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Burdens of Persuasion: Burdened by Too Many Burdens

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BURDENS OF PERSUASION: BURDENED BY TOO MANY BURDENS

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Imagine this scene: You have just delivered the best closing argument in your trial career. The jury deliberates for no longer than 20 minutes. The foreperson announces a large verdict in favor of your client; but, suddenly, before the foreperson can sit down, the judge calls counsel to the bench: "I am disappointed with the verdict this jury has returned. Clearly, the weight of the evidence was against the verdict of the jury. Viewing all evidence and inferences in favor of the plaintiff, a reasonable person could not return with a verdict in the plaintiff's favor. Consequently, the verdict is vacated and the case dismissed."

While this happens infrequently, it illustrates that success at a trial depends upon the moving party's ability to meet its burden of persuasion to the satisfaction of the jury *and the judge*. While no two trials are alike, all cases have a specific degree of persuasion which must be satisfied.

Before becoming a judge, I never attempted to differentiate among the various degrees of persuasion. Instead, I simply made out the best possible case for my client and then argued that the result met the applicable burden. This method of advocacy seemed to work best considering the numerous types of persuasion burdens.

It was not until I became a judge and had to act as the finder of fact, that it became apparent that it was impossible to distinguish among the various burdens with any degree of assurance. Therefore, I thought it would be helpful to collect the different burdens and place them in a relative order of what I thought would be a neat, well organized, precisely graduated list of ascending requirements of easily determined degrees of persuasion. Much to my dismay, however, the list turned into a quagmire of phrases without solid underpinnings and defined boundaries, a paradigm in form, but an undefined mass in substance.

Undaunted by my personal reaction and resulting doubt, I ploughed ahead with the research (or at least pushed on my law clerks). After much research, reading, and revision, I came across a law review article entitled: "Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?"[2] I heartily recommend it to all judges and lawyers. While that treatise adequately addressed my concerns, I felt that a brief article, confining itself to Maryland cases, would be of benefit to the bench and bar. Dealing with the burdens of proof as a judge, I now realize the importance, to trial lawyers, of their being able to articulate the differences in their arguments to the *judge* as well as the jury.

Burden of *proof* refers to that party who has the obligation of convincing the trier of fact of the truth of the facts as alleged. The burden of *persuasion*, on the other hand, refers to the various degrees of belief which a fact finder must reach to deem facts to be true.[3] For example, in a criminal case the burden of *proof* is on the government. The government's burden of *persuasion* is to prove the necessary elements of the crime beyond a reasonable doubt.[4]

The appropriate burden of persuasion is dictated by either the substantive law of the case, or by the procedural posture of the case. The latter occurs when the trial court acts in an appellate capacity, such as when hearing exceptions from a Master's findings,[5] sitting in an en banc panel,[6] or hearing appeals from a lower court[7] or administrative agency.[8]

This article will: (1) identify the various burdens of persuasion used by Maryland's trial and appellate courts; (2) illustrate the differences among those burdens; and, (3) suggest a reduction in the number of different kinds of burdens used so that the confusion among them is reduced.

I. TRIAL BURDENS DEFINED

At the trial level, there are three primary burdens of persuasion: (1) preponderance of the evidence; (2) clear and convincing evidence; and (3) beyond a reasonable doubt. Substantive law dictates which burden is appropriate. Generally, the "preponderance of the evidence" standard is used in civil cases. The more stringent "beyond a reasonable doubt" standard is applied in criminal proceedings. A middle ground of "clear and convincing evidence" is used in a variety of cases as a result of common-law or statute. An example of the former is a civil case where fraud is alleged.[9] An example of the latter is a case involving the involuntary termination of parental rights.[10] In addition to these three primary burdens, there are a number of other burdens the

courts employ: probable cause to believe; reasonable cause to believe; and reasonable suspicion, to name a few.[11] These burdens will be addressed later in this article.[12]

Choosing the proper burden should be a mechanical function; difficulties arise, however, in deciding if the burden has been met. This problem occurs when judges and juries fail to appreciate the distinctions between the various burdens.

A. *Preponderance of the evidence.*

In addition to the traditional tort and contract cases, there are other civil matters where the preponderance burden is appropriate. Among such cases are civil contempt proceedings[13] and those equity matters such as paternity,[14] divorce[15] and proceedings seeking to sustain a forfeiture of property.[16] Preponderance of the evidence is also applied in various "internal findings" in criminal cases for juvenile waiver,[17] admissibility of a defendant's confession or statements,[18] proof of affirmative defenses, and evidence of mitigating factors in death penalty cases.[19]

The preponderance of the evidence standard requires evidence which: (1) is sufficiently strong to establish that a fact is "more likely true than not true"; or "more probable than not"; (2) "tips the scale ever so lightly in the favor of [the party who bears the burden of persuasion]"; (3) has the "greater weight"; or (4) amounts to at least 51 percent of the evidence.[20] The Maryland Civil Pattern Jury instructions state:

> [t]o prove by a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that it is more likely true than not true.[21]

B. *Clear and Convincing Evidence*

Clear and convincing evidence is more than a preponderance of the evidence and less than evidence beyond a reasonable doubt.[22] The Maryland Civil Pattern Jury Instructions state: "[t]o be clear and convincing, evidence should be 'clear' in the sense that it is certain, plain to the understanding, and unambiguous and 'convincing' in the sense that it is so reasonable and persuasive as to cause you to believe it."[23]

Clear and convincing evidence is the appropriate burden to apply, *inter alia*: in setting aside a release;[24] establishing constructive trusts;[25] the state's rebuttal to an allegation that an informer's identity is necessary and relevant to a fair defense;[26] using the sealed container defense in product liability litigation;[27] fraud;[28] attorney discipline actions before the attorney grievance commission;[29] and involuntary civil commitment proceedings.[30] The most recently added forum for this burden is when punitive damages are claimed in products liability cases.[31]

C. *Beyond a reasonable doubt*

Proof beyond a reasonable doubt is the appropriate burden of persuasion in criminal cases,[32] juvenile delinquency cases,[33] and in determining the existence of aggravating circumstances in death penalty cases.[34] In *Montgomery v. State*,[35] the Maryland Court of Appeals reversed a trial judge's jury instructions and described a proper instruction for beyond a reasonable doubt:

> That doesn't mean, however, that the State must prove those elements of a crime to an absolute or mathematical certainty. It means such evidence as you would act upon in a matter involving important affairs in your life or your business or with regard to your property. If the evidence is sufficient that you would act upon it in a very important matter in your own lives then it is sufficient to convict in a criminal case.[36]

"The appropriate burden of persuasion is dictated by either the substantive law of the case, or by the procedural posture of the case."

In the case of *Wills v. State*,[37] the court of appeals made it very clear that while no specific language is mandated, the preferred instruction as to reasonable doubt should follow the Maryland Civil Pattern Jury Instructions.

II. APPELLATE BURDENS DEFINED

At the appellate level, there are primarily two standards used to review the actions of a trial court, substantial evidence and clearly erroneous. These appellate standards are binding on a trial court when it is sitting as an appellate court, such as when hearing an appeal from the district court, hearing an administrative appeal, or hearing exceptions to the findings of a master.[38]

A. *Substantial Evidence*

In all appeals, generally, and in administrative appeals specifically, the reviewing court will not disturb the facts as found by the initial fact finder if supported by substantial, competent and material evidence when the record is viewed as a whole.[39] Moreover, when dealing with an appeal from an administrative agency, the court of appeals requires that the agency's decision be reviewed in the light most favorable to the agency, and that the court not infringe upon judgments within the presumed expertise of the administrative agency.[40] Clearly, this situation must be distinguished from that presented by a de novo appeal. In such a case, the

"appellate court" acts as a fact finder and owes no deference to the administrative agency. A de novo trial, in essence, is a new trial.

In *Newell v. Richards*,[41] the Court of Appeals of Maryland distinguished the appropriate difference in procedures between appeals from the Health Claims Arbitration Office for medical malpractice claims and those appeals from the Workers' Compensation Commission. In an appeal from the Health Claims Arbitration Office, the judge shall instruct the jury that while the decision of an arbitration panel is presumed to be correct, the plaintiff (i.e., the claimant), *whether successful or not before the arbitration office* still has the burden of proving his or her case by a preponderance of the evidence.[42] "In workers' compensation cases, *whoever takes the appeal*, whether claimant or employer/insurer, has the burden of proving its case by a preponderance of the evidence and becomes the "plaintiff" while the appellee becomes the "defendant."[43] The two types of appeals are treated differently because the medical malpractice appeal arises from a common law tort cause of action, but workers' compensation cases are entirely creatures of statute.[44] In the *Newell* case, the court stated that while the Maryland Civil Pattern Jury Instructions[45] on the burden of proof for medical malpractice is correct, it should be preceded with a traditional instruction on plaintiff's burden of proof upon request.[46]

B. *First-Level v. Second-Level Fact Finding*

A Master makes "first-level fact findings" which must be accepted by the trial court if there was credible evidence before the Master from which reasonable inferences could be made supporting the Master's findings.[47] For example, if there is evidence of different amounts as to a party's earnings, the Master's finding of any specific amount, supported by credible evidence, is binding on the trial court. However, the conclusions and recommendations drawn from these facts, i.e., *second level facts*, by the Master must be determined by the trial court using its own discretion without reliance on the Master's findings.[48] For example, the specific amount of alimony recommended by a Master would be a second level fact finding. The trial judge reviews that finding, using his or her own discretion which might, but not necessarily, be the same conclusion as reached by the Master.[49]

C. *Clearly Erroneous*

The clearly erroneous standard applies to review of a Chancellor's factual findings.[50] While the rule can be simply stated: an appellate court cannot set aside factual findings unless they are clearly erroneous,[51] the court of special appeals has added a twist to that burden of persuasion in a recent case by creating a threshold test.

That test provides that the limits on the trial court's discretion will "be narrow" when consequences of a particular exercise of discretion are clear. For example, when one result is clearly just and the other clearly unjust. However, where there is no clear just or unjust result, the trial court will have broad latitude in its use of discretion.[52] A threshold test must now be satisfied before an appellate court can review and decide if a trial court's decision is clearly erroneous. That question is: are the consequences clearly, or unclearly, just or unjust? Presumably, there would not be a dissenting opinion to an appellate answer to this threshold question.

III. BURDEN APPLICATION PROBLEMS

In *Harris v. State*,[53] the court stated that "the choice of a particular burden of persuasion is the way in which the law sends the message to the fact finder that with respect to a given issue, he should be persuaded a little bit, a lot, or something in between."[54] As simple as this sounds, courts are continually faced with the problem of whether the fact finder has used the proper degree of persuasion. The *Harris* court continued with an explanation of the function of the burden of persuasion in a case:

> All the fact finder has acquired is a belief of what probably happened. The intensity of this belief - the degree to which a fact finder is convinced that a given act actually occurred - can, of course, vary .... Although the phrases "preponderance of the evidence" and "proof beyond a reasonable doubt" are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.[55]

A. *Preponderance Of The Evidence.*

There is a little difficulty in applying this burden which is often defined as "more likely than not." This is the burden upon which most court decisions are based. The difficulty comes in applying those burdens which call for a lesser degree of proof, such as "reasonably possible" and "probable cause." Maryland courts have stated that "reasonably satisfied" is no more stringent a standard than "preponderance;"[56] and that "[a] 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[57] There seems to be little consistency among the various lesser burdens used.

1. *Reasonable Satisfaction*

"Reasonable satisfaction" is the standard applicable in a violation of probation proceeding.[58] This standard is actually the same as preponderance of the evidence. In *Wink v. State*,[59] the court of appeals addressed the appellant's contention that the trial court applied the wrong standard of proof in a revocation of probation hearing.[60] Appellant claimed that the court used the "preponderance of the evidence" standard instead of the "reasonable certainty" standard, which he believed was a higher degree of proof.[61] The court, relying in part on case law from other jurisdictions, determined that "reasonable satisfaction" is actually a preponderance of the evidence.[62] In addition, the court

stated, "tracking the origin and use of reasonable satisfaction in our cases demonstrates that the expression does not connote a different standard from preponderance on a fact finding issue."[63] Consequently, in violation of probation proceedings, the state needs to establish by a preponderance of the evidence that a violation occurred in order to have a defendant's probation revoked.[64]

B. *Clear and Convincing Evidence*

A number of problems have arisen in the proper application of this burden. As recently as 1986, the court of appeals stated that the proper burden of persuasion to establish fraud was "satisfactorily convincing evidence."[65] Two years later, a trial judge erroneously equated the clear and convincing standard with proof beyond a reasonable doubt.[66] It is generally believed that the clear and convincing standard exists somewhere between a preponderance of the evidence and proof beyond a reasonable doubt. It appears that clear and convincing can best be defined by comparison - more than preponderance, but less than reasonable doubt.

C. *Beyond A Reasonable Doubt*

Proof of guilt beyond *all* doubt has never been required in Maryland, even in the most serious criminal cases.[67] In *Collins v. State*,[68] the defendant argued on appeal that the trial court's jury instruction regarding reasonable doubt was misleading and lowered the burden of proof. In its instruction, the court stated: "In other words, you must be *reasonably certain* of the guilt of the accused in order to convict."[69] Defense counsel objected at trial to this phrase and the court then reinstructed the jury that the burden to prove murder is beyond a reasonable doubt. The court of appeals in affirming the trial court found that when the trial court reinstructed as to the burden, it more than adequately explained the beyond a reasonable doubt burden.[70]

In *Montgomery v. State*,[71] the court stated that "even judges have problems construing the term reasonable doubt and that laymen are at least as likely to misconstrue the term."[72] The court also stated that: "the term reasonable doubt' is not so commonplace, simple and clear that its meaning is self-evident to the jury."[73]

In *Laster v. State*,[74] the defendant objected to the trial court's instruction on the reasonable doubt standard, saying it "could only . . . confuse and mislead the jury . . ." The trial court instructed, in part, as follows:

> Now, when we say beyond a reasonable doubt, are we telling you that the State has to prove it more than a reasonable doubt or beyond a reasonable doubt or further than a reasonable doubt? That's ridiculous. As I said, it's a term of art and what it means is that the State has to prove its case to the exclusion of a reasonable doubt. Now, let me tell you what a reasonable doubt is not. It doesn't mean that you have to be a hundred percent convinced of the Defendant's guilt . . . A reasonable doubt is just what it says, it's a doubt founded on reason. When you go back in the jury room you take your common sense with you.[75]

The court of special appeals noted that "there is no particular litany a court must recite in defining reasonable doubt . . . in any event, we perceive no error."[76]

One can see in the *Laster* jury instruction the results of an attempt by the court to define the beyond a reasonable doubt burden in lay terms. It also demonstrates how this and other burdens are terms of art which are likely to be applied differently by different people.

IV. JUDICIAL SURVEY

As I researched this article, I became curious about my colleagues' concepts of the burdens of persuasion. I asked them to complete a survey modelled on that used by Professor McCauliff in her research.[77] The survey asked the judges to give a percentage value to each of nine phrases which describe various burdens faced by them. Space was provided for any written comments.[78] Of the twenty-five judges on the Circuit Court for Baltimore City, fourteen judges responded to the survey. Of the fourteen who completed and returned the survey, eleven placed numerical values by each of the burdens, while the remaining three explained why they could not evaluate the burdens in percentages. One of the three simply stated: "I am unable to place numerical percentages by these concepts." The other two stated that they could not quantify the burdens and ranked them in descending order from highest to lowest degree of certainty required.

There was significant variety among the responses to the survey.[79] As to the percentage value of "preponderance of the evidence," responses were: 50-plus percent, 50.1 percent, and 51 percent. Nine respondents agreed that preponderance of the evidence was valued at just higher than 50 percent.[80] Responses to "clear and convincing evidence" ranged from 60 percent to 85 percent, with the majority placing this burden at 75 percent.[81] The responses to "beyond a reasonable doubt" ranged from 65 percent to 100 percent, with no more than two respondents agreeing on the value for this burden.[82] The response to "clearly erroneous" was the largest spread, from a low of 0-0.1 percent to a high of 90-plus percent.[83]

Of particular interest was the comparison of the response of 65 percent certainty for beyond a reasonable doubt with the response of 85 percent needed for clear and convincing.

V. SUGGESTED SOLUTION

The rationale for requiring different degrees of persuasion is traced to what degree society will tolerate the possibility of error. No more than a probability is required in a tort case, but substantially more probability is required when one's liberty or life is at stake. Society is more willing

to tolerate innocent people bearing the cost of an automobile accident (if 51 percent probability is satisfactory, that means that a 49 percent possibility of error is acceptable) than it is to tolerate incarcerating innocent persons.

For the fact finder, there ought to be only two burdens of proof, preponderance of the evidence and beyond a reasonable doubt. As evidenced by cases and judicial surveys, the clear and convincing standard is a happy medium that is neither happy nor medium.

For appeals, there should be only a *factually* based test; that of substantial evidence. The clearly erroneous rule is an awkward phrase. A conclusion is either erroneous or not. The modifier, "clearly" does nothing to this test but add a level of confusion. This is shown by the survey responses, ranging from less than one to more than ninety percent.

In summary, the use of various burdens of persuasion ought to be streamlined. Justice requires consistency which can best be obtained by reducing the varieties of burdens of proof and making their definitions clear. (Not clear and convincing, nor clear beyond a reasonable doubt, just clear!) As to the lesser burdens, such as reasonable probability, etc., they are so hopelessly impossible to describe with any degree of precision, that they can only be understood by reference to fact specific precedent.

Endnotes

[1]The author gratefully acknowledges significant assistance from his law clerks: Matthew B. Cooper, Esq. and Jeffrey S. Marcalus.
[2]C. M. A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 Vand. L. Rev. 1293 (1982).
[3]*Id.*
[4]*In re Winship*, 397 U.S. 358 (1970).
[5]Md. R. 2-541(h).
[6]Md. R. 2-551.
[7]Sometimes such appeals are heard *de novo*, but at other times, those appeals are heard by the circuit court acting in the capacity of an appellate court. *See* Md. R. 1300.
[8]*Id.* at B2.
[9]*Everett v. Baltimore Gas & Elec. Co.*, 307 Md. 286, 301, 513 A.2d 882 (1986).
[10]Md. Fam. Law Code Ann. § 5-313(a).
[11]Although a thorough discussion about these additional burdens is beyond the scope of this article, they were included in the judicial survey. *See infra* note 76 and accompanying text.
[12]*See infra* note 55 and accompanying text.
[13]*State v. Roll*, 267 Md. 714, 728, 298 A.2d 867 (1973).
[14]Md. Fam. Law Code Ann. § 5-1028(a).
[15]The preponderance of the evidence standard applies in cases which do not involve questions of moral turpitude. *See France v. Safe Deposit & Trust Co.*, 176 Md. 306, 4 A.2d 717 (1939).
[16]*Prince Georges County v. Blue Bird Cab Co.*, 263 Md. 655, 659, 284 A.2d 203 (1971).
[17]Md. Cts. & Jud. Proc. Code Ann. § 3-817(c).
[18]*Kidd v. State*, 33 Md. App. 445, 465, 366 A.2d 761 (1976), *aff'd*, 281 Md. 32, 375 A.2d 1105, *cert. denied*, 434 U.S. 1002 (1977).
[19]*Maziarz v. State*, 302 Md. 1, 6, 485 A.2d 245 (1984).
[20]Lynn McClain, EVIDENCE § 144 (1987).
[21]Maryland Civil Pattern Jury Instruction 1:8(a) (2d ed. 1989).
[22]*Vogel v. State*, 315 Md. 458, 470, 554 A.2d 1231 (1989); *Weisman v. Connors*, 76 Md. App. 488, 503-05, 547 A.2d 636 (1988) *cert. denied*, 314 Md. 497, 551 A.2d 868 (1989).
[23]Maryland Civil Pattern Jury Instruction 1:8(b)(2d ed. 1989).
[24]*Peters v. Butler*, 253 Md. 7, 251 A.2d 600 (1969).
[25]*Kelley v. Kelley*, 178 Md. 389, 13 A.2d 529 (1940).
[26]*Whittington v. State*, 8 Md. App. 676, 262 A.2d 75 (1970).
[27]Md. Cts. & Jud. Proc. Code Ann. § 5-311(c)(3).
[28]*Everett v. Baltimore Gas & Elec. Co.*, 307 Md. 286, 513 A.2d 882 (1986).
[29]*Attorney Grievance Comm'n v. Kerpelman*, 288 Md. 341, 420 A.2d 940 (1980), *cert. denied*, 450 U.S. 970 (1981).
[30]Md. Health-Gen. Code Ann. § 10-632(e)(2).
[31]*Owens-Illinois v. Zenobia*, 325 Md. 420, 470, 601 A.2d 633 (1992) (changing the common law of Maryland for this case and all other trials commencing or in progress on or after the date of this opinion was filed concerning the appropriate burden to be applied for punitive damages in tort cases).
[32]*In re Winship*, 397 U.S. 358 (1970).
[33]Maryland Rule 914(e).
[34]Md. Ann. Code art. 27, § 413(d),(f) (1985).
[35]292 Md. 84, 94, 437 A.2d 654, 659 (1981).
[36]*Id.* (quoting *Lambert v. State*, 193 Md. 551, 558, 69 A.2d 461, 464 (1949)).
[37]329 Md. 370, 620 A.2d 295 (1993).
[38]Maryland Rule 2-541(i).
[39]*Board of Educ. Mont. County v. Paynter*, 303 Md. 22, 35, 491 A.2d 1186, 1193 (1985).
[40]*Id.*
[41]*Newell v. Richards*, 323 Md. 717, 594 A.2d 1152 (1991).
[42]*Id.* at 733, 594 A.2d at 1160.
[43]*Id.* at 732, 594 A.2d at 1160.
[44]*Id.*
[45]Maryland Civil Pattern Jury Instruction 27:2 (2d Ed. 1989).
[46]*Newell*, 323 Md. at 734, 594 A.2d at 1160.
[47]*Domingues v. Johnson*, 323 Md. 486, 593 A.2d 1133 (1991).
[48]*Id.* at 496, 593 A.2d at 1135. *See also Levitt v. Levitt*, 79 Md. App. 394, 398-401, 556 A.2d 1162 (1989).
[49]*Levitt v. Levitt*, 79 Md. App. 394, 398, 556 A.2d 1162 (1989).
[50]*Davis v. Davis*, 280 Md. 119, 372 A.2d 231, *cert. denied*, 434 U.S. 939 (1977).
[51]*Id.* at 124, 372 A.2d at 233.
[52]*Thodos v. Bland*, 75 Md. App. 700, 712, 542 A.2d 1307 *cert. denied*, 313 Md. 689, 548 A.2d 128 (1988).
[53]*Harris v. State*, 81 Md. App. 247, 567 A.2d 476 (1989), *rev'd*, 324 Md. 490, 597 A.2d 956 (1991).
[54]*Id.* at 293, 567 A.2d at 499.
[55]*Id.* at 292, 567 A.2d at 498-99 (quoting *In re Winship*, 397 U.S. 358 (1970)).
[56]*Wink v. State*, 76 Md. App. 677, 682, 547 A.2d 1122, 1124 (1988).
[57]*State v. Thomas*, 325 Md. 160, 190, 599 A.2d 1171 (1992) (citing with approval *U.S. v. Bagley*, 473 U.S. 667, 682 (1985)).
[58]*Scott v. State*, 238 Md. 265, 276 (1965).
[59]76 Md. App. 677, 547 A.2d 1122 (1988).
[60]*Id.* at 680, 547 A.2d at 1124.
[61]*Id.*
[62]*Id.* at 681-82, 547 A.2d at 1124-25.

[63]*Id.*

[64]*Id.* at 683. Prior to *Wink v. State*, the standard was reasonable certainty. *See Herold v. State*, 52 Md. App. 295, 449 A.2d 429 (1982). This presented problems because while it was fairly well established that this standard was less than the reasonable doubt standard, it was certainty was more or less than clear and convincing evidence.

[65]*Everett v. Baltimore Gas & Elec. Co.*, 307 Md. at 301-04, 513 A.2d at 890-92.

[66]*Weisman v. Connors*, 76 Md. App. 488, 505, 547 A.2d 636 (1988), *cert. denied*, 314 Md. 497, 551 A.2d 868 (1989).

[67]*Pettis v. State*, 2 Md. App. 651, 653, 236 A.2d 429 (1968).

[68]*Collins v. State*, 318 Md. 269, 568 A.2d 1, *cert. denied*, 497 U.S. 1032 (1990).

[69]*Id* at 283, 568 A.2d at 7 (emphasis added).

[70]*Id.* at 284, 568 A.2d at 7. In reaching its decision, the court relied on *Poole v. State*, 295 Md. 167, 186, 453 A.2d 1228 (1983), which held that "when objection is raised to a court's instruction, attention should not be focused on a particular portion lifted out of context, but rather its adequacy is determined by viewing it as a whole."

[71]*Montgomery v. State*, 292 Md. 84, 437 A.2d 654 (1981).

[72]*Id.* at 94, 437 A.2d at 659.

[73]*Id.*

[74]*Laster v. State*, 70 Md. App. 592, 600, 521 A.2d 1289 (1987).

[75]*Id.*

[76]*Id.* at 601, 521 A.2d at 1293.

[77]McCauliff, *supra* note 2.

[78]I asked the judges to rate nine phrases: beyond a reasonable doubt; probable cause to believe; reasonable cause to believe; reasonable suspicion; clear and convincing evidence; clearly erroneous; substantial evidence; preponderance of the evidence; and more probable than not.

[79]Complete responses to the burdens "preponderance of the evidence," "clear and convincing evidence," and "beyond a reasonable doubt" are given in the notes to this section. A breakdown of all responses is given in Appendix B to this article.

[80]The other two responses could also be described as "just more than 50%" with responses of 55% and 60%. Actual breakdown of responses for "preponderance of the evidence": 50%+ - 1, 50.1% - 2, 50.1% - 6, 55% - 1, 60% - 1.

[81]Actual responses: 60% - 2, 75% - 6, 75-80% - 1, 85% - 1, "not in terms of percentage" - 1.

[82]Actual responses: 65% - 1, 75% - 2, 80% - 1, 85% - 1, 90% - 1, 90%+ - 1, 99% - 1, 100% - 2, "not in terms of percentage" - 1.

[83]Actual responses: 0.1-1% - 1, 60% - 1, 65% - 1, 70% - 1, 75% - 5, 90%+ - 1. It is interesting to note that where there was consistency among the respondents, it was in rating "clearly erroneous" the same as "clear and convincing." This is either due to coincidence or to the fact that "clear" must mean, to the judges of this bench, "more than half but less than all".

About the Author: The Honorable Marvin B. Steinberg serves as a Circuit Court Judge for Baltimore City. He has served as chairman of numerous distinguished panels and committees, including Founder and Chairman of the Maryland Retardate Trust and Chair of American Bar Association. Judge Steinberg has been published in several journals, including a previous issue of *The Law Forum.*
