

# Proof of Facts

Christopher Enright



*Although continuing judicial education is the order of the day, fact-finding is not subject to the rigor of scientific analysis. Judges are left to apply common sense or intuition.*

Justice David Ipp (2006) 'Problems with Fact-Finding'

Edited version of paper delivered at the Winter Conference of the New Zealand Bar Association on 2 September 2006 at Queenstown

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To

the memory of my brother Anthony (1945-2005)

*Blessed are the pure in heart for they shall see God.*

St Matthew's Gospel 5:3



# Preface

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This account of proof of facts seeks to blend principle and practice as it explains how courts should prove facts in litigation. This provides an intellectual foundation for understanding the process. The subject is an important even if much neglected aspect of legal training since litigation is such a large part of legal practice.

Part of the approach is to emphasise and explain the probabilistic nature of fact-finding. A court is not obliged to find facts true to an absolute standard but true to a stipulated degree or probability. For these purposes the book rests its analysis on a scale of proof that ranges from 0% to 100%. To assist readers the final chapter explains the main principles of probability. This is for two classes of reader – (i) those who evaded the reach of probability in their earlier education (the outliers) and (ii) those who need a refresher.

This book explains the process in a structured way. This structured way is based on a model for proof of facts. These are the four steps in the model.

Step 1. Starting Point

Step 2. Versions of Truth

Step 3. Probability of Truth

Step 4. Finishing Point

The Summary of Proving Facts that precedes the main text outlines these steps by way of a step up to assist readers in following the explanation

*Christopher Enright*

Newcastle

1 July 2015



# Legal Skills Series

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## Series

This book is part of a series of textbooks that explain legal skills. The aim of these books is to simplify and systematise tasks for working with law by describing a step-by-step guide. The aim has been to make this guide as close as possible to an algorithm. The ultimate goal was to enable law schools to train lawyers so that they could understand these tasks and perform them effectively and efficiently when required.

The table below sets out the books in this series:

<b>Authors</b>	<b>Title</b>
Christopher Enright	Legal Reasoning
Christopher Enright	Legal Method
Christopher Enright	Legal Writing
Christopher Enright	Proof of Facts
Christopher Enright	A Method for Interpreting Statutes
Christopher Enright	Drafting Readable Statutes
Christopher Enright & Clare Cappa	Fundamentals of Legal Research

## Website

The legal skills website address is: [www.legalskills.com.au](http://www.legalskills.com.au)



# Author

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## **Christopher Enright**

Christopher Enright is qualified as a barrister, solicitor and chartered accountant. Chris has a Master of Commerce (Management) from the University of New England. Chris is the proprietor of the publishing firm Maitland Press – [www.legalskills.com.au](http://www.legalskills.com.au).

In a former life Chris lectured in law and management at various universities. Much of his research time as an academic was working in the much-neglected field of legal skills. This research was directed to the major tasks with law that involved reasoning. These tasks are organising law, making law, interpreting law, applying law to facts, proving facts, exercising a discretion, researching law, reading law and writing law.



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## Abbreviations

ANRC	Australian National Railways Commission
BHRA	Borough of Hendon Rating Authority
DEC	Department of Environmental Conservation
FGC	Fidelity and Guarantee Co
FTC	Federal Trade Commission
HCA	High Court of Australia
MMIC	Merchants' Marine Insurance Co
NSWCCA	New South Wales Court of Criminal Appeal
PI	Property Investment
SRA	State Rail Authority

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1. 9 July 2001

2. The full citation of this case is *Soci t  d'Advances Commerciales (Soci t  Anonyme Egyptienne) v Merchants' Marine Insurance Co (The 'Palitana')* (1924) 20 Ll L Rep 140

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3. The full citation of this case is *Société d'Advances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co (The 'Palitana')* (1924) 20 Ll L Rep 140



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# Labels

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Introduction  
Describing Items  
Listing Items  
Diagrams  
Probability

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## Introduction

Discussion in this publication refers to items such as a statute or a meaning of an ambiguous provision. Often these are part of a collection, list, range or set of items. Frequently the text puts them in a diagram where they represent a model or a step on the way to explaining a model. The purpose here is to explain the labelling system used to refer to these items.

## Describing Items

### *Labelling Items*

There are several aspects to labelling the items in a set, range, list or collection. These are name, number, letter and designating a set of items.

### **Name**

The name of an item commences with a capital letter. Some examples are Element, Statute and Meaning.

### **Number**

Items in a set, range, list or collection are generally numbered. For example, the elements of a legal rule are labelled Element 1, Element 2, Element 3 and so on. These numbers are ways of identifying elements and distinguishing one from another. They are generally not intended to create any list according to preferences or values.

### **Letter**

Items in a set, range, list or collection can be lettered. For example a list of statutes can be Statute A, Statute B and so on.

### **Designating a Set of Items**

It is useful to designate a set of items with a single and simple tag. Here is an outline. The basic proposition is that a simple and obvious tag has two aspects:

1. Description. Use a written label on the items as a tag or description. Put it in plural form. Thus a tag for a set of statutes would be 'Elements'.

2. Numbers. After the tag add a space then a compound numerical tag consisting of three items:

- 2.1 The number of the first item in the set.
- 2.2 A hyphen.
- 2.3 The number of the last item in the set.

Here are two illustrations:

1. A set of six elements would be Elements 1-6.
2. A set of elements where the number can vary from situation to situation is written as Elements 1-n.

### *1. Naming the Items*

The item has a name, which is usually obvious. For example each statute in a set of statutes would bear the name ‘Statute’, and each elements in a set of elements would be ‘Element’.

### *2. Numbering the Items*

There are two possibilities for the numbering of a set, list or range of items:

1. There can be a fixed number in the set.
2. There can be a variable number in the set.

#### *2.1 Fixed Number in the Set*

In a particular instance there may be a specific number of items in a set. For example a particular legal rule might be composed of five elements. In this case the first and last numbers designate the number of items in the set or range. In this example of a set of five elements, one would designate the set as ‘Elements 1-5’.

#### *2.2 Variable Number in the Set*

Sometimes the text refers to a set or a list in general terms in cases where the number of items in the set can vary from situation to situation. In this event, the way to go is to number the last item with the symbol ‘n’. To refresh readers, ‘n’ stands for however many there are on a particular occasion. An example would be a general discussion about elements of a legal rule. In this case the possibilities vary from legal rule to legal rule. Thus the designation of this set of items is Elements 1-n.

### ***Null Option***

There is a special case with options where one of the options is to do nothing and leave things as they are. This occurs, for example, with the proposed making of a statute where one option is just not to enact a statute. In a case such as this the option is labelled with the symbol for nought, namely ‘0’. Thus the

option not to enact a statute is designated as Statute 0. Statute 0 represents the null option – it is the option for a legislature not to enact a statute on a topic whereas Statutes 1, 2 3 and so on are options for different versions of a statute on a topic (on the basis that there is no form of a statute that can better present conditions). Given this the full set or range of possible statutes for a legislature to enact consists of Statutes 0-n.

### ***Corresponding Items***

Sometimes there are sets with corresponding items. This can occur for a number of reasons. Here are two examples:

1. For making and interpreting law, items correspond because of causation. Each version of a statute on a subject and each meaning of an ambiguous provision will cause an effect if a legislature enacts the statute or if a court declares the meaning to be legally correct.
2. In the model for litigation, elements and facts correspond because each element delineates a category of facts so that in a particular case the element is satisfied by a fact that falls within that category. Similarly, facts and evidence correspond because each fact is proved or potentially provable by some evidence.

### **Single Relationships**

Corresponding items are labelled with the same number or letter. Here are some illustrations:

1. Statutes, Meanings and their Predicted Effects. Statute 0 is predicted to cause Effect 0, Statute 1 is predicted to cause Effect 1, Statute 2 is predicted to cause Effect 2 and so on. Meaning 1 is predicted to cause Effect 1, Meaning 2 is predicted to cause Effect 2 and so on. Similarly, Statute X (or Meaning X) is predicted to cause Effect X while Statute Y (or Meaning Y) is predicted to cause Effect Y.
2. Facts Satisfying Elements. Fact 1 is the label given to a fact that fits within or satisfies Element 1, Fact 2 is the label given to a fact that fits within or satisfies Element 2 and so on.
3. Evidence Proving Facts. Evidence 1 is the label given to evidence that might prove or has proved Fact 1, Evidence 2 is the label given to evidence that might prove or has proved Fact 2, and so on.

### **Collective Relationships**

It is possible to use labels of correspondence to make collective statements. Here are some examples: Statutes 0-n are predicted to cause Effects 0-n, while Evidence 1-n is capable of proving Facts 1-n. To construe these collective statements properly it is necessary to apply the maxim *reddendo singula*

*singulis*. Literally this says that each is rendered on their own. In plainer language, the items are to be taken singularly so the each item in the first list is paired with the corresponding item in the second list. The adverb ‘respectively’ captures this notion.

### ***Two or More Version of an Item***

There may be two or more versions of an item. Additional letters or numbers can distinguish the different versions. For example:

1. If Element 2 is ambiguous because it has two meanings, the versions of Element 2 can be designated Element 2A and Element 2B.

2. There can be two versions of a fact. There are two major possibilities:

2.1 In a case there may be two versions of Fact 2 because the plaintiff propounds one and the defendant propounds the other. These can be designated ‘P’ and ‘D’ to signify the plaintiff and defendant’s version. Thus the two versions are Fact 2P and Fact 2D.

2.2 After investigating the facts of a case the defendant may find that there is evidence to support two versions of one of the facts in their case. These are facts that the defendant could use to rebut the plaintiff’s satisfying Element 3. The defendant or the court could designate these as Fact 3D.1 and Fact 3D.2.

### ***Subdivisions of Items***

It is possible to designate subdivisions of an item with a numbering system that invokes the form but not the meaning of decimal points. Thus if Element 2 has three sub-elements, one can designate them as Element 2.1, Element 2.2, and Element 2.3. If Element 2.2 has three sub-elements we can designate these as Element 2.2.1, Element 2.2.2 and Element 2.2.3. Obviously this form of numbering adapts to any number of levels of subdivision.

### ***Possibilities: ‘X’, ‘Y’, Etc***

Sometimes the text needs to refer to any option, that is, to an option in general terms. Conveniently this is labelled with a capital letter. Commonly, this is the letter X, so that a general option for a legislature wishing to pass a statute is Statute X. Naturally, if there is a need to refer to more than one option additional letters may be used. For example, there could be reference to Statute X and Statute Y; in this case Statute X is one possible statute and Statute Y is another possible statute.

### ***Signifying Relationships***

Sometimes it is necessary to signify a relationship between two items. This can be done using standard symbols. This table sets out the major possibilities:

Symbol	Relationship	Illustration
<	Less than	$X < Y$ . X is less than Y.
>	Greater than	$X > Y$ . X is greater than Y.
=	Equals	$X = Y$ . X equals Y,
≠	Not Equals	$X \neq Y$ . X does not equal Y.
≈	Approximately Equals	$X \approx Y$ . X is approximately equal to Y.
≡	Congruence Relationship	$X \equiv Y$ . X is congruent with Y.
≅	Isomorphic	$X \cong Y$ . X is structurally identical to Y
<i>Labels Diagram 1. Symbols for Relationships</i>		

### Listing Items

Where there is a list, for example a list of the meanings of an ambiguous provision, we can set these out in the text as a series – Meaning 1, Meaning 2 ... Meaning n. In the text, as we have noted, the range can be efficiently represented as Meanings 1-n. In a table they are set out as a list in the following way:

Meanings
Meaning 1
Meaning 2
Meaning n
<i>Labels Diagram 2. List of Meanings</i>

In this presentation it is not strictly necessary to include Meaning 2. Indeed, it is actually redundant, when  $n=2$ . However, it usefully emphasises the sense of a list that sets out the range of options or possibilities.

### Diagrams

Lists in a table can be connected to become a diagram or figure. This can involve corresponding items. A useful illustration consists of a diagram that has two major columns that match corresponding items. One column sets out the meanings of an ambiguous provision in a statute in Statute X and the other sets out the effect for the whole statute that each meaning is predicted to cause. Here is the illustration:

1	2	3	
<b>Meanings</b>	→	<b>Effects</b>	<b>1</b>
Meaning 1		Effect 1	<b>2</b>
Meaning 2		Effect 2	<b>3</b>

Meaning n		Effect n	<b>4</b>
<i>Labels Diagram 3. Meanings and Effects</i>			

This diagram functions in the following way:

\* Column 1 shows the meanings of the ambiguous provision, being Meanings 1-n.

\* Column 3 shows the effect of the statute that each meaning is predicted to cause if a court chooses them as the legally correct meaning of the ambiguous provision. Let us flesh this out. Every statute that is enacted causes a number of outcomes. The author refers to the full collection of outcomes that a statute is predicted to cause as an effect. When a court interprets a statute it is faced with the basic options in terms of the range of meanings of the ambiguous provision that gives rise to the need to interpret the statute. The diagram labels these meanings as Meanings 1-n. If a court decides that Meaning 1 is the legally correct meaning of the ambiguous provision that decision is likely to have an impact on the effect that the whole statute will cause. Column 3, as stated, sets out this effect, the effect of the whole statute, for Meaning 1. In a similar way it sets out the effect for each other meaning of the ambiguous provision. This method of identifying the effects of each meaning caters for the constitutional rule in each Australian jurisdiction that requires a court to interpret a statute in the way that will ‘best achieve’ the purpose and object for which the legislature enacted the statute. Now the purpose or object of a statute is to cause some effect or outcome. Hence the term ‘Effect’ aligns directly with purpose and object (which of course is why the table includes it).

\* Column 2 contains an arrow pointing from the Column 1 to Column 3, thereby indicating that each meaning in Column 1 is predicted to cause the statute to have the corresponding effect in Column 3.

\* Columns 1-3 indicate meanings and their predicted effects. Assume for the purposes of the explanation that a court is interpreting an ambiguous provision in Statute X that has Meanings 1-3:

1. If a court chooses Meaning 1 as the legally correct meaning the prediction is that Statute X will cause Effect 1.

2. If a court chooses Meaning 2 as the legally correct meaning the prediction is that Statute X will cause Effect 2.

3. If a court chooses Meaning 3 as the legally correct meaning the prediction is that Statute X will cause Effect 3.

## Probability

A number of symbols are used for probability. This diagram shows the common symbols and their meanings:

Symbol	Meaning
$P(A)$	probability that event A occurs
$P(B)$	probability that event B occurs
$P(A \cup B)$	probability that event A or event B occurs (A union B)
$P(A \cap B)$	probability that event A and event B both occur (A intersection B)
$P(A')$	probability that event A does not occur
$P(A   B)$	probability that event A occurs given that event B has occurred already (conditional probability)
$P(B   A)$	probability that event B occurs given that event A has occurred already (conditional probability)
$P(B   A')$	probability that event B occurs given that event A has not occurred already (conditional probability)
$\phi$	the empty set = an impossible event
S	the sample space = an event that is certain to occur
<i>Labels Diagram 4. Symbols Used for Probability</i>	



# Summary of Proving Facts

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Introduction

Scale of Proof

Steps in the Model: Descriptions

Steps in the Model: Diagrams

Step 1: Starting Point: Burden of Proof

Step 2: Versions of Truth

Step 3: Probability of Truth

Step 4: Finishing Point: Standard of Proof

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## Introduction

This appendix outlines all the steps, Steps 1-4, in the model for proof of facts. It explains the steps in two forms – first as descriptions and then as diagrams.

## Civil Case

To flesh out the illustration this explanation uses a civil case. It does so because the key rules can be precisely expressed in mathematical terms. This highlights the mathematical type reasoning that underlies proof of facts, which draws on some of the rules of probability.

## Parties

For convenience, the summary sometimes uses two generic terms, initiator (plaintiff, prosecutor, applicant) and responder (defendant and respondent), to indicate the party who commences a case and the party against whom the case is commenced. However since the illustration uses a civil case the explanation also uses the terms plaintiff and defendant.

## Scale of Proof

Proof is based on probability. A useful way to explain and represent this is through a scale of proof that ranges from 0% to 100%. The diagram below portrays this scale. In this diagram Column 1 shows the start of the scale, being the 0% mark. Column 8 shows the end of the scale, being the 100% mark. Column 4 represents the mid point of 50%. Columns 2, 3, 5 and 6 represent the remaining points on the scale in summary form by:

<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>	<b>6</b>	<b>7</b>
0%	20%	40%	50%	60%	80%	100%
<i>Summary Diagram 1 Scale of Proof</i>						

Often the explanation in the book uses actual numbers to represent percentages. In practice a court can rarely assess a probability using figures and has to use verbal formulas such as ‘highly improbable’ or a ‘real possibility’. Nevertheless there is an advantage in using figures to explain the rules because it achieves two worthy goals:

1. Numbers are simple and highlight relationships.
2. Numbers emphasise the probabilistic nature of proof of facts.

Generally, a party who initiates proceedings commences at 0% on the scale of proof. To prove their case they have to reach some defined point that is further along the scale. For example, in a civil case for a plaintiff the standard of proof at common law is variously called preponderance of evidence, the preponderance of probabilities or the balance of probabilities, which is generally treated as a probability of 51%. So to win a civil case the initiator needs to prove their case to a level of 51%.

Conventionally lawyers view the probabilities of proof from the perspective of the initiator. In fact, because of a rule called the complementarity rule, one can view the probabilities of proof from the perspective of the responder as well. For example if a plaintiff wins a civil case by achieving a probability of 55%, the defendant has reached a probability of 45% ( $100 - 55 = 45$ ). If the defendant had reached a probability of 50% the plaintiff would have also achieved 50%. To state the obvious 50% falls short of 51%, even if it is tantalisingly close.<sup>1</sup>

### Steps in the Model

There are four steps in the model for proof of facts, which are set out in this diagram:

Step 1. Starting Point	Step 3 Probability of Truth
Step 2. Versions of Truth	Step 4 Finishing Point
<i>Summary Diagram 2 Model for Proof of Facts</i>	

### Steps in the Model: Descriptions

#### Step 1. Starting Point: Burden of Proof

This step identifies the point on the scale of proof where a prosecutor (in a criminal case) and a plaintiff (in a civil case) are located when the case commences. Each is located on 0%. The conventional name for the function of

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1. Here is an explanation of the complementarity rule. If an event can only happen or not happen (which is typically the case) the probability of the event happening (for example 65%) is the complement of the probability of the event not happening (35%). In other words the total of the probabilities of all possible outcomes is 100%.

this step is *onus of proof* or *burden of proof*. This rule is also the basis of the *presumption of innocence* in criminal law and the *presumption of non liability* in civil law. This is the point from which both a plaintiff and a prosecutor start their proof, subject to some narrow exceptions for some issues.

### **Step 2. Versions of Truth**

Each party presents to the court their version of the truth of the case. The main method is by presenting evidence to the court.

### **Step 3. Probability of Truth**

Aided by submissions from the parties, the court assesses the probability that each party's case is true. Ideally it does this by reliance on cognitive science, induction, deduction and deeming provisions. This is the most intense, difficult and uncertain of the four steps. Moreover, judges are not trained as a matter of course in any of the disciplines that are relevant to fact finding (and in any event even with this training the task is not very scientific). There is a further point. Ideally a court would make a numerical assessment of these probabilities. In practice this is not possible given the nature and complexity of a disputed case in law.

### **Step 4. Finishing Point: Standard of Proof**

The finishing point is the point on the scale of proof that a prosecutor (in a criminal case) and a plaintiff (in a civil case) must attain in order to win their case. This is the standard of truth that a prosecutor or plaintiff must achieve. Lawyers conventionally refer to it as the *standard of proof*. Step 4 involves determining whether the prosecutor or plaintiff has reached this point. In other words, Step 4 involves determining whether they have determined their case to the required degree of proof. If they have done so they have proved their case to the court. Consequently, they have reached the required finishing point. If they have done this they win the case; if they have not done this they lose.

### **Probability**

The final chapter of this book explains the main principles of probability. This is for two classes of reader:

1. Those who evaded the reach of probability in their earlier education (the outliers)
2. Those who need a refresher on probability.

### **Steps in the Model: Diagrams**

Below there are two diagrams that illustrate the four steps in the model for proving facts, first as functions and second as percentages. The explanations of

the four steps that follow refer to these diagrams. The diagrams are based on civil liability, so for this reason the finishing point (alternatively the standard of proof) is the balance of probabilities. This translates into numerical form as 51%.

**Steps as Functions**

The diagram below portrays the steps as functions. It would have been ideal to have set out the four steps across the page, but space did not permit. Here is the diagram:

<b>Step 1. Starting Point</b>	→	<b>Step 2. Versions of Truth</b>	
Burden of proof <sup>2</sup>		Prima facie case	
↓		↓	
0%		1%	
		↓	
←	←	←	
↓			
<b>Step 3 Probability of Truth</b>	→	<b>Step 4 Finishing Point</b>	
Probative or persuasive case		Standard of truth	
↓		Losing	Winning
↓		↓	↓
(1+X)%		50%	51%
		↓	↓
		0%	100%
<i>Summary Diagram 3 Steps for Proving Facts as Functions</i>			

**Steps as Percentages**

This diagram shows the four steps in terms of the percentages for proof that each achieves:

<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>	<b>6</b>	<b>7</b>	<b>8</b>	<b>9</b>
<b>Step 1.</b>	→	<b>Step 2.</b>	→	<b>Step 3</b>	→	<b>Step 4</b>		
Starting Point		Versions of Truth		Probability of Truth		Standard of Truth		
↓		↓		↓		↓		
0%		1%		(1+X)%		50%		100%
<i>Summary Diagram 4 Steps for Proving Facts as Percentages</i>								

2. This is also called the onus of proof. This rule generates two principles that are important for justice:

- A. The presumption of non-liability in civil cases
- B. The presumption of innocence in criminal cases.

## Step 1: Starting Point

The diagrams portray the starting point from the perspective of a plaintiff in a civil action. It shows where the common law rules as to burden and standard of proof apply.

### Step 1 as Percentages

In Step 1 the plaintiff is located on the 0% mark on the scale of proof. The plaintiff is like a batsman in cricket who has just come to the crease – there is a nought beside their name on the scorecard. To put more perspective on Step 1 Starting Point, and to assist understanding it, look along the scale to Step 4 Finishing Point. Under the common law rule the plaintiff must prove their case to a standard of 51%, which is described in the rule as the balance of probabilities. In percentage terms, the plaintiff must take their case from 0% along the scale of proof at least to the 51% mark to win their case.

### Step 1 as Functions

These are the key propositions:

1. Starting Point: Nothing Proved. At the start of the case the court takes nothing as proved so the initiator has it all before them.
2. Presumption of Non-Liability. This is the basis of the presumption in civil cases of non-liability.
3. Presumption of Innocence. This is the basis of the presumption of innocence in a criminal case.

## Step 2: Versions of Truth

### Step 2 as Percentages

The diagram depicts Step 2 taking the initiator from 0% to at least 1%. This is an artificial and cryptic device for emphasising that the initiator must present a prima facie case to move off the starting point of 0%. That is all it is saying. Until the initiator present a prima facie case they stay stuck on 0%. How this fits into a bigger picture will become clearer in the account of Step 3.

### Step 2 as Functions

In Step 2 each party to the case, the initiator and the responder present their version of the truth of the case to the court. At the very least the initiator must present evidence that is capable of proving every disputed fact that is needed to satisfy the elements of the cause of action. Lawyers describe these facts as described as the material facts, the relevant facts or the essential facts. Doing this constitutes what lawyers call a prima facie case. By presenting a prima facie case the plaintiff presents a complete case, so the defendant must reply to it or lose the case.

### Step 3: Probability of Truth

#### Step 3 as Percentages

Step 2 depicts an initiator moving from 0% to at least 1%. As stated above this is an artificial but very useful way of portraying the process of proof. The initiator must make out a prima facie case or they lose the case. And they do so without the responder needing to present any of their case. In cricketing terms the batsman has broken their duck, which they do when the score their first run.<sup>3</sup>

Step 3 portrays a plaintiff presenting a probative or persuasive case. The diagrams indicate how this is a probative case by the artificial device of showing that a probative case takes a plaintiff beyond a minimal prima facie case to something more. They move their case from 1% probable to (1+X)% probable.

#### Step 3 as Functions

In practice a plaintiff presenting their case does not just present a prima facie case and leave it there. In reality a plaintiff will present the most persuasive case that they can. The explanation of proof presented in this summary has separated the prima facie case from the persuasive case in order to emphasise the two functions. In reality a plaintiff presents their whole case, which has two characteristics. It constitutes their persuasive case, which incorporates their prima facie case. In other words the prima facie case is buried within the persuasive case.

Three factors affect how persuasive a case of a plaintiff or defendant is:

1. The amount of evidence that a party presents.
2. The quality of that evidence.
3. The reasons that the party puts to the court as to why it should believe their case and not the defendant.

### Step 4: Finishing Point

#### Step 4 as Percentages

Column 7 portrays the two possible outcomes:

1. Losing the Case: 50% or Less. If a plaintiff proves their case to a level of 50% or less they have not reached the finishing point so they lose the case.

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3. In cricket terminology, which originated in England, a batsman scores a duck when they do not score any runs at all. The suggested origin of the term is that the shape of the number '0' is similar to that of a duck's egg. Indeed, the *Concise Oxford Dictionary* cites 'duck's egg' as an alternative version of the term. In the United States of America the term 'goose egg' is a common expression for a score of zero in any activity. The Americans appear to have transported the term across the Atlantic while at the same shifting the ornithological classification.

2. Winning the Case: 51% or More. If the plaintiff proves their case to a level of 51% or more they have reached or surpassed the finishing point. Consequently they win the case:

2.1 If a plaintiff attains the 51% mark they have reached the finishing point – only just but that is good enough. A level of 51% is the balance of probabilities as a percentage.

3.2 If a plaintiff achieves more than 51% they have reached the finishing point and more. However, reaching more than 51% has no legal consequences for the outcome of the case.

### **Step 4 as Functions**

The diagrams portray Step 4 as the finishing point. There are two possibilities:

1. The plaintiff at least reaches the finishing point by proving their case on the balance of probabilities. In this event the plaintiff wins their case and the defendant loses it.

2. The plaintiff fails to reach the finishing point because they do not succeed in proving their case on the balance of probabilities. In this event the plaintiff loses their case. Instead the defendant wins.



# Chapter 1

## Outline

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Introduction

Facts

Basic Concepts

Models

Step 1 Starting Point

Step 2 Versions of Truth

Step 3 Probability of Truth

Step 4 Finishing Point

Probability

Summary and Diagrams

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*I believe that more injustices are created by erroneous findings of fact than by errors of law.*<sup>1</sup>

### Introduction

*The adversary system has evolved not to find the truth, but to find a winner.*<sup>2</sup>  
The purpose of this chapter, as the title aptly indicates, is to provide an outline of the book and in so doing, to provide an outline of how to go about the task of proving facts. Appropriately, the discussion commences by stating the three types of disputes that cause parties to litigate.

Litigation arises because of disputes over any of three types of issues:

1. Issues of Law. These issues concern how to interpret a legal rule when a word or phrase in the rules is ambiguous.
2. Issues of Fact. These issues concern how to find facts when parties to a case present competing versions of facts to a court.
3. Issues of Discretion. These issues concern how to exercise a discretionary power. By its nature a discretionary power authorises some official to decide one way or another.

This book explains the basic reasoning processes involved in determining issues of fact.<sup>3</sup> These issues arise when parties to a dispute proffer different versions of one or more of the material facts of a cause of action. Thus, one party says that a fact is X, the other says that it is Y, and the court must resolve the issue by making a finding of facts. This is a finding that one version or another, X or Y in the example, has been proved to the satisfaction of the court. When the court does so, the facts are conclusively established for the purposes of the legal system. However there is no

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1. Gibbs (1993) p 497

2. Richard (2009)

3. For discussion of the underlying reasoning for resolving disputes of fact see Christopher Enright *Legal Reasoning*.

general guarantee, and there never can be, that facts have been correctly established as true in any absolute sense.

### **Methodical Approach**

Litigation lawyers tend to learn the reasoning process for fact-finding by some sort of osmosis or immersion. Consequently, they possess an internalised knowledge and understanding but cannot necessarily articulate how and why they do what they do in a full and structured way. This probably explains why there are few basic accounts of the process by which lawyers and courts prove facts in litigation. This also is the source of Professor William Twining's famous lament. Twining has lamented in at least two journal articles that investigating and proving facts are two of the most basic functions of a legal system yet they have been severely and sorely neglected both in legal literature and in the syllabus of law schools.<sup>4</sup> This book seeks to redress this problem to some extent by providing a basic model for proving facts that explains the reasoning processes involved. This model, as is later explained, provide a structured account of proof of facts because it consists of four steps, which flow in a logical sequence.

### **Theory and Practice**

Scholars who specialise in proof of facts often enter areas of great complexity and controversy. It is not the purpose of this book to entertain this complexity as such. Instead it takes a judicious mixture of theory and practice to provide a coherent account of proving facts. While this may lack conceptual niceties it furnishes a basic understanding of the reasoning processes. At the same time it provides an intellectual framework that law students and lawyers can take into the practice of law as a guide to fact-finding in litigation. It can also serve as a platform for launching into a more complex understanding of the process.

### **Labelling Parties**

Lawyers use a variety of labels used for a party who initiates a case. Common labels are plaintiff and applicant in civil cases and prosecutor in criminal cases. Common names for the party against whom the case is brought are defendant (in both criminal and civil cases) and respondent (in civil cases).

This book uses some generic terminology for parties to a case as a matter of convenience. Much (but not all) of the discussion refers to cases generally and thus equally to civil and criminal cases. To indicate this, the book uses two devices. First, the generic terms 'initiator' and 'responder' are used as labels to refer to the party who initiates a case and the party who defends the case. Second, sometimes when explaining or illustrating a point the book refers just to civil cases without specifically mentioning criminal cases. This is done for simplicity. What it says about a civil case, however, applies equally to a criminal action, subject to an obvious qualification – it is necessary to adjust the standard of proof from the civil to the criminal standard.

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4. Twining (1984), Twining (1994)

## Probability

Proof is based on probability so the account of proof of facts naturally refers to probability. There are two further points. For those who are uncertain about probability there is a basic account in the Appendix. In referring to probabilities the book mainly uses percentages and whole numbers. Thus it would refer to a probability of 51% in preference to some other scale, for example 0.51. Also, for the most part the book uses only whole numbers as percentages. This is just to keep the explanation as simple as possible.

## Facts

Since this book is about facts it is important to explain at the outset three basic items concerning facts. Chapter 2 Facts performs this task. It explains the nature of facts, the relationship between law and facts and a classification of facts.

## Basic Concepts

### Introduction

Chapter 3 explains some basic concepts. There are several connections between these concepts that will be explained in the discussion.

### Concept 1 Probabilistic Proof: Scale of Proof

In theory the legal system could have determined that parties had to prove their case to be absolutely true, that is, to a probability of 100%. Instead, and for good reason, the legal system does not require perfect or absolute proof. Instead by means of the doctrine called standard of proof (also called the finishing point in this book) the legal system requires proof to some lesser standard or degree that is stipulated by law. This means the proof is probabilistic – facts need not be absolutely true for a party to win a case. Instead, they need only to be probably true, or putting it better, they need to be true to some degree that represents a measure of probability.

A useful way to explain and represent this is through a scale of proof that ranges from a probability of truth of 0% to a probability of truth of 100%. This book uses such a scale of proof to explain and illustrate many of the concepts. This scale is portrayed in the following diagram:

0%	20%	40%	50%	60%	80%	100%
<i>Diagram 1.1 Scale of Proof</i>						

This diagram illustrates the simple proposition that the scale of proof runs from 0% to 100%. The intervening percentages – 20%, 40%, 50%, 60% and 80% – are displayed simply to emphasises and highlight the scale. They do not have any other significance.

### Concept 2 Legal Rules

There are two major legal rules that underpin the model for proof of facts and are incorporated into it – the rules for the burden of proof and the standard of proof.

*Burden of Proof*

The rule for the burden of proof, or the onus of proof as it is also called, determines which party to a case is responsible for proving the various parts of the case. For the positive elements in both civil and criminal cases the rule says that the initiator – the plaintiff or prosecutor – bears the onus of proof. There are separate and special rules for the defences (which of course are explained in the later discussion). In this book the burden or onus of proof is also referred to as the starting point or the starting point rule.

*Standard of Proof*

The rule for the standard of proof explains the degree or standard to which a party has to prove their case. In this book the standard of proof is renamed the finishing point or sometimes the finishing point rule. The standard of proof for civil and criminal cases is as follows:

1. Civil Case. In a civil case, the common law rule says that the initiator (the plaintiff) must prove their case according to a standard that is variously described as the preponderance of evidence, the preponderance of probabilities or the balance of probabilities. This represents 51% on the initiator's scale.
2. Criminal Case. In a criminal case, the common law says that the initiator (the prosecution) must prove their case beyond reasonable doubt. This phrase is not given an official numerical measure. This book, however, assigns a value of 99%, partly because this captures the spirit of the rule and partly because it assists the explanation to furnish a figure, even if it is a merely a plausible suggestion.

**Concept 3 Two Strands of the Rules**

The rules for the standard of proof differentiate between positive element of a rule and negative elements or defences as they are also called. The rules create different provisions for each of these two classes of elements.

**Concept 4 Two Faces of the Rules: Complementarity**

Assume that a certain event can either happen or not happen. A good example is whether it rains on a particular day. If the probability of its happening – there is rain – is 58% it is possible to work out the probability of its not happening by applying the complementarity rule. This rule says that the probabilities of all possible outcomes of some event add up to 100%. In the example, therefore, the probability of there being no rain is  $(100 - 58)\%$ , which is 42%.

This rule has an obvious application to proof of facts. To explain this, consider two stages in a two party case where a plaintiff and a defendant are disputing an issue of fact:

1. If a plaintiff has proved their case to the extent that it is 65% probable, then the probability of the defendant's case being true is  $(100 - 65)\%$ , namely 35%.
2. Assume now that the defendant obtains the leave of the court to bring in fresh evidence. As a result they increase the probability of their case being true by 20%. This means that their case is now 55% certain because the defendant has 'gained'

20%. This also means that the plaintiff ‘loses’ 20%. Their case is now only 45%. This can be explained in two ways:

2.1 Direct Application of the Complementarity Rule. If the defendant’s case is now 55% certain the plaintiff’s case is  $(100 - 55)\%$  certain, namely 45%.

2.2 Derivative Application of the Complementarity Rule. There is a rule that is derived from the complementarity rule. In a case with two competing versions of fact put by the plaintiff and defendant the rule says as follows. Any increase in the percentage of certainty by one party causes an equivalent decrease in the percentage of certainty of the other party. In this case by bringing in fresh evidence the defendant has increased the certainty of their case by 20% – it has gone from 35% to 55%. This means that the certainty of the plaintiff’s case must go down by the same amount, 20%. It is now  $(65 - 20)\%$  namely 45%.

### Concept 5 Relationship Between Burden of Proof and Standard of Proof

Properly conceived, the burden of proof and the standard of proof are not really two separate rules but are related. Indeed they can be conceived as two sub-rules within a rule governing proof.

The scale of proof clearly exposes this relationship between these two rules as does the additional names that this book confers on these rules, namely starting point and finishing point. There are two core propositions:

1. The Rules Identify Points on Scale of Proof. Each rule is identifying a point on the scale of proof.
2. The Points are Related. These points are related because one is the starting point for proof and the other is the finishing point:

2.1 The burden of proof is the starting point for a party on the scale of proof.

2.2 The standard of proof is the finishing point for a party on the scale of proof.

A diagram that depicts the scale of proof will illustrate this relationship. It uses the standard of proof for a civil case, 51%, for the demonstration:

<b>1</b>	<b>Starting Point</b>	→	<b>Finishing Point</b>		
<b>2</b>	0%	→	51%	→	100%
<i>Diagram 1.2 Scale of Proof</i>					

Row 2 of this diagram of the scale of proof depicts the scale running from 0% to 100%. Row 1 shows both the starting point and the finishing, each being highlighted with bold type:

1. Starting Point. The starting point is the 0% mark. This indicates the burden of proof because it indicates that the initiator has to prove their case.
2. Finishing Point. The finishing point is the 51% mark. This indicates the standard of proof because it indicates how far along the scale of proof the initiator must travel in order to furnish legal proof of their case. This is the minimum point they must reach on the scale of proof to win the case.

### Concept 6 Prima Facie Case

An initiating party moves off the 0% mark on the scale of proof once they have made out a prima facie case. They do so when they do the following:

1. They present evidence to the court.
  2. This evidence is capable of proving each material fact that is in dispute in the case.<sup>5</sup>
- The phrase ‘capable of proving’ means that if the evidence is unchallenged or the challenge has no substance, the evidence will legally prove the material fact in question.

### Concept 7 Policy Considerations

The starting point and finishing point rules rest on some important policy considerations. These are explained in later chapters.<sup>6</sup>

## Models

### Background: Three Models

The method for proving facts is incorporated into a model, which is called, appropriately enough, the model for proof of facts. Before the book explains the model for proof of facts it is necessary to explain three other models for working with law because they underpin proof of facts or assist readers to understand it better because it draws on these three models.

The discussion of these models in Chapter 4 Models commences with an outline of all models to capture the key points. In addition, it explains how the models are related in order to enable the reader to integrate the models and the methods that they describe. It then proceeds to explain the four relevant models, which are explained in more detail in subsequent chapters. The full count of the discussion of these background models and the chapters in which they occur are set out in the following table:

Models	Chapters
Models	Chapter 4 Models
Model for Organising Law	Chapter 5 Model for Organising Law
Model for Applying Law	Chapter 6 Model for Applying Law
Model for Litigation	Chapter 7 Model for Litigation
<i>Diagram 1.3 Models for Working with Law</i>	

### Model for Proof of Facts

The three models discussed in Chapters 4-7 are background for explaining proof of facts. The fourth model in the list, the model for proof of facts, is obviously foreground. It consists of four steps, which are described below. This book provides several outlines of this model:

- # There is a brief outline of the model and its steps in the Preface.
- # There is a fuller outline of the steps in the next four sections of this chapter.

5. There is a fuller explanation of a prima facie case in Chapter 7 Model for Litigation.

6. Chapter 9 Starting Point and Chapter 14 Finishing Point

- # There is an outline of the model in Chapter 8 Model for Proof of Facts.  
 # There is an outline of the model in Summary of Proving Facts. This is located in the preliminaries of this book.

After Chapter 8 has outlined the model for proof of facts the next six chapters explain the model in more detail. The following table indicates how each of these chapters cover the four steps in the model for proving facts:

Steps	Chapters
Outline of the Steps	Chapter 8 Model for Proof of Facts
Step 1. Starting Point	Chapter 9 Starting Point: Burden of Proof
Step 2. Versions of Truth	Chapter 10 Versions of Truth
Step 3. Probability of Truth	Chapter 11 Probability of Truth
	Chapter 12 Probability of Truth: Specific Facts
	Chapter 13 Probability of Truth: Overall Facts
Step 4. Finishing Point	Chapter 14 Finishing Point: Standard of Proof

*Diagram 1.4 Model for Proof of Facts*

## Step 1. Starting Point: Burden of Proof

Step 1 Starting Point is the first of four steps in the model for proof of facts.<sup>7</sup> Step 1 is located firmly on the scale of proof. It comprises the rule called the burden of proof, the onus of proof or the starting point. This is one of two major legal rules that underpin the model and are incorporated into it, the other rule being called the standard of proof or the finishing point.

At common law there is one set of starting point rules for the positive elements and another for the negative elements or defences. This outline focuses on the rule for the positive elements for the burden of proof. For these, the general rule at common law is as follows. The party who brings the case (the initiator) must prove the positive elements of the case. This means that the initiator commences their proof at 0% on the scale of proof. They have it all to do. The 0% mark on the initiator's scale, it is worth noting, is also the 100% mark on the responding party's scale of proof.<sup>8</sup>

## Step 2. Versions of Truth

### Step 2

Step 2 Version of Truth is the second of four steps in the model for proof of facts.<sup>9</sup> In this step each party presents the following to the court:

1. Version of the Facts. They present their version of the facts of the case.
2. Evidence. They present evidence to support their claim.
3. Arguments. They present arguments to support their claim.

7. Chapter 9 Starting Point

8. Chapter 9 Starting Point

9. Chapter 12 Versions of Truth

### **Relationship Between Step 1 and Step 2**

To give the reader some perspective let us explain how Step 1 relates to Step 2. Right at the commencement of the case, Step 1 locates the initiator at 0% on their scale of proof. For an initiator, the next significant step towards proof is to put forward their facts and evidence to the court. They do this in Step 2. By this means they present a probative case, which they hope will convince the court to give judgment in their favour. This probative case generally incorporates a prima facie case by providing evidence for each disputed element of the cause of action or crime. By presenting a prima facie case the initiator discharges the onus of proof. It takes the initiator through the gateway leading from onus of proof to standard of proof. The prima facie case moves them off the 0% point on the scale of proof. So, they are now pursuing a percentage higher than 0% as they seek to prove their case to the legally required standard of truth.

### **Step 3. Probability of Truth**

Step 3 Probability of Truth is the third of four steps in the model for proof of facts.<sup>10</sup> Step 2 Versions of Truth is the background to Step 3. There the parties presented their versions of the truth of the facts of the case.

Here in Step 3 the court assesses the probability that each version is true. In doing this it is usually aided by submission from the parties. In deciding the probabilities the court resort to four reasoning processes, which are as follows:

1. Observation By a Witness. This draws on cognitive science and induction.
2. Induction. Lawyers commonly refer to this as inference.
3. Deduction. Lawyers commonly also refer to this as inference.
4. Deeming Provisions. Some rules of evidence deem that in certain circumstances the court must take some facts to be proved.

### **Step 4. Finishing Point: Standard of Proof**

Step 4 Finishing Point is the fourth of four steps in the model for proof of facts.<sup>11</sup> Step 4 Finishing Point is traditionally known as the standard of proof. It can also be conceived as the standard of truth that the legal system demands of a party. It identifies the degree of certainty or probability of truth that a party must establish to win their case. This rule is also called the finishing point because it tells a party how far along the scale of proof they need to be to win their case.<sup>12</sup>

In the preceding step, Step 3 Probability of Truth, the court has determined the probability that each version of facts alleged by the parties is true. Here in Step 4 the court compares that probability to the probability laid down in and required by the rule as to the standard of proof. There will be one of two possible outcomes:

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10. Chapter 13 Probability of Truth, Chapter 14 Probability of Truth: Specific Facts, Chapter 15 Probability of Truth: Overall Facts.

11. Chapter 16 Finishing Point

12. Chapter 14 Finishing Point

1. Not Proving Case. The party has failed to prove their case to the level required by the standard of proof. In this case they lose.
2. Proving Case. The party has proved their case to the level required by the standard of proof (for example 51% in a civil action) or they have proved their case beyond that level (for example 64% in a civil case). In this case they win the case. For this reason, as indicated, the standard of proof is also called the finishing point because if a party attains this point they have finished proving their case.

### **Probability**

The analysis of proof of facts in this book draws on the concepts and rules of probability. Those readers who are unfamiliar with probability or for whom it is a distant memory can acquaint or reacquaint themselves with the concepts and rule by reading the basic account of it in the final chapter.<sup>13</sup>

### **Summary and Diagrams**

In the preliminary part of there is an overview of the process of proving facts. It is entitled Summary of Proving Facts. This summary outlines the process of proving facts with a narrative. It is also includes two diagrams, which are useful not only for the summary but for digesting the remainder of this book.