

BURDEN OF PROOF: THE EROSION OF AN ANCIENT RULE

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ABSTRACT: The ancient rule of the burden of proof contained in Article 2697 of the Italian Civil Code has experienced a significant erosion in recent years due to case law. The judge often creates presumptions and distributes the burden by asking the party that has the greatest possibility or facility to provide evidence. The rule of the burden of proof, moreover, was traditionally understood to mean that the burdened party had to provide full evidence, only in such cases the burden could be considered to have been met. But even this rule, in many areas, is no longer respected, as case law uses quite different standards of proof, even settling for the so-called prevailing probability. Lastly, a further erosion factor is related to the increasingly frequent use of court-appointed expert witnesses to provide the judge with elements useful for the decision, so that the reference to the party responsible for providing the evidence is disregarded.

KEYWORDS: evidence, burden, conviction, proximity of evidence, presumptions, standard of proof, expert opinion

SUMMARY: 1. ARTICLE 2697 OF THE ITALIAN CIVIL CODE AND THE TWO FUNCTIONS OF THE RULE ON THE BURDEN OF PROOF.— 2. THE MANDATORY NATURE OF THE RULE WITH REGARD TO THE DISTRIBUTION OF THE BURDEN OF PROOF AND THE RULE OF JUDGMENT.— 3. THE EROSION OF THE RULE CONCERNING THE DISTRIBUTION OF THE BURDEN OF PROOF THROUGH PRESUMPTIONS.— 4. THE EROSION OF THE RULE REGARDING THE DISTRIBUTION OF THE BURDEN OF PROOF THROUGH THE CRITERION OF PROXIMITY OF EVIDENCE.— 5. THE EROSION OF THE RULE REGARDING THE FULFILMENT OF THE BURDEN OF PROOF.— 6. THE EROSION OF THE RULE AS A RESULT OF A COURT-APPOINTED EXPERT OPINION.— 7. CONCLUSIONS.

1. ARTICLE 2697 OF THE ITALIAN CIVIL CODE AND THE TWO FUNCTIONS OF THE RULE ON THE BURDEN OF PROOF

The Italian Civil Code of 1942—as is known—contains Article 2697 in Book VI, a provision on the burden of proof¹ that sets a rule considered fundamental as well as an expression of reason and common sense. Precisely because of these characteristics the rule, which has a clear historical continuity with well-known maxims of Roman law such as *actori incumbit probatio* and *ei incumbit probatio qui dicit, non qui negat*, has not been provided for in other European codes, for example in the German Civil Code (BGB)².

According to a systematic interpretation, shared by the prevailing legal doctrine, the function of Article 2697 of the Italian Civil Code is twofold. First, it distributes among the parties the burden of proving the facts that constitute the basis of their claims: in this sense, we speak of the burden of proof in the subjective sense. Secondly, although the principle has not been expressly established, the function of enabling the judge to decide in any case, either by granting or rejecting the claim, depending on whether or not the burden has been met: in this case we speak of a burden of proof in the objective sense³.

To have failed to meet the burden of proof equals a failure to provide the judge with sufficient evidence to convince himself of the truth of the facts alleged and relevant for the decision. For this reason, the rule on the burden of proof has traditionally been linked to that of Article 116 of the Italian Code of Civil Procedure, which governs the principle of free belief, arguing that if the judge is not convinced of the truth of the facts, he must decide the case based on the «rule of judgment» contained in Article 2697 of the Italian Civil Code⁴.

Analysing both functions of Article 2697 of the Italian Civil Code, the eminent legal doctrine has emphasized the public importance of the rule on the burden of proof, which allows it to achieve «an end of general relevance»⁵. This is because the rule provides the judge with the means to avoid having to pronounce a *non liquet*, justified by the permanence of doubt as to the factual situation, since, following the application of the rule on the burden of proof, the proceedings will end by granting or rejecting the claim.

¹ The Italian Civil Code of 1865 had merely reproduced Article 1315 of the *Code civil* concerning the proof of obligations.

² The rule that is applied in Germany, however, has accepted the famous theory of Rosenberg (1965), which is the theoretical basis for the rule in the Italian Civil Code. It is argued, in fact, that a rule can be applied only if the judge is convinced that all the factual conditions set forth in the rule are met. Therefore, the burden of proof rests on the party invoking the favourable effects provided by the rule.

³ See, among others, Micheli (1966), p. 177 ff.; Comoglio (1995), p. 262 ff. In the German doctrine, see for all Blomeyer (1955), 605 ff.

⁴ See Patti (2021), p. 311 ff.

⁵ Taruffo (2012), p. 429.

2. THE MANDATORY NATURE OF THE RULE WITH REGARD TO THE DISTRIBUTION OF THE BURDEN OF PROOF AND THE RULE OF JUDGMENT

The parties may derogate from the provision of Article 2697 of the Italian Civil Code within the limits set forth in Article 2698 of the Italian Civil Code. The parties may thus reverse the burden of proof or exclude the possibility of the use of certain means of evidence, provided that this does not make it «excessively difficult» for the other party to exercise its right⁶.

However, in the absence of an agreement between the parties, the rule of Article 2697 of the Italian Civil Code is mandatory. The judge must distribute the burden of proof taking into account the nature of the (constituent, impeditive, modifying, extinguishing) facts relevant to the case and cannot grant the claim (or exception) if the burden of proof has not been met.

Thus interpreted, the rule has provided, in general terms, stability and certainty. If, for example, A claims that B has caused him harm and seeks compensation, he must prove the basis of his claim and, therefore, convince the judge of the truth of his allegations.

In the absence of evidence, the judge *must* dismiss the case. If evidence is provided, primarily in the form of «legal» evidence that the judge *must* take into account in making his decision in the sense prescribed by law, the discretion on the *quaestio facti* is somewhat limited. The so-called principle of free belief expresses only the power/duty to assess the evidentiary material, but without creating any room for «subjective» considerations. What dominates is the rationality of the evaluation of the evidence, subject to scrutiny through the logic and reasonableness of the argumentation; thus, the preservation of existing situations is favoured and the protection of interests secured by subjective rights is strengthened.

In this sense, it is stated that «free belief» must be understood in a precise and strict manner, and this seems indisputable if one considers that belief is indeed the final moment and the result of a procedure guided by logical and legal rules. It is added that, ultimately, it is not the mode of formation but the *an* of the belief that is free⁷, and it is specified that in any case it is a «free» belief only in a particular sense: as sure as the judge's «intimate belief» may be, if it derives from means that do not correspond to the schemes established by the law (e.g. facts not alleged, private knowledge of the judge), at the time of the decision the judge—it is said—must absolutely «forget» what he has learned⁸. Thus, the judge arrives at a belief that *must* be formed according to specific rules, under which, for example, certain facts must be taken into account while others not.

⁶ On this subject, see Patti (2021), p. 343 ff.

⁷ Andrioli (1967), p. 267.

⁸ Calamandrei (1939), p. 112.

Ultimately, the freedom of belief concerns only the existence of the belief itself. Regardless of the «degree» of probability reached, except in matters where the criterion of «more likely than not» has been affirmed (see *below*), the judge is indeed considered free to be «convinced» of the truth of the facts or not. The judge has to give reasons for his decision to consider the fact as not proven although the party has presented certain evidence, but since no evidence—apart from legal evidence—guarantees the certainty of the fact *probandum*, an explicit or implicit reference to the persistence of doubt nevertheless remains possible⁹. The judgement is final.

Well, this world of certainties, which in many respects reminds us of the world «of yesterday» described by Stefan Zweig, for various reasons does no longer correspond to the reality (of many areas) of civil law.

3. THE EROSION OF THE RULE CONCERNING THE DISTRIBUTION OF THE BURDEN OF PROOF THROUGH PRESUMPTIONS

The rule provided for in Article 2697 of the Italian Civil Code does not correspond to the reality of the judicial proceedings, especially as far as the distribution of the burden of proof is concerned.

In order to avoid the application of the rule under examination, two techniques developed by case law are most commonly used. The first consists in the use of reversals of the burden of proof of jurisprudential «creation», often through the more or less formal construction of simple presumptions under Article 2729 of the Italian Civil Code¹⁰. The second, for which it is difficult to find even a frail normative basis, is that of «proximity to (or of) evidence».

In the case of the reversal of the burden of proof, the judge, disregarding Article 2697 of the Italian Civil Code, decides on the burden of proof of the parties on the basis of the mere reasonableness of the asserted hypothesis¹¹. Frequently, the judge—who according to Article 2729 of the Italian Civil Code shall only admit material, precise and concordant presumptions that relate to the circumstances of the particular case submitted to his examination—makes presumptions that are placed on the same level as the legal ones, as they go beyond the specifics of the case to which they are applied from time to time, have the characteristics of generality and abstractness of legal norms,

⁹ On this point, see Carnelutti (1965), p. 6 according to whom «the judge, after examining the evidence, after listening to the reasons, after evaluating them, continues to find himself, in reality, faced with that doubt, which his thinking cannot, at any cost, eliminate. There will be macroscopic doubts and microscopic doubts; but even the latter are enough to constitute his difficulty and torment.»

¹⁰ See Patti (2020), p. 891 ff.; and (2022), p. 3041 ff. For a comparison with French and German law, see Ghestin and Goubeaux (1994), p. 694; Laumen, (2015), p. 1 ff.

¹¹ Verde (1974), p. 142 ff.

and do not have the function of discovering the ignored fact from the known fact, but rather of distributing the burden of proof¹².

Thus, the jurisprudence does not apply the rule of Article 2697 of the Italian Civil Code in the aforementioned cases, and the use of the presumption has only a function of formal legitimation of the rule adopted. In some cases, the presumption scheme is even abandoned and one formulates (directly) a rule for the distribution of the burden of proof, by saying, e.g., «it is not up for the plaintiff to prove...but it is up for the other party to prove... »¹³.

Presumptions of this kind, also analysing the less recent case law, are found in numerous areas of private law, from domestic work and work between family members to the dismissal of an employee followed by an immediate re-employment with identical duties, assuming a gratuitous performance in the first case and fraudulent dismissal in the second one.

In this regard, one must agree with the considerations that in these cases there is usually no assessment in terms of the probability of the alleged fact and the question is not posed in terms of personal belief, but rather according to the distribution of the burden of proof in light of the mere reasonableness of the asserted hypothesis¹⁴.

Therefore, the judge, who according to the wording of Article 2729 of the Italian Civil Code should only rely on material, precise and concordant presumptions regarding the circumstances of the individual case submitted to his examination, makes presumptions that—as said—are placed on the same level as legal presumptions, both because they go beyond the specifics of the case in which they are applied from time to time, having the characteristics of generality and abstractness of legal norms, and because they do not have the function of moving from the known fact to the unknown fact, but rather that of distributing the burden of proof.

Ultimately, the jurisprudential formation of «presumptions» that have the function of distributing the burden of proof, as well as the «direct» affirmation of a rule for the distribution of the burden of proof other than the one established in Article 2697 of the Italian Civil Code, constitute an (inadmissible) creation of legal norms.

The above-mentioned use of simple presumptions has long been criticized by those who denounce a reversal of the burden of proof that is not provided for by law and thus lacks a legal basis¹⁵. It is particularly noted that any reconstruction of an event is based on experience and, therefore, the use of simple presumptions, whose «construction» is justified in light of experience, in order to determine the distribution of the burden of proof is not considered permissible.

¹² See Patti (2021), p. 774 ff. On the topic see also Taruffo (1974); (1991), p. 211; (2018), p. 1316 ff.; and the essays collected in Patti and Poli (2022).

¹³ Italian Supreme Court, April 23, 1969, no. 1298. See also Italian Supreme Court, October 30, 2018, no. 27680, in *NGCC*, 2019, p. 483.

¹⁴ Verde (1974), p. 142 ff.

¹⁵ Tietgen (1966), p. 55 ff.

Given, in fact, that the rules for the distribution of the burden of proof belong to substantive law, the reversal of the burden of proof can only be based on a rule, as in the case of legal presumptions *iuris tantum*. The simple presumption, on the other hand, based on Article 2729 of the Italian Civil Code, allows the judge, on the basis of data relating to a fact of life (and thus often in light of statistical laws), to consider a fact as true in the absence of evidence to the contrary¹⁶. It is therefore a logical operation which in principle does not concern the reversal of the burden of proof, but exclusively the proof¹⁷.

Nevertheless, the resulting «erosion» of the old rule deserves appreciation in many cases, either because the plaintiff is spared the need to provide negative evidence, or because criteria of reasonableness are followed that take into account the underlying interests and often the need to protect the weaker party.

In other cases, «jurisprudential presumptions» are not created, but a presumption is nevertheless construed, with regard to the concrete case, on the basis of an interpretation of Article 2729 of the Italian Civil Code that is completely contrary to its literal wording, considering a single piece of evidence as sufficient, sometimes without ensuring the contradictory participation of the parties¹⁸.

4. THE EROSION OF THE RULE REGARDING THE DISTRIBUTION OF THE BURDEN OF PROOF THROUGH THE CRITERION OF PROXIMITY OF EVIDENCE

Similar considerations can be made with regard to judgments in which the burden of proof is distributed according to the criterion of the so-called proximity to (or of) evidence¹⁹. This criterion, as well, has no basis in law, but responds to the requirements of common sense and reasonableness, which are especially evident in certain areas.

¹⁶ See Italian Supreme Court, May 24, 1979, no. 2994, in *Giur. it.*, 1979, I, 1, p. 1934.

¹⁷ The English-speaking doctrine is similarly oriented, according to which, unlike in the case of *iuris tantum* legal presumptions, the simple presumption does not have the effect of placing the burden of proof «...presumptions of fact amount to nothing more than examples of circumstantial evidence». In other words, through the simple presumption the judge «assists» the burdened party, who is only called upon to allege the relevant facts with precision. It is stated, however, that «The party relying on the presumption bears the burden of establishing the basic fact». The other party, in any case, and the clarification seems of great importance, must have the opportunity to provide contrary evidence. Keane (1985), 470 ff.

¹⁸ See Italian Supreme Court, March 26, 2003, no. 4472, *Rep. Foro it.*, 2003, section *Presunzione*, no. 9; Italian Supreme Court, September 11, 2007, no. 19088, in *Giust. Civ., Mass.* 2007, no. 1550; Italian Supreme Court, March 2, 2017, no. 5374, in *Corr. trib.*, 2017, 1453 with note by Pellecchia.

In the doctrine, see Cavallone (1991), p. 426 ff; Taruffo (2012), p. 1113 ff; (1974), c. 107; Muroi, (2015), p. 633 ff.

¹⁹ See recently, e.g., Italian Supreme Court, July 6, 2020, no. 13851, in *Foro it.*, 2020, I, c. 3856 ff. and the extensive review by Franzoni (2016), p. 360 ff. On the topic see also, among others, Besso (2015), p. 1383 ff.; Sassani (2022), p. 425.

The criterion (or principle) of proximity to evidence is obviously not unrelated to the normative structure of evidence and can be used, for example, to explain the rule on the imputability of non-performance contained in Article 1218 of the Italian Civil Code. In fact, the rule imposes on the debtor the burden of proving that the impossibility of performance is due to a cause not imputable to him. It is also recognized that the debtor can prove the non-imputability if the cause is not ascertainable. Thus, the criterion of proximity to evidence does not imply that the debtor must positively prove the non-imputability.

Hence, in the present case there is an exception to the general rule of Article 2697 of the Italian Civil Code, but it is an exception provided for by law.

An important (and cogent) application of the criterion developed instead by case law can be found—for example—on the subject of defects in the object of sale. The judgment of the Italian Supreme Court, Joint Chambers, dated May 3, 2019, no. 11748²⁰, modified on this point the precedent set by the famous Italian Supreme Court, Joint Chambers, dated October 30, 2001, no. 13533²¹, according to which the burden of proving the lack of defects at the time of delivery of the goods lies with the seller. The most recent decision, which has accepted the widespread view according to which the warranty for defects does not constitute an obligation of the seller, has followed—with greater rigour—the criterion of the proximity of evidence, the buyer, who received the good, certainly being in the best position to prove the existence of the defects.

Indeed, the grounds state that «the principle of proximity of evidence leads to allocating the burden of proof as to the defects (themselves) on the party who, having received the good, has its material availability»²².

5. THE EROSION OF THE RULE REGARDING THE FULFILMENT OF THE BURDEN OF PROOF

The rule provided for in Article 2697 of the Italian Civil Code does not correspond to the reality of the proceeding even as a rule of judgment, since the required standard of proof is often «lowered». In fact, whenever the judge considers it sufficient that the evidence meets the standard of «more likely than not», or even that of the so-called prevailing probability, he does not

²⁰ Italian Supreme Court, Joint Chambers, May 3, 2019, no. 11748, in *Foro it.*, 2019, I, c. 2726 with note by M. Magliulo. In legal doctrine, see also Modica (2022), p. 276 ff.

²¹ Italian Supreme Court, Joint Chambers, October 30, 2001, no. 13533, in *Foro it.*, 2002, I, c. 769 with note by P. Laghezza. On the issue under consideration, the ruling had been criticized by Patti (2010), p. 160 ff; (2015), p. 170 f., and the criticism was shared by Villa (2019), p. 744 ff.

²² Italian Supreme Court, Joint Chambers, May 3, 2019, no. 11748, cit.

apply Article 2697 of the Italian Civil Code, which would have obliged him instead to dismiss the claim (or the objection)²³.

The phenomenon is also known in other legal experiences, in which, however, it occurs in attenuated terms and often on the basis of statutory requirements²⁴. Regarding the «more likely than not» parameter, the evolution of jurisprudence can be shared, but it requires extreme caution in evaluating the percentages of evidence as well as an adequate reflection on the scope of the rule regarding the judge's belief.

Precisely, the above result is achieved by requiring the party to prove only a certain «degree» of probability of the occurrence of the asserted fact and establishing that the judge has to deem it sufficient to consider the evidence provided²⁵.

Hence, the judge does not have to achieve the belief of the truth—albeit understood as «moral certainty», to use an expression widely used in our doctrine—but merely to determine, based on the evidence presented by the parties, whether (the existence of) a certain fact has a certain degree of probability²⁶. The permanence of doubt is thus expected and in a certain sense physiological: the judge does not have to make an effort to take that «further step», according to some of an exclusively psychological nature, which should lead him to the highest moment of inner certainty.

Of course, the judge must take into account the empirical generalisations drawn from experience, but it is ultimately up to him to determine the probative value of the facts and thus to decide whether the required «degree» of evidence, usually «more likely than not», has been achieved in the specific case²⁷.

Thus, there is no room left for a subjective «belief» of the «truth», at least not in the sense we understand it in our experience. A certain margin of subjectivity is indeed apparent with respect to certain types of evidence, with regard to establishing the degree of probability reached. In many cases, moreover, science now helps to determine the degree of evidentiary value so that the remaining subjective aspects tend to disappear²⁸.

²³ In the hypothesis that a «high degree of rational credibility» is not found, the rule on the burden of proof should apply, as this is expressed by a legislative will of distribution: in this sense Poli (2018), p. 2517 ff., 2529.

²⁴ Clermont and Sherwin (2002), 243 ff.

²⁵ Scognamiglio (2010), p. 619 f.; see Ramponi (1890).

²⁶ In doctrine, for all, see Carratta (2003), p. 27 ff., 43 ff. In case law, among many others, Italian Supreme Court, March 8, 2019, no. 6734; Italian Supreme Court, September 27, 2018, no. 23197, in *Rep. Foro it.*, 2018, section *Responsabilità civile*, no. 86; Italian Supreme Court, July 11, 2017, no. 17084, in *Foro it.*, 2017, I, c. 3358.

²⁷ For an extensive discussion of the topic, see Patti and Poli (2022).

²⁸ Lombardo (2007), p. 35 ff.; Comoglio (2018).

6. THE EROSION OF THE RULE AS A RESULT OF A COURT-APPOINTED EXPERT OPINION.

Finally, the rule of distribution of the burden of proof established in Article 2697 of the Italian Civil Code does not concretely apply in some of the cases where the technical complexity of the facts compels the judge to obtain an expert opinion. For example, if A has purchased a complex machine to be integrated into the production chain of his company, and he brings an action for the defective functioning of the machine itself, the judge—usually—does not rely only on the technical reports submitted by the alleged injured party, but he requires a court-appointed expert opinion. The more intricated the matter (and consequently the expert opinion), the less the possibility of evaluation and independent judgment by the judge. Above all, it seems necessary to overcome the old orientation that excludes the expert opinion from the means of evidence and, in fact, the rule of the burden of proof loses its meaning, since the judge will decide in favour of the plaintiff or the defendant on the basis of the indications provided by the technical expert, in the example given about the existence or non-existence of the defect of the machine supplied.

In this way, on the one hand, the long-standing doctrine is respected according to which the judge, using his own non-official investigative powers, should avoid, as much as possible, resorting to the rule of judgment established in Article 2697 of the Italian Civil Code²⁹; on the other hand, in many cases the decision on the facts is actually made by the expert. The judge—only formally *peritus peritorum*—takes into account the results of the expert opinion and bases his decision on them. On the other hand, due to the complexity of the issues and the technical assessments, it is extremely unlikely that a decision contradicting the results of the expert opinion will be sufficiently substantiated.

For certain matters, it is even envisaged that the expert takes the place of the judge or that the formation of adjudicative panels consisting of jurists and technical experts is considered³⁰.

In fact, the position of the expert at the side of the judge as an «auxiliary» reduces the scope of the reported difficulties. In other words, the Italian system does not ignore the fact that in some cases the technical expert not only provides the judge with the elements to evaluate the evidence, but is himself involved in its evaluation. It should be noted that the degree of this participation can change considerably: consider modern systems of paternity assessment—the judge can do no more than accept the indications from science and decide the case in light of them.

²⁹ Fabbrini (1985), p. 736 ff.

³⁰ Patti (2021), p. 322.

In the legal vocabulary, the different character of the expert opinion is defined by the distinction between the so-called deductive expert opinion, which is directed only to the evaluation of already obtained facts, and the so-called percipient expert opinion, which aims precisely to establish the otherwise inaccessible fact. Due to its essentiality, the percipient expert opinion is considered an objective source of evidence and, as such, must be admitted by the judge if the party asserts a fact that can only be ascertained by technical means.

Recent rulings of the Joint Chambers confirm the aforementioned trend, stating that «The court-appointed technical expert may, within the scope of the issue assigned to him and subject to adversarial proceedings with the parties, ascertain all facts inherent in the subject matter of the dispute and obtain all documents the investigation or procurement of which is necessary to answer the formulated questions »³¹.

In other matters the problem arises—to some extent in a sense opposite to the one examined—as regards the limits of use of any «specialized» knowledge of the judge. It seems certain that the question cannot be resolved on the basis of the principles applicable in the case of «empirical generalisations drawn from experience», since we are dealing precisely with specialized knowledge and not with rules belonging to the common culture.

Therefore, it seems appropriate for the judge to inform the parties of his special knowledge, so that the guarantee of adversarial proceedings is not undermined.

7. CONCLUSIONS

The reasons for the erosion of the ancient rule of the burden of proof are also found in other countries and, above all, in legislation of European source. Consider, first of all, the legislation on product liability which, on the subject of evidence, by implementing the Council Directive of July 25, 1985 (85/374/EEC), used the concepts of «probability» and «likelihood»³², and, in general, the legislation protecting the consumer as the weaker party in the contractual relationship: for example, on the topic of unfair clauses derogating from the jurisdiction of the court and evidentiary covenants contained in general terms and conditions of contract³³.

The spread of the phenomenon and the undoubted benefit of the new criteria force us to take note of the (partial) decline of the ancient rule and show

³¹ See Italian Supreme Court, Joint Chambers, February 1, 2022, no. 3086 and Italian Supreme Court, Joint Chambers, February 28, 2022, no. 6500, in *Giur. it.*, 2022, p. 2136 ff., with note by F. Auletta.

³² See Patti (1990), I, p. 705 ff.

³³ See Bin (1996), p. 8 ff. De Nova (1996), p. 18 ff.; Sirena, (1997), p. 123 ff.; Patti (2000), p. 513 ff.; Scarano (2003), p. 990 ff.; Dalmotto (2005), 144 ff. In case law, see Italian Supreme Court, March 20, 2010, no. 6802, in *Obblig. e contr.*, 2011, 271 with note by O. Trombetti.

that even norms based on «principles» of reason and responding to ancient traditions are inevitably subject to the erosion of time.

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