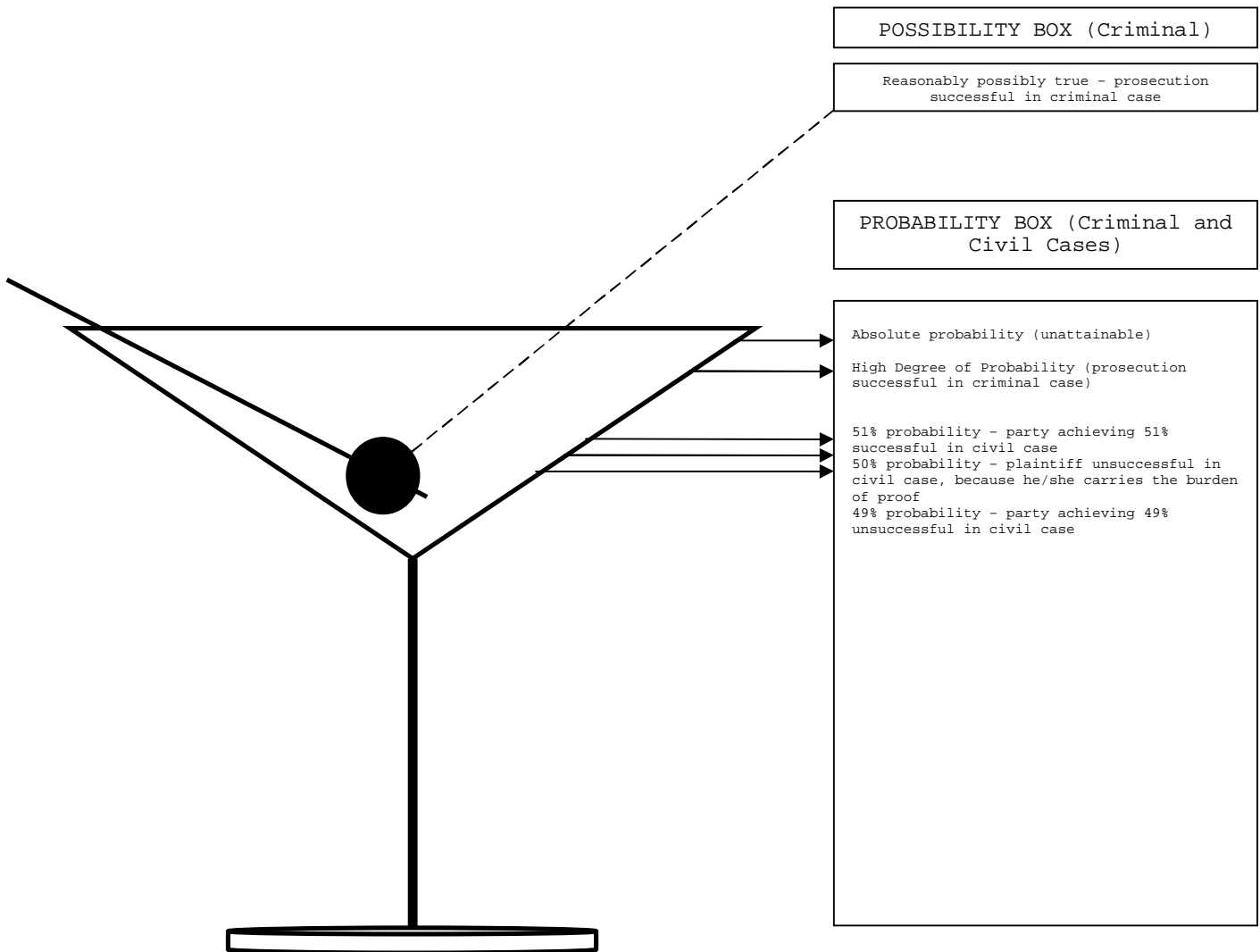
¹⁸⁹ [2007] SCA 39 (RSA):[19].

the appellant in his own yard and having heard a warning shot fired, would charge at him in a threatening manner.’ This improbability played a significant role in the court’s finding whether the appellant had committed the offence, or not. *S v M*¹⁹⁰ further supports the importance of probabilities in the evaluation of evidence where Cameron JA states that the totality of the evidence must be weighed, not in isolation, but whether in light of the inherent strengths, weaknesses, *probabilities and improbabilities on both sides, the case weighs so heavily in favour of the state* that any reasonable doubt about the accused’s guilt is excluded. *Haslam v The State*,¹⁹¹ by mouth of Theron AJA further supports the ‘probability-theory’ in this research, by stating, before he makes his finding, that his view is that ‘*there is nothing improbable in the explanation by the appellant*’ (emphasis added).

The illustration hereunder reflects the quantum of proof to be attained before a case is proven.

¹⁹⁰ 2006 1 SACR 135 (SCA):183H-I.

¹⁹¹ [2007] SCA 33 (RSA):[23].



3.4 Conclusion

The submission made in this research, supported by the precedents above, is that, although many factors play a role during the total evaluation process, during which logic, common sense and experience play a dominant role, the *probabilities* of a case is the central feature. Furthermore, the subjective belief of the trier of fact is

the dominant issue as far as the determination of the credibility of the individual witnesses and exhibits are concerned, which amounts to whether a trier of fact believes a witness and/or exhibits individually (whether he/she believes it to be the probable truth/legal truth). Even when considering the case (cumulative value of the evidence for a party), the question to be answered is whether the trier of fact believes that party's case to be the probable/legal truth, or not. This *belief*, so it is submitted, is based on the belief of the trier of fact. The *belief*, in turn, is based on how probably true the version of a party is. The burden of proof, on the other hand, is an application of this belief to a legal rule, namely whether the degree of probability is so high that it can be said that a case was proven 'beyond a reasonable doubt' or 'on a balance of probabilities', depending on whether it is a criminal or civil case, because in a civil case the probable truth must be such that it can be said by the trier of fact at the end of the case, taking into account all the evidence adduced, that the probable truth is that the version of the plaintiff is such that it is more probably the truth (plausible/acceptable) than that of the opposing party. Similarly, in a criminal case the probable truth must be such that it can be said by the trier of fact at the end of the case, taking into account all the evidence adduced, that the probable truth is that the version of the state is such that it is so probably the truth (high degree of probability) that it is beyond a reasonable doubt that the accused committed the offence, given that his/her version cannot be regarded as reasonably possibly true.

CHAPTER 4

The burden of proof

- 4.1 Introduction
- 4.2 A brief discussion of the common law legal systems and civil legal systems in its application of the burden of proof in litigation
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4.1 Introduction

The Constitution of the Republic of South Africa¹⁹² is the supreme law and it has an impact on both public and private law.¹⁹³ Every person has certain rights in terms of the Bill of Rights¹⁹⁴ of the Constitution. As mentioned in the introduction of this research, Dhlamini¹⁹⁵ is of the opinion that one of the constitutional rights not mentioned

¹⁹² Act 108/1996.

¹⁹³ Dhlamini 1998:324.

¹⁹⁴ Act 108:1996:chapter 2.

¹⁹⁵ 1998:324-424.

specifically in the Bill of Rights, is the right to have a case *proven* against him/her. This right stems from the right to a fair trial in terms of the Constitution.¹⁹⁶

The burden of proof finds application in every legal dispute. It represents the manner in which a court determines whether sufficient weight can be attached to evidence adduced¹⁹⁷ before it can pronounce on whether a party to a dispute had been successful in proving his/her case, or not. Zeffertt *et al*¹⁹⁸ refers to the burden of proof as a:

' ... metaphorical expression for the duty which one or other of the parties has of finally satisfying the court that he or she is entitled to succeed on his claim or defence whichever it may be'.

As argued above, *absolute certainty* in the sense of demonstrable proof of the existence of a factual situation and therefore that a case can *absolutely* be proven, is unattainable. It is only when the fact-finder has applied one or other norm in order to arrive at an acceptable level of *conviction*, that a burden of proof had been satisfied to such an extent that it can be said that a required burden of proof of 'on a balance of probabilities' or 'beyond a reasonable doubt' have been satisfied.¹⁹⁹ The criminal standard is higher than the civil standard in that criminal cases are to be proven by the prosecution 'beyond a reasonable doubt', whereas civil cases are to be proven 'on

¹⁹⁶ Act 108/1996:sec 35(3).

¹⁹⁷ Schmidt and Rademeyer 2006:77.

¹⁹⁸ 2003:45. See also *Pillay v Krishna* 1946 AD 946:952.

¹⁹⁹ Dhlamini 1998:454-455.

a balance of probabilities' by the bearer of the burden of proof, who is usually the plaintiff. This standard of 'on a balance of probabilities' is also applied in labour disputes.²⁰⁰ According to Grogan²⁰¹ it is not absolutely clear why the labour dispute resolution bodies and labour courts have adopted the civil standard of proof for cases of dismissal for misconduct.

When referring to the burden of proof it has to be borne in mind that the concept may enjoy two primary meanings, namely firstly the burden of who has the right or the duty to begin to lead evidence,²⁰² which is commonly referred to as the incidence of proof. This research, for its specific purposes, however, focuses on a second meaning of the concept of 'burden of proof', namely that of the *sufficiency* of proof, which is the measure of *how much proof* is required in order to be able to find that a party had satisfied the burden of proof depending on whether it is a criminal case or civil case. It is significant to note that the application of the burden of proof is a problematic concept and is not applied in a unified manner internationally, as will be reflected below.

This chapter is comparative in an attempt to define the nature of the burden of proof in both criminal and civil matters. It mainly focuses on the English law, as South African law of evidence is based on English law, due to the historical development of the South African law. Reference

²⁰⁰ Grogan 2000:12. See also Brand *et al* 2001:200 and Van Niekerk and Lindström 2006:120.

²⁰¹ 2000:12.

²⁰² May 1962:15.

is however also made to the law of evidence of the United States of America.

Specific emphasis is placed on the concept of 'probabilities', the importance of which is discussed above, in the development of the English law, as it plays a vital role in the conclusion of this research, which includes references to English cases dealing with some *quasi*-judicial cases. The inclusion of this discussion is mainly due to the reference to the concept of 'probabilities' and the important role which the concept plays in determining what the burden of proof in a specific type of legal dispute should be, with specific reference to the flexibility which the concept of 'probabilities' enjoys in the process. This reflects on the degree of probabilities which is required to come to a finding that a case was proven, either 'beyond a reasonable doubt' in criminal cases or 'on a balance of probabilities' in civil cases. In determining this it is conducive that a hard and fast definitions of these various concepts exist. This is, however, not the case, which is why it is important to discuss the endeavours (and the feasibility of the endeavours) in this regard. It is submitted that this is an important aspect on the law of evidence in South Africa, in so far as the burden of proof is concerned.

4.2 A brief discussion of the common law legal systems and civil legal systems in its application of the burden of proof in litigation

Legal system families are categorised in different manners into various types of legal systems. Van Zyl²⁰³ categorises legal systems aptly as follows:

- (1) Roman-German legal systems (France, The Netherlands, Italy, Germany, Austria and Switzerland);
- (2) Anglo-American legal systems (England and the United States of America);
- (3) Socialistic legal systems (Russia, Hungary and Yugoslavia);
- (4) Nordic systems (Scandinavia);
- (5) Far East legal systems (China and Japan);
- (6) Traditional and religious legal systems (Islamic law, Hindi law, Jewish law and traditional African law); and
- (7) Hybrid legal systems (Scotland and South Africa).

The discussion which follows reflects a slightly different sub-classification for the specific purposes of this research, but remains recognisable within the Van Zyl-classification as reflected above. A distinction is drawn between common-law legal systems, such as England and the United States of America, and civil-law systems, such as those of most of the continental European legal systems. Clermont and Sherwin²⁰⁴ note that there is a striking difference in the application of the burden of proof between common law systems and civil-law systems in respect

²⁰³ 1981:55.

²⁰⁴ 2002:1.

of both civil and criminal cases. They use the German and French systems (as example of a civil law system) to illustrate that the standard of proof in respectively civil and criminal cases seems to be that the fact that the *truth of a case is to be proven* in order for a party in the litigation to satisfy the required burden of proof. They seem to appeal to the *inner, deep-seated, personal conviction of the presiding officer*. Clermont and Sherwin²⁰⁵ however acknowledge a lowering in the civil standard in, for instance, Japan. They do, however, make mention of the fact that they are not suggesting that all civil-law systems employ exactly the same standard in all their civil and criminal cases.

Clermont and Sherwin²⁰⁶ further regard the Revolution in France as the 'disruption' which probably led to a simplification of the law of evidence in France and which trend was followed by the rest of continental Europe, whereas no similar disruption took place in the countries resorting under the common-law legal systems. This has resulted in theories of probabilities (impacting on the burden of proof) having received much attention and consistently being refined during the centuries in the common-law countries, as opposed to that of continental Europe.

South Africa has as its basis the common-law system, and therefore shares the endeavours of England and the United States of America in finessing the concept of the 'burden of proof' (and equally the theories of probability). South

²⁰⁵ 2002:2

²⁰⁶ 2002:9.

Africa furthermore recognises the 'beyond a reasonable doubt' standard of proof in criminal cases and the 'on a balance of probabilities' standard of proof in civil cases. As a result of the afore-mentioned reasons this research entails a comparative discussion of only the English and American legal systems in their application of the concept of the burden of proof apart from that of the South African law, as the developments in the mentioned two countries are most conducive in the contributing to the development in South African law. The English and American legal systems will, for the purposes of this discussion in this research, be grouped together under the term 'Anglo-American' law.²⁰⁷

4.3 Criminal law

4.3.1 Anglo-American law

Murphy²⁰⁸ states that the standard of proof required of the prosecution in the discharge of the legal burden of proving the guilt of an accused is a high one.²⁰⁹ *Woolmington v DPP*²¹⁰ is one of the leading cases²¹¹ on the nature of the

²⁰⁷ As in Van Zyl's classification above.

²⁰⁸ 1980:95.

²⁰⁹ Nokes (1957:491), defines 'beyond a reasonable doubt' by stating that it should be such a doubt as a reasonable person might have in conducting his/her own personal affairs, which excludes consideration of fanciful possibilities.

²¹⁰ [1935] AC 462:473.

²¹¹ Schwikkard and van der Merwe 2006:29, referring to *Papenfus v Transvaal Board for the Development of Peri-Urban Areas* 1969 SA 66 (T):69, state that English decision after 30 May 1961 are not binding upon South African courts, but that they do have considerable persuasive force. Post-1950 Privy Council decisions may have persuasive force on South African courts due to the Privy Council Appeals Act 16/1950. In summary, thus, lower courts in South Africa are bound by the decisions of the Appellate Division, followed by pre-1950 decisions of the Privy Council, followed by pre-30 May 1961 decisions of the English appeal courts and the House of Lords.' All of

burden of proof in a criminal case. In this case the judge *a quo* had instructed the jury as follows:

'The Crown has got to satisfy you that this woman, Violet Woolmington, died at the prisoner's hands. They must satisfy you of that beyond a reasonable doubt. If they satisfy you of that, then he has to show that there are circumstances to be found in the evidence which has been given from the witness box in this case which alleviate the crime so that it is only manslaughter of which excuse the homicide altogether by showing that it was pure accident.'

This instruction was criticised as it seemed to cast a burden on the accused. The House of Lords²¹² subsequently held that it was for the prosecution to prove the guilt of the accused and that no burden whatsoever should rest on the accused.

Denning J made a notorious statement as far as the concept of 'beyond a reasonable doubt' is concerned in *Miller v Minister of Pensions*,²¹³ also reflecting that the burden of proof required in a criminal case is a high one, and, significantly, defining these concepts by utilising the concept of 'probabilities':

'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against

this is, of course, overridden by the Constitution of the Republic of South Africa 108/1996.

²¹² [1935] AC 462:481.

²¹³ [1947] 2 ALL ER 372:373H.

a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course if it is possible but not in the least probable' the case is proved beyond a reasonable doubt, but nothing short of that will suffice'.

This definition has been referred to constantly by the English courts as well as South African courts until this day.

Murphy²¹⁴ points out that the formulation in the *Miller*-case did, in fact, fell into some disfavour in England for some time because of difficulties of explaining to juries the nature of the concept of 'reasonable doubt', during which time a second formulation gained wide favour, namely that of Goddard CJ in *R v Summers*²¹⁵ when he used the term 'satisfied so that they feel sure' (or more simply 'sure of guilt'), by stating:

'If a jury is told that it is their duty to regard the evidence and see if it satisfies them so that they feel sure when they return a verdict of guilty, that is much better than using the expression 'reasonable doubt' and I hope in future that will be done'.

According to Murphy²¹⁶ the direction to a jury will only be proper if the direction successfully conveys the high degree of probability required. He further mentions that therefore the formulation of the direction in this regard is of less importance than the substance thereof. He refers to Goddard CJ, in a different case, namely *R v*

²¹⁴ 1980:95.

²¹⁵ (1952) 36 Cr. App. R. 14.

²¹⁶ 1980:95-96.

*Hepworth and Fearnley*²¹⁷ where it was held that a judge would be on safe ground if he/she directs a jury to be satisfied beyond a reasonable doubt of the guilt of an accused, but that the judge could also say that the jury must *feel sure* of the accused's guilt, thereby referring to both the preceding views with approval.

The formulation has however frequented itself to be problematic. In yet a different approach in England in *R v Ching*²¹⁸ the Court of Appeal (which is the second highest criminal court in England) pointed out and emphasised that if judges stopped trying to define that which is almost impossible to define there would be fewer appeals. The court also added: 'We hope there will not be any more for some considerable time'. Dhlamini²¹⁹ strongly criticises this and views it as an 'interdict' against the courts from attempting to define the standards of proof, which, according to him, is the incorrect approach as the endeavour to understand the concept of the burden of proof must be explored and developed to a definable concept.

It is submitted that in English law the required standard in a criminal case, could be either proof between a measure of 'beyond a reasonable doubt', 'with complete satisfaction' or with a 'feeling sure of the guilt of the accused'. The impression is thus not gained that certainty as to the application of this concept exists in England, or that a hard and fast definition had been attached to this

²¹⁷ (CCA) [1995] 2 QB 600.

²¹⁸ (1976) 63 Cr App R 7:11.

²¹⁹ 1998:452.

concept which is capable of being applied to each and every case.

In the United States of America it has been accepted as long ago as 1881 by the Supreme Court in *Miles v United States*²²⁰ that the evidential test in a criminal case is that the accused's guilt must be proven 'to the exclusion of all reasonable doubt'. It has however, such as is the case in England, been a troublesome task to provide a jury with correct, hard and fast directions in this regard.

In the seventies the United States of America was in a problematic situation with the case of *In re Winship*.²²¹ This case answers the question of whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required when a *juvenile* is charged with an act which would constitute a crime if committed as an adult. The facts of the case were briefly that at the age of twelve Samuel Winship was arrested and charged as a juvenile delinquent for breaking into a woman's locker and stealing \$112.00 from her pocketbook. Relying on the New York Family Court Act,²²² which provided that the determination of a juvenile's guilt is based on a preponderance (balance of probabilities) of the evidence, the Family Court found Winship guilty. The court, however, acknowledged that the evidence did not establish his guilt beyond a reasonable doubt. Winship's appeal of the court's use of the lower 'preponderance of the evidence' burden of proof, was rejected in both the Appellate Division of the

²²⁰ 103 US 432.

²²¹ 397 US 358.

²²² Sec 744(b).

New York Supreme Court and in the New York Court of Appeals. The question posed in the Appeal Court was whether the requirement that juvenile convictions rest on 'preponderance of the evidence' burden of proof, as opposed to that stricter 'beyond a reasonable doubt' threshold, violated the Fourteenth Amendment's Due Process Clause. The court concluded in the affirmative. In the majority decision, the court found that when establishing guilt of criminal charges, the strict 'reasonable-doubt' standard must be applied to both adults and juveniles alike. The court noted that by establishing guilt based only on a 'preponderance of the evidence', as is customary in civil cases, courts were denying criminal defendants a fundamental constitutional safeguard against the possibility that their fate be incorrectly decided due to fact-finding errors. The significance of this case is that mere variations in age among criminal defendants will not suffice to warrant the use of different burdens of proof so long as they all face loss of liberty as a possible sentence.

But, one of the most notorious and frequently referred to quotes, contributing to the law of evidence with regards to the burden of proof, comes from Wigmore²²³ where he is of the opinion that the concept 'beyond a reasonable doubt' is not clearly definable because 'no one has yet invented or discovered a mode of measurement for the intensity of human belief.' Dhlamini²²⁴ argues that the very principle of legality requires that legal rules must be certain and that

²²³ 1940:(Volume 9:319).

²²⁴ Dhlamini 1998:438.

therefore the concept of 'beyond a reasonable doubt' must be certain, and properly defined. In addition, in *Sullivan v Louisiana*²²⁵ it was held that the requirement of proof 'beyond a reasonable doubt' in the American law would not be satisfied to have a jury determine that a defendant is 'probably guilty', and leave it up to the judge to determine whether he/she is guilty beyond a reasonable doubt. *Coffin v US*²²⁶ aptly summarises the standard as follows:

'The law presumes that persons charged with crime are innocent until they are proven, by competent evidence, to be guilty. To the benefit of this presumption the defendants are all entitled, and this presumption stands as their sufficient protection, unless it has been removed by evidence proving their guilt beyond a reasonable doubt.'

In this case it was also held that it is not necessary to establish guilt to an absolute certainty:

'It is not meant by this that the proof should establish their guilt to an absolute certainty, but merely that you should not convict unless, from all the evidence, you believe the defendants are guilty beyond a reasonable doubt. Speculative notions, or possibilities resting upon mere conjecture, not arising or deducible from the proof, or the want of it, should not be confounded with a reasonable doubt. A doubt suggested by the ingenuity of counsel, or by your own ingenuity, not legitimately warranted by the evidence, or the want of it, or one born of a merciful inclination to permit the defendants to escape the penalty of the law, or one prompted by sympathy for them or those connected with them, is not what is meant by a reasonable doubt. A

²²⁵ 508 US 275.

²²⁶ 156 US 432:452.

'reasonable doubt,' as that term is employed in the administration of the criminal law, is an honest, substantial misgiving, generated by the proof, or the want of it.'²²⁷

The court also seems to acknowledge that the persuasion in a case must be such that a presiding officer is personally convinced of the guilt or accountability of a party:

It is such a state of the proof as fails to convince your judgment and conscience, and satisfy your reason of the guilt of the accused. If the whole evidence, when carefully examined, weighed, compared, and considered, produces in your minds a settled conviction or belief of the defendants' guilt,-such an abiding conviction as you would be willing to act upon in the most weighty and important affairs of your own life,-you may be said to be free from any reasonable doubt, and should find a verdict in accordance with that conviction or belief.'²²⁸

4.3.2 South African law

In the South African law there seems to be uniformity that the standard of prove in a criminal case is one of 'beyond a reasonable doubt'.²²⁹ The English case of *Miller v Minister of Pensions*²³⁰ was adopted by the South African Appellate Division in the case of *Ocean Accident and Guarantee Corporation Ltd v Koch*.²³¹

²²⁷ 156 US 432:453.

²²⁸ 156 US 432:453.

²²⁹ See May 1962:24 where he refers to *R v Ndhlovu* 1945 AD 369:386, in which it was held that 'In all criminal cases it is for the Crown to establish the guilt of the accused, not for the accused to establish his innocence. The onus is on the Crown to prove all averments necessary to establish his guilt'.

²³⁰ 1947 2 All ER 372.

²³¹ 1963 4 SA 147 (A).

Dhlamini²³² does not agree that the *Miller*-case provides a real definition of the standard of reasonable doubt, but rather 'nothing more than a description thereof'. According to him Denning J's expression has nothing to do with the inherent qualities of proof of the standard 'beyond a reasonable doubt'. The tendency which originated in the English and American legal systems, namely that it is not admissible to attempt to define the term 'beyond a reasonable doubt' is present in South African law as well. In the judgment of *R v Blom*²³³ the notion that the term 'beyond a reasonable doubt cannot adequately be defined has been acknowledged in South African law some decades ago. But Dhlamini²³⁴ calls for continued endeavours towards a formal definition for this concept. He is of the opinion that, to accept that a standard has to be used and then to say that a standard should not be defined, is to postulate a contradiction in terms. He is also of the opinion that it cannot be said to be a standard at all and that this may entail the inference that fact-finders base their decision on their subjective assessments. He furthermore suggests that proof must be based on *evidence* and not on mere *intuition* or *belief* in that even if the fact-finder believes that a person had committed a crime, but the belief is not supported by the evidence, the accused should be given the benefit of the doubt and be acquitted. Elaborating on the concept 'beyond a reasonable doubt', in the South African context, the court warned in *S v Glegg*²³⁵ that proof beyond a *reasonable* doubt cannot be put on the

²³² 1998:449.

²³³ 1939 AD 188.

²³⁴ 1998:461.

²³⁵ 1973 1 SA 34 (A).

same level as proof beyond the *slightest* doubt, as the burden of adducing proof as high as that would in practice lead to defeating the ends of justice.

It is clear from criminal case law that a close relationship exists between the concept of 'beyond a reasonable doubt' and the concept 'reasonably possibly true' as applicable to the accused's version. In *S v van der Meyden*²³⁶ the accused was charged with the murder and assault of a three-month-old child. Nugent J reiterated that in a criminal case the *onus* of proof is discharged by the state if the guilt of an accused is proved beyond a reasonable doubt. Referring to *R v Difford*²³⁷ he added that the corollary of the concept of *proof beyond a reasonable doubt* is that an accused is entitled to be acquitted if it is *reasonably possible* that he might be innocent.²³⁸ It was also held that they are not separate tests, but rather an expression of the same test when viewed from opposite perspectives. Nugent J²³⁹ formulates this as follows:

'In order to convict, the evidence must establish the guilt of the accused beyond a reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.'²⁴⁰

²³⁶ 1999 1 SACR 447 (W):450.

²³⁷ 1937 AD 370:383.

²³⁸ In *R v M* 1946 AD 1023 it was held that it is not a prerequisite for an acquittal that the court should believe the innocent account of the accused, but that it is sufficient that it might be substantially true.

²³⁹ 1999 1 SACR 447 (W):448G-H.

²⁴⁰ See also *S v Magano* 1990 2 PH H 135 (B) where the court set aside a conviction due to the fact that the magistrate found that 'the evidence of the State was reasonably possibly true against that of the defence.', and in the process misdirecting itself.

In *Cornick & Kinnear v The State*²⁴¹ the court recently confirmed this view that the 'reasonable possibility' of the version of the accused *must* be considered. It is submitted that it is reflected in this case that, although these concepts are regarded as logical corollary of one another, they are 'tested' in two different phases. There is no doubt that the intention of the court is that the evidence *as a whole* is to be considered before arriving at a finding of guilt as it refers, however with approval to the *van der Meyden*-case²⁴² with regard to the fact that the defence case is not to be examined in isolation. This view is echoed in the equally recent case of *Mlenze v The State*²⁴³ where the court found that a trial court considering whether to convict or acquit an accused person is enjoined to consider all the evidence in its totality. The purpose is to determine whether, given all the evidence the state has succeeded in proving, the guilt of the accused is proven beyond reasonable doubt. It was also held in *S v van der Meyden*²⁴⁴ that the process of appropriate reasoning in this regard depends on the circumstances of each given case and therefore depends on the specific nature of the evidence which the court has before it. Nugent J added that in whichever form the test as referred to above is expressed, it should always be a consideration of *all* the evidence presented in that a court does not look for evidence implicating the accused in isolation in order to determine whether there is proof beyond a reasonable doubt. It does also not consider

²⁴¹[2007] SCA 14 (RSA): [39].

²⁴²Which was followed in *S v van Aswegen* 2001 2 SACR 975 A:101 b-e.

²⁴³ [2007] SCA 39 (RSA): 17.

²⁴⁴ 1999 1 SACR 447 (W):450.

exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.²⁴⁵ It is thus important that the conclusion to convict or acquit must account for *all* the evidence in that some of the evidence may be found to be false, some unreliable or possibly false or unreliable, but none of it may ever simply be ignored.²⁴⁶

The standard of the 'reasonably possibly true' concept (for the accused) forms the opposite of the state's 'beyond reasonable doubt' concept, although this is only to be *attained* by the accused and not *proven* in the sense that there is a burden of proof on the accused, as was held in *S v Radebe*.²⁴⁷ It may therefore be formulated in a manner which suggests that if the accused attains this, the burden of proof on the state will be neutralised. It is submitted that a notion that the accused's version is to be tested 'on its own' for whether it is 'reasonably possibly true' is left in the manner in which it is reflected by the *dicta* in *Dlepu v The State*.²⁴⁸ In this case it was held that the regional court *a quo* was required to view the appellant's version 'on its own' and to investigate whether in the light of all the evidence, it was reasonably possibly true.

'Reasonable doubt' does not mean 'any doubt', as the test involves *reasonable* doubt and not the doubt of, for instance, an indecisive person.²⁴⁹ There had been various attempts in South African case law to formulate various

²⁴⁵ *S v van der Meyden* 1999 1 SACR 447 (W):447.

²⁴⁶ *S v van der Meyden* 1999 1 SACR 447 (W):450.

²⁴⁷ 1991(2) SACR 166 (T).

²⁴⁸ [2007] SCA 81 (RSA):23.

²⁴⁹ See *S v Van As* 1991(2) SACR 74 (W).

concepts which contribute to the guideline which are to be applied in legal practice in utilising the concepts of 'beyond a reasonable doubt' and 'reasonably possibly true'.

Various definitions and explanations in this regard of the various concepts exist in precedents, to serve as guidelines. In *S v Rama*²⁵⁰ where the minority judgment of Malan J A in *S v Mlambo*²⁵¹ was followed, the court reiterated the importance of the concept of probabilities in that it must be so high that the presiding officer must be morally certain of the guilt of an accused:

'There is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man after mature consideration comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must in other words be morally certain of the guilt of the accused.'

In *S v Glegg*²⁵² the term 'beyond a reasonable doubt' was also defined in terms of the probabilities of a case:

'Wanneer die Staat sy saak op so 'n manier moet bewys dat die judex facti oortuig moet wees dat die misdryf gepleeg is, word dit nie van die judex verwag dat sy oortuigings gebaseer moet wees op 'n sekerheid wat daarin bestaan dat 'n onbeperkte aantal geopperde moontlikhede wat denbeeldig is of op blote spekulاسie berus, deur die Staat uitgeskakel moet wees nie. Die begrip 'redelike twyfel' kan nie presies

²⁵⁰ 1966 (2) SA 395 (A)401A-C.

²⁵¹ 1957 (4) SA 727 (A):738.

²⁵² 1973 (1) SA 34 (A):34H.

omskryf word nie, maar dit kan wel gesê word dat dit 'n twyfel is wat bestaan weens waarskynlikhede of moontlikhede wat op grond van algemene gangbare menslike kennis en ondervinding as redelik beskou kan word. Bewys buite redelike twyfel word nie gelyk gestel aan bewys sonder die allerminste twyfel nie, omdat die las om bewys so hoog gestel te lewer, prakties die strafregsbedeling sou verydel.'

The term 'reasonably possibly true' enjoyed attention in *S v Jochems*,²⁵³ where Milne JA illustrates the significance of this concept as follows:

'If the Court finds that their version might reasonably be true, that is sufficient. There is no question of the court having to be convinced that it is so. ... Thus if a good witness is contradicted by an indifferent one, that is no reason for rejecting the evidence of the former.'

In order for a court to find that such 'reasonable possibility' exists it must also be based on proven facts, in order to be regarded as such, in the specific circumstances of the case according to *S v Radebe*.²⁵⁴ This notion was echoed in *S v Malan*²⁵⁵ where the court held that:

'The court is not called upon to speculate on the possible sources of contamination upon which there is no evidence or the reasonable existence of which cannot be inferred from the evidence. The possibility of contamination is not reasonable without some supporting evidence more or less directly related to the possibility itself.'

²⁵³ 1991(1) SACR 208(A):211F.

²⁵⁴ 1991 2 SACR 166 (T). See also *S v Adams* 1993 1 SACR 330 (C).

²⁵⁵ 1972 1 PH H (S) 5 (T):12.

In *R v M*²⁵⁶ it was further held in amplification of the concept of 'reasonable possibility' as a defence that it does not necessarily have to be believed by the court in order for it to be successful, in that:

'...the court does not have to believe the defence story; still less has it to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true.'

But *S v Alex Carriers (Pty) Ltd en 'n Ander*²⁵⁷ heeds the warning that a judgment should not be based on speculation, but on proven facts, when it suggested:

'Dit sluit hierby aan dat 'n hof nie nodig het om te spekuleer omtrent onskuldige moontlikhede wat nóg deur die feit wat reeds blyk nóg deur die getuienis wat afgelê word gesuggereer word as 'n moontlikheid waarmee redelikerwys rekening gehou moet word nie.'

It is clear from the above-mentioned discussion that it is trite law that the standard of proof in criminal cases is one of 'beyond a reasonable doubt'. But it is equally true that no single hard and fast definition for this concept exists. The authors and precedents describe how to achieve the standard from different vantage points, but the definition seems lacking.

What is clear is that in determining whether a standard of proof in a criminal case had been satisfied various concepts play a role namely:

²⁵⁶ 1946 AD 1023.

²⁵⁷ 1985 3 SA 79 (T):89F-G.

- (1) 'Beyond a reasonable doubt'
- (2) 'Reasonably possibly true'
- (3) 'Probabilities'.

In addition, there is a specific interaction between these concepts in that:

- (1) An accused cannot be convicted if his/her version can be regarded as reasonably possibly true
- (2) An accused can only be convicted if the prosecution is able to prove its case beyond a reasonable doubt
- (3) The manner to attain the standards in (1) and (2) above is dependent on the degree of probabilities of the truth of a case, as required by that case

This manner of attaining the desired standard of proof is supported by the manner in which it is applied in the Anglo-American law.

4.4 Civil law

4.4.1 Anglo-American law

Cross²⁵⁸ points out that the English cases reflect clearly that there is a difference between the standards of proof in criminal and civil proceedings. But he highlights that the validity of this distinction has not gone unquestioned and refers in this regard to Goddard J in *R v Hepworth and*

²⁵⁸ 1976:110.

Fernley,²⁵⁹ where the learned judge confessed that he had some difficulty in understanding how there can be two standards. In addition, Hilbery J is reported to have said in the course of argument in *R v Murtagh and Kennedy*²⁶⁰ that he has personally never seen the difference between the onus of proof in a civil and criminal case by stating 'If a thing is proved, it is proved, but I am not entitled to that view'. Cross²⁶¹ accepts, however, that there may be different degrees of probabilities and argues that if that much is accepted, then it must be said that a law can intelligibly require that a very high degree must be established by the prosecution in a criminal trial.

The civil standard of burden of proof in England has, according to Nokes,²⁶² in English law²⁶³, been established since the sixteenth century, referring to *Newis v Lark*²⁶⁴, which standard of proof has been repeated and confirmed by the highest courts from time to time and is well established in its nature. It is, however, clear that much more of a variation of the standard of proof is within the standard of a 'balance of probabilities' is concerned. What is important to this research is that this variation is virtually solely dependent on a degree of probabilities, as will be reflected by the discussion hereunder. It should be borne in mind in this respect that the gist of this research is that this degree of probabilities applied

²⁵⁹ [1955] 2 QB 600:603.

²⁶⁰ (1955) 39 Cr. App. Rep. 72.

²⁶¹ 1976:111.

²⁶² 1957:114.

²⁶³ Which was later 'inherited' by the South African law. The English law of evidence seems to have been inherited throughout South Africa. See Wille 1961:340, for instance, as far as the law of contract is concerned.

²⁶⁴ (1791) Plow. 403:412.

in the criminal standard as well, in that the standard of 'beyond a reasonable doubt' is determined by requiring a very high degree of probability (much higher than that of the civil standard).

But the leading case for the nature of the burden of proof is to be found in *Miller v Minister of Pensions*,²⁶⁵ as referred to above, which though it was a civil case, also contributed largely to the definition of the criminal standard of proof. The facts of this case were briefly that Captain Miller joined the army in 1915 at the age of 18 and served for 30 years until his death in 1944. He was in the Middle East and he fell ill when he became hoarse and could not eat much, whereafter his sickness was diagnosed as cancer of the gullet. He died shortly after having been flown back to England. This was less than a month after having reported sick. Although his widow was entitled to a pension on account of his long service, she wanted to claim a higher pension granted to soldiers whose death is due to war service. The tribunal, determining these types of claims, rejected her claim and she appealed against its decision to the King's Bench Division. The first point of law was whether the tribunal applied the correct burden of proof, which is why Denning J dealt with this aspect extensively. The standard of proof for civil cases was defined aptly in the well-known *dicta* by Denning R:²⁶⁶

'If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide

²⁶⁵ 1947 2 All ER 372.

²⁶⁶ *Miller v Minister of Pensions* [1947] 2 All ER 372:374A.

accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a conclusion one way or the other, then the case must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. 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: 'We think it is more probable than not', the burden is discharged, but if, the probabilities are equal, it is not.'²⁶⁷

Thirty years later Murphy²⁶⁸ defines the same standard as follows in nearly the same fashion also emphasising the fact that that when a party in a civil case presents a version more likely (probable) than the other it satisfies the burden of proof:

'In a civil case, the standard of proof required is no more than proof on a balance of a preponderance of probabilities, that is to say, sufficient to show that the case of the party having the legal burden of proof is more likely than not to be true.'

He goes on to say in elaboration that this means no more than for the court to be able to say that, on the whole of the evidence, the case for the asserting party has been

²⁶⁷ Eighteen years later in *v Judd v Minister of Pensions and National Insurance* [1965] 3 All ER 642 Davies J dealt with a similar matter. He found that it is important to note that Denning J clearly considered that he was not making new law when the burdens of proof were defined by him as he began by saying at 373f in the *Miller*-case that 'The proper direction is covered by decisions of this court'. According to Davis J the measure of the burden of proof has already been well established by the time Denning J made these comments in the *Miller*-case.

²⁶⁸ 1980:94.

shown to be more probable than not and that if the probabilities are equal, then the party bearing the burden of proof will be unsuccessful in having satisfied the burden of proof.²⁶⁹

Denning J refers to *degrees of proof* within the same standard in *Bater v Bater*:²⁷⁰

'It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard ... So also in civil cases the case must be proved by a preponderance of probability, but there may be degrees of probability, within that standard.'

He then addresses the question of when such a higher degree of probability will be required:

'The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally call for a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion'.²⁷¹

²⁶⁹ 1980:99.

²⁷⁰ [1951] P. 35:36-37.

²⁷¹ [1951] P. 35:36-37.

Morris J in *Hornal v Neuberger Products, Ltd*²⁷² provides the following explanation in that the gravity of a matter should not have any effect on how evidence is approached as far as the burden of proof is concerned:

'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 in the scale when deciding as to the balance of probabilities'.

*Bater v Bater*²⁷³ above was about a wife's petition for a divorce on the ground of cruelty. The court of appeal found that it was not a misdirection for the trial judge to have stated that the petitioner must prove her case beyond reasonable doubt. Bucknill LJ, with whom Somervell LJ agreed, considered that 'a high standard of proof' was required because of the importance of such a case to the parties and the community. Of importance for this research is where it was stated the difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard.' Likewise, a divorce court should require a degree of probability which is proportionate to the subject-matter.'

²⁷² [1957] 1 Q.B. 247:266.

²⁷³ [1950] 2 All ER 458.

In *Hornal v Neuberger Products Ltd*²⁷⁴ again the issue was the standard of proof in a civil claim for fraudulent misrepresentation. The Court of Appeal held that the trial judge had directed himself correctly by reference to the balance of probability. In this case Denning LJ referred to the views he had expressed in *Bater v Bater*.²⁷⁵ Hodson LJ²⁷⁶ expressed his complete agreement with those views, adding:

'Just as in civil cases the balance of probability may be more readily tilted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others.'

Morris LJ's²⁷⁷ observations, is also revealing in reflecting the tension between the application of the burden of proof in criminal and civil cases in so far as the 'stakes of a case' are concerned:

'It is, I think, clear from the authorities that a difference of approach in civil cases has been recognized. Many judicial utterances show this. The phrase 'balance of probabilities' is often employed as a convenient phrase to express the basis upon which civil issues are decided. It may well be that no clear-cut logical reconciliation can be formulated in regard to the authorities on these topics. But perhaps they illustrate that 'the life of the law is not logic but experience. In some criminal cases liberty may be involved; in some it may not. In some

²⁷⁴ [1956] 3 All ER 970.

²⁷⁵ [1951] P. 35:36.

²⁷⁶ [1951] P. 35:36.

²⁷⁷ [1956] 3 All ER 970:978E-F.

civil cases the issues may involve questions of reputation which can transcend in importance even questions of personal liberty.'

The case of *Re Dellow's Will Trusts, Lloyds Bank Ltd v Institute of Cancer Research*,²⁷⁸ reiterated the notion that the type and seriousness of the allegation have an impact on the application of the burden of proof:

'It seems to me that in civil cases it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but, as Morris LJ says, that the gravity of the issue becomes part of the circumstances which the court has to take into consideration in deciding whether or not the burden of proof has been discharged. The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it. This is perhaps a somewhat academic distinction and the practical result is stated by Denning LJ ([1957] 1 QB 247 at 258): 'The more serious the allegation the higher the degree of probability that is required: but it need not, in a civil case, reach the very high standard required by the criminal law.' In this case the issue is whether or not the wife feloniously killed the husband. There can hardly be a graver issue than that, and its gravity weighs very heavily against establishing that such a killing took place, even for the purpose of deciding a civil issue.'

In *Blyth v Blyth*,²⁷⁹ Lord Denning, further supports this view in finding that:

²⁷⁸ [1964] 1 All ER 771:773E-G.

²⁷⁹ [1966] 1 All ER 524:536H-I.

'In short it comes to this: so far as the *grounds* for divorce are concerned, the case, like any civil case, may be proved by a preponderance of probability, but the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear. So far as the *bars* to divorce are concerned, like connivance or condonation, the petitioner need only show that on balance of probability he did not connive or condone as the case may be.'

*Re H*²⁸⁰ concerned the Children Act²⁸¹ which, in summary, allows a court to make an order to place a child in the care of the local authority if the court is satisfied that the child is suffering significant harm or, secondly, is likely to do so. The mother in this case had four children, all girls. The local authority applied for a care order in respect of the three youngest girls, basing its application solely on allegations of sexual abuse of the eldest girl. The House of Lords held by a majority that, just as there must be facts, properly proved to the court's satisfaction if disputed, on which the court can properly conclude that a child 'is suffering' harm, so too there must be facts from which the court can properly conclude that a child 'is likely to suffer' harm. This was the context within which the court considered a further issue, namely the standard of proof required to prove relevant facts, such as the allegations of sexual abuse on which the application was founded. On that issue the court held:

'Where the matters in issue are facts the standard of proof required in non-criminal proceedings is the preponderance of

²⁸⁰ [1996] 1 All ER 1.

²⁸¹ 1989:sec 31.

probability, usually referred to as the balance of probability. This is the established general principle. There are exceptions such as contempt of court applications, but I can see no reason for thinking that family proceedings are, or should be, an exception . . . Family proceedings often raise very serious issues, but so do other forms of civil proceedings. The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.²⁸²

The approach followed in authorities such as the judgment of Morris LJ in *Hornal v Neuberger Products, Ltd*²⁸³ supports the view that the presiding officer is to have a 'feeling' that the party, not carrying the burden of proof, is accountable for his/her actions:

'This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters. No doubt it is this feeling which prompts judicial comment from time to time that grave issues call for proof to a standard higher than the preponderance of probability ... *The law looks for probability, not certainty. Certainty is seldom attainable. But probability is an unsatisfactorily vague criterion because there are degrees of probability.*

²⁸² [1996] 1 All ER 1F-J.

²⁸³ [1957] 1 Q.B. 247:266.

In establishing principles regarding the standard of proof, therefore, the law seeks to define the degree of probability appropriate for different types of proceedings.

The court further discusses the concept 'beyond a reasonable doubt, and acknowledges that different standards apply to any given scenario:

Proof beyond reasonable doubt, in whatever form of words expressed, is one standard. Proof on a preponderance of probability is another, lower standard having the inbuilt flexibility already mentioned. If the balance of probability standard were departed from, and a third standard were substituted in some civil cases, it would be necessary to identify what the standard is and when it applies. Herein lies a difficulty. If the standard were to be higher than the balance of probability but lower than the criminal standard of proof beyond reasonable doubt, what would it be? The only alternative which suggests itself is that the standard should be commensurate with the gravity of the allegation and the seriousness of the consequences. A formula to this effect has its attraction. But I doubt whether in practice it would add much to the present test in civil cases, and it would risk causing confusion and uncertainty. As at present advised I think it is better to stick to the existing, established law on this subject. I can see no compelling need for a change.' (Emphasis added).²⁸⁴

In *Secretary of State for the Home Department v Rehman*²⁸⁵ which entailed a deportation order under the Immigration

²⁸⁴ [1957] 1 Q.B. 247:266.

²⁸⁵ [2002] 1 All ER 122:140-141[55].

Act²⁸⁶ on the ground that deportation would be conducive to the public good in the interests of national security, the Special Immigration Appeals Commission held that the Secretary of State had not established to a high degree of probability that the applicant had been or was likely to be a threat to national security. The Secretary of State appealed. The House of Lords upheld the Court of Appeal's decision, and found that the concept of standard of proof was not applicable to the evaluation of whether the risk to national security was sufficient to justify deportation, but where past acts were relied on, they should be proved in accordance with the civil standard of proof:

'I turn next to the commission's views on the standard of proof. By way of preliminary I feel bound to say that I think that a 'high civil balance of probabilities' is an unfortunate mixed metaphor. The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in *Re H* [1996] 1 All ER 1 at 16, [1996] AC 563 at 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.'²⁸⁷

²⁸⁶ 1971:sec(3)(5)(b).

²⁸⁷ *Secretary of State for the Home Department v Rehman* [2002] 1 All ER 122:140[55]J.

Reference should also be made to the decision of the Privy Council in *Campbell v Hamlet*²⁸⁸ where there had been a finding of professional misconduct by an attorney. One of the issues on the appeal was the correct standard of proof to apply to such proceedings. It was found that the criminal standard was the correct standard:

'... there is flexibility in the civil standard of proof which allows it to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters.'²⁸⁹

Recently, in *R (on the application of N) v Mental Health Review Tribunal (Northern Region)*,²⁹⁰ the claimant was detained under the Mental Health Act.²⁹¹ He was the subject of a hospital order and a restriction order. Under s 72(1)1 of this Act, where an application was made by a patient to a mental health review tribunal, the tribunal was to direct the discharge of the patient if they were not satisfied that he was then suffering from mental illness, psychopathic disorder, or mental impairment, or from any of those forms of disorder of a nature or degree which made it appropriate for him to be liable to be detained for treatment, or secondly that it was necessary for his health or safety or for the protection of other persons that he should receive such treatment. Section 73(1)2 of the same Act applied where the application to the tribunal was made by a patient subject to a restriction order. The tribunal was to direct the absolute discharge of a patient if (a) it

²⁸⁸ [2005] 3 All ER 1116:1121.

²⁸⁹ *Campbell v Hamlet* [2005] 3 All ER 1116:1121[17]E.

²⁹⁰ [2006] 4 All ER 194.

²⁹¹ 1983:sec 72(1).

was not satisfied as to the matters mentioned in section 72(1)(b)(i) or (ii) of the Act and (b) it was satisfied that it was not appropriate for the patient to remain liable to be recalled to hospital for further treatment. The tribunal had to direct discharge if it was not satisfied, as to the specified matters. The burden was on the detaining authority to satisfy the tribunal as to those matters. The claimant applied to the tribunal which decided not to direct his discharge. He brought proceedings for judicial review of the decision of the tribunal, where he contended that the tribunal had erred in its approach to the required standard of proof. The judge *quo* held that that the applicable standard of proof was the ordinary civil standard of proof and that issues under sections 72 and 73, as to the appropriateness and necessity of continuing detention or the appropriateness of the patient remaining liable to be recalled, were not susceptible to a defined standard of proof but involved a process of judgment, evaluation and assessment. The judge concluded that the only misdirection by the tribunal in the claimant's case, in applying the criminal standard of proof of 'beyond reasonable doubt', had been favourable to the claimant, and that the application for judicial review had therefore to be dismissed. The claimant appealed. The court considered whether the correct standard of proof, in relation to those issues under sections 72 and 73 that were susceptible to proof to a defined standard, was the ordinary civil standard of proof and whether certain issues under sections 72 and 73 were not susceptible to proof to a defined standard but were to be determined by a process of evaluation and judgment. The issue of the burden of proof

enjoyed much attention in this judgment, which is relevant to this research.

A very sound argument was forwarded by counsel on behalf of the appellant where he submits that there are many circumstances in which an interest of transcending value falls to be determined in a civil context where an equal sharing of the litigation risk is not appropriate, in that the English common law has long recognised that in certain contexts the ordinary civil standard of proof may require modification. Further that in specific circumstances, such as where serious allegations of a criminal nature are made in civil cases or the consequences of a finding one way or the other will be particularly grave for the individual concerned, for third parties or for the general public. In some cases more than one such feature may exist and the competing utilities of the individual's rights and those of third parties or the wider public interest may have to be balanced. Counsel then submits that four different approaches have been adopted as regards the standard of proof, namely:

- (1) The 'flexible standard' approach, in which the civil standard, while expressed as the balance of probabilities, is nevertheless capable of a range of differing degrees of probability, from 'more likely than not' to something approaching the criminal standard of 'beyond reasonable doubt'. He also makes reference to a number of cases the in this category.²⁹²

²⁹² *Bater v Bater* [1950] 2 All ER 458, [1951] P 35, *Hornal v Neuberger Products Ltd* [1956] 3 All ER 970, [1957] 1 QB 247, *Blyth v Blyth* [1966] 1 All ER 524, [1966] AC 643 and *Khawaja v Secretary of State for the*

- (2) The 'fixed civil standard', where the standard of proof remains fixed but the degree of evidence needed to satisfy it varies because events such as serious criminal offences are said to be less probable.²⁹³
- (3) The 'quasi-criminal standard' approach, in which the 'flexible standard' approach is said to be taken to its logical conclusion so as to encompass the criminal standard.²⁹⁴
- (4) The 'single third standard of proof' which rests between a bare civil standard and the criminal standard.

Reference was also made to the so-called 'convincing evidence' standard (or 'convincingly established') that has been applied by the European Court of Human Rights when determining whether an interference with various qualified rights under the convention is necessary and proportionate. It was argued that the same approach has been adopted by the European Court of Human Rights, and in the jurisdiction of the current Court of Appeal in case, *R (on the application of N) v Dr M*²⁹⁵ in determining whether there is a medical necessity for compulsory medical treatment that would otherwise amount to a violation of human rights.

Home Dept [1983] 1 All ER 765, [1984] AC 74. It is interesting to note that a similar approach has been adopted in Australia (see *Briginshaw v Briginshaw* (1938) 60 CLR 336, which has been the basis of state and federal legislation) and Canada (see *Smith v Smith* [1952] 2 SCR 312).

²⁹³ *Re Dellow's Will Trusts, Lloyds Bank Ltd v Institute of Cancer Research* [1964] 1 All ER 771, *Re H* [1996] 1 All ER 1 and *Secretary of State for the Home Dept v Rehman* [2002] 1 All ER 122.

²⁹⁴ *B v Chief Constable of the Avon and Somerset Constabulary* [2001] 1 All ER 562, *Gough v Chief Constable of the Derbyshire Constabulary* [2002] 2 All ER 985 and *R (on the application of McCann) v Crown Court at Manchester, Clingham v Kensington and Chelsea Royal* [2002] 4 All ER 593.

²⁹⁵ [2003] 1 WLR 562.

Further, in this case the court stated in its concluding remarks, that by analogy with those situations where a higher standard of proof has been held to be appropriate (such as in *quasi*-criminal cases, disciplinary proceedings, contempt proceedings) and by reference to the approach adopted in other common law jurisdictions, that the transcending values of liberty and autonomy are such that the social cost of erroneous detentions must be seen as greater than that of erroneous decisions to release. While the potential cost of erroneous decisions to release is that patients so released will harm themselves or others, in the generality of cases that is an extremely small risk.

With reference to the nature of the burden of proof the appeal was ultimately dismissed and the court ruled as follows, highlighting that:

'For all those reasons, we respectfully differ from the conclusion reached by Munby J on this issue. We would hold that the tribunal should apply the standard of proof on the balance of probabilities to all the issues it has to determine. We would not, however, expect the difference between that approach and the approach favoured by Munby J to have much practical significance, given the limited role that the standard of proof will have in relation to matters of judgment and evaluation. Nor does the difference affect the outcome of the present appeal, since the tribunal appears to have applied the standard of proof on the balance of probabilities to all issues save the factual issues to which it applied a standard akin to the criminal standard . . . Although our reasoning differs in some respects from that of Munby J, we are in agreement with his conclusion that the only misdirection by the tribunal in the case of *N* was favourable to the patient and that *N*'s judicial review

application fell to be dismissed. It follows that this appeal must also be dismissed.²⁹⁶

It is submitted that from *California v Mitchell Bros.*²⁹⁷ *Santa Ana Theatre*²⁹⁷ is it evident that the standard of proof in civil cases has crystallised clearly that the standard is virtually always that of a 'balance of probabilities'. It is stated that the purpose of a standard of proof is to instruct the fact-finder (in the case of American law, the jury) concerning the degree of confidence our society thinks it should have in the correctness of factual conclusions for a particular type of adjudication. From this case it is furthermore clear that three standards of proof are generally recognised in American law, ranging from the 'preponderance of the evidence' standard employed in most civil cases, to the 'clear and convincing standard reserved to protect particularly important interests in a limited number of civil cases, to the requirement that guilt be proved 'beyond a reasonable doubt' in a criminal prosecution.

It is necessary to take note that the so-called 'single third standard of proof', as referred to above, which was rejected in England, has been recognised in the United States of America as the standard of 'clear and convincing evidence' and is applied to cases involving infringements of fundamental rights, including mental health cases.²⁹⁸

²⁹⁶ *R (on the application of N) v Mental Health Review Tribunal (Northern Region)* [2006] 4 All ER 194:228 [104]H-[105]C.

²⁹⁷ 454 US 90.

²⁹⁸ See *Addington v Texas* (1979) 441 US 418.

4.4.2 South African law

In South Africa the standard of the burden of proof in a civil case is also 'on a balance of probabilities'.²⁹⁹ Schwikkard and van der Merwe³⁰⁰ warn that 'on a balance of probabilities', should not be understood as requiring that the probabilities in a civil case should do no more than favour one party in preference to the other. They elaborate by stating that what is required is that the probabilities in a case be such that, on a preponderance, it is probable that the particular state of affairs existed. In addition, it was held in *Peregine Group (Pty) Ltd*³⁰¹ 'that in determining such 'likelihood' a party must have proven its case on a balance of probability.'

When can such an inference of 'on a balance of probabilities' be drawn in South African law? The inference, must firstly be in accordance with the proven facts and secondly must be the most probable inference which can be drawn.³⁰² The second principle applies to the burden of proof 'on a balance of probabilities' only, as in criminal cases the second prerequisite is stricter than that of a civil case in that the inference drawn in order to prove a case 'beyond a reasonable doubt' must be the only reasonable inference which can be drawn.³⁰³ In *Govan v*

²⁹⁹ Schwikkard and van der Merwe 2005:544; Schmidt and Rademeyer 2006:77 and Zeffertt *et al* 2003:55.

³⁰⁰ 2005:544.

³⁰¹ 2001 3 SA 1268 (SCA).

³⁰² Schmidt and Rademeyer 2006:78. See also Schwikkard and van der Merwe 2005:505.

³⁰³ *R v Blom* 1939 AD 188:202-203.

*Skidmore*³⁰⁴ it was found in this regard that in finding facts from direct evidence, or by drawing inferences to find facts, in a civil case, the presiding officer may, by balancing probabilities, select a conclusion which seems to be the more natural, or plausible conclusion from amongst several conceivable ones, even though that conclusion is not the only reasonable one.

*AA Onderlinge Assuransie Assosiasie Bpk v De Beer Ltd*³⁰⁵ aptly reflects the South African application of this standard. It entailed an appeal against a decision of the Witwatersrand Local division, where the appellant's (wife of the deceased) case was that the collision occurred whilst the insured driver was driving a truck on the correct side of the road and that the deceased's vehicle was also on the right side of the road, but had swerved unexpectedly causing the insured driver's vehicle colliding with it. The majority judgment found in favour of the plaintiff. The only witness for the defendant was the driver's passenger (as the driver could never be located), the investigating officer and the wife of the deceased (the appellant). It was common cause that it had been raining hard on the night in question. The passenger of the insured vehicle testified that the deceased had suddenly swerved in front of their truck after having been on the right side of the road. His evidence was challenged in cross-examination *a quo*, but he stuck to his version, in principle. The investigating officer was unable to explain why he had marked the point of impact in the manner he did and his evidence in this regard was not significant. After

³⁰⁴ 1952 1 SA 732 (N):734C-D.

³⁰⁵ 1982 2 SA 603 (A).

having evaluated the evidence Viljoen JA found in the majority judgment that the only evidence on which the court could make a finding were circumstantial evidence, and that the question was that the evidence was such that a finding could be made that, on a balance of probabilities, the plaintiff had succeeded in proving that the driver of the insured vehicle was negligent.³⁰⁶ It is of significance to this research that Viljoen JA then states that it is not necessary for a plaintiff who founds his/her case on circumstantial evidence in a civil case, to prove that the inferences he seeks the court to draw is indeed the only reasonable inference. Further that the plaintiff will have satisfied the burden of proof on him/her if he/she is able to convince the court that the inference which he seeks is the most natural and plausible inference from a number of possible inferences.³⁰⁷ Viljoen JA accepts the following dicta of *Govan v Skidmore*:³⁰⁸

' ... it seems to me that one may, as Wigmore conveys in his work on Evidence 3rd ed para 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one'.

As far as specifically the probabilities of the case are concerned, Viljoen JA in *AA Onderlinge Assuransie Assosiasie Bpk v De Beer Ltd*³⁰⁹ comes to the conclusion that as both vehicle's lights were on, the deceased must have

³⁰⁶ *AA Onderlinge Assuransie Assosiasie Bpk v De Beer Ltd* 1982 2 SA 603 (A):614G-H.

³⁰⁷ *AA Onderlinge Assuransie Assosiasie Bpk v De Beer Ltd* 1982 2 SA 603 (A):614H.

³⁰⁸ 1952 1 SA 732 (N):734C-D.

³⁰⁹ 1982 2 SA 603 (A):615.

seen the oncoming truck and would not have swerved into it, except if he wanted to commit suicide. He would rather have swerved to his left.

The evidence of the passenger of the insured vehicle was not found to have been equally credible, as the vision must have been poor because of the rain, in that his evidence of what exactly the approaching vehicle did before the collision. It was also found that it is equally probable that the insured vehicle was not entirely on its right side. There was no evidence as to the speed at which the vehicles were travelling. The learned judge stated that he could not find that the accident occurred, on a balance of probabilities, as the passenger of the insured vehicle described it. The question which was then asked was which other inferences could be drawn as to the cause of the collision. Viljoen JA found, due to evidence of the police plan and that of the investigating officer that it was highly probable that the truck never left the road, despite the effort of the driver to go left when he saw the oncoming vehicle and that in the process the oncoming vehicle collided with the back of the truck. He found this inference as the most probable and plausible of the several possible inferences which may be drawn for the cause of the collision, accepting that both drivers may have contributed to the negligence which caused the accident. The negligence was decided on the fact that it would be reasonably expected from the driver of the truck in the circumstances to drive as left as possible on the road. Wessels JA and Miller JA concurred that the appeal was dismissed, with costs. In the minority judgment, however, Trengrove JA was, of the opinion that the inference of fact

which was drawn was not based on the proven facts.³¹⁰ His finding entails that there was insufficient evidence on which an inference of the cause of the accident could be drawn on a balance of probabilities and that thus the appellant had not satisfied the burden of proof which rested on her.

Grogan,³¹¹ arguing from a labour law dispute point of view, where the burden of proof is also that of 'on a balance of probabilities', and referring to *AA Onderlinge Assuransie Assosiasie Bpk v De Beer Ltd*³¹² holds the view that 'proof' in this context means that there clearly must be evidence on which to base the conclusion that the defendant (typically an employee in a disciplinary hearing or arbitration) indeed committed the misconduct concerned and that his/her guilt is more probable than the reverse. He amplifies this statement by arguing that when the evidence permits more than one reasonable inference, one pointing to guilt and the other to innocence, the selected inference must be the balancing of probabilities in order to find the more natural, or plausible conclusion of the possible inferences. He suggests that the test for 'on a balance of probabilities' requires a tribunal to weigh the alternatives and to select the most plausible and concludes at 13 by saying:

³¹⁰ In *Trust Bank of Africa v Senekal* 1977 2 SA 587 (T) it was held that "Merely to cast suspicion on the correctness of the fact or facts *prima facie* established and mere theories or hypothetical suggestions will not avail the defendant; the defendant's answer must be based on some substantial foundation of fact."

³¹¹ 2000:12.

³¹² 1982 2 SA 603 (A).

'In other words, the test allows a tribunal to select an inference even if there are others which, though plausible, are less plausible than that selected. Such a course is not permissible in criminal cases where a conclusion of guilt cannot be drawn if there are inferences which, though less plausible, are nevertheless reasonably possible'.³¹³

Without regards to the nature of the burden of proof (whether 'beyond a reasonable doubt' in a criminal case or 'on a balance of probabilities' in a civil dispute or labour dispute), any fact is proven by the evidence adduced, if not directly, then when an inference can be drawn as far as that specific fact in dispute is concerned.³¹⁴ It is submitted that the same test will apply to the respective cases of each of the parties to a dispute, in determining whether a party had been successful in proving the facts of their case, or not. Phrased differently, when considering whether a fact was proven, the presiding officer must ask whether the evidence adduced has proven the fact. At the end of having established which facts were proven, the test is again applied to the cumulative facts of a party to a dispute (his/her case, as a whole) in order to determine the success, or not of a party having proven his/her case or not. In both instances the fact and/or case will only be proven if an inference can be drawn from the adduced evidence that the fact and/or case had been proven. It was held in *Vermaak v Parity Insurance Co Ltd (in liquidation)*³¹⁵ that the concept 'on a balance of probabilities' entails, that, should there be more than one possible interpretation of the facts in

³¹³ Grogan 2000:13.

³¹⁴ Schmidt and Rademeyer 2006:78.

³¹⁵ 1966 2 SA 312 (W):314C.

respect of any specific fact in issue, then the interpretation of the facts in respect of any specific fact in issue, then the interpretation of the less favourable is to be applied to the party who bears the burden of proof. There had also been attempts to define this concept more accurately. In *Wildebbeest v Geldenhuys*³¹⁶ it was suggested that in order for evidence to be proven on a balance of probabilities, the evidence should be such that it satisfies the mind and conscience of an ordinary person to the extent that it would cause him/her to be prepared to act thereupon in his/her own significant personal matters. A yet further attempt was made in *West Rand Estates Ltd v New Zealand Insurance Co Ltd*³¹⁷ and in *Cape Coast Exploration Co Ltd v Scholtz*,³¹⁸ which both amounted to suggesting that the standard of care, before finding that a fact has been proven on a balance of probabilities, should be more than 'conjecture' or 'minor probabilities'. However, according to Schmidt and Rademeyer,³¹⁹ these attempts 'to define more accurately' do not bring the traditional definition much further. What needs to then be addressed is how this burden of proof should be applied in practice.

Schmidt and Rademeyer³²⁰ point out that if at the end of a civil case (other than in a criminal case) there exists no reason to place one party in a better position than the other for the reason of quantum of proof the party not carrying the burden of proof, must succeed. In other

³¹⁶ 1911 TPD 1050:1052.

³¹⁷ 1925 AD 245:263.

³¹⁸ 1933 AD 56.

³¹⁹ 2006:78.

³²⁰ 2006:78.

words, the party whose version seems to be the more probable version, is entitled to be the successful party in so far as the satisfaction of the burden of proof is concerned, as it is trite law that in civil cases that the burden of proof is one of 'on a balance of *probabilities*'. Although this standard is not very precise and is dependent on the value given to facts in so far as it relates to relative probabilities it is regarded as an objective standard.³²¹

In *Estate Kaluza v Braeuer*³²² a warning was extended that a case cannot always be decided on only probabilities, as the human element is an important aspect to take into account. Wessels AJ in this case was of the opinion that 'men do sometimes act imprudently and contrary to what one would expect'. His opinion is criticised by Schmidt and Rademeyer³²³ in that they suggest that such surprising (improbable) actions of mankind, which is indeed always possible, should rather be regarded as one of the *factors of probabilities*, rather than to state that a case cannot be decided on probabilities, as a result thereof.

What happens if upon consideration of the probabilities a court finds itself in a situation where there are two equally strong versions destroying one another? Wessels AJ stated in *National Employers Mutual General Insurance Association v Gany*³²⁴ that a court should then be sure that *absolute reliance* could be placed on the version of the

³²¹ Schmidt and Rademeyer 2006:78.

³²² 1926 AD 243:263.

³²³ 2006:78.

³²⁴ 1931 AD 187:199.

party on whom the burden of proof rests. In *Maitland and Kensington Bus Co (Pty) Ltd v Jennings*³²⁵ the word 'absolute' in the *Gany*-case was criticised as making the standard too high and that it should rather read 'sufficient reliance'. Subsequently, the standard of 'on a balance of probabilities', were once again rather utilised in this regard. In *Koster Koöperatiewe Landboumaatsapy Bpk v Suid-Afrikaanse Spoorweë en Hawens*³²⁶ the presiding officer reiterates, however, that this test can only be used when the two versions are mutually destructive, and therefore not when other proven facts exist which renders one version more probably than the other.

The facts of *African Eagle Life Assurance Co Ltd v Cainer*³²⁷ reflect a situation similar to the one in the *Koster*-case, save that there were no probabilities on which a court could decide. In such an instance it would seem that a court must then merely decide which of the parties he/she believes, as the decision will rest on the credibility of the witnesses. Coetzee R, substantiating his finding in the *Koster*-case³²⁸ formulates the solution to this problem as follows:

' ... where there are no probabilities - where, for instance, the factum probandum was whether a particular thing was white or black, with not the slightest evidence as to the preponderance of white or black things in that particular community, there are clearly no probabilities of any sort. And, when the testimony of witnesses is in conflict, the one merely saying the thing was white and the

³²⁵ 1940 CPD 489:492.

³²⁶ 1974 4 SA 420 (W).

³²⁷ 1980 2 SA 234 (W):237.

³²⁸ 1974 4 SA 420 (W):237G.

other black, it does not matter logically what the measure of proof is, whether it is on a balance of probabilities or beyond a reasonable doubt. The position is simply that there is no proof, by any criterion, unless one is satisfied that the one witness[\'s] evidence is true and that the other is false.³²⁹

Caution should, however, be applied in not being too stringent in distinguishing between credibility of a witness and probabilities in the sense of evaluating credibility subjectively and drawing inferences objectively in order to determine probabilities.³³⁰ In *Selamolele v Makhado*³³¹ the court ruled that both the findings of credibility and the factors of probability must be considered when determining whether the person bearing the burden of proof has satisfied that burden of proof or not.

The burden of proof must be distinguished from the so-called 'incidence of proof'. In brief, the incidence of proof refers to 'which party to the litigation bears the burden of proof'. The criminal law in this regard is straightforward, namely that the prosecution always bears the burden of proof beyond a reasonable doubt in all respects. In civil cases this situation differs somewhat, in that it is determined as a matter of substantive law.³³² Although the incidence of proof, as opposed to the actual burden of proof and the quantity thereof, is exclusive of this research, it is conducive to refer briefly to it.

³²⁹See also *Pietermaritzburg SPCA v Peerbhai* [2007] SA 66 (RSA).

³³⁰ See *National Employer's General Insurance Co Ltd v Jagers* 1984 4 SA 432(EC):440F, where the court held that "The estimate of the credibility of a witness will ... be inextricably bound up with a consideration of the probabilities of the case."

³³¹ 1988 2 SA 372 (V).

³³² Schwikkard and van der Merwe 2005:537.

*Pillay v Krishna*³³³ is of utmost importance in this regard. It provides that if one person claims something from another in a court of law, then that party must satisfy a court that he/she is entitled to it. But this case also provides that there is a second principle which must always be read with this, namely that where the person against whom the claim is made is not content with a mere denial of that claim). This principle is derived from the principle that he/she who asserts, must prove and he/she who denies. The onus of proof is on the person who alleges something and not on his opponent who merely denies it. *Schwikkard and van der Merwe*³³⁴ provides the following example in amplification hereof, namely that when a plaintiff claiming damages for unlawful assault is required to prove the fact of the impairment of his/her bodily integrity, but a defendant who seeks to justify his/her conduct on the grounds that he/she acted in self defence generally bears the burden of proving the facts necessary to sustain that defence. And further that at the end of the trial, it is unclear whether the force used by the defendant was commensurate with the attack, the defence will fail and the plaintiff's claim will succeed. So too, in a situation such as a claim for recovery of a loan it is for the plaintiff to prove that the loan was made, but a defendant who alleges that the loan has been repaid bears the burden of proving that the fact in order for the defence to succeed. If at the end of the trial it is established that the loan was made, but it is unclear whether it was repaid, the plaintiff will succeed. In conclusion it must be said that although such examples may

³³³ 1946 AD 9461.951-952.

³³⁴ 2005: 537.

appear that the burden of proof shifts from one party to another in civil cases, it is not so. The incidence of the burden of proof, once established, never shifts as the only thing which may happen is that each of the parties might bear the burden of proof in relation to separate issues in the trial.

Before the aspect of the role which probabilities play enjoys attention, the following aspects are to be understood, where the burden of proof, specifically also finds application in some other forms of litigation. This discussion is important in order not to confuse the ordinary applicability of the burden of proof.

At Inquest-proceedings, although there is not really any burden of proof, the judicial officer must make a finding as to whether any person is criminally responsible for the death of the deceased. *In re Goniwe*³³⁵ the court found that the test is whether the judicial officer is of the opinion that there is evidence which is available which may at a subsequent trial be held to be credible and acceptable and which, if accepted, could prove that the death of the deceased was caused by an act or omission which amounts to the commission of an offence on the part of some person.

As far as evidence in the sentence-phase of criminal proceedings is concerned *S v Pethla*³³⁶ finds as follows about mitigating factors and the burden of proof:

³³⁵ 1994 2 SACR 425 (SE).

³³⁶ 1956 4 SA 605 (A):608F-G.

'It may be legitimate to argue that our law should follow the Roman Dutch authorities in placing the onus of proving drunkenness on the accused when it is relied on merely as a matter in mitigation of sentence'

There are no fixed rules governing the burden of proof in statements made in mitigation of sentence. Our appellate division has also expressed itself against the use of a burden of proof during sentencing. In *S v Von Zell(2)*³³⁷ the following is said in this regard:

'The use of the term onus is ... inappropriate. The judge has to weigh a variety of factors, some of them facts, others impressions regarding the accused's character and probable reactions to clemency, others again matters of policy ... the trial judge must reach his own conclusions as he thinks right, and there is no obligation upon him to use the language of onus of proof in examining the issues.'

In fact, according to *S v Khumalo*³³⁸ the so-called *de-individualization* as a mitigating factor is discussed and where it is held that the mere possibility, as opposed to the probability of the existence thereof, is sufficient to constitute a mitigating factor.

It is, however, to be noted that in *S v Nkwanyana*³³⁹ Nestadt JA is of the opinion that even aggravating circumstances are to be proven beyond a reasonable doubt in criminal cases, and therefore does not condone an easier burden of proof in the sentence phase for the prosecution:

³³⁷ 1953 4 SA 552 (A):561F-G.

³³⁸ 1991 4 SA 310 (A):360.

³³⁹ 1990 4 SA 735 (A):743I. See also *S v Mabizela* 1991 2 SACR 129(A):132E and especially *S v Mbotshwa* 1993 2 SACR 468 (A).

'No difficulty arises in relation to the onus and degree of proof of aggravating factors. In accordance with the principle it will be for the State to establish their presence. And in order to discharge such onus, proof beyond a reasonable doubt will be required ... Placing the burden of proof on the State to negative the existence of mitigating factors will avoid a difference in the incidence of the onus of proof (which would otherwise occur) in regard to mitigating on the one hand and aggravating factors on the other; and also in regard to facts relevant to conviction on the one hand and those relevant to sentence on the other.'

4.5 The role which probabilities play

Salmond³⁴⁰ describes the nature of the concept of 'probabilities' in terms of the exclusion of the truth of 'something else which is not (or less) probable':

'One fact is evidence of another when it tends in any degree to render the existence of that other probable. The quality by virtue of which it has such an effect may be called its *probative force*, and evidence may therefore be defined as any fact which possesses such force. Probative force may be of any degree of intensity. When it is great enough to form a rational basis for the inference that the fact so evidenced really exists, the evidence possessing it is said to constitute proof.'

This reflects only one perception of the concept of 'probabilities'. There are various types of formalised theories of probability and the aspect of 'probabilities' have been discussed to an extent in the discussion above.

³⁴⁰ 1924:498.

It is however necessary to divulge in a somehow more in-depth discussion thereof in so far as it relates to this specific research as the conclusion of this research is, to an extent, based thereon.

It is clear from the above-mentioned discussion that probabilities play an important role as far as the determination of the success of a party to litigation is concerned. It plays a central role in civil proceedings, as the standard of proof 'on a balance of probabilities' reflects. It is submitted that its role in criminal proceedings have been enjoying less pertinence. The version of the accused is tested against the possibility that it may be 'reasonably possibly true', which may equally be defined that as the accused is to be convicted if his version is found to be inherently *improbable*.

It is trite law that the case of the state is evaluated in the sense that it should provide prove 'beyond a reasonable doubt'. In this regard, with reference to the Miller-case, the notion had been left that the satisfaction of such burden is to be obtained by the state convincing the presiding officer of its case on a 'high degree of probabilities'.

In view of this it is submitted that probabilities play an equally important role in criminal proceedings, as it does in civil proceedings. The measure of certainty which is expected in a criminal case is merely higher than in that of a civil case. It is therefore submitted that in criminal proceedings, firstly the court must decide, after

the facts of a case were proven by the state, whether the accumulated weight of the probabilities is such that it can be said that the state case is so strong, on the probability test, that its case proved the guilt of an accused beyond a reasonable doubt. But the test does not end there. The second leg of the test is to ask whether the version which the accused gave cannot perhaps be said to be *reasonably possibly true on the probabilities* of the proven facts. If so, the accused must be acquitted. It is submitted that this suggestion, as far as the role of the probabilities of the facts of a case are concerned, is supported by *S v Munyai*³⁴¹ where it was held:

'In other words, even if the state case stood as a completely acceptable and unshaken edifice, a court must investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false. There is no room for balancing the two versions, ie the state case as against the accused's case and to act on preponderances ... the proper approach in such a case is for a court to apply its mind not only to the merits and demerits of the state and defence witnesses, but also to the probabilities of the case. It is only after applying its mind to such probabilities that the court would be justified in reaching a conclusion as to whether the guilt of the accused had been established beyond a reasonable doubt.'

Further support for this submission is found in *Shackell v S*³⁴² where Brand AJA prominently rules that probabilities play an important role in both the evaluation of evidence and application of the burden of proof in a criminal case.

³⁴¹ 1986 4 SA 712 (V):715G-I.

³⁴² 2001 4 SA 1 (SCA).

In the court *a quo* in the *Shackell*-case, the appellant's version was rejected because it was found to be inherently improbable. After having considered the grounds on which the court rejected the version of the appellant, Brand AJA finds that he is not persuaded that each and every ground mentioned by the court *a quo* can rightfully be described as such. He concludes that it is trite law that the prosecution must prove its case beyond a reasonable doubt in a criminal case, and that a mere preponderance of probabilities is not enough. Brand AJA³⁴³ then proceeds to make a paramount statement for the clear understanding of the concept of the burden of proof, namely:

'Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of the accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance or that version. Of course it is permissible to test the accused's version against the probabilities.'

But Brand AJA³⁴⁴ immediately then heeds the important warning, quite correctly, that the version of an accused can, however not be rejected *solely* on the probabilities of his/her version:

But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the court *a quo* its reasoning lacks this final and crucial step.'

³⁴³ 2001 4 SA 1 (SCA):[30].

³⁴⁴ 2001 4 SA 1 (SCA):[30].

Although correct, it is submitted that this warning is merely emphasising the rule that no case (whether civil or criminal) should be evaluated in a 'piece-meal' fashion, but that all the evidence must always be taken into account before the presiding officer can come to a finding

In civil cases probabilities play a slightly different role. At the end of a trial the court must determine which party's version is the most probable (plausible) version, as that party will be entitled to judgment in his/her favour.

It is furthermore also important not to lose sight of the fact that the probabilities of a case must be *founded on facts which have been proven*, as reflected in *S v Abrahams*,³⁴⁵ where Hoexter AJ found that: '... 'n Verhoorhof kan die waarskynlikhede, wat gemeensaak is, toets.' Schmidt and Rademeyer³⁴⁶ referring to both civil and criminal trials state that proof is delivered by means of deductions made as far as facts in dispute are concerned. They emphasise that in both criminal and civil cases such deductions can only be made when it is in accordance with proven facts. They describe this as 'elementary logic'. They further emphasise that in criminal matters such a deduction must also be the only reasonable deduction, whereas in civil cases it is sufficient that the deductions are the most probable deduction.³⁴⁷

³⁴⁵ 1979 1 SA 203 (A).

³⁴⁶ 2006:78.

³⁴⁷ Schmidt and Rademeyer 2006:78.

Schmidt and Rademeyer³⁴⁸ argue that it should be distinguished between the concept of evaluation or that of the *credibility of a witness* and that of the *evaluation of probabilities*. They argue that the evaluation of the credibility of a witness is mainly a subjective evaluation of whether a witness can be believed or not, and that the most important feature thereof is the courts impression of a witness. What is taken into account are aspects such as the witnesses demeanour in the witness box, the manner in which he/she answers questions, his/her honesty or lying nature, his/her powers of observation, his/her prejudices or objectivity and his/her opportunities of observation. On the other hand, the evaluation of the probabilities of the case is about objective grounds of deduction. The factor which plays the most important role is the deduction which can be made from the evidence which was found to be reliable evidence by the court during the presentation of evidence phase. It may therefore be said that the first-mentioned aspect involves the presentation of evidence, and the last mentioned the question of whether the adduced evidence is such that it provides proof. Schmidt and Rademeyer³⁴⁹ argue that, if this is correct, it is not the same measurement which applies to the two situations.

It is therefore so, that when the court considers the credibility of a witness, it is not busy making deductions from which it must choose the most probable. This argument also holds that it may equally apply to criminal cases when evaluating the credibility of a witness. In *National*

³⁴⁸ 2006:78.

³⁴⁹ 2006:79.

*Employers' General Insurance Co Ltd v Jagers*³⁵⁰ the court was of the opinion that it does not seem to be desirable for a court to first consider the question of credibility of a witness and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate field of enquiry:

'It seems to me ... that in any civil case... the onus can ordinarily only be discharged by adducing credible evidence to support the case of a party on whom the onus rests. In a civil case ... where the onus rests on the plaintiff ... and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether the evidence is to or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do to the defendant's the plaintiff can only succeed if the Court nevertheless believes him and that the defendant's version is false.'

Le Roux³⁵¹ makes the remark that a court should only make a deduction, referring obviously to the application of the burden of proof, from the *evidence as a whole*. *R v de*

³⁵⁰ 1984 4 SA 432 (EC):440D-I.

³⁵¹ 1992:123.

*Villiers*³⁵² equally reflects that a court must weigh the cumulative effect of all of the facts proven as a whole. *Le Roux*³⁵³ refers to *S v Smith*³⁵⁴ in this regard because it represents a very important extension to this principle. In this case it was found that it is not necessary that the deduction of liability is to be made beyond a reasonable doubt of each fact, which, to an extent, supports the view that the evidence of an individual witness differs, as far as the application of the probabilities are concerned, to the application thereof to a set of facts (the whole case).

In *S v Mtembu*³⁵⁵ it was made clear that a case cannot be decided on probabilities only:

'... for consideration in a criminal case on the general issue with the guilt has been established beyond reasonable doubt, mere probabilities in the Crown's favour would have to be excluded from consideration and mere probabilities in favour of the accused would have to be assumed to be certainties.'

In *Selamole v Makhado*³⁵⁶ it was held that both the findings of credibility and the probability factors must be considered when a determination is made whether a party has satisfied its burden of proof. Schmidt and Rademeyer³⁵⁷ argue that any finding about what has happened in the past is based on deductions, including the evaluation of the credibility of a witness. But the same standard of 'on a

³⁵² 1944 AD 493:508-509.

³⁵³ 1992:126.

³⁵⁴ 1978 3 SA 749 (A):755A.

³⁵⁵ 1950 1 SA 670 (A):679.

³⁵⁶ 1988 2 SA 372 (V).

³⁵⁷ 2005:79.

balance of probabilities' exists no matter how serious an allegation of fact in a civil case may be in that the onus of proving a fact in civil cases, remains one of discharging it 'on a balance of probabilities'.³⁵⁸ There had been suggestions through the years that there might be different degrees, or standards of proof, in a civil case, depending on the nature of the facts in issue, but this notion had been rejected in the South African law.

4.6 Conclusion

In criminal law the concept of 'reasonableness' plays an important role. This term is to be considered in both the above-mentioned concepts 'beyond a reasonable doubt' and 'reasonably possibly true'. The legal convictions of the community, the *boni mores*, as informed by the Constitution³⁵⁹ form part of public policy. From this it may be deducted that when applying the term 'reasonableness' it should *reflect* the public policy (convictions of society). But the 'legal convictions of the community' is no easy task to establish.³⁶⁰ Nugent JA made a very important statement in this regard in *Minister*

³⁵⁸ Schwikkard and van der Merwe 2005:545, referring to *Ley v Ley's Executors* 1951 3 SA 186 (A):192D.

³⁵⁹ 108/1996.

³⁶⁰ See, for instance in this regard Van Blerk (1998:16) where she states that 'positivists criticise the assumption that, because law commands or prohibits in many instances behaviour that is also morally commanded or prohibited, law has a moral content. Here is the danger that reactionaries or conservatives will employ this confusion of law and morals to advance the legitimacy of positive law by automatically identifying it with a natural, reasonable or divine order. The implication is that if the legal order reflects the moral order, it follows that if something is law, not only is it 'right' but it is as it 'ought' to be.'

of *Safety and Security v Van Duivenboden*³⁶¹ where he defined the legal convictions of a community in terms of the norms and values of that community:

'In applying the test that was formulated in *Minister of Police v Ewels* the 'convictions of the community' must necessarily now be informed by the norms and values of our society as they have been embodied in the 1996 Constitution. The Constitution is the supreme law, and no norms or values that are inconsistent with it can have legal validity - which has the effect of making the Constitution a system of objective, normative values for legal purposes.'

It is submitted that especially the English law has left a very strong notion which is applied in South Africa that *probabilities* play an important role in the distinction between the standard of proof in a criminal as well as civil proceedings. Furthermore, the probabilities play a more important role in the determination of the guilt of an accused, in criminal proceedings, than would generally be acknowledged. As support for this argument, the authoritative *Miller v Minister of Pensions*³⁶² case, as referred to above, clearly states that to achieve the criminal standard of proof, the proof of a case does not have to reach certainty, but a high degree of *probability*. As discussed above, many cases, including South African cases, also reflect this notion, although it was also determined from the discussion above that some of the concepts of the issue related to the burden of proof in general, are not easy to define into a hard and fast

³⁶¹ 2002 6 SA 431 (SCA):444.

³⁶² 1947 2 All ER 372.

workable definition which can be applied to all factual situations.

Authors such as Cross, as reflected above, accept that there are degrees of probabilities and then go on to state that if thus much is accepted then it must be said that the law can intelligibly require that a very high degree of probability must be established by the prosecution in a criminal case.

These submissions obviously refer to the *test which applies to a case as a whole* in order to determine whether the burden of proof had been satisfied in a given case or not, although probabilities also play a role in the determination of each witnesses' credibility.

But both the standards of 'beyond a reasonable doubt' and 'on a balance of probabilities' are determined, to an extent, on the *probabilities* of the whole case before a court, more specifically, the *degree of probabilities*, of a case. In a civil case, if the probabilities are weighed and found equal, the defendant will be successful as the plaintiff carries the burden of proof. If the scale however tips in the slightest in the favour of either of the parties, that party will be successful. Anything more than an equal weight will ensure that party is victorious. In a criminal case the probabilities are expected to be much higher.

The question which is of importance here seems to be: *when* can it be said, that the probabilities are such that it is

high enough to satisfy a particular standard? There is healthy confusion in both the case law and opinion of authors as to how the standard is determined. The crux of this difference is whether the standard to be applied should be an objective or subjective standard.

If the standard is *objective*, weighing the probabilities may be the answer to the problem. The degree of probabilities would be able to determine whether a case was *not proven*, proven 'on a balance of probabilities' or proven 'beyond a reasonable doubt', which may be termed the *scales of probabilities*. The weight of the evidence, given its probabilities, would become the hard and fast rule of how to determine whether a case was proven or not.

If the standard is *subjective*, on the other hand, it could be argued that a trier of fact, as in the continental European system, is to be *convinced of the truth* of a fact or a case before that party can be the successful party having proven his/her case or not. It is however submitted that it could still be argued that this decision of the trier of fact is made on the probabilities of a fact and/or the probabilities of a case. In fact, it is more so that in this case the balance of the probabilities would determine whether a trier of fact believes something or not. The measure would merely be dependant, not only on the weight of the probabilities of a fact or case, but also in addition, on whether a specific trier of fact, is convinced subjectively that a fact exists or a case was proven or not. The subjective approach would also entail a *personal* belief or disbelief of a fact or case by the trier

of fact. It is submitted that the probabilities would thus be evaluated from a value-laden personal belief as opposed to a weighing of probabilities from an objective point of view. This view is supported by the definition of 'proof' which Bell³⁶³ advocates, namely:

'Proof. 'The word *proof* seems properly to mean anything which serves, either immediately or mediately, to convince the mind of the truth or falsehood of a fact or proposition; and as truths differ, the proofs adapted to them differ also. Thus the *proofs* of a mathematical problem or theorem are the intermediate ideas which forms the links in the chain of demonstration; the *proofs* of anything established by induction are the facts from which it is inferred, etc.: and the *proofs* of matters of fact in general are our senses, the testimony of witnesses, documents and the like. *Proof* is also applied to the conviction generated in the mind by *proof* properly so called'.

The reality is that traces of both an objective and subjective approach are to be found in both the Anglo-American and South African legal systems. *Miller v Minister of Pensions*³⁶⁴, for instance, clearly favours the objective approach of weighing probabilities both in civil and criminal cases in order to determine whether a fact or case was proven or not. *Bater v Bater*³⁶⁵ supports this view. *R v Summers*³⁶⁶ and *R v Hepworth and Fearnley*³⁶⁷ suggest otherwise. They place the emphasis on 'feeling sure of the guilt of an accused' which reflects a subjective approach

³⁶³ 1925:442.

³⁶⁴ 1947 2 All ER 372.

³⁶⁵ [1951] P. 35.

³⁶⁶ (1952) 36 Cr. App. R. 14.

³⁶⁷ (CCA) [1995] 2 QB 600.

to the evaluation of evidence in order to determine whether a fact and/or case was proven or not.

Courts in South Africa favour an objective approach. In *Ocean Accident and Guarantee Corporation Ltd v Koch*³⁶⁸ the approach which Denning J applied in *Miller v Minister of Pensions*³⁶⁹ was adopted. But *S v Rama*³⁷⁰, followed by *S v Mlambo*³⁷¹, the favoured approach was that the trier of fact must morally be certain of the guilt of the accused. South African law seems to reflect much less of a notion that the approach is more subjective in civil cases, than in criminal cases. The approach is much rather that the probabilities of a case should be the *legal* truth, as opposed to the *actual* truth, decided on an objective basis on the probabilities of a case. The decision of *S v Mattioda*³⁷² reflects the attitude, so it is submitted, of a subjective 'probability-approach' which is advocated in this research, where its finding reflects that the proper approach in a criminal case is to consider the totality of the evidence (meaning to examine the nature of the state case) the nature of the defence case, the probabilities emerging from the case as a whole, the credibility of all the witnesses in the case (including the defence witnesses) and then to ask whether the guilt of the accused has been established beyond a reasonable doubt. This case cautions, in conclusion, that it is not a proper approach to hold that, because the court finds that the state witnesses have

³⁶⁸ 1963 4 SA 147 (A).

³⁶⁹ 1947 2 All ER 372.

³⁷⁰ 1966 2 SA 395 (A).

³⁷¹ 1957 4 SA 727 (A).

³⁷² 1973 1 PH H 24 (N).

given evidence in a satisfactory manner, that therefore the defence evidence must be rejected as false.

It is submitted thus that probabilities do play a vital role in the application of the burden of proof, whether evaluated from a subjective or objective point of view in both criminal and civil proceedings.

CHAPTER 5

Conclusion

5.1 Introductory remarks

5.2 'The scales of probabilities' as a suggested model of finding the legal truth during litigation

5.1 Introductory remarks

It was shown in this research that legal dispute and the resolution thereof are primarily about fact-finding.³⁷³ Without being able to find the *actual* truth of what gave rise to a dispute and/or what happened during the course of a dispute, mankind is left with little or no other option other than utilising its own manufactured processes in an attempt to find, at least, the *legal* truth of a dispute. These processes are encompassed in the rules of evidence, in specific the concept of the 'burden of proof'.

The search for 'truth' through fact-finding has, however, been troublesome and healthy in controversy over the centuries. In criminal law, for instance, the thorny road

³⁷³ Fact-finding is an aspect which is developed in practice. Van Warmelo (1959:215) makes a relevant remark. He points out that the Roman law and English law (which South Africa has inherited to a large extent as far as the law of evidence is concerned) coincide on one very important aspect, namely that both systems have grown and developed in and for the legal practice. It is submitted that the refinement of the fact-finding process and the burden of proof, for the purposes of this research is largely developed within the legal practice.

between extracting confessions from an accused by means of torture and the right of an accused to be presumed innocent had taken a considerable time to evolve and has caused vast injustices in the process.

The 'truth' is a variable concept. This research highlights the shortcomings of mankind's ability to find the actual truth and attempts to serve as a contribution in the continuous strive for the search of a better system with which to find the truth of a legal dispute in order to be able to pronounce on the rights and responsibilities of parties to a dispute in the best possible manner conducive to all parties to litigation.

In the research the point of departure is that there are mainly three phases in the process of fact-finding in litigation, namely the phase *before the presentation of evidence*, the phase *during the presentation of evidence* and the phase *after the presentation of evidence*. The focus was mainly on the last phase, which strives to successfully find facts and determine liability of the parties to legal dispute. The fact-finding process has certain safety valves in order to ensure justifiable results. It, for instance, ensures that only admissible evidence is received by the presiding officer. Evidence is excluded primarily because of the irrelevance thereof. Relevant evidence itself is however also excluded as admissible evidence in certain circumstances where the evidence is perceived not to be sufficiently reliable to contribute to determining a fact in dispute. Due to the possible unreliability of evidence, an opponent is given the opportunity, during the

presentation of evidence phase to test the reliability of the evidence presented and the credibility of the witnesses who testify by means of cross-examination. An evaluation of the evidence which was adduced, including the facts which were established during the first phase takes place. After having established the facts which were proven the burden of proof is applied in order to determine whether the party who carries the burden of prove had satisfied it. Only then can a decision be made whether a party to a dispute had been successful in proving his/her case, or not.

It was shown that the concept of 'probabilities' is most important in the fact-finding process and application of the burden of proof. 'Probabilities' play the central role in this respect. The application of the concept of 'probabilities' throughout the fact-finding process and application of the burden of proof ensure that justice is best served. The following model is suggested in correctly applying this concept to the so-called 'phase three' above, namely the fact-finding process (in general) as well as the burden of proof in litigation.

5.2 'The scales of probabilities' as a suggested model of finding the legal truth during litigation

In litigation there is a constant process of determining facts. This may include informal conversation about a case between parties and/or their legal representatives, the pleadings in civil cases or plea process in criminal cases, the presentation of evidence, cross-examination, re-

examination, legal argument and judgment by the presiding officer (including appeal and review remedies). Facts in dispute are the essence of dispute resolution, as those are the facts to be determined (found). The other facts are out of contention, until the trier of fact is to evaluate all the evidence in totality (all the facts which have been proven). Proving the facts does not constitute meeting the burden of proof, however. Proving the facts is determined by a subjective finding of credibility of the testimony of witnesses or the reliability of exhibits. It has been shown that this process is highly dependent on the concept of 'probabilities'.

'Probabilities' is a synonym for 'probable truth'. This concept is applicable to all the various processes during the fact-finding process and application of the burden of proof'.

Fistly, the probable truth of a matter, plays the most important role in the determination of whether individual facts have been proven or not. It is submitted that the degree of probability required in this regard is high, in that a trier of fact is to be persuaded and/or convinced of the existence of a fact before he/she will find that such fact indeed existed, or not. The probable truth of a matter will play an equally important role in determining both which facts have been proven by any one of the parties and the proven facts of the case, as a whole, as it merely reflects a cumulative effect of all the individually proven facts.

Secondly, the probable truth is applied to the case as a whole in order to determine whether the burden of proof has been satisfied, or not. In this regard, there is a distinction between civil cases and criminal cases, in that:

- (1) In civil cases, if the probable truth is such that one party's version is more plausible and/or probable than the other party's, the plaintiff will be the successful party as he/she carries a burden of proof of 'on a balance of probabilities'. In other words, the degree of probability (probable truth) required is a fifty-one percent degree for any of the parties in order to be the successful party. It is to be noted that in the case where the probabilities and/or plausibility is equal between the parties (fifty percent to both parties) the party not carrying the burden of proof (usually the defendant) will be the successful party.

- (2) In criminal cases it was shown that the manner of the application of the concept of 'probabilities' should not differ from that in civil cases. Although this notion is not generally accepted, it is submitted that there is evidence that the only difference between the application of the burden of proof in civil and criminal cases should be the degree of probabilities (probably truth) required. The degree in criminal cases required in this sense, is namely so high that the case for the prosecution must be so probably (probably the truth) that it can be said that the

version of the state is probably the truth beyond a reasonable doubt. An important factor is however that, even if the version of the prosecution may be said to be true beyond a reasonable doubt upon consideration of all the evidence in its totality, the version of an accused must always also be tested on its own (although against the background of the totality of the evidence) whether his/her version is not perhaps so probable (probably the truth) that it can be said to be reasonably possibly true. If this can be said of the version of the accused that he/she must be acquitted, regardless of whether the version of the prosecution may probably be true beyond a reasonable doubt.

The evaluation of the credibility of a witness's evidence and the determination whether facts have been proven seems therefore to be dependent upon the subjective belief of the fact-finder. He/she will necessarily evaluate the evidence of a specific witness in a manner conducive to his/her belief of logic (he is either convinced or persuaded that a fact exists or not). This process has nothing to do with the ultimate application of the burden of proof which a party has to satisfy in order to prove its case (the cumulative effect of individually proven facts). It has been argued above that the facts in dispute do not all have to be proven according to the relevant burden of proof which a party bears in order to prove its case. For instance, not all facts in dispute in criminal proceedings are expected to be proven beyond a reasonable doubt.

Therefore, only when the presiding officer determines the liability/accountability of a party should the real

difference between criminal cases and civil cases emerge. It is trite law that the burden of proof resting on a party to prove a criminal case differs vastly from that of a civil case. The reason for this is to be found in the discussion of the principle that ten guilty persons should rather be acquitted of a crime than one innocent person be found guilty. This is also closely related to the presumption of innocence in the criminal law. But the manner in which to approach this aspect, although having been rich in controversy, is problematic. South African courts have throughout been referring to the English case *Miller v Minister of Pensions*³⁷⁴ with approval. The crux of this authoritative case, so it is submitted, is simply that a much higher degree of convincing the presiding officer that the state case (in criminal proceedings where the state bears the burden of proof beyond a reasonable doubt) is to be regarded as the probable truth is required, as opposed to civil cases where the burden of proof is on the plaintiff (bearing the burden of proof on a balance of probabilities).

De lege ferenda the submission is thus made that the application of the probabilities to a case is the most important aspect of the fact-finding process and the burden of proof in litigation, which is to be regarded against the point of departure that mankind cannot attain a finding of *absolute/actual* truth. Both, as far as *individual facts/witnesses* and the *case as a whole* are concerned the presiding officer is dependent on his/her own perception of what the truth of a dispute is. It

³⁷⁴ 1947 2 All ER 372.

follows logically that a purely subjective approach in this regard may cause difficulties, in that no two presiding officers has exactly the same 'make-up' as far as aspects such as their backgrounds, prejudices, knowledge of the law are concerned. Therefore a measure of objective standards should also apply to the evaluation process, where probabilities find application.³⁷⁵

It is submitted that this model does not detract at all from the principles which currently find application in the determination of how to come to a finding in a given dispute-resolution. However, it enhances the value of the application of the concept of 'probabilities' and attempts to create a more unified *modus operandi* in both criminal and civil proceedings, which may be conducive to the interests of justice and law certainty.

³⁷⁵ It is also important to remember that the application of the probabilities to the evidence of an individual witness is not the only factor which plays a role in the evaluation of the evidence of a witness. The other factors, however, fall outside the ambit of this research.

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