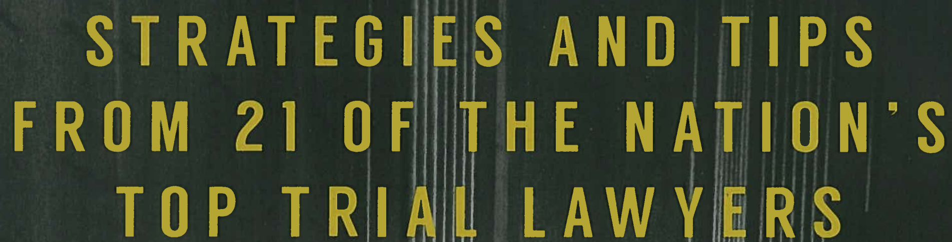

FROM THE TRENCHES

EDITED BY JOHN S. WORDEN

CHAPTER 11

The Beast of Burden

John S. Worden

By definition, the burden of proof determines the outcome in every trial, and yet so often lawyers fail to take full advantage of it. This chapter examines specific strategies and techniques for arguing the burden of proof each time the lawyer talks to the jury—during jury selection, opening statement, and closing argument, including arguing the burden of proof even if you have it.

Every issue in every case has a burden of proof. In order for any fact to be admissible, it must be offered to prove or disprove an element of a claim or defense, and on each of those one party or the other bears the burden of proof. That party is usually the plaintiff (but not always). There are no ties, there are no toss-ups. It is never a jump ball. It is never a 100-yard dash where both parties start at the same starting line. Why some lawyers, especially those who do not have the burden, fail to hammer on this point at every possible opportunity at trial is more than perplexing.

Jurors' understanding of the burden of proof in civil cases is all over the map. Some assume there are no burdens, or have never thought about it. Some assume the burden is beyond a reasonable doubt, like in a criminal case. Some assume the case must have some merit or it would have been thrown out already. Some believe that a case must have some merit or the court clerk downstairs would not have allowed its filing.

Some lawyers believe this confusion is to their benefit (especially if they represent a defendant). The more confused the jurors are, the less likely they are to unify in favor of the plaintiff. This may work sometimes, but a lawyer with a good case, whether representing plaintiff or defendant, is almost always better off with a jury understanding exactly what their task is.

By definition, the burden of proof is the most important issue in every trial. Every verdict necessarily depends on whether one party met the correct burden or

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Jean Bertrand, author of chapter 5 and my partner at Schiff Hardin, and I have spoken repeatedly on ways to handle the burden of proof at trial, and more than once I have "incorporated" (it sounds better than "stolen") ideas of hers where they fit well within this chapter. I would like to give her my special thanks.

not. Even for a plaintiff, raising the issue is often advantageous to ensure that the jury does not impose too high of a burden.

For a defendant, it is imperative that the jury understand at every step of the way that this is not a fair fight, nor should it be: They started it, now they have to prove every bit of it or the jury *must* rule in the defendant's favor. Failing to emphasize this point every step of the way borders on malpractice from a defendant's standpoint. This chapter explains how.

The Preponderance of Evidence: A Good Trial Lawyer Makes Sure Jurors Understand Complex Issues

Most states have a jury instruction similar to this, which defines the applicable burden in a civil case:

> "Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of the issue preponderates, your finding on that issue must be against the party who had the burden of proving it.[1]

Preponderance? Preponderates? Ask the average person on the street if they have ever heard the phrase "beyond reasonable doubt." Then ask them if they have ever heard "preponderates" or "preponderance of the evidence." Most normal people (i.e., jurors) will never use either form of "preponderance" in a sentence. Yet this is the ultimate instruction they are to follow to determine who wins?

Even when representing a defendant, but especially when representing a plaintiff, I try to get a jury full of smart people who want to be there or who are at least willing to listen. I would not be trying the case unless I thought I could win it, and I want jurors who will pay attention. Those who do not want to be there will usually scream it out to the lawyers during voir dire. Therefore, I cringe every time I hear a lawyer blame a bad verdict on the jury, because the lawyers picked the jury. There is no doubt that I, and virtually all lawyers who have tried more than a few cases, will have one or more verdicts where we can legitimately query after the verdict, "What were they thinking?" But that is a rarity.

A competent trial lawyer does not blame "dumb jurors" for a bad verdict. She does not blame the jurors for not understanding her case. If a jury does not understand the case, whose fault is that? It is the fault of the trial lawyer for not making complex subject matter understandable to jurors who know nothing about the case until they first sit in the box.

1. *See* Cal. B.A.J.I. 2.60; *but cf.* C.A.C.I. 200.

Although we make jokes about the folly of allowing our fate to be decided by 12 people too stupid to get out of jury duty, the fact is that most jurors who ultimately end up hearing the case are committed to doing a good job. Some actually want to be on a jury. Many others would prefer not to be, but they see it as a civic duty and make the most of it.

There are undoubtedly those jurors who simply do not want to be there and refuse to take their civic duty seriously. If the lawyers are doing their jobs, especially the plaintiff's attorney, those jurors quickly are long gone. Usually the angry juror will do the work for the lawyer, saying one or more things to give the judge obvious grounds to dismiss him for cause. Those angry jurors who still remain will be dismissed by any competent plaintiff's lawyer, since the last thing she wants is a juror resenting her client for making him sit through the case. The end result should be a jury at least willing to listen and attempt to follow the rules.

This does not mean, however, that even the smartest juror will understand the lawyer's case as well as the lawyer does. The lawyer has been working on the case for one, two, or even more years. She knows every document, every witness, how every fact interrelates with every other fact, how each proves or disproves every element of every particular cause of action. How can the juror possibly understand all of this (especially if the case involves very technical issues) when the juror never even heard of the case until he first sat in the box perhaps as little as a few minutes before opening statements?

It is therefore imperative for the lawyers to find ways to explain a complicated fact pattern in ways anyone can understand. A breach of distributor agreement is simply a broken promise between partners. The breach of a fiduciary duty? A close and trusted friend unexpectedly betraying another's trust.

Similarly, there are ways to explain the burden of proof so that jurors who have never heard the words "preponderance" and "preponderates" understand exactly how they are to fulfill their duties.[2]

Do You Even Have the Burden?

Before running into court ready to address the burden of proof, make sure you know who has it. The plaintiff has the burden of proof, right? Not necessarily. It depends on the issue; it depends on the case.

In a typical personal injury case, for example, the plaintiff does have the burden of proving negligence, but is negligence really the issue in the case? Many

2. Pretrial focus groups are almost always essential in this regard. Whether it be hiring an expensive jury consultation outfit to orchestrate a formal mock trial session, or having an employee in the copy room round up 10 of his rugby teammates, explaining the important parts of your case (and, at least as important, your adversary's case) to those who know nothing about it wins trials. As stated above, it is important that complicated legal principles, issues, and fact patterns be explained to jurors in ways anyone can understand. But how can you know which parts of your trial explanation are understandable and which are not? Let the focus group/mock jurors tell you two weeks before trial, as opposed to receiving similar answers from the real jurors moments after their adverse verdict is read.

personal injury cases come down to comparative fault being not only important but potentially dispositive. And on the issue of comparative fault, as is the case with all affirmative defenses, the defendant bears the burden of proof.

Indeed, it is not uncommon for a defendant to stipulate to liability. In such cases, when liability is no longer an issue for the jury, the primary issues for the jury are damages and/or comparative fault. However, if the issue is comparative fault and/or a reduction in damages due to comparative fault, the defendant bears *every* relevant burden at trial.

In such a case, it is a mistake for the plaintiff not to argue burden of proof at virtually every opportunity to remind the jury that he does not have any burden whatsoever on the issue of comparative fault. The defendant bears 100 percent of the burden on the issue. The plaintiff does not have any responsibility whatsoever to prove that he was not at fault. And if he fails to produce any evidence on that issue, he still carries the day on comparative fault unless the defendant comes forth with sufficient evidence to meet her burden that not only was the plaintiff negligent, but that the plaintiff's comparative fault was a substantial factor in the plaintiff's injuries and damages.[3]

In such a case it is a mistake to allow the jury to jump to the conclusion that the plaintiff has to prove everything, when indeed the plaintiff may not have to prove anything. So, the first step is to determine who has what burden as you prepare your case for trial, right? Actually, no; sometimes it starts long before then.

Different States Apply Relevant Burdens of Proof Differently: Choice of Law Is Not Only Important, It Can Be Dispositive

In the traditional personal injury/products case, the plaintiff has the burden of proof on negligence and damages, and the defendant has the burden on comparative fault and related affirmative defenses. It is pretty simple.

It is not always so simple in more complex commercial matters. How one state allocates burdens in business cases may differ dramatically from the allocation in another state. Indeed, which state's law is applied can shift burdens such that choice of law becomes dispositive. Sometimes the trial can be won or lost on the day the lawsuit is filed, depending on where it is filed.

3. I once won a trial on behalf of an elderly gentleman who slipped and fell in the snow and ice outside a casino. Fortunately, the engineer for the casino admitted on the stand that he thought his own staff had been negligent in not clearing the path (while snow was falling!). No one disputed the severity of my client's injuries. Thus the entire issue was comparative fault, on which only the casino had the burden. I did not have to prove anything. The jury determined that that issue was too close to call, so they had to rule for the plaintiff, since we did not have the burden.

An example? One of my biggest trial victories was a case we likely won the day we filed it. The case resulted in an eight-figure verdict in a dramatic federal court trial in Kansas City, Kansas, between our client, a Catholic hospital, and its insurance company. But the case was likely won because our adversary bore the burden of proof on the only issue in the case, even though it was the defendant.

The story began five years before. A surgeon working at one of our client's hospitals in Evansville, Indiana, allegedly slipped in a puddle in a private room and fell and injured his elbow. No one else saw this alleged puddle, no one saw him fall, and he did not even report it until well after the accident. He then claimed that fall injured his elbow to the point that he could no longer operate. He sued the hospital.

The hospital had a $1 million self-insured retention/deductible (SIR), which coincidentally was the same amount as the largest known jury verdict in Evansville history. Under these facts, the hospital did not bother even to report the loss to the insurer. Nonetheless, the jury returned a verdict of $16 million, 16 times as large as the largest verdict in the history of Evansville, and $15 million over the applicable insurance SIR.

The day after the verdict, I received the call from the client. We immediately tendered the claim verdict to the insurance company. The insurance company, not surprisingly, denied the claim as late. Although virtually every insurance policy contains a self-serving statement that no claim will be honored unless tendered at the earliest possible moment, different states deal with the issue in different ways.

Like most insurance coverage actions (and most contract/commercial cases in general), the litigation could have been filed in multiple jurisdictions and different states' laws could apply. The three most obvious were (1) Indiana, the location of the underlying injury and verdict; (2) Missouri, the headquarters of the hospital chain; and (3) Kansas, the headquarters of the insurer. Each state, however, approached the issue differently.

Under Indiana law, policy provisions requiring early tender are strictly enforced. If the tender is late, the claim is dead. Missouri and Kansas, however, look for prejudice. Why should an insurer who has collected premiums to insure against a specific loss be allowed to sidestep responsibility due to a technicality regarding the timing of the tender? What difference does it make?

Instead, Missouri and Kansas focus on whether the insurer was prejudiced at all by the late notice. However, even though Missouri and Kansas both focused on prejudice, each state applied the burden differently. Missouri law required the policyholder to prove that the insurer was not prejudiced. Conversely, Kansas law required the carrier to prove the insurer *was* prejudiced.

In other words, if the action was filed in Indiana, the hospital had no hope; in Missouri, the hospital had a claim but it bore a heavy burden; but in Kansas, the hospital had a claim, and the burden of showing prejudice rested solely on the carrier.[4]

4. Indeed, since damages were fixed at the amount of the underlying verdict ($16 million), the only issue at trial in a Kansas court would be whether the insurer could meet its burden of proving prejudice.

If the carrier had beaten us to the Indiana courthouse with a declaratory relief action, the case would have been over. Missouri would have been tough on us as well. Instead, we filed first in federal court in Kansas City, Kansas.

The case proceeded to trial. Excellent trial counsel represented the carrier. At the end of the two-week trial, the jurors came back with their verdict after only 90 minutes of deliberations. The jurors felt that the case was too close to call: Both sides presented compelling arguments, strong percipient witnesses, qualified expert witnesses, and compelling documents. In such circumstances, what is a jury to do?

The answer is simple: If the case is too close to call, the jury *must* rule against the party who has the burden of proof. Accordingly, the jury ruled that the carrier had not met its burden of proving prejudice. The end result was a verdict of $15 million,[5] but the die was cast not at closing arguments, but when the action was filed two years earlier in a jurisdiction that allocated the burden to the carrier.[6] I just had to remind the jury of that at every possible opportunity.[7]

Judge Research on Jury Selection: One Area Where It Works

In our law firm, as at many firms, when a new case is assigned to a particular judge and the lead lawyer is not already familiar with that judge, an e-mail goes around, "Is anyone familiar with Judge X?" By and large these e-mails are not productive because any lawyer's view of a particular judge will be colored by results in prior cases before that judge: If that judge previously ruled in my favor or presided over a trial victory, she is undoubtedly a genius; if the opposite, she is the opposite.

However, one very specific and concrete benefit from such e-mails is determining how a particular judge tends to conduct voir dire. This is something that can

5. $16 million minus the $1 million SIR.
6. Another interesting procedural anomaly was that, because the only issue in the case was prejudice and because the defendant/carrier had the burden of proof, the defendant sat closest to the jury, gave the first opening statement, put on its evidence first, rested first, gave the first closing, and then gave the final reply. Indeed, everything normally done by a plaintiff was done by a defendant here.
7. In many ways the burden of proof is even more important in commercial and business cases, where most jurors have little experience or familiarity and do not come with preconceived notions in favor of one or the other. By comparison, often jurors come to personal injury cases either sympathizing with the plaintiff taken advantage of by a greedy corporation, or looking with a jaundiced eye at those scam artists seeking a $1 million payout for a little spilled coffee. Similarly, in medical malpractice cases many jurors arrive in the box either empathizing with an injured victim or outraged that anyone would hurl allegations against a professional who has dedicated her life to healing others.

   This is not usually the case in commercial cases. Jurors seldom enter the courtroom already leaning toward one side or the other. Few have preconceived notions about, for example, a NASA subcontractor using liquid nitrogen in a dispute against the manufacturer of such product, or two investment firms allocating losses related to collateralized mortgages.

differ dramatically from judge to judge, but it will almost invariably remain constant for that particular judge from trial to trial. As discussed later in this chapter, in many jurisdictions a lawyer has an absolute right to confirm that each juror will follow the law. While many judges recognize this right, others attempt to impose arbitrary restraints on it. Knowing in advance where your judge falls can help dramatically in crafting your voir dire strategy.

Are you going to have to fight for minimal questioning regarding whether a particular juror understands the applicable burdens and will follow them? Some judges do not like discussion regarding burden of proof at all because they believe it borders too much on argument.[8] Finding out as much as possible about a particular judge's habits will enable you to craft a voir dire strategy to take as much advantage as the judge will allow without any embarrassing rebuke by the judge along the way.

Arguing the Burden of Proof in Voir Dire

Many lawyers waste their limited opportunity to argue their case and indoctrinate the jury on applicable burdens in voir dire (jury selection). A lawyer is given only three opportunities to speak to the jury: voir dire, opening, and closing.[9] We all know argument in closing is not only permissible but required. Argument in opening is discouraged.[10]

That leaves voir dire. There is no written rule anywhere prohibiting argument per se during voir dire. Indeed, there is not much statutory or appellate authority at all in most jurisdictions as to precisely what can and cannot be asked/stated in voir dire. Most states have a rule similar to California's:

> [A]n "improper question" is any question which, as its *dominant* purpose, attempts to precondition the prospective jurors to a particular result, [or] indoctrinate the jury. . . .[11]

Nonetheless, most jurisdictions provide for an absolute right to inquire into matters that would be grounds for challenging for cause or would assist counsel in exercising peremptory challenges intelligently. Part of that includes the right to determine whether a particular juror will follow the law and apply it accordingly,

8. Whether we will admit it to the judge or not, argument is precisely what we are attempting to accomplish during voir dire. However, there is no law per se prohibiting argument in voir dire, so long as its sole purpose is not to "indoctrinate" the jury.
9. A fourth would be after they return with a verdict, but by then. . . .
10. Good trial lawyers attempt to argue as much as they can during opening, but an "improper argument" objection will get sustained by many judges.
11. Cal. Code Civ. Proc. § 222.5 (emphasis added).

and this *must* include requiring a commitment by each juror to apply the law as instructed by the trial court, whether they agree with it or not:

> A reasonable question about a potential juror's willingness to apply a particular doctrine of law shall be permitted when from the nature of the case the judge is satisfied that the doctrine is likely to be relevant at trial.[12]

When is the burden of proof *not* likely to be relevant at trial?

Focusing solely on generalized questions in voir dire is a waste of time. Although some time should be spent with open-ended questions to get each juror to talk, the lawyer must use that opportunity to indoctrinate the jury regarding favorable burdens.

Spending all of voir dire asking pointless questions like "My client is a corporation. Would you have any trouble treating a corporation fairly?" is worse than inefficient. There is minimal value to these questions, and they waste crucial time that could be used for burden indoctrination.

In order to determine which jurors should end up in the box, it is important to let every juror speak for at least a couple of minutes on a topic that allows him to show how he thinks. But at least as much time should be spent arguing the burden of proof. Yes, indoctrinating the jury in your favor regarding the applicable burdens is impermissible if it is the "dominant" purpose. But, of course, if challenged on this point in a sidebar you will have plenty of explanations as to why your dominate purpose is something other than burden indoctrination, won't you?

Voir Dire by the Party with the Burden of Proof: Don't Let the Specter of "Beyond a Reasonable Doubt" Submarine Your Case

I know some very good trial lawyers who never like to mention burden of proof if they have it. Their rationale is, why remind the jury that they have the burden of proof? Why not let the jury assume there are no burdens, or the defendant has it, or who knows what?

The danger is too great. I would not be trying the case as a plaintiff unless I thought I had a story to tell that reasonable jurors could believe. The last thing I want is for a jury to come back and tell me that they ruled against my client because they applied a burden of "beyond a reasonable doubt," a virtually impossible

12. People v. Williams, 29 Cal. 3d 392, 410 (1981); *see also* People v. Tolbert, 70 Cal. 2d 790, 812 (1969).

standard to meet in a civil case.[13] Having to prove your case by a preponderance is a disadvantage; having the jurors assume a higher standard is a disaster.

Most jurors' familiarity with the burden of proof comes from trials they have seen in the papers, on television, and in the movies, almost all of which are criminal. Whether they grew up watching O.J., Enron, Martha Stewart, or George Zimmerman, all of those were criminal cases. In those cases the applicable burden of proof was "beyond a reasonable doubt." It is important that jurors understand that is categorically not the burden in a civil case. If "beyond a reasonable doubt" could numerically be categorized as 95 percent certain, the plaintiff in a civil case only needs to prove 51 percent. If the jury requires you to prove the former, you have no chance of winning a civil case.

Hammering on the burden is clearly detrimental to the plaintiff, but the jury must be disabused of any notion that beyond a reasonable doubt, the only burden most of them have ever heard of, applies. Ask them:

> This is not like Enron, O.J., Martha Stewart, Scott Peterson, Robert Zimmerman/Trayvon Martin [or whatever is timely or well known in your jurisdiction] or the other cases you have seen in the media. Those were criminal cases. In those cases the applicable burden of proof was *beyond a reasonable doubt*. That is *not* the burden here. [Call on a juror who has not said much] Ms. X, what do you think about that?

Why? Why is the burden different in this case? Jurors want explanations:

> "Beyond a reasonable doubt" is appropriate where someone may be sent to jail. Whether my client can in fact meet that beyond a reasonable doubt standard [I don't want them to think I am running from the burden], no one is going to go to jail in this case, and thus the 51 percent burden. Mr. X, does the difference seem fair to you? Do you understand that all I have to do is prove by a 51 percent margin what I am required to prove, and if I do you *must* render a verdict in my client's favor?

Obviously, strike any juror who suggests in any way, shape, or form that she would apply a higher burden, regardless of how fair she tells you she will try to be.

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13. Admittedly, in criminal cases the prosecutors meet that burden most of the time. But those cases are quite different because the party with the burden of proof is always some form of prosecutorial arm of the all-powerful U.S. government. Ask any former Assistant U.S. Attorney who has later gone on to do defense work which side has the easier go of it in the typical government versus individual criminal case, and the answer unanimously is the former. Civil cases are a completely different animal.

DEFENDANT'S VOIR DIRE: GO FOR THE JUGULAR

Your goals in voir dire are (1) to get each juror talking so that you learn enough about her to decide whether to strike her for cause or to use one of your limited peremptory challenges and (2) to convince the jury such that throughout trial they must view with scrutiny any evidence presented by plaintiff as being sufficient or not to satisfy his heavy burden of proof.

The following questions are designed to do both. Yes, they are designed to precondition the jurors. This is not a fair fight. The plaintiff has the burden and you do not. Never miss an opportunity to remind the jury of that:

> Our judge will instruct you that the law requires that if you think both sides have equally valid arguments, you *must* rule in my favor. Is there anyone who believes that that is not fair?

If someone raises her hand, obviously ask that person first. If not, pick a particular juror who has not said much yet and ask, "Mr. X, what do you think of that?"

Then ask all:

> Do you understand that if each side presents witnesses that cancel each other out because each are equally believable, you *must* render a verdict in my client's favor? Is there anyone who disagrees with that? [If no one raises a hand:] Ms. X, what do you think of that?

Or,

> If, at the end of the trial, you believe the witnesses have canceled each other out, the experts have canceled each other out, the lawyers have canceled each other out, and you say to yourself, it is too close to call, I can't decide. If you reach that point, do you understand that you *must* rule in favor of my client, the defendant? Does anyone have a problem with that?

While you are emphasizing this point, it is important to remind the jury why this burden makes sense. It is not at all uncommon for a juror, in response to a burden-related statement/question, to blurt out, "Why?" They want to know. They want an explanation for why it is fair that one side has to prove something but the other side does not. Upon being reminded that the plaintiff started it, the plaintiff filed the lawsuit, hurling a terrible allegation against your client, they can see why it is only fair that the plaintiff has to prove its case. You should not have to disprove it.

You do not want jurors to think that the entire system is stacked up against the poor plaintiff and have them immediately start resenting your client accordingly:

> Does anyone think it is unfair that if the plaintiff makes a serious allegation against my client, the plaintiff should have to prove it?
>
> Does anyone think that my client, having had this serious allegation made against it, has to prove its own innocence? Guilty until proven innocent?

How personal one can get while questioning a juror varies from judge to judge, but the more you can get the jurors to think about what would be a fair burden if someone hurled a baseless allegation against *them*, the better:

> Has anyone ever accused you of something you didn't do?

If the judge thinks this is too personal:

> Have you ever seen anyone wrongly accused of something? Mr. X, what do you think about someone having to prove their claim after they have sued someone in a public court of law? Does anyone think they shouldn't have the burden of proving every bit of it?
>
> All it takes is $300 [or whatever the going rate in your court is] to file a lawsuit and take a case to trial without yet having to prove anything. Do you understand that?
>
> Do you understand that they have not yet had to prove anything to anyone to get their allegations in front of a jury? This is the first time they have to present proof. Ms. X, did you know that?

Blame it on the plaintiff's lawyer:

> The question you ought to answer is whether Mr. Plaintiff's lawyer has shown you enough evidence that you conclude he has proven every element of his case. Ms. X, what do you think of that?
>
> Mr. Y, can you commit to follow the law, fairly apply that test, and hold Mr. Plaintiff's lawyer to that burden?

Reinforce:

> Do you understand that I do not have the burden of proving *anything*? Mr. X, do you think that is fair?
>
> Do you understand that I do not have to prove *anything* and I can still win? Ms. X, do you think that is fair?

> Do you understand that if Mr. Plaintiff's lawyer does not prove every single point on which he has the burden of proof you *must* rule in my favor, even if I don't prove one thing during this trial?[14]

It is a mistake to categorize potential jurors based on gender, ethnicity, age, or any other generalization. Every juror is an individual. Any lawyer assuming that all people of any certain walk of life will rule a certain way in a certain kind of case is almost always going to be disappointed. No matter what they look like, jurors are individuals and it is imperative that each be given a chance to speak his mind at some point during jury selection to give some guidance as to how he may rule in your particular case.

But, you cannot let this opportunity pass to convince the jurors, most of whom have no idea what a civil burden of proof is, that they almost *must* rule in your favor in this trial because plaintiff has so many burdens and you have none.

They say 85 percent of all jurors form a tentative opinion on liability during opening statement. This is not accurate, because many of them have already started to form an opinion during voir dire. The goal is to make the jurors—during jury selection—understand that they are forced to sit through a trial only because the plaintiff's lawyer had $300 for a filing fee; the plaintiff and her lawyer have not had to prove one fact to anyone yet; the plaintiff and her lawyer hurled completely unfounded allegations against your client; and thus it is not only fair that they must meet a very high burden on every element of every claim, it is mandatory before they can even consider awarding damages. You do not have to prove anything and they need not expect you to prove anything (but you could). If you walk into opening statement with the majority of them feeling that way, your trial is off to a good start.

Opening Statement: More of the Same

If you are the plaintiff, you made your point about the burden of proof in jury selection. Depending on the responses you received this may be an opportunity for a short reminder, but not imperative if you believe your point was well received.

As the defendant, never miss an opportunity, and remember that this is the second of only three opportunities to talk to the jury. Remind the jury of the burden of proof at every opportunity until if and when the judge sustains an "improper argument" objection. If the plaintiff's counsel is sitting there like a potted plant, pile it on.

14. This chapter is primarily focused on questioning by the defendant where the plaintiff has the primary burden of proof. However, as stated above, what if the primary issue in the case is comparative fault? What if the real fight in the case is an affirmative defense or some other issue on which the defendant bears the burden? Obviously, everything in this section is fair game for a plaintiff's lawyer to use in the opposite direction.

DEFENDANT'S CLOSING ARGUMENT: PUT PLAINTIFF DOWN FOR THE COUNT[15]

No matter what you did in voir dire and opening, closing is the time for the knock-out punch. Virtually anything goes in closing argument, and repeatedly arguing the burden of proof is fair game.

Jurors, not unlike everyone else, remember a small percentage of what they hear but a large percentage of what they see. This is time to use visuals to demonstrate clearly the burden of proof and why the plaintiff cannot possibly meet it under these facts, as follows:

1. Remind the jury of their commitment. During jury instruction you asked them to make certain commitments to follow the law, including that the law requires them to rule in your favor unless the plaintiff has satisfied entirely her burden on every single issue. Now is the time for them to keep that commitment.
2. Quote the preponderance jury instruction and the instructions on the elements of each claim. Blow them up and read carefully the instructions that require the plaintiff to prove *all* of the elements of each cause of action.
3. Emphasize again that you do not need to prove *anything*. The plaintiff started it by hurling unfounded accusations against your client. From the time this lawsuit was filed until the beginning of trial, no one required plaintiff to prove anything. Now she, and only she, has the burden of justifying the allegations she made. You do not have to disprove anything.[16]
4. Blame it on Ms. Plaintiff's lawyer. Her lawyer stood there in opening statement and promised the jury he would prove certain things. Do not let the jury start to feel sympathetic for the plaintiff. Jurors will quickly jump to the conclusion that the case is lawyer driven, the lawyer makes the arguments, the lawyer is responsible for putting on the evidence, and the lawyer has failed here.
5. Use a simple visual aid to show the burden of proof in no uncertain terms. Everyone is familiar with a childhood seesaw. Most of us rode on one plenty of times earlier in our lives. Everyone understands how a seesaw works. The side with the most weight moves downward, and the other side goes up.
6. This is a perfect visual to explain the burden of proof. The evidence on the plaintiff's side of the seesaw must definitively outweigh the evidence on your

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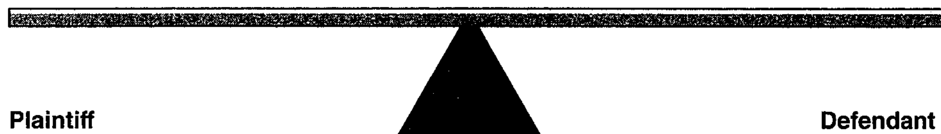
15. I devote little time here to plaintiff's closing argument, because plaintiff's options are limited: A gentle reminder that the standard is only 51 percent is helpful, but belaboring your burden at this point can be counterproductive.
16. A casual comment that you would still win this case even if you did have the burden of proof is helpful, lest they think you are running away from the facts and hiding behind a burden technicality. But remind them that even if you could meet the burden of disproving the plaintiff's claims, you do not have to prove yourself innocent. The plaintiff filed this lawsuit and hauled your client into court, not the other way around.

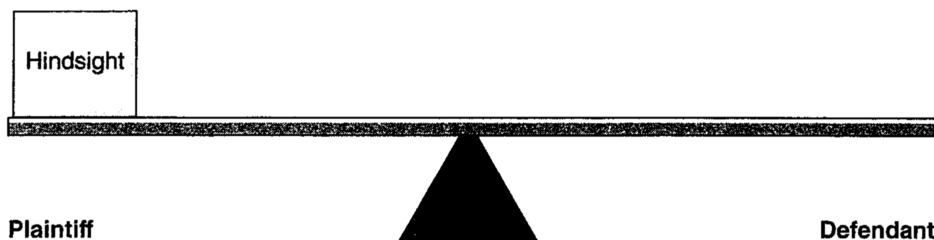
side as they have not met their burden. You will load up the defense side and let the jurors visualize how apparent it is that the seesaw must move in your direction and thus cannot move in the direction the law requires of plaintiff.[17]

Negligence/Breach?



Load the seesaw one block at a time. To show fairness, put something on the plaintiff's side. Choose something that appears to be in plaintiff's favor, but really has no relevance in the case. I often use "hindsight." Tell the jury, "Yes, in hindsight, knowing there would have been an injury, everyone should have done something different. If my truck driver had known that the plaintiff was going to run that red light, he would have been better off not having gotten out of bed today, so in hindsight. . . ."

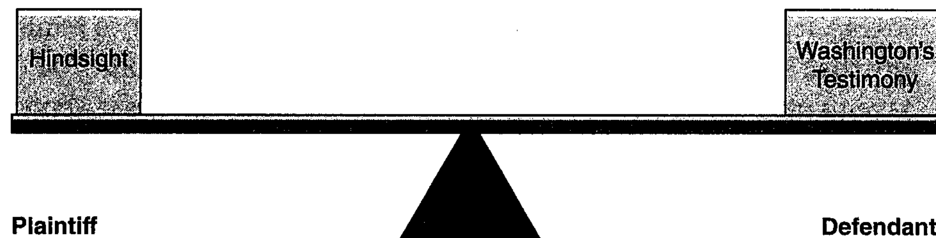
Negligence/Breach?



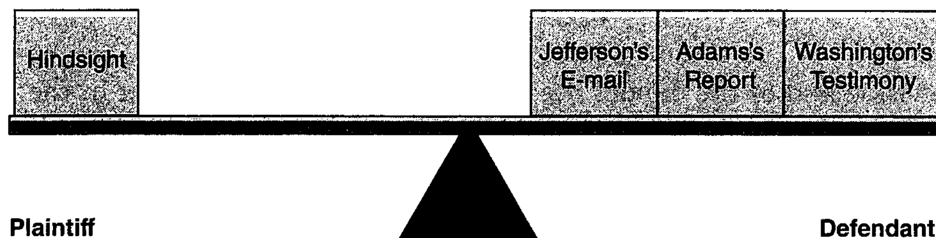
17. Jean Bertrand (author of chapter 5) likes to use the analogy of a cup. The plaintiff cannot just pour a few drops into the cup and hope to satisfy his burden of proof. The plaintiff must pour and pour and pour until the evidence not only reaches the top but clearly spills over the sides. Anything less and the plaintiff has not satisfied his burden of proof, period.

In the old days, I used to draw the squares with a felt-tip pen. But in today's Facebook/smartphone era, jurors (just like the rest of the population) need to be entertained each step of the way. Accordingly, a PowerPoint or something sexier now works better. Proceed to load up the right side one block at a time, one slide at a time, explaining each element of evidence that makes it more impossible for plaintiff to meet her burden, explaining each block's significance as it adds to the stack:[18]

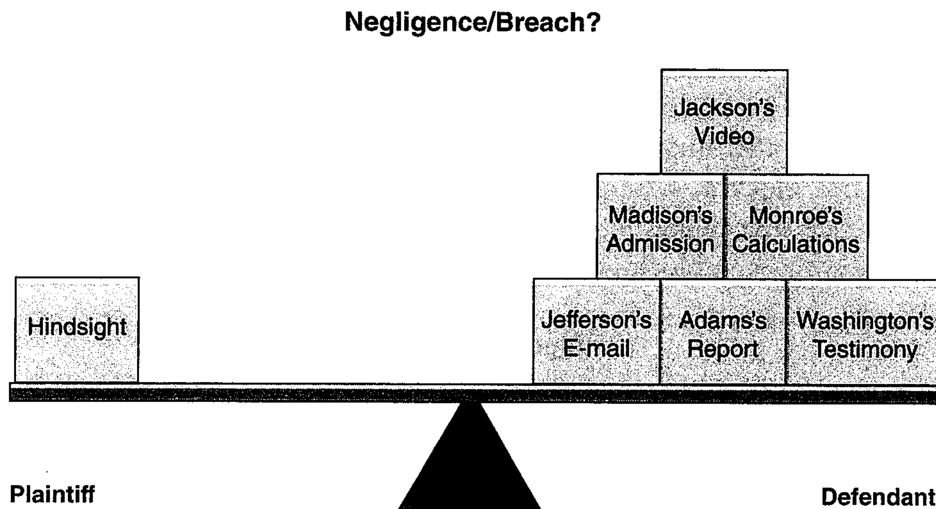
Negligence/Breach?



Negligence/Breach?



18. Depending on the case, the seesaw can be useful for a plaintiff, loading up its side: "All I have to do is make my side 1 percent, but do you see all this weight on my client's side? It must come crashing down."



When you have reached the end, the defense side will have several boxes, clearly outweighing the plaintiff's side. It is important to remind the jury that you do not have to prove that your side weighs more. You do not have to prove *anything*. But a quick look at the seesaw makes it abundantly clear that there is no conceivable way the left side of the seesaw is going to move in the required direction, and thus no possible way the plaintiff can meet her burden under these facts in evidence:

Just look at it. It isn't even a close call. They have not and cannot meet *their* burden. You promised me on the day we met that you would hold them to that, making them prove their case. Have they done it? The answer is no. And the answer to the first question on the verdict form is . . . a resounding *no*.

Conclusion

On television and in the movies the lawyers are always on their feet in the courtroom. The truth is far different. Over 90 percent of all lawyers will never first-chair a trial, and the vast majority of partners at the nation's top-grossing firms, even "litigation" partners, will never once talk to a jury.

Being a trial lawyer can be excruciatingly painful. There is a reason all but a few lawyers steer their careers as far away from trial work as they can. The level of agony that comes with losing a trial seems never to reach the level of exhilaration that comes with winning one. The loss brings with it the rejection of one's entire persona by a group of jurors the lawyer personally selected (or at least did not strike). However, even that sting is magnified sevenfold because, no matter how well prepared the lawyer, how experienced, or how hard he or she tried, it is not simply a personal failure but it delivers the severest of disappointments to the client who

entrusted the lawyer with his, her, or its fate. Add to that torture that such failure is undoubtedly amplified as word spreads through the firm, the legal community, legal papers, and more.

Such is the life of a trial lawyer, the life only another trial lawyer can truly appreciate. I have great respect for lawyers who have *lost* big cases; at least they tried.

But without the trial, and the trial lawyer who tries it, the rest of the system fails. Ninety-eight percent of all cases settle, and they settle because of the fear of an adverse trial verdict, and someone needs to have the courage to stand up and say, "Yes, Your Honor," when the presiding judge asks us, "Ready?" To paraphrase Teddy Roosevelt, there is something special about the lawyer in the courtroom who, if he or she fails, "at least fails while daring greatly, so that his [or her] place shall never be with those cold and timid souls who neither know victory nor defeat."

If you are reading this, you are likely a trial lawyer, and thus by definition there is something special about you. I hope your clients and colleagues think so, because other trial lawyers do.