

影印版法学基础系列

# 证据法基础

# ESSENTIAL

# EVIDENCE

特拉西·阿奎诺

Tracey Aquino

(第二版)

(Second Edition)



全国优秀出版社  
武汉大学出版社

影印版法学基础系列

# 证据法基础

# ESSENTIAL EVIDENCE

特拉西·阿奎诺

Tracey Aquino, LLB, Barrister

(第二版)

(Second Edition)



全国优秀出版社  
武汉大学出版社

图书在版编目(CIP)数据

证据法基础=Essential Evidence:第2版/(英)特拉西·阿奎诺  
(Tracey Aquino)著. —武汉:武汉大学出版社,2004.6

(影印版法学基础系列)

ISBN 7-307-04233-9

I. 证… II. 特… III. 证据—法的理论—英国—高等学校—教材—英文 IV. D956.15

中国版本图书馆 CIP 数据核字(2004)第 033613 号

著作权合同登记号:图字 17-2004-010

©Cavendish Publishing Limited

This reprint of *Essential Evidence* is published by arrangement with  
Cavendish Publishing Limited.

本书中文版专有出版权由英国卡文迪什出版有限公司授予武汉大学出版社  
出版。未经出版者书面允许,不得以任何方式复印或抄袭本书内容。

责任编辑:游径海 赵 慧 版式设计:支 笛

---

出版发行:武汉大学出版社 (430072 武昌 珞珈山)

(电子邮件:wdp4@whu.edu.cn 网址:www.wdp.whu.edu.cn)

印刷:武汉大学出版社印刷总厂

开本:920×1250 1/32 印张:6.875 字数:279千字

版次:2004年6月第1版 2004年6月第1次印刷

ISBN 7-307-04233-9/D·561 定价:11.00元

---

版权所有,不得翻印;凡购我社的图书,如有缺页、倒页、脱页等质量问题,请  
与当地图书销售部门联系调换。

---

## 本书导读

---

中国向来具有重实体轻程序的传统,在中华法系的发轫和发展中,实体法和程序法呈现不协调发展的状态,程序法在中国法制史上是没有自己应有的法律地位的。这种立法思想和观念反映在司法实践中,就是强调程序法的工具和刀把子性质,程序法的价值就是促进实体法规定的权利义务的实现。为了实现国家镇压打击犯罪和保护社会的目的,国家不惜动用一切司法资源甚至牺牲国民个人的自由权利。个人在这种司法体制下是没有自己独立的存在价值的,他们都作为社会一员而且只能作为社会一员而生存。这样,我们就能很好地理解了口供在中国法制史上的重要象征意义,以及司法人员为什么对刑讯逼供那么地顶礼膜拜了。虽然在新中国成立后这种状况得到了一定程度的修正,但传统法律观念对我们的浸润使我们即使现在在社会也能感受到口供和刑讯逼供在我国的阴魂不散。与中国相对的是,近代以来,西方国家在反封建不人道、反侵犯人权的司法制度的旗帜下,加之民主、文明观念的诱导,发展出一套比较成熟的现代司法制度和观念形态。在这种司法体制中,不管是英美法系还是大陆法系国家都高扬程序法的独立价值,主张在正当程序中实现实体正义。特别是具有浓郁实用主义色彩的英美法系国家,更是在司法实践的砥砺中发展了一套完善的程序模式与方法。程序虽然具有自身的独立价值(如开放性、自治性等),但程序的运作主要还是通过证据制度来实现的。因此,证据法集中反映了程序的内在要求,也是程序自治、程序发展的重要动力。在我国程序法特别是证据法不发达的情况下,借鉴、吸收国外比较先进的法律文化是当前最利于实现我国法律革故鼎新的重要路径。通过对西方先进的证据法研究成果仔细体会其技巧、消化其原理,有利于提升我国证据法的学术质量与实践品格。

摆在读者面前的就是这样一本好书。它深入浅出、详细地勾画了英国关于证据分析和确认方面的高超技巧,对于证据法的重大问题,如证明责任、证明标准、证据的可采性、交叉询问、非法证据和传闻证据的排除、证人证言、自认、相同事实证据规则、证人品格以及补强证据等问题都进行了具体解读,一部适合初学者了解英美法系证据法的快速入门教材。

本书目录和索引由武汉大学法学院赵慧博士翻译,由于译者水平有限,错误在所难免,请专家、读者不吝指教。

译 者

2004年5月

---

# Foreword

---

This book is part of the Cavendish Essential series. The books in the series are designed to provide useful revision aids for the hard-pressed student. They are not, of course, intended to be substitutes for more detailed treatises. Other textbooks in the Cavendish portfolio must supply these gaps.

Each book in the series follows a uniform format of a checklist of the areas covered in each chapter followed by expanded treatment of 'Essential' issues looking at examination topics in depth.

The team of authors bring a wealth of lecturing and examining experience to the task in hand. Many of us can even recall what it was like to face law examinations!

Professor Nicholas Bourne AM  
General Editor, Essential Series  
Conservative Member for Mid and West Wales

---

# Table of Contents

---

<i>Foreword</i> .....	5
<b>1 Burden and Standard of Proof</b> .....	1
Introduction .....	1
Criminal cases .....	2
The legal burden of proof .....	2
The evidential burden .....	6
The standard of proof .....	7
Civil cases .....	8
Standard of proof .....	11
<b>2 Competence and Compellability</b> .....	13
Introduction .....	13
The defendant .....	14
The spouse of the defendant .....	17
Children .....	19
Persons of defective intellect .....	21
The Youth Justice and Criminal Evidence Act 1999 .....	22
Miscellaneous categories .....	24
Civil cases .....	24
<b>3 Examination-in-Chief</b> .....	27
Calling witnesses .....	27
The course of testimony .....	28
Previous consistent statements .....	34
<b>4 Cross-Examination</b> .....	39
Introduction .....	39
The Bar Code of Conduct .....	39
The aim of cross-examination .....	40
Relevance and admissibility of cross-examination .....	41
Discrediting witnesses .....	41
The complainant in rape cases .....	41
Previous inconsistent statements .....	48
Rebutting answers to questions relevant to the subject matter of the dispute .....	48

Effect of previous inconsistent statements	49
Re-examination	52
<b>5 Similar Fact Evidence</b>	53
Introduction	53
The search for positive probative value	54
Identity cases and the search for striking similarity	56
Positive probative value in the form of strong underlying links	59
Multiple accusations	60
Examples of positive probative value in non-identity cases	61
Sexual offences and the significance of sexual disposition	63
Possession of incriminating items	64
Similar fact evidence for the defence	64
Use of similar fact evidence	65
Similar fact evidence in civil cases	65
<b>6 The Character of the Accused</b>	67
Introduction	67
The defendant who does not testify	67
Where the defendant testifies	68
The s 1(f) shield	69
The good character direction	79
<b>7 Corroboration and Care Warnings</b>	81
What is corroboration?	81
Corroboration required by law	82
Corroboration warnings	83
Care warnings	84
<b>8 Identification Evidence</b>	87
General descriptions	87
Identification of the accused	87
Assessing the quality of the evidence	88
Directing the jury	89
Identification procedures and Code D of PACE 1984	92
<b>9 The Rule Against Hearsay</b>	99
Introduction	99
Testing whether the evidence is hearsay	100
Mechanical calculations by machines and computers	109



<b>10 The Common Law Exceptions</b>	111
Introduction	111
The <i>res gestae</i>	111
Statements referring to the physical state of the maker	113
Statements by persons now deceased	114
Public documents	117
Admissions	117
<b>11 Statutory Exceptions in Criminal Law</b>	121
The Criminal Justice Act 1988	121
Exclusion of evidence under the CJA	128
Computer evidence	132
<b>12 The Rule Against Hearsay: Civil Cases</b>	135
Introduction	135
The Civil Evidence Act 1995	136
<b>13 Confessions</b>	141
Introduction	141
The nature of a confession	142
Excluding confessions	142
Challenging admissibility under s 76	143
Oppression	144
Unreliability	144
The causal link	145
Exclusion of confessions under s 78	145
Access to legal advice	146
Covert police operations	147
Other exclusionary discretion	148
The consequences of exclusion for the prosecution	148
The consequences of exclusion for a co-accused	149
Editing of confessions	149
Exclusion of other improperly obtained evidence under s 78	150
The Human Rights Act 1998	150
<b>14 Silence of the Defendant</b>	151
Common law	151
Statute	151

<b>15 Opinion Evidence</b> .....	159
Introduction .....	159
Expert opinion evidence .....	159
Non-expert opinion evidence: the eye witness account .....	163
Evidence of general reputation .....	163
<b>16 Use of Previous Judgments</b> .....	165
Introduction .....	165
Civil cases .....	166
Use of previous judgments in criminal cases .....	167
<b>17 Public Interest Immunity and Privilege</b> .....	171
Introduction .....	171
Public interest immunity .....	172
Privilege .....	176
 <i>Index</i> .....	 181

---

# 目 录

---

前 言	5
1 证明责任与证明标准	1
导论	1
刑事案件	2
法定证明责任	2
证明责任	6
证明标准	7
民事案件	8
证明标准	11
2 作证能力与强制作证的可行性	13
导论	13
被告	14
被告的配偶	17
儿童	19
智力障碍者	21
青少年司法与刑事证据法(1999年)	22
不同类别	24
民事案件	24
3 主询问	27
传唤证人	27
证明过程	28
先前一致的陈述	34
4 交叉询问	39
导论	39
律师行为法典	39

交叉询问的目的	40
交叉询问的相关性与可采性	41
对证人产生怀疑	41
强奸案件中的被告人	41
先前不一致的陈述	48
对争议事项相关问题的反驳回答	48
先前不一致陈述的影响	49
再询问	52
<b>5 相同事实证据</b>	<b>53</b>
导论	53
对积极证明力价值的调查	54
确认案件与对显著相似证据的调查	56
强内在联系形式中的积极证明力价值	59
多项指控	60
非确认案件中的具有积极证明力价值的案例	61
性犯罪与性倾向的意义	63
对有罪事实的占有	64
在辩护中使用相同事实证据	64
民事案件中的相同事实证据	65
<b>6 刑事被告人的品格</b>	<b>67</b>
导论	67
不作证的被告	67
当被告作证时	68
第1条F项的保护	68
良好品格指示	79
<b>7 补强证据与注意警告</b>	<b>81</b>
什么是补强证据?	81
法律需要的补强证据	82
补强证据的警告	83
注意警告	84

8	辨认证据	87
	概述	87
	刑事被告人的辨认	87
	证据力评估	88
	对陪审团的指示	89
	辨认程序与警察与刑事证据法(1984年)D卷	92
9	反对传闻证据规则	99
	导论	99
	审查证据是否传闻证据	100
	通过机器和计算机进行的机械化计算	109
10	普通法的例外	111
	导论	111
	发生的事件	111
	关于陈述者身体状态的陈述	113
	死者所作的陈述	114
	公共文件	117
	供认	117
11	刑法中制定法的例外	121
	刑事司法法(1988年)	121
	刑事司法法中证据的排除	128
	计算机证据	132
12	民事案件中反对传闻证据的规则	135
	导论	135
	民事证据法(1995年)	136
13	自 认	141
	导论	141
	自认的性质	142
	自认的排除	142
	第76条对自认可采性的挑战	143

胁迫	144
不可靠	145
因果联系	145
第 78 条对自认的排除	145
取得法律咨询	146
秘密警察行为	147
其他排除的自由裁量权	148
排除自认对控方的影响	148
排除自认对共同被告的影响	149
对自认的编辑	149
根据第 78 条,对其他不正当手段取得证据的排除	150
人权法(1998 年)	150
<b>14 被告的沉默权</b>	<b>151</b>
普通法	151
制定法	151
<b>15 意见证据</b>	<b>159</b>
导论	159
专家意见证据	159
非专家意见证据:目击证人的叙述	163
一般名誉证据	163
<b>16 先前判决的使用</b>	<b>165</b>
导论	165
民事案件	166
刑事案件中先前判决的使用	167
<b>17 公共利益豁免与特权</b>	<b>171</b>
导论	171
公共利益豁免	172
特权	176
<b>索引</b>	<b>181</b>

---

# 1 Burden and Standard of Proof

---

***You should be familiar with the following areas:***

- the legal burden of proof in criminal cases
- exceptions to the rule in *Woolmington*
- the evidential burden in criminal cases
- the standard of proof in criminal cases
- civil cases: the legal burden
- the standard of proof
- presumptions

## Introduction

The legal burden of proof is the obligation to prove a fact in issue. The party who bears the legal burden will lose if they fail to prove the point on which they bear the burden. This is sometimes referred to as the onus of proof.

An evidential burden is the obligation to raise enough evidence on a particular point to justify the issue being considered by the court. There is no need to prove anything if a party has an evidential burden; there is merely the need to put forward sufficient evidence to ensure that the issue is a live one.

The standard of proof is the degree of cogency required of evidence in order to satisfy the legal burden of proof.

The incidence of the legal and evidential burden and the level of the standard of proof varies according to whether the case is a criminal or civil case.

## **Criminal cases**

### **Introduction**

In criminal cases, there is a perception that the individual defendant is pitted against the weight of the state in the form of the prosecution. Since the individual's liberty is at stake, and historically it could also have been his life, the law adopts a protective and paternalistic approach. The rules on the legal burden of proof and the standard of proof are such that the prosecution has the onus of proving guilt beyond reasonable doubt, and the defendant is very rarely put to proof.

### **The legal burden of proof**

In *Woolmington v DPP* (1935), the defendant successfully appealed against the suggestion by the trial judge that the defendant should have to prove that the killing was accidental in order to be acquitted of murder.

Viscount Sankey's famous statement forms the basis of the rule governing the incidence of the legal burden of proof:

Throughout the web of the English criminal law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt ... If ... there is a reasonable doubt ... the prosecution has not made out the case and the prisoner is entitled to an acquittal.

Therefore, in a criminal case, if a fact or issue is disputed, then as a general rule, the prosecution will bear the legal burden of proof. A defendant does not normally have a legal burden of proof in a criminal case, unless he raises an issue that falls within one of the exceptions to the rule in *Woolmington v DPP*.

### **Exceptions to the rule in *Woolmington v DPP***

In *Woolmington*, it was recognised that there would be cases where the defendant would bear a legal burden of proof. These are:

- where the defendant raises the defence of insanity;
- where the defendant raises an issue where the statute expressly places the legal burden on him;
- where the issue is one where it can be implied from the statute that Parliament intended the defendant to bear the legal burden of proof.



## Insanity

If the defendant wishes to argue that he is innocent because he was suffering from insanity at the time of the offence, then he bears the legal burden. This is because a man is presumed to be sane, and to know the nature of his actions: *M'Naghten's case* (1843).

This only applies to insanity within the narrow definition in *M'Naghten* rules; if a defendant raises non-insane automatism, he has no legal burden of proof: *Bratty v AG of N Ireland* (1963).

If the defendant raises insanity, he only has to prove it on the balance of probabilities. If the prosecution raises the issue of the defendant's insanity, then the prosecution bears the legal burden of proof, and must prove this disputed point beyond reasonable doubt.

## Express statutory exceptions

Parliament is sovereign, and can thus place the legal burden on the defendant if it sees fit. This usually occurs in cases where it would be very onerous if the prosecution had the legal burden and where policy dictates that it should be on the defendant.

Such statutes tend to use phrases such as 'it shall be for the defence to prove' or 'unless the contrary is proved'.

Common examples include:

- diminished responsibility (s 2 of the Homicide Act 1957), where the defendant must prove that he was suffering from a defect of reason that impaired his responsibility;
- possession of offensive weapons (s 1 of the Prevention of Crime Act 1953), where a defendant in possession of an offensive weapon must prove lawful authority or reasonable excuse;
- possession of controlled drugs (s 6 of the Misuse of Drugs Act 1971), where a defendant has the legal burden of proving that he did not know or suspect the substance to be cannabis.

## Statutes which imply the burden

A statute will contain a definition of the offence that it creates and the usual rule is that the prosecution bears the legal burden of proving all the contentious issues, including disproving any defence raised. However, it is possible that one of the areas in dispute is an issue that can be properly categorised as 'an exception, exemption, proviso, excuse or qualification'. The defendant may then bear the legal burden of proving that point, as the burden may be implied on him by reference to s 101 of the Magistrates' Courts Act 1980.