



Generally, within a legal proceeding, the 'burden of proof' will be borne by the side bringing the matter forward.

In a litigation matter, such as a lawsuit in the Small Claims Court, the Plaintiff has the burden of proving that the Defendant is liable for causing losses to the Plaintiff and the burden of proving the amount of the losses. This is sometimes referred to as the burden of proving liability and quantum (quantum is Latin for amount).

In a criminal matter (such as charges under the Criminal Code of Canada, or quasi-criminal matter (such as charges under the Highway Traffic Act, the Crown Prosecutor bears the burden of proving the accused as guilty. However, some offences are 'reverse onus' in which the accused does have the burden of proving innocence.

Level of Proof, possibility or probability

What then is 'proof'? In civil proceedings, such as Small Claims Court, the burden of proof requires that the 'story' being told is demonstrated as true 'beyond the balance of probability' as deemed by a judge. Of course, the judge is unable to go back in time and travel to where the matter in dispute took place so as to be absolutely sure that that is said to have happened is actually what did happen. A judge can only determine 'beyond the balance of probability' that something did happen. However, in criminal proceedings or quasi-criminal proceedings, where much more is at stake than just money, such as a person's freedom, liberty, reputation, the burden of proof is raised to the 'beyond a reasonable doubt' level which is considerably higher than the 'balance of probability' requirement in civil law matters.

Assumedly and ironically, we have all heard the expression '*when you assume you make an ass out of you and me*'.

The burden of proof requires proof of a factual theory that is on a balance of probability in that the facts are reasonably more true than false. Accordingly, the burden of proof is considerably higher than a mere possibility. Per the case of ***Cannito v. Madison Properties Inc.***, [2018 ONSC 6190](#) at paragraph 31:

... An inference of causation must be based on objective facts rather than conjecture or speculation.

Unfortunately, all too often allegations of various kinds are based from merely a subjective viewpoint involving conjecture and speculation of the possibilities rather than via objectively considered probabilities. Accordingly, if the proof is based merely on a 'guess' that something is true, steer clear of litigation. Without directly supporting evidence, a guess is only a 'guess'. This point and concern is especially important where 'state of mind' is involved. Without powers of clairvoyance, it is impossible to know what someone else knows or thinks. What is possible may be very far from the actual truth!

Keep objective attention on the requirement that, in civil matters, the burden of proof is beyond the balance of 'probability'. Allegations of fact require an objectively based rationalized review of the probabilities rather than subjectively based, and often emotionally charged, speculations that amount to mere guessing. What likely happened and what might have happened are two very different perspectives.

It is often very challenging, and emotionally frustrating, for people who have suffered harms and losses to prove a case to the degree required by our legal system. Unfortunately, there is often very strong suspicion of who is likely responsible; however, there is often insufficient evidence to succeed in a legal case. In law, much more is needed than just a gut feeling.

When considering whether there is enough information available to prove a case, potential Plaintiffs struggle greatly (usually the advisor as the Plaintiffs themselves are usually oblivious to the technical legal problem) in trying to calculate a balance between when to bring a legal action and when more is required. Wait too long and Plaintiffs risks losing the right to bring legal action due to expiry of the limitation period. Sue too early and Plaintiffs risk being without enough evidence and having a case dismissed for failure to meet the burden of proof.