ARRESTING THE MALAYSIAN JUDICIARY'S AMBIVALENT SYNDROME CONCERNING THE QUANTUM OF PROOF IN ALLEGATIONS OF FRAUD IN CIVIL CASES – IN THE INTEREST OF CERTAINTY IN THE LAW

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Abstract

It has been settled law in Malaysia that the quantum of proof in civil courses is on a balance of probabilities. Even if the allegation is fraud, still the balance of probability standard applies. Though the civil court when considering a charge fraud will naturally require for itself a higher degree of probability than that which it would require when negligence or breach of contract is established. It does not adopt so high a degree as a criminal court, but still it does require a degree of probability which is commensurate with the occasion. However, this traditional position has been departed from a series of apex court decisions which had held that in civil cases the quantum of proof required in allegations of fraud is beyond a reasonable doubt. The Apex court has even gone to the extent of pronouncing that this is the common law of Malaysia. Then there is another view which enunciates that the quantum of proof required in allegations of fraud in civil cases will depend on the nature of fraud. If the nature of the fraud alleged is criminal, than the amount to evidence required to prove that allegation is the criminal standard of beyond reasonable doubt. If the nature of fraud is civil, then civil standard of balance of probabilities suffices. This ambivalent judicial attitude has now been compound by a recent 2015 apex court decision, that all is required to prove fraud is just on a balance of probabilities, irrespective of the nature of the allegation. The paper seeks to analyse the law on this matter by looking at the judicial attitudes of other common law jurisdictions such as Australia, Singapore and the United Kingdom and suggest that the Malaysian judiciary adopt a consistent approach that will be a conduce clarity, instead of creating confusion in this critical area of the law.

Keywords: Quantum of Proof, Balance of Probability, Proof beyond reasonable doubt

1. BURDEN OF PROOF

In any case, civil or criminal, there must always be rules as to who must prove what. If for example a plaintiff/claimant brings a civil action against the defendant, it is desirable that there be certainty not only in the substantive law of the case but also on the fundamental question of whether the plaintiff/claimant must prove the allegations in order to establish liability, or whether, once the allegations are made, the defendant must disprove them to escape liability. It is important to have an answer to this question for several reasons: firstly it will usually determine who has the right to call evidence first at the trial, which may give that party an important advantage; secondly if the court is conscientiously unable to decide between the parties at the end of the case, the answer will determine who wins and who loses: see sections 101 and 102 of the Malaysian Evidence Act 1950.

Section 101 of the Malaysian Evidence Act 1950 reads: 'Whoever desires any court to give judgement as to any legal right on liability, dependent on the existence of facts, which the asserts, must prove that those facts exist. Where a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.' Section 102 provides: 'The burden of proof in a suit or proceeding lies on that person who would fails if no evidence at all were given on either side.' For elucidation of the conceptual difference between sections 101 and 102 of the Evidence Act 1950, see *Nanyang Development (1996) Sdn. Bhd. v How Swee Poh Perwaja Steel Sdn. Bhd* (1995) 4 MLJ 673, 676. See also *Tan Kim Khuan v Tan Kee Kiat (M) Sdn. Bhd.* (1988), MLJ 697, 706]. Thirdly, if the case is appealed, it will enable the appellate court to determine whether or not the judge applied the correct test in assessing the significance of the evidence. In the language of the law of evidence, a party who must prove something in order to establish or escape liability is said to have the burden of proof: see Section 101 of the Evidence Act 1950.

The second question which must be answered is, what degree or amount of proof is required of a party, who has the burden of proof, in other words to what degree of satisfaction must the court be persuaded, before the burden of proof can be found to have been discharged. This degree of persuasion is called the standard or quantum of proof, and is also important in any evaluation by an appellate court of the way in which the trial court dealt with the evidence. In a civil case, (the subject matter of this paper), the law maintains a neutrality as between the parties, and tries to keep them on even terms as far as possible. While one party must have the burden of proof, its significance is minimized by a minimal standard of proof, which maintains an even balance and permits the better case to win the day.

It is useful to note that section 3 of the Malaysian Evidence Act has given a statutory definition of 'proved', 'disproved' and 'not proved'. Section 3 states that 'proved' a fact is said to be 'proved'. When after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, act on the supposition that it exists. On the other hand, section 3 also states when a fact is said to be 'disproved', 'disproved' a fact is said to be 'disproved' when after having considered the matters before it, the court either believes it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

The section further provides for situations where a fact is neither proved nor disproved, 'not proved' a fact is said to be 'not proved' when it is neither proved nor disproved. But the definition does not state what amount or quantum of proof is required to prove the fact. However, in *PP v Yuvraj* [1969] 2 MLJ 89, the Privy Council stated: "that in Malaysia as in India, the law of evidence has been embodied in a statutory code as in the Evidence Ordinance. However – no enactment can be fully comprehensive. It takes place as part of the general corpus of the law. It is intended to be construed by lawyers, and upon matters about which it is silent or fails to be explicit, it is not to be presumed that it was the intention of the legislature to depart from well-established principles of law".

This was confirmed by the Federal Court recently in 2015 in *Sinniayah & Sons Sdn Bhd v Damai Setia Sdn*

Bhd [2015] MLJ U 0292. This clearly means principles relating to quantum of proof in civil and criminal cases still follows the common. It is useful not bear in mind that the Malaysian Evidence Act, finds its inspiration from the Indian Evidence Act 1872. In *Looi Wooi Saik v PP* [1962] MLJ 337 CA, Thomson CJ said "In this country, the questioned is governed by terms of the Evidence Ordinance which is the same as the Indian Evidence Act [1872]. It is generally accepted that the Indian (Evidence] Act was drafted by Sir James Stephen in 1872 with the intention of stating in a codified the English law relating to evidence as it stood at that date".

The legal burden as to any fact in issue in a civil case lies upon the party who affirmatively asserts that fact is issue, and to whose claim or defence of the fact is issue is essential. This is a sound rule in civil cases, in which the law seeks to hold a neutral balance between the parties. It has been confirmed judicially that it is **"an ancient rule founded on considerations of good sense and it should not be departed from without strong reason",** per Viscount Maugham in *Joseph Constantine Steamship Line v Imperial Smelting Corp* [1942] AC 154 at 174. Of course, the essential elements of a claim or defence are determined by reference to the substantive law.

It has been settled law that the quantum or standard of proof required of any party to civil proceedings for discharge of the legal burden of proof is proof on the balance of probabilities. This means no more than that the court must be able to say, on the whole of the evidence, that the case for the asserting party has been shown to be **more probable than not.** If the probabilities are equal, i.e. the court is wholly undecided, the party bearing the burden of proof will fail. [*Miller v Minister of Pensions* [1947] 2 All ER 372 Denning J., *Lee You Sin v Chong Ngo Khoon* [1982] MLJ 15, FC; *Adorna Properties Sdn Bhd v Boonsom Boonyamit* [2001] MLJ 241.

The balance of probabilities standard is clearly lower than that required of the prosecution in a criminal case which is beyond reasonable doubt. However judges have also stressed, that the more grave the allegation, the clearer should be the evidence adduced to prove it. There are dicta which suggest that there is some sort of sliding scale of standard of proof, between the ordinary balance of probabilities, used in cases where no criminal or quasi criminal stigma attaches to the allegations made and some higher degree or proof (though falling short of the criminal standard) used in some cases. In *Bater v Bater* [1951] p 35 at 37, the issue before the English Court of Appeal was the proper standard of proof of a matrimonial cause, but in the course of his judgment Denning LJ said is more general terms: "As Best CJ any many other great judges have said, 'in proportion the crime is enormous, so ought the proof be clear'. So also in civil cases, the case may be proved by a preponderance of probability, **but there may be degrees of probability within the standard."**

The degree depends on the subjects matter. A civil court when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which would require when asking if negligence is established. It does not adopt so high degree as a criminal court even when it is considering a charge of criminal nature, but it still does require a degree of probability which is commensurate with the occasion. This flexible degree as expounded in *Miller* and *Bater v Bater* has been endorsed in Malaysia in ***Lau Hee Teah v Hargill Engineering*** [1980] 1 MLJ 145 **and *Lee You Sin v Chong Ngo Khoon*** [1982] 2 MLJ 15, FC.

2. ALLEGATIONS AMOUNTING TO A CRIME OR FRAUD IN CIVIL CASES: THE POSITION IS MALAYSIA

Three approaches are seen. The first approach - the usual balance of probabilities combined with the flexible standard within the balance of probabilities standard. This approach which has been the established and hallowed approach. A trilogy of local Malaysian Apex Court decisions had adopted this approach endorsing the flexible approach taken [1947] AII ER 374 in ***Miller v Miller of Pensions, Bater v Bater*** [1950] AII ER and ***Hornal v Neuberger Products*** [1957] 1 GB 247, 263 – 266. These Federal Court cases are ***Lau Hee Heah v Hargill Engineering Sdn Bhd Anor*** (1980) 1 MLJ 145, ***Lee You Sin v Chong Ngo Khoon*** (1982) 2

MLJ 15 and ***Adorna Properties Sdn Bhd v Boonsom Boonyamit*** [2001] 1 MLJ 241.

The second approach requiring a criminal standard of beyond reasonable doubt – when allegation of fraud are made in civil cases. The first reported case to require the higher standard was ***Saminathan v Pappa*** [1981] 1 MLJ 121 where the Privy Council on appeal from Malaysia clearly held that the onus of proof to prove fraud in Malaysia is proof beyond reasonable doubt and cannot be based on suspicion or conjecture following the Privy Council decision from India in ***Narayanan v Official Assignee, Rangoon*** AIR 1941 PC 93.

In ***Chu Choon Moi v Ngan Sew Tin*** [1986] 1 MLJ 34, the Federal Court again held that fraud whether made in civil or criminal proceedings must be proved beyond reasonable doubt again following ***Narayanan and Saminathan v Papa***. This higher standard was again approved in a number cases. In ***M. Ratnavale v Lourdenadin*** [1988] 2 MLJ the then Supreme Court again said that the criminal standard of proof of beyond a reasonable doubt is required to prove fraud. Suspicion, however grave is not proof. Again the next year in ***Eastern and Oriental Hotel [1951] Sdn Bhd v Ellarious George*** [1989] 1 MLJ 35 ***Fernandez & Anor***, the Supreme Court following ***Saminathan v Pappa*** again endorsed the law that the onus of proof in a case involving fraud is proof beyond reasonable doubt.

Also the Court of Appeal in ***Lee Way Fay v Lee Beng Ein*** [2005] 4 MLJ 701 emphasized that the burden of proof on the plaintiff is beyond reasonable doubt and not on a balance of probabilities. So much so that the Federal Court ***Yong Tim v Hoo Kong Chong v Anor*** [2005] 3 CLJ 229 elevated the principle by saying that **it is the common law (of evidence) in Malaysia** that the standard of proof to prove fraud in Malaysia is beyond reasonable doubt. The criminal standard was again endorsed in ***Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd*** [2007] 2 MLJ 301 FC and in ***Elba Spa v Fiamma Sdn Bhd*** [2008] 3 MLJ 713 HC.

The third Conciliatory Approach. In ***Ang Hiok Seng v Yim Yut Kiu*** [1997] 2 MLJ 45, the Federal Court took a different view, from the first and the second approaches as stated above. The Federal Court said that where the alleged fraud in civil proceedings is based on a criminal offence, the proof beyond reasonable doubt must be applied. **However, where the fraud alleged is purely civil in nature, the civil burden is applicable.** This view was endorsed by the Court of Appeal [2009] in ***Lembaga Kemajuan Tanah Persekutuan (FELDA) v Awang Soh bin Mamat*** [2009] 14 MLJ 610.

Then in 2015 the Federal Court took an absolutist view by stating in the law of evidence there are only two standards of proof and that the standard of proof in civil cases is on balance of probabilities, even when more serious allegations like fraud and/or dishonesty are made. In *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] MLJU 0292, after surveying some Australian authorities like the Australian High Court decision ***Rejfek v Anor Mc Elroy & Anor*** [1965] 39 ALJR 177 where it said "The difference between the criminal standard of proof is no mere matter of words. It is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such proceedings to attain that degree of certainty which is indispensable to the support of a conviction and the earlier High Court Case of *Helton v Allen* [1940] 63 C.L.R which had expressed similar sentiments." The Federal Court also approved two leading Canadian authorities which had insisted on a single balance of probabilities standard of proof.

The Canadian Supreme Court in *FH v Mc Dougall* [2008] SCC 53, had already held that 'in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine it is more likely or not that an alleged event occurred. Rothstein J roundly rejected the suggestion that there are different levels of scrutiny of evidence depending on the seriousness of the allegation. Then the Federal Court relied on two recent English cases of high authority to pronounce that in Malaysia too following the jurisprudence of Australia and Canada, there is

only one standard of proof in civil cases however serious the allegations may. It said at paragraph 39:

"It is worthy to note that the English Supreme Court in the case of In ***re S-B Children*** (2009) UKSC 17 followed the law as pronounced in In re B (Children) (supra). The Supreme Court firmly approved that 'there is only one civil standard of proof and that is proof that the fact in issue more probably occurred that not'. The Court also rejected the "nostrum, "the more serious the allegation, the more cogent the evidence needed to prove it". This rejection goes to show that even for hybrid cases (Civil cases but containing material allegations implying criminal conduct. There are some judicial views that for a hybrid case a higher degree of probability or a higher standard of proof is required. In the worlds of Lady Hale in ***re S-B Children*** (supra) such views 'had become a commonplace but was a misinterpretation of what Lord Nicholls had in fact said' in ***Re H (Minors) (Sexual Abuse: Standard of Proof)*** (1996) AC 563) the same civil standard of proof applies".

And in paragraph 52 the Federal Court said: "We therefore reiterate that we agree and accept the rationale in In re B (Children) (supra) that in a civil claim even when fraud is alleged the civil standard of proof, that is, on the balance or probabilities, should apply. And perhaps it is not out of place here to restate the general rule at common law that, "In the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be a balance of probabilities".

Nearer home in Singapore, the rule of law on the standard of proof for fraud in civil claims is on a balance of probabilities. However, though the notion of a third standard has been rejected, the courts still added a caution that ' the more serious the allegation, the more the party on whose shoulders the burden of proof lies, may have to do if he hopes to establish his case. These was what was stated clearly in ***Yogambikai Nagarajah v Indian Overseas Bank*** [1966] 2 SLR (R) 774 and ***Tang Yoke Heng v Lek Benedict*** [2005] 3 SLR (R) 263.

However, it is submitted that the traditional hallowed formula has worked well and should be retained. The position stated by Morris LJ in the English case of ***Hornal v Neuberger Products*** [1957] 1 Q B 247 at 266, correctly represents the position: "But in truth, no real mischief results from the acceptance of the fact that there is some difference of approach in civil actions. Though no court would give less careful attention to issues lacking gravity than those marked by it, the very element of gravity become part of the whole range of circumstances which had to be weighed in the scale when deciding as to the balance of probabilities.

In fact the law was stated with equal clarity by Ungoed – Thomas, after referring to the passage cited above from the judgement of Morris LJ in *Hornal*. "It seems to me that in civil cases it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but the gravity of the issue becomes part of the circumstances which the court has to take into consideration in deciding whether or not the burden of proof has been discharged. The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it" in ***Re-Dellow's Will Trust*** [1964] I WLR 451 at 454.