

# Washington Law Review

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Volume 41 | Number 1

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1-1-1966

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### Recommended Citation

Lloyd L. Wiehl, *Our Burden of Burdens*, 41 Wash. L. Rev. 109 (1966).

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## OUR BURDEN OF BURDENS

LLOYD L. WIEHL\*

*Judge Lloyd L. Wiehl critically examines the different standards utilized by the Washington Supreme Court to measure and describe the burden of proof in civil cases. He concludes that the present formulas should be converted into standards based on the probability theory.*

An essential requirement for the determination of any judicial action is the existence of clear and comprehensible standards for describing and measuring the burden of proof. In criminal actions, the burden of proving a case "beyond a reasonable doubt" appears to be the best and only standard. In civil cases, however, standards utilized to measure and describe the burden of proof have proliferated to such an extent that they detract from rather than contribute to clarity and understanding.

Recently, the author heard a civil case in which three different standards or formulas were applicable in determining the burden of proof. The fact that such a paradox existed had never been illustrated so forcefully. This case happened to be non-jury but the same standards would apply in a jury case, and, of course, the jury in that event would have to be told in clear and understandable language about these different measures of persuasion.

The Washington Supreme Court has developed many different standards to measure and describe the burden of persuasion in civil cases. Five of these standards are: (1) proof by "a preponderance of the evidence"; (2) proof by "clear, cogent and convincing evidence"; (3) proof to a "reasonable certainty"; (4) proof by "clear, unequivocal and decisive evidence"; and (5) proof by evidence that is "conclusive, definite, certain and beyond all legitimate controversy."

This multiplication of standards is not unique to Washington. Courts throughout the land are engaging in a flight of abstract legalistic verbosity which promises to end only when they run out of new adjectives. It is truly a flight into a land of fantasy since neither lawyer nor layman has any idea of the fine and shadowy distinctions, if any, between all of the adjectives used to describe or define the burden of persuasion. In the area of fraud alone, the courts of the country have come up with no less than forty different

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combinations of adjectives to describe what they believe to be the burden of proof.<sup>1</sup>

Since different factual situations evidently require different standards of proof or measures of persuasion, it is absolutely essential that the finder of fact, whether judge or jury, know and understand the particular measure involved in the case. If trial is by jury, it is of course the duty of the judge to instruct to that end. This has proven unsuccessful. Controlled tests and questionnaires have shown that a jury has little conception of the meaning of the present burden of proof in civil cases.<sup>2</sup>

The purpose of this article is to examine the usefulness of the five standards of proof listed above. Each measure of persuasion will be analyzed separately and definite suggestions made as to whether the measure should be eliminated or couched in more understandable language.

### I. PREPONDERANCE OF THE EVIDENCE

The "reasonable doubt" standard used in criminal cases points to what we are really concerned with—a state of the trier's mind. However, the traditional standard used in civil cases—by "a preponderance of the evidence"—is a step removed since it refers to an amount of evidence and is merely the instrument by which the juror's mind is influenced. It is therefore an awkward vehicle for expressing the degree of the juror's belief.<sup>3</sup> In most jurisdictions, the expression has been interpreted as meaning that proof which leads the finder of fact to find that the existence of a contested fact is more "probably" or more "likely" true than not true.<sup>4</sup> By utilizing a

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<sup>1</sup> See 24 AM. JUR., *Fraud and Deceit* § 278 (1939), wherein the author remarked:

The variety in the various expressions above noted which purport to state the degree of proof necessary to establish fraud renders them far from satisfactory in establishing any workable rule.

<sup>2</sup> See Hagman & MacArthur, *Evidence: The Validity of Multiple Standards of Proof*, 1959 WIS. L. REV. 525; Remarks of Hon. Walter B. Wanamaker, *Trial by Jury*, 11 U. CINC. L. REV. 119, 191-200 (1937); *Report of Committee on Administration of Justice*, WIS. B. BULL., June 1952, p. 25-28.

<sup>3</sup> McCORMICK, *EVIDENCE* 676 (1954).

<sup>4</sup> The Washington court has reduced the burden to the probability factor. See, e.g., *Kilmer v. Bean*, 48 Wn. 2d 848, 851-52, 296 P.2d 992, 994 (1956); *Cambro Co. v. Snook*, 43 Wn. 2d 609, 615, 262 P.2d 767, 771 (1953); *Home Ins. Co. v. Northern Pac. Ry. Co.*, 18 Wn. 2d 798, 803, 140 P.2d 507, 509 (1943). *Accord*, *Cook v. Michael*, 214 Ore. 513, 330 P.2d 1026 (1958); MATHES & DEVITT, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 71.01 (1965); ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL 116 (1961); MINNESOTA JURY INSTRUCTION GUIDES (CIVIL) 42 (1963). See also MORGAN, *SOME PROBLEMS OF PROOF* 84-85 (1956); Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 51 (1961); McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242 (1944); Roberts & Sinrich, *Variable Verbalistics*, 11 VAND. L. REV. 1413 (1958).

standard framed in terms of probability rather than preponderance of the evidence, the intention of the finder of fact will be more properly focused on his own impressions and state of mind rather than upon the evidence in the case.<sup>5</sup> This should be more understandable to the average juror since his own everyday decision-making processes are usually in terms of probabilities. In addition, by means of the probability theory, any conflict over the meaning of the word "preponderance" and any argument over the amount of the preponderance required will be avoided.<sup>6</sup> It is the recommendation of this writer that the "preponderance of the evidence" formula be converted in all applicable cases into the "more probably true than not" standard—a standard based on the probability theory.<sup>7</sup>

## II. PROOF BY "CLEAR, COGENT, AND CONVINCING EVIDENCE"

The second standard used—that a certain fact must be proved by "clear, cogent and convincing evidence" or by "clear and convincing evidence,"<sup>8</sup>—is often presented to the trier of fact in fraud cases and in cases where a party must rebut a strong presumption.<sup>9</sup> The Washington Supreme Court has decreed that the jury must be advised that the three magic words *mean* more than a "preponderance of the evidence."<sup>10</sup> This kind of formula is even more objectionable than

<sup>5</sup> See Roberts & Sinrich, *supra* note 4.

<sup>6</sup> See Ball, *supra* note 4, at 808, in which Professor Ball discusses the communication muddle over the meaning of "preponderance."

<sup>7</sup> This has been done by the Washington Supreme Court Committee on Jury Instructions (WPI), yet to be published, by its pattern instruction No. 21.01, as follows:

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a "preponderance" of a "fair preponderance of the evidence," or the expressions "if you find" or "if you decide" are used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which he has the burden of proof is more probably true than not true.

<sup>8</sup> There seems to be no difference in the two ways of describing this formula since "cogent" is a synonym of "convincing," and it seems to be purely a matter of semantics. It is also interesting to note that, while "cogent" by definition means "convincing," the word "clear" by common understanding also means "convincing," and therefore it is hard for an attorney, let alone a layman, to recognize any difference in the meaning of the three words. It is also true that a widely accepted definition is that evidence "preponderates" when it is more "convincing" to the trier than the opposing evidence. See *State v. Amunsis*, 61 Wn. 2d 160, 377 P.2d 462 (1963); *McCORMICK, EVIDENCE* 677 (1954). Therefore, it could well be argued that the use of the adjectives add little, if anything, to the traditional standard in a civil case.

<sup>9</sup> See *Dizard & Getty v. Damson*, 63 Wn. 2d 526, 387 P.2d 964 (1964) (presumption that a husband as manager of the community property incurs a community debt must be rebutted by "clear and convincing" evidence); *Bland v. Mentor*, 63 Wn. 2d 150, 385 P.2d 727 (1963) (fraud case); *Holmes v. Raffo*, 60 Wn. 2d 421, 374 P.2d 536 (1962) (emancipation of a minor child must be proved by evidence that is "clear, cogent and convincing."); *King v. Prudential Ins. Co.*, 13 Wn. 2d 414, 125 P.2d 282 (1942) (presumption of gratuity which attaches to the work a child does for his father must be overcome by "clear and convincing" evidence).

<sup>10</sup> See *Holmes v. Raffo*, *supra* note 9.

the "preponderance of the evidence" standard, since the trier of fact is left without any measuring device whatsoever. As stated by Professor McCormick, "no high degree of precision can be attained by these groups of adjectives."<sup>11</sup> And, as stated in a prior article by this author,<sup>12</sup> the use of such adjectives is not necessarily inconsistent with the use of the traditional "preponderance of the evidence" standard. The words "clear," "cogent" and "convincing" used separately or in groups are nothing but adjectives, and an adjective is nothing more or less than a word used with a noun to denote a *quality* of the thing named. Thus, it may well be argued, and has in fact been held, that such a group of adjectives denotes the *quality* of the evidence required to reach a certain verdict and does not necessarily denote the *quantum* of the evidence.<sup>13</sup> Some courts, however, have held that this group of adjectives means "beyond a reasonable doubt."<sup>14</sup> Professor McBaine has suggested that the use of these adjectives could be more simply and intelligibly translated to the jury if the jurors were instructed that they must be persuaded that the truth of the contention is "highly probable."<sup>15</sup> This is now the rule in Oregon.<sup>16</sup> By utilizing Professor McBaine's suggestion, the trier would again be dealing in probabilities and would be expressing the trier's belief and not merely discussing the quality of the evidence which is required to form that belief. This is an understandable measure.

In *Bland v. Mentor*,<sup>17</sup> the Washington court states that the phrase "clear, cogent and convincing evidence" denotes not only *more* than a mere preponderance of the evidence but *less* than "beyond a reason-

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<sup>11</sup> McCORMICK, EVIDENCE 679 (1954).

<sup>12</sup> Wiehl, *Instructing a Jury in Washington*, 36 WASH. L. REV. 378 (1961).

<sup>13</sup> Ray v. Nanney, 21 Tenn. App. 618, 114 S.W.2d 51 (1938). See Speiss v. Brandt, 230 Minn. 246, 41 N.W.2d 561 (1950); WISCONSIN JURY INSTRUCTIONS (CIVIL), Part 1, forms 200-11 (1960), in which, on authority of Wisconsin decisions, it is provided that the usual burden of proof in a civil case is to satisfy to a "reasonable certainty," but in those cases, such as fraud cases, where a greater or "middle" burden is needed, then the jury is told: "Such burden as to each question is to satisfy or convince you to a reasonable certainty, by evidence that is clear, satisfactory, and convincing, that . . ." In other words, in Wisconsin the quantum does not change; only the quality changes.

<sup>14</sup> Greene v. Bride & Son Constr. Co., 252 Iowa 220, 106 N.W.2d 603 (1960); Karr v. Pearl, 212 Ky. 387, 279 S.W. 631 (1926).

<sup>15</sup> McBaine, *supra* note 4 at 246-47, 253-54. Professor McBaine cogently suggests that the formulas used for criminal and civil matters, that is, "beyond a reasonable doubt," "by clear, cogent and convincing evidence" and "by preponderance of the evidence" are equivalent to statements that the trier must find that the fact is (a) almost certainly true, (b) highly probably true, and (c) probably true.

<sup>16</sup> Supové v. Densmoor, 225 Ore. 365, 358 P.2d 510 (1960); Cook v. Michael, 214 Ore. 513, 330 P.2d 1026, 1032 (1958).

<sup>17</sup> 63 Wn. 2d 150, 385 P.2d 727 (1963).

able doubt." This is the same indefinite standard suggested by the Uniform Rules of Evidence<sup>18</sup> and by the New Jersey court in *Aiello v. Knoll Golf Club*,<sup>19</sup> where the court said that the use of this group of adjectives "establishes a standard of proof falling somewhere between the ordinary civil and criminal standards."<sup>20</sup> The trier of fact is, therefore, told what these adjectives *do not mean but is never told what they do mean*. Another defect of the "clear, cogent and convincing" formula is that the trier of fact may well be faced with a situation where the evidence, both for and against a contested fact, will be of a quality suggested by the group of adjectives. If this occurs, the trier could well start wondering which side of the case is the clearer or the more cogent or the more convincing. The trier of fact would then be confronted with the confusing task of evaluating comparative degrees of the adjectives.

Jurors, if not the trial court, must be given a more satisfactory measuring device. If the courts cannot agree on the meaning of such a group of adjectives, how can a jury of laymen understand what is being said? In fact, jurors do not understand.<sup>21</sup> If it is concluded that the adjectives merely express the quality of the evidence required (and that is the purpose of an adjective), then it must be further concluded that the resolution of a contested fact may still be decided by what is more probably true than not true. However, if a court feels that a heavier burden is required (and certainly this is the holding of the Washington court), then it should adopt the "highly probable" test which is the rule in Oregon.<sup>22</sup> By putting the measurement in these terms a court would be exacting a higher standard than that required by the "more probably true than not true" formula discussed previously and at the same time would be presenting the trier of fact with a comprehensible measurement directed toward his belief rather than toward the evidence. In addition, uniformity between the two measurements would exist.

### III. PROOF TO A "REASONABLE CERTAINTY"

The third formula requires that a fact be proved to a "reasonable certainty." This standard is apparently used by the Washington

<sup>18</sup> Rule 1(4).

<sup>19</sup> 64 N.J. Super. 156, 165 A.2d 531 (1960).

<sup>20</sup> *Accord*, *Cross v. Legford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954); *Child v. Child*, 8 Utah 2d 261, 332 P.2d 981 (1958).

<sup>21</sup> See *Hagman & MacArthur*, *supra* note 2.

<sup>22</sup> See *Supové v. Densmoor*, 225 Ore. 365, 358 P.2d 510 (1960), in which the Oregon court said: "Clear and convincing evidence means that the truth of the facts asserted is *highly probable*." (Emphasis added.)

Supreme Court in describing the burden of proof regarding future or prospective damages. Although this formula appears from a preliminary reading of the cases to be a third and separate measurement of the burden of proof, a closer examination of the cases indicates that as a standard it requires nothing more than the traditional "preponderance of the evidence" measurement and should therefore be discarded as a separate and distinct statement of the measurement of proof.

The Washington court, since 1904<sup>23</sup> has held almost uniformly that the phrases "reasonably certain" or "to a reasonable certainty" were not needed in instructions relating to future damages and that when such phrases were used they were to be interpreted as meaning by a "preponderance of the evidence" or "reasonably probable" since the burden of proof for future damages was the same as for past damages.<sup>24</sup>

However, in *Taylor v. Lubetich*,<sup>25</sup> the court appears to have deviated from the *Gallamore* line by requiring the "reasonably certain" burden. But *Taylor* should not be considered as authority in the matter since the court was merely passing on the sufficiency of the evidence and not upon the necessity of the words "reasonable certainty" in a jury instruction. In the next case, *Orme v. Watkins*,<sup>26</sup> the court seems to approve an instruction on future damages including the phrase "reasonably certain." However, the instruction was not accepted to and the court therefore was merely passing upon the sufficiency of the evidence to sustain the instruction. The *Orme* rule was followed in *Venske v. Johnson-Lieber Co.*,<sup>27</sup> in which the court stated that the trial court erred in giving an instruction which permitted the jury to speculate as to what future medical expenses "might" be incurred and held that such damages must be proved

<sup>23</sup> *Gallamore v. City of Olympia*, 34 Wash. 379, 75 Pac. 978 (1904); *Webster v. City of Seattle, Renton Ry. Co.*, 42 Wash. 364, 85 Pac. 2 (1906); *Rowe v. Whatcom Co. R. & Light Co.*, 44 Wash. 658, 87 Pac. 921 (1906); *Harris v. Brown's Bay Logging Co.*, 57 Wash. 8, 106 Pac. 152 (1910); *McIlwaine v. Tacoma R. & Power Co.*, 72 Wash. 184, 129 Pac. 1093 (1913); *Holt v. School Dist. No. 71*, 102 Wash. 442, 173 Pac. 335 (1918); *Kane v. Nakamoto*, 113 Wash. 476, 194 Pac. 381 (1920); *Johnson v. Dye*, 131 Wash. 637, 230 Pac. 625 (1924). *But cf.*, *Ongaro v. Twohy*, 49 Wash. 93, 94 Pac. 916 (1908).

<sup>24</sup> For a general discussion of cases from this jurisdiction and others, see Annot., 85 A.L.R. 1010, 1019 (1933); 81 A.L.R. 423, 467 (1932).

<sup>25</sup> 2 Wn. 2d 6, 97 P.2d 142 (1939).

<sup>26</sup> 44 Wn. 2d 325, 267 P.2d 681 (1954).

<sup>27</sup> 47 Wn. 2d 511, 288 P.2d 249 (1955). For cases applying "reasonable certainty" doctrine to prospective business profits, see *Ingersol v. Seattle-First Nat'l Bank*, 63 Wn. 2d 354, 387 P.2d 538 (1963); *Hole v. Unity Petroleum Corp.*, 15 Wn. 2d 416, 131 P.2d 150 (1942).

with reasonable certainty, citing *Taylor* as authority. It must be noted that in *Venske* the court, while not passing squarely on the matter, appears to indicate or suggest a change from the *Gallamore* line.

However, since *Johnson v. Dye* has never been overruled, and since it is the last case in which the court passed squarely on the proposition, it seems that the words "reasonable certainty" should not be required. Therefore, the phrase "reasonable certainty," born of accidental surplusage and transition, should be discarded.

It may be argued, however, that the "reasonable certainty" requirement, while not changing the traditional burden of proof in a civil case, is an added epithet thrown in to insure against speculation and conjecture. But this could be prevented by specifically admonishing the jury not to base a verdict for damages on speculation and conjecture, without changing the usual standard of proof. All of this confusion should therefore be eliminated by simply instructing the jury that future damages must be proved by the same burden of proof as all other damages, plus specifically admonishing against speculation and conjecture.

#### IV. PROOF BY "CLEAR, UNEQUIVOCAL AND DECISIVE EVIDENCE"

This standard was apparently first adopted by the Washington court in *Tuschoff v. Westover*,<sup>28</sup> in which the court held that the burden of proof, upon one who sets up abandonment of a lease as a defense, is to prove the same by "clear, unequivocal and decisive evidence."

The Washington court further held that, as in the case of "clear, cogent and convincing evidence," a general instruction stating the correct rule as to the quality of the evidence cannot cure the error of applying the "preponderance of the evidence" standard, citing *Adjustment Dep't, Olympia Credit Bureau v. Smedegard*.<sup>29</sup> It might be argued that the standard applied in *Tuschoff* is the same as the "clear, cogent and convincing" standard. While it may be admitted that this new standard lies somewhere in between "preponderance of the evidence" and "beyond a reasonable doubt," nevertheless, it cannot be said to be the *same* as "clear, cogent and convincing," or else the court would have said so, especially in view of its citation of *Smedegard*. Also, it has been held that "clear and convincing"

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<sup>28</sup> 65 Wn. 2d 69, 395 P.2d 630 (1964).

<sup>29</sup> 40 Wn. 2d 76, 241 P.2d 203 (1952).



does not mean "clear and unequivocal."<sup>30</sup> While a judge or jury might reasonably conclude that the phrase means the same as "beyond a reasonable doubt,"<sup>31</sup> nevertheless, that is evidently not what the Washington court meant; at least it did not say so. It must therefore be assumed that this new burden is another classic example of the use of a floating standard providing little assistance to the court or jury in the trial of a case. Much of what has been said in section (2), dealing with "clear, cogent and convincing" evidence, applies to this conglomeration of adjectives, which again deals only with the quality of the evidence, but evidently denotes a heavier burden than by a "preponderance of the evidence," and perhaps not as heavy as proof "beyond a reasonable doubt." Again, it must be said that we are dealing in abstract legal verbiages and certainly cannot expect a jury of laymen to understand the shadowy distinctions between these adjectives. If this floating burden must be retained, then it should be described in terms of probabilities; in other words, "highly probable." The jury could hopefully understand that standard, and it would again promote uniformity.

#### V. PROOF BY EVIDENCE THAT IS "CONCLUSIVE, DEFINITE, CERTAIN, AND BEYOND ALL LEGITIMATE CONTROVERSY"

In *Bicknell v. Guenther*,<sup>32</sup> the court, relying strongly on *Jennings v. D'Hooghe*,<sup>33</sup> held that the existence of an oral contract to devise or bequeath property must be proven by evidence that is "conclusive, definite, certain, and beyond all legitimate controversy." In *Jennings*, the court reviewed all cases to date and concluded that the above-stated standard was firmly adhered to in every case except two,<sup>34</sup> where the "reasonable certainty" standard was used. In trying to locate the exact measure of proof intended by the Washington court, it is interesting to note that in *Jennings* the court in discussing the sufficiency of the evidence in two prior cases, said: "In fact, the evidence there would have been sufficient to prove guilt in a criminal case."<sup>35</sup> The court therefore indicates that it is talking about

<sup>30</sup> *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118, 123 (1954), in which the Supreme Court of Ohio, in speaking of "clear and convincing" evidence, said: "It does not mean clear and unequivocal."

<sup>31</sup> "Unequivocal" means "without doubt," and "decisive" means "conclusive." WEBSTER, *NEW INTERNATIONAL DICTIONARY* (2d ed. 1948).

<sup>32</sup> 65 Wn. 2d 749, 399 P.2d 598 (1965).

<sup>33</sup> 25 Wn. 2d 702, 172 P.2d 189 (1946).

<sup>34</sup> *Avenetti v. Brown*, 158 Wash. 517, 291 Pac. 469 (1930); *Herren v. Herren*, 118 Wash. 56, 203 Pac. 34 (1921).

<sup>35</sup> 25 Wn. 2d at 724, 172 P.2d at 200.

a quantum of evidence less than "beyond a reasonable doubt." One might wonder at such a statement since the use of the word "conclusive" in the epithet indicates a burden even greater than "beyond a reasonable doubt." Certainly, the court meant a burden heavier than imposed by the "reasonable certainty" or the "clear, cogent and convincing" standards previously discussed. Judge Finley's strong dissent in *Bicknell*, concurred in by Judge Hamilton, sharply attacks the *Jennings* rule. His attack centers on the apparent absolute certainty required by the standard and also on its indefiniteness. He states that the term "beyond a legitimate controversy" is the "ultimate in legal abstractions," and suggests the "clear, cogent and convincing" standard, which, according to his research, is the obvious and popular alternate.<sup>36</sup> In any event, it must be agreed that this constant proliferation of burdens must stop somewhere or we will end up with a different burden for every conceivable type of case, with so many shadowy distinctions that it will become impossible to intelligently instruct a jury. It therefore is recommended that this standard be converted into an understandable measure, such as that which is "highly probable" or is to be found "beyond a reasonable doubt." The "highly probable" measure would seem to be preferable from the standpoint of uniformity. It should also be sufficient to insure against speculation or conjecture. In addition, as has been stated previously, such a standard would be articulated in terms of the jurors' belief in the existence or non-existence of the disputed fact, which, after all, is the kind of measuring device we are really looking for. We are certainly not seeking the jury's estimate of the weight of evidence in the abstract, apart from its powers of persuasion.<sup>37</sup>

## VI. CONCLUSION

Hopefully, it has been demonstrated that there is considerable basis for the present-day criticism of our multiple standards of proof. From the standpoint not only of arriving at a more precise standard but also of communicating it to a jury, we should attack this problem with renewed determination. The suggested solution is that the five standards presently used in civil cases be converted into only two degrees of probability, that which is "more probably true than not true" and that which is "highly probable." If it is concluded

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<sup>36</sup> 65 Wn. 2d at 765-66, 399 P.2d at 607-08.

<sup>37</sup> See James, *Burdens of Proof*, 47 V.A. L. Rev. 51, 53-54 (1961).

that an epithet is needed as a caution to the jury, then it should be converted into the probability standard, such as has been done by the Washington Supreme Court Committee on Jury Instructions in its handling of the "preponderance of the evidence" standard.<sup>38</sup> This may be done by an instruction reading substantially as follows:

When it is said that a party has the burden of proving any proposition by [clear, cogent and convincing evidence] [or any other epithet] it means that you must be persuaded, considering all the evidence in the case, that the proposition on which he has the burden of proof is highly probable.

On the other hand, if it is concluded that an epithet is not needed, then an instruction could be worded in the following manner:

One who claims [fraud] [—————] has a burden of proof greater than persuading you that its existence is more probably true than not true. He has the burden of persuading you that its existence is highly probable.

The latter instruction is preferred since, generally speaking, epithets are confusing and ambiguous. Also, the latter instruction can conveniently be used in conjunction with the ordinary burden of proof by simply preceding it with the word "However." In most cases both standards will be needed. If another and more onerous burden is desired, then we should go to the present standard used in criminal cases, "beyond a reasonable doubt." In this manner, we achieve not only uniformity but also improved communication with the jury. Instructions phrased in terms of probability, being in degrees of belief, are clear, understandable and, above all, accurate. Courts should also terminate the questionable habit of inventing new abstract standards or epithets to add to our already intolerable "burden of burdens."

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<sup>38</sup> For text of pattern instruction, see *supra* note 7.