200 BURDEN OF PROOF: ORDINARY

Certain questions in the verdict ask that you answer the questions "yes" or "no". The party who wants you to answer the questions "yes" has the burden of proof as to those questions. This burden is to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that "yes" should be your answer to the verdict questions.

The greater weight of the credible evidence means that the evidence in favor of a "yes" answer has more convincing power than the evidence opposed to it. Credible evidence means evidence you believe in light of reason and common sense.

"Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof.

COMMENT

This instruction was approved in 1972 and revised in 1989, 1991, 2000, and 2002. The instruction was reviewed without change in 2003. The comment was updated in 1982, 1985, 1986, 1988, 1989, 1991, 2000, 2001, and 2002.

In 2002, the Committee reviewed the standard civil burden of proof instructions following the decision of the supreme court in Nommensen v. American Continental Insurance Co., 2001 WI 112, 246 Wis.2d 132, 629 N.W.2d 301. The Committee is mindful of a number of suggestions made by the supreme court in Nommensen. From that case, we glean the following:

(1) The two element approach (the greater weight standard and the reasonable certainty standard) should not be abandoned. ¶4.

(2) The term, "the greater weight of the credible evidence," is understandable by the average juror. ¶16.

(3) The term, "reasonable certainty" has been firmly established in our case law. ¶26.

(4) Substituting "reasonable probability" for "reasonable certainty" would be inconsistent with precedent and is not the solution here. ¶56.

(5) A jury should first consider the greater weight standard, then apply the reasonable certainty standard. ¶27.

(6) The revision should separate the two elements. ¶57.

Our revision in 2002 endeavors to satisfy the guidelines set out in Nommensen.

Nommensen was a medical malpractice action. When the plaintiff filed proposed jury instructions, he asked the trial judge to replace the word "certainty" with the word "probability" in Wis JI-Civil 200, Burden of Proof: Ordinary. The trial judge declined to do so and charged the jury with Wis JI-Civil 200 without modification.

On appeal, the plaintiff, who had failed to establish causation, argued that the trial judge erroneously instructed the jury when it gave the standard jury instruction although he concluded the instruction correctly sets out current Wisconsin authority. The court of appeals affirmed the use of the instruction without modification, but said it was bound by precedent. A concurring opinion criticized the current instruction and urged the supreme court to reevaluate the use of the phrase "reasonable certainty."

The supreme court affirmed the trial judge's use of Wis JI-Civil 200. Its opinion contains the following passages:

- We think the Wisconsin Civil Jury Instructions Committee was standing on solid ground when it commented that "The Committee believes the term 'reasonable certainty' has been firmly established in our case law and accurately reflects the degree of certitude jurors must reach in answering verdict questions." Wis JI-Civil 200 cmt . . .

- We disagree with the criticism that "reasonable certainty" is not firmly established in our case law, or that it is not well supported by the cases that adopted it. Reasonable certainty is one of the two essential elements of the ordinary burden of proof in this state . . .

- Another of Nommensen's proposals—to eliminate discussion of the degree of certitude altogetherBruns contrary to well-established case law . . . This idea of Nommensen's does not square with this state's long-standing two-element approach to the burden of proof. The Wisconsin Civil Jury Instructions Committee also has expressly rejected this proposal. Accordingly, we decline to rewrite instruction 200 in the manner proposed by Nommensen . . .

- We have carefully considered petitioner's argument that there is potential for juror confusion in Wis JI-Civil 200, with respect to the elements of degree of certitude and quantum of evidence. With this in mind, we respectfully request the Wisconsin Civil Jury Instructions Committee to revisit the instruction for a thorough review . . .

- Changing "reasonable certainty" to "reasonable probability" in the instruction is not the proper tonic for potential juror confusion and would be inconsistent with precedent. However, we concur with Nommensen that instruction 200 as written is deserving of a thorough review. Such a review should consider all legitimate reformulations of the current instruction, so long as the instruction maintains the two-element approach to the burden of proof . . .

- In examining instruction 200, the committee should make every effort to remedy one of the most troubling aspects of the instruction: the juxtaposition of the two elements of the burden of proof . . .

General Verdict. If a general verdict is used, the first paragraph should read:

> The verdict form requires you to state whether you find for the plaintiff or the defendant. The burden, called the burden of proof, is on the plaintiff to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that you should find for the plaintiff. If you are not so satisfied, you must find for the defendant.

Guessing and Speculation. This instruction was revised in 1989 to incorporate concepts relating to speculation and guessing that were previously contained in Wis JI-Civil 220. As a result of this revision, the Committee believes a separate general instruction on speculation is not necessary and, therefore, Wis JI-Civil 220 was withdrawn.

Case Law. Wisconsin law recognizes and requires differing degrees of persuasion for different types of cases. Thus, separate and distinct burdens exist for: (1) criminal cases (beyond a reasonable doubt); (2) civil cases with penal aspects or involving criminal type behavior (higher civil standard: to a reasonable certainty by evidence that is clear, satisfactory, and convincing); and (3) ordinary civil actions (ordinary civil standard to a reasonable certainty by the greater weight of the credible evidence).

Each of these three burdens of proof has a mental element. This mental component is identical for the two civil standards (i.e., "satisfaction to a reasonable certainty"). Criminal cases call for a higher mental element: "beyond a reasonable doubt." In addition to the mental component, the two civil standards include a requirement as to the kind of evidence needed to carry a burden, i.e., "clear, satisfactory, and convincing evidence" for the middle civil burden and "greater weight of the credible evidence" for the ordinary civil burden.

Chief Justice Hallows in 1972 discussed the two components of the civil burdens in writing for the court in State ex rel. Brajdic v. Seber, 53 Wis.2d 446, 448, 193 N.W.2d 43 (1972):

> Every standard of burden of proof, other than the standard applied to criminal cases, is composed of two elements: (1) The degree of certitude required of the trier of the fact, i.e., reasonable certainty, and (2) either the quantity of the evidence, i.e., the greater weight or convincing power, or the quality of the evidence, i.e., clear, satisfactory, and convincing.

Along these same lines, the court, in Kuehn v. Kuehn, 11 Wis.2d 15, 104 N.W.2d 138 (1960), said the "complete rule of the burden of proof contains both the element of reasonable certainty and some degree of preponderance of the evidence."

Some have suggested, pointing to decisions predating 1920, that the dual component civil burdens can be abbreviated by simply dropping the mental element. See Sullivan v. Minneapolis, St. Paul & S.S.M.R. Co., 167 Wis. 518, 167 N.W. 311 (1918). The Committee disagrees with such proposals and follows the rationale expressed by the Wisconsin Supreme Court in Kuehn v. Kuehn, supra, in which Chief Justice Hallows said:

> The statement of the complete rule of the burden of proof contains both the element of reasonable certainty and some degree of preponderance of the evidence. It is possible the contestant having the burden of proof may have the preponderance of the evidence fair, clear, or otherwise in his favor and still fall short of convincing the jury to a reasonable certainty of the existence of the facts for which he is contending. 11 Wis.2d at 28

Based on the Committee's review of the case law, the Committee concluded in 1989 that this instruction, as well as the instruction on the middle burden (JI-Civil 205), correctly instruct juries on the burdens of proof in civil actions.

Suggestions have also been made to the Committee and to trial judges during instruction conferences that the certainty element ("to a reasonable certainty") should be replaced with the term "reasonable probability." Apparently, this suggestion is prompted by the fact that most expert witnesses, at least in medical malpractice cases, are asked to give opinions "to a reasonable probability." In Victorson v. Milwaukee & Suburban Transport. Corp., 70 Wis.2d 336, 356-57 234 N.W.2d 332 (1975), the trial judge used the word "probability" in place of "certainty" in Wis JI-Civil 200. The remainder of the instruction defining "greater weight" and "credible evidence" was given. The court said using the term "reasonable probability" was error, although not reversible error. The court also said the "use of probability rather than certainty was not to be encouraged."

The Committee feels that "greater weight" is an exact synonym for "fair preponderance" and much more understandable by the average juror. This expression of the ordinary burden was cited approvingly by the supreme court in Wangen v. Ford Motor Co., 97 Wis.2d 260, 299, 294 N.W.2d 437 (1980).

Adverse Possession. This instruction should be used in adverse possession cases. Kruse v. Horlamus Indus., 130 Wis.2d 357, 387 N.W.2d 64 (1986). Perpignani v. Vonasek, 139 Wis.2d 695, 735, 408 N.W.2d 1 (1987). In Kruse, the court expressly rejected the argument that the middle burden of proof applies to the jury's determination of whether adverse possession has occurred. In some older adverse possession cases, the term "clear and positive" evidence appears regarding evidence of possession. In Kruse, the title holder of the property argued that this term, "clear and positive," means that the middle burden of proof applies to the jury's determination. The court disagreed, concluding that the term is not to be used for the overall burden of proof.

Instead, this term refers only to the quality of evidence which may even be considered. To avoid confusion in future cases, the court expressly instructed trial judges to delete this term from their instructions to juries on adverse possession.

Comparative Negligence. For the burden of proof in connection with the comparison of negligence question, see Wis JI-Civil 1580, Comparative Negligence: Basis of Comparison.

Presumptions. Special attention is needed when instructing the jury on the burden of proof in cases involving statutory or common law presumptions. See Wis JI-Civil 1600, for an example of a situation where the burden rests upon the party contending the answer to a special verdict question should be "no."

Damages. See Wis JI-Civil 202 and 1700 for the burden of proof on damages.