Clear and Convincing Evidence: How Much Is Enough?

by Robin Meadow

Robin Meadow is a partner in the Beverly Hills law firm of Greines, Martin, Stein & Richland, which specializes in appellate practice. Mr. Meadow, who is a member of the California Academy of Appellate Lawyers, was cocounsel for the plaintiff in *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 60 Cal.Rptr.2d 780, which unequivocally approved BAJI No. 2.62's definition of clear and convincing evidence.

A plaintiff seeking punitive damages must prove his claim by "clear and convincing evidence." CC § 3294. Many other statutes also require this burden of proof.[1] But despite the daily importance of "clear and convincing evidence" in the trial courts, no California statute defines it and, until fairly recently, no reported California decisions considered how to explain it to a jury.

One standard definition is BAJI No. 2.62, which defines "clear and convincing evidence" as evidence demonstrating "a high probability of the truth of the fact for which it is offered as proof." BAJI No. 2.62 (8th ed. 1994 bound vol.) But this instruction has been criticized as insufficiently rigorous in light of the supreme court's language in *Sheehan v. Sullivan* (1899) 126 Cal. 189, 193, 58 P. 543, to the effect that "clear and convincing evidence" is evidence "so clear as to leave no substantial doubt" and "sufficiently strong to command the unhesitating assent of every reasonable mind."

The most recent judicial pronouncement is *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847-850, 60 Cal.Rptr.2d 780, in which Division Three of the Second District explicitly approved BAJI No. 2.62—rejecting in the process dicta in several of its previous decisions. But Justice Croskey's trenchant dissent [*Mattco Forge*, 52 Cal.App.4th at 850-856] shows that the debate is not over. *See Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1164-1165, 74 Cal.Rptr.2d 510 ("absent some additional mandate from the Supreme Court or the Legislature, BAJI No. 2.62 remains a correct instruction").

Despite the frequent appearance of the *Sheehan* language in cases discussing "clear and convincing evidence," there is no historical basis for using that language *in a jury instruction*. Quite the contrary, in other contexts California courts have specifically rejected similar language because it sounds too much like "beyond a reasonable doubt" and it, therefore, creates too great a risk of juror confusion. *See, e.g., People v. Miller* (1916) 171 Cal. 649, 651, 154 P. 468 (language used in "preponderance of the evidence" instruction); *In re Ross' Estate* (1919) 179 Cal. 629, 633, 178 P. 510 (same). Moreover, no other state requires instructional language as strong as the *Sheehan* language. Indeed, for an instruction to require the "unhesitating assent of every reasonable mind" could by strongly suggesting a need for jury unanimity abridge a party's constitutional right to a civil verdict in its favor based on a 9 to 3 vote. Const Art I § 16; *see also* CCP § 613.

A. No decisional law requires the *Sheehan* language in jury instructions.

As noted above, the rigorous definition of clear and convincing evidence entered California jurisprudence in 1899 in the *Sheehan* case. There the supreme court was reviewing trial court findings in a nonjury case where the plaintiff sought to prove that a deed absolute on its face was actually a trust instrument, a proposition that requires proof by clear and convincing evidence. *Sheehan,* 126 Cal. at 192-193. In holding that the evidence did not meet that standard, the court observed:

> Language used by different courts in declaring how strong such evidence must be may be seen in the notes to *Mahon[e]y v. Bostwick* 31 Am

[1] *See, e.g.*, Const Art. I § 12 (bail) and Art XIIID §4 (property tax); B & P C §§ 2760.1 (nursing), 4982.2 (family counselors), 10471 (real estate broker Recovery Account), 19804 (gambling); CC §§ 798.88 (mobile home parks), 1695.12 (home equity contracts), 1719 (dishonored checks), 1789.35 (check cashers), 1936 (rental vehicles), 3507.1 (nuisance); CCP §§ 527.6-527.8 (injunctions); Prob C §§ 2464, 9850 (deed in lieu of foreclosure). *See* 1 *Witkin, Cal.Evidence* (3d ed. 1986) Burden of Proof and Presumptions, § 161, pp. 138-139 & supp. 3 (listing 18 categories).

St. Rep. 180. Some of the expressions there quoted are: "Must be clear, satisfactory, and convincing"; "clear and satisfactory"; "clear and convincing"; "very satisfactory"; "strong and convincing"; "clear, unequivocal, and convincing"; "clear, explicit and unequivocal"; "so clear as to leave no substantial doubt"; "sufficiently strong to command the unhesitating assent of every reasonable mind." [*Sheehan*, 126 Cal. at 193]

This list describes a spectrum of formulations, and *Sheehan* expressed no preference among them; indeed, later in the opinion, the court indicated that all it was trying to do was to avoid proof that was "a mere guess or surmise." *Sheehan*, 126 Cal. at 194. Nevertheless, by 1981 the last two phrases had become firmly embedded in the decisional law:

> "Clear and convincing" evidence requires a finding of high probability. This standard is not new. We described such a test, 80 years ago, as requiring that the evidence be "so clear as to leave no substantial doubt"; "sufficiently strong to command the unhesitating assent of every reasonable mind." It retains validity today. [*In re Angelia P.* (1981) 28 Cal.3d 908, 919, 171 Cal.Rptr. 637, 623 P.2d 198, *quoting Sheehan*, 126 Cal. at 193]

But there was no decision that specifically discussed how the concept of clear and convincing evidence should be explained *to a lay jury*. For example, *In re Angelia P.* the supreme court was not addressing how to define clear and convincing evidence but the question of whether it was the appropriate standard for nonjury juvenile proceedings. *In re Angelia P.*, 28 Cal.3d at 919. The court had no occasion to address the parameters of the standard beyond noting that it represents a higher burden of proof than the preponderance standard; and the court certainly did not address the implementation of the standard in jury instructions. The same is true of other authorities that cite or state the more rigorous standard—they do not discuss how to charge a jury.[2]

In 1988, the Committee on Standard Jury Instructions (Committee), Civil, of the Superior Court of Los Angeles County stepped into this void when it published BAJI No. 2.62:

> "Clear and convincing" evidence means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the fact[s] for which it is offered as proof. Such evidence requires a higher standard of proof than proof by a preponderance of the evidence.

While the Committee's Use Note and Comment cites *Sheehan* and its progeny, the Committee chose not to include the *Sheehan* language in BAJI No. 2.62. That decision may have reflected the settled proposition that decisional language is not automatically appropriate for a jury instruction:

> [I]t is a dangerous practice, and one not to be followed, to take excerpts from opinions of the courts of last resort and indiscriminately change them into instructions to juries. The reasons are too obvious to require further comment. [Citation.] . . .
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> One of the reasons for care in adopting a court opinion verbatim as a jury instruction is that its abstract or argumentative nature may have a confusing effect upon the jury." (*Sloan v. Stearns* (1955) 137 Cal.App.2d 289, 300-301; *accord, Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 Cal.App.2d 675, 718; *see California Judges' Benchbook: Civil Proceedings—Trials* (1981) § 13.8, pp. 560-561.)

[2] *See, e.g., People v. Martin* (1970) 2 Cal.3d 822, 833, fn. 14, 87 Cal.Rptr. 709, 471 P.2d 29 (prosecution's burden on remand in voir dire proceedings); *People v. Caruso* (1968) 68 Cal.2d 183, 190, 65 Cal.Rptr. 336, 436 P.2d 336 (same); *United Professional Planning, Inc. v. Superior Court* (1970) 9 Cal.App.3d 377, 386, 88 Cal.Rptr. 551 (proceedings to expunge lis pendens); *In re Michael B.* (1983) 149 Cal.App.3d 1073, 1087, 197 Cal.Rptr. 379 (statutory proceedings to declare juvenile a ward); *In re Terry D.* (1978) 83 Cal.App.3d 890, 899, 148 Cal.Rptr. 221 (juvenile court proceedings); *Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320, 206 Cal.Rptr. 603 (conservatorship proceedings). The one arguable exception is an appeal in a jury case in which the appellate department recited the *Sheehan* language without discussion and without indicating the proper form of jury instructions. *Tague v. Citizens for Law & Order, Inc.* (1977) 75 Cal.App.3d Supp. 16, 26, 142 Cal.Rptr. 689 (disapproved on other grounds by *James v. San Jose Mercury News, Inc.* (1993) 17 Cal.App.4th 1, 20 Cal.Rptr.2d 890).

This brings us to recent judicial history in the Second District. Until *Mattco Forge*, the district was split. In several opinions, Division Three[3] in dictum expressed doubts about BAJI No. 2.62, while Division Six[4], also in dictum, endorsed it. However, none of the parties in those cases provided the reviewing court with briefing on the underlying meaning of "clear and convincing evidence" or with any examples of how other courts have addressed the proper formulation of a jury instruction under that standard.

B. Despite the many different formulations used to describe "clear and convincing evidence," most authorities recognize that the standard is simply an intermediate burden of proof lying somewhere between "a preponderance of the evidence" and "proof beyond a reasonable doubt."

The efforts of courts to create a meaningful definition of "clear and convincing evidence" have not been particularly successful—"the decisions relating to the meaning of 'clear and convincing evidence' and similar expressions are confused and confusing." McBaine, *Burden of Proof: Degrees of Belief* (1944) 32 Cal. L. Rev. 242, 254. It is doubtful that additional adjectives yield additional meaning.[5] Professor McBaine, therefore, urged that the most effective method of instructing lay jurors on the meaning of "clear and convincing evidence" is simply to identify the standard as an intermediate one lying between "preponderance of the evidence" and "beyond a reasonable doubt." McBaine, 32 Cal. L. Rev. at 254; *see also* McBaine, *Burden of Proof: Presumptions* (1954) 2 UCLA L. Rev. 13, 18-20; 2 *McCormick on Evidence* (4th ed. 1992) § 340, p. 442 ["It has been persuasively suggested that they could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is 'highly probable.'"].

Further, neither the courts nor the commentators have suggested that the required level of juror conviction for "clear and convincing evidence" is necessarily closer to "beyond a reasonable doubt" than to "preponderance"—that "clear and convincing evidence" means, say, an 85 percent or 90 percent certainty instead of 75 percent. "We cannot so easily frame a rule for measurement of mental state as we can devise a method for finding whether a vessel which contains some water is 55 or 75 per cent filled." McBaine, 32 Cal. L. Rev. at 254.

A review of the definitions of the intermediate burden of proof in the 50 states reveals that many states have, consciously or not, incorporated Professor McBaine's views. A survey of the definitions of the intermediate burden of proof from each of the 50 states reveals that the vast majority of states—39 of them—use a relatively neutral description of the burden of proof. Four of these states (Illinois, Mississippi, Missouri, and Vermont) appear to have no formal definition at all—presumably, the jury is simply told that it must find the facts by "clear and convincing evidence." Most of the remainder of the 39 states use the unadorned phrase "highly probable" as Professor McBaine advocated and/or describe the burden as intermediate between the "preponderance" and "reasonable doubt" standards. The strongest language used in any of the 39 states is that the jury must have a "firm conviction" or an "abiding conviction" of the truth of the matters in question.

Of the remaining 11 states, four (Maryland, Montana, New Jersey and Wisconsin) embellish their instructions with additional descriptions of what the jury must find; but qualitatively the instructions do not appear significantly stronger than the instructions used in the 39 states described above. Only seven states use language that sounds anything like *Sheehan*—and *not one of these states uses*

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[3] *In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, 487, fn. 8, 273 Cal.Rptr. 696; *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 333, fn. 29, 5 Cal.Rptr.2d 594; *Dubarry Internat., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 566, fn. 19, 282 Cal.Rptr. 181.

[4] *Roberts v. Ford Aerospace & Communications Corp.* (1990) 224 Cal.App.3d 793, 804, 274 Cal.Rptr. 139.

[5] *See* 2 *McCormick on Evidence* (4th ed. 1992) § 340, p. 442 ("No high degree of precision can be attained by these groups of adjectives."); James, *Burdens Of Proof* (1961) 47 Va.L.Rev. 51, 54-55 ("These formulations show the same confusion as that noted above between an objective measurement of the weight of proof and its persuasive effect on the mind of the trier.").

language as strong as Sheehan.[6] Indeed, one court has directly criticized the *Sheehan* language as "risk[ing] expository overload in quest of definitional precision." *State v. Renforth* (Ct. App. Div. 1 1987) 155 Ariz. 385, 387, 746 P.2d 1315.

In short, BAJI No. 2.62 is squarely in the mainstream of judicial and academic opinion.

C. Phrases like "the unhesitating assent of every reasonable mind" and "no substantial doubt" pose a substantial risk of confusing the jury into demanding proof "beyond a reasonable doubt."

Until Division Three's decisions in *Weaver* and *Mock*, California courts had not addressed the propriety of using the *Sheehan* language to instruct juries on the meaning of "clear and convincing evidence." But the supreme court has specifically *rejected* almost identical language when it has been used to describe the "preponderance" standard *because the language was too similar to "beyond a reasonable doubt."*

In *People v. Miller* (1916) 171 Cal. 649, 154 P. 468, the supreme court ordered a new trial after a trial court had given this instruction to the jury on the "preponderance" burden of proof:

> Preponderance of the evidence means that degree of evidence which *proves to a moral certainty*, or, in other words, that degree of proof that produces *conviction in an unprejudiced mind*, regardless of the number of the witnesses from whom it proceeds. [*Miller*, 171 Cal. at 651; emphasis added]

The supreme court rejected this instruction, noting: "It is plain to us that the definition thus given by the court was *substantially the same as that of proof beyond a reasonable doubt*, and that certainly a jury of laymen could find no possible distinction." *Miller*, 171 Cal. at 651; emphasis added.

In *In re Ross' Estate* (1919) 179 Cal. 629, 178 P. 510, the supreme court, holding that "conviction in an unprejudiced mind," standing alone, was an improper description of the preponderance standard, stated that the instruction was "substantially identical" to the instruction the court had rejected in *Miller*. *Ross*, 179 Cal. at 633. Similarly-phrased jury instructions were criticized in a series of decisions until trial courts finally stopped using the inappropriate language.[7]

Sheehan's "unhesitating assent of every reasonable mind" is impossible to distinguish from the phrase "conviction in an unprejudiced mind" that the supreme court disapproved in *Ross* and *Miller*. "Reasonable minds" are, presumably, "unprejudiced"; and if anything, "unhesitating assent" describes an even higher level of certainty than mere "conviction." Similarly, it is not reasonable to expect a lay juror to understand the difference—if there is one—between *Sheehan*'s description of proof that is "so clear as to leave no substantial doubt" and proof "beyond a reasonable doubt," particularly since "doubt" is used to describe both concepts. *Miller*, 171 Cal. at 651.

Courts of other states have frequently held that language similar to *Sheehan* imposes too rigorous a standard for the intermediate burden of proof. For example, in *Molyneux v. Twin Falls Canal Co.* (1934) 54 Idaho 619, 35 P.2d 651, 94 A.L.R. 1264, the Idaho Supreme Court ordered a new trial where a jury instruction on the intermediate burden of proof required that the proof be "clear, positive and unequivocal." *Molyneux*, 54 Idaho at 631. The court

[6] *Colorado* (form instruction uses phrase "free from serious or substantial doubt"); *Florida* (form instruction describes proof required as "precise," "lacking in confusion," and "without hesitation"); *Iowa* (form instruction uses phrase "no serious or substantial uncertainty"); *Pennsylvania* (case law description, "without hesitance"); *South Carolina* (form instruction includes "unequivocal," "lead to but one conclusion"); *South Dakota* (case law description, "without hesitancy"); and *Utah* (form instruction, evidence "must have reached the point where there remains no substantial doubt").

[7] *See*, e.g., *Bowman v. Motor Transit Co.* (1930) 208 Cal. 652, 656-657, 284 P. 443 (instruction requiring "conviction in the unprejudiced mind of the juror" inaccurate, but error cured by other instructions); *In re Guilbert's Estate* (1920) 46 Cal.App. 55, 57-58, 188 P. 807 (same); *Gregoriev v. Northwestern Pac. R. Co.* (1928) 95 Cal.App. 428, 440-441, 273 P. 76 (same); *Richmond v. Moore* (1930) 103 Cal.App. 173, 179-180, 284 P. 681 (same). As the court explained in *Gregoriev*, the erroneous instructions were premised on a statute (former CCP § 1835) that was repealed in 1923, "apparently for the purpose of preventing continual confusion." *Gregoriev*, 95 Cal.App. at 441.

noted that both the common and legal definitions of these terms required proof to a virtual certainty, a burden too close to the criminal burden of proof to be an accurate description of the intermediate burden. *Molyneux*, 54 Idaho at 633. And in *State v. King* (1988) 158 Ariz. 419, 763 P.2d 239, Arizona's Supreme Court reversed a conviction in which the jury had been instructed that the "clear and convincing evidence" burden of proof for the insanity defense meant that the jurors had to be "certain" and "unambiguous" in their findings. The court concluded that such a burden was effectively "beyond a reasonable doubt." *King*, 158 Ariz. at 421-422. In doing so, the court relied in part on *State v. Renforth* (Ct. App. Div. 1 1987) 155 Ariz. 385, 746 P.2d 1315, which was the case in which the Arizona court had criticized California courts for "expository overload" in using the *Sheehan* language to describe the intermediate standard of proof. *Renforth*, 155 Ariz. at 387; *see also Williams v. Blue Ridge Bldg. & Loan Ass'n* (1934) 207 N.C. 362, 177 S.E. 176 (instruction requiring the jury to be satisfied "to a moral certainty" took the case "out of that line of cases requiring the second degree of proof, and placed it in the category of criminal cases requiring the third degree of proof").

But as a matter of constitutional law, unanimity is not required in a civil case. Const Art I § 16; CCP § 613. Trial by jury is "an inviolate right" to be "zealously guarded by the courts." *Cobill v. Nationwide Auto Service* (1993) 16 Cal.App.4th 696, 699, 19 Cal.Rptr.2d 924 (internal quotation marks omitted). In *People v. Collins* (1976) 17 Cal.3d 687, 692-693, 131 Cal.Rptr. 782, 552 P.2d 742, cert. den. (1977) 429 U.S. 1077, 97 S.Ct. 820, 50 L.Ed.2d 796, the supreme court held that this right may not be abridged by an act of the Legislature and that regulations on its enjoyment are permissible only if the "essential elements" of a trial by jury are preserved—including in criminal cases unanimity of a 12-member jury. An essential element of trial by jury in a civil case, as explicitly stated in the Constitution, is the three-fourths requirement. Until the Constitution is amended to require a 12 to 0 vote to award punitive damages or for other relief that requires proof by clear and convincing evidence, the courts must "zealously guard" the existing essential elements of the system. Without some qualifying explanation, the *Sheehan* language could cut the heart out of the constitutionally guaranteed three-fourths requirement.

D. There is no reason to presume that the Legislature intended to include the *Sheehan* language in CC § 3294.

In his dissent in *Mattco Forge*, Justice Croskey argued that principles governing the determination of legislative intent require a presumption that when the Legislature enacted CC § 3294 in 1987, it was aware of the *Sheehan* language and intended the statute to be construed in accordance with *Sheehan*. *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 853-854, 60 Cal.Rptr.2d 780 (dis. opn. of Croskey, J.). There are several reasons why the presumption does not necessarily apply.

First, because there is no body of California law predating the adoption of CC § 3294 that addressed *the formulation of jury instructions*, there is no basis for assuming that the Legislature intended to incorporate any decisional law on that subject. In fact, one could even accept the *Sheehan* language as a correct philosophical expression while still recognizing that it is not suitable for instructing a lay jury. Besides, the presumptive legislative knowledge of decisional law would have to include *Miller*, *Ross* and similar decisions *rejecting* the use of *Sheehan*-type language as being too similar to "beyond a reasonable doubt."

Second, CC § 3294 did not undergo comprehensive legislative review before its enactment. It was part of the "napkin" agreement that led to the hastily-enacted compromise tort reform legislation known as the Civil Liability Reform Act of 1987. Stats. 1987, ch. 1498; see *American Tobacco Co. v. Superior Court* (1989) 208 Cal.App.3d 480, 487-488, fn. 3, 255 Cal.Rptr. 280. The legislative history contains no suggestion that the Legislature undertook any kind of study of the parameters of "clear and convincing evidence," much less considered how to explain the concept to a jury.

Third, the formulation of jury instructions is a uniquely judicial task that one would ordinarily

expect the Legislature to entrust to the judicial branch. The Legislature rarely specifies jury instructions; and when it does, so it usually makes its purpose clear. *See, e.g.*, Ev C §§ 646 ([res ipsa loquitur instruction), 669.1 (statute states its purpose was to clarify certain BAJI instructions, Stats. 1987, ch. 1207, §§ 5-6]; Gov C § 985 (collateral source payments in action against public entities); *Pen C §§ 1127a et seq. (various specific instructions* in criminal cases). Unless there is some explicit legislative directive to the contrary—none exists here—there is no basis for assuming that the Legislature intended to undertake the role of deciding how to explain legal concepts to a jury.

* * *

Since the Legislature has yet to speak, there is still plenty of room for debate over how much is enough to show "clear and convincing evidence." But the debate is about policy, not semantics. Assuming that words are up to the task, the Legislature can place the "clear and convincing evidence" bar at whatever height it wants—just above "preponderance of the evidence," just below "beyond a reasonable doubt," or somewhere in between. Until it does so, BAJI No. 2.62 is the most reasonable and intelligible expression of the concept.

Adjusters

Independent Adjuster Hired by Insurer Owes Insured No Duty of Care

Insured May Not Sue Adjuster for Economic Loss Caused by Delay in Resolving Claim

Sanchez v. Lindsey Morden Claims Services, Inc. (1999) 72 Cal.App.4th 249, 84 Cal.Rptr.2d 799 (2d Dist., Div. 7)

Case at a Glance

An independent claims adjuster hired by an insurer to adjust its insured's claim is not liable in tort for negligent claims handling that causes only economic loss.

Summary of Decision

The insured was in the business of transporting commercial machinery. After a commercial dryer was damaged while the insured was moving it to Los Angeles, the insured submitted a claim under his cargo insurance policy for repair of the dryer. The damage was capable of repair in one week's time at a cost of $12,000. The insured advised the insurer that immediate repairs were needed because the dryer's purchaser was suffering business loss. The insurer hired defendant Lindsey Morden Claims Services, an independent claims adjuster, to investigate and adjust the loss. Three months passed before the claim was paid and the repairs completed. As a result, the dryer's purchaser sued the insured and obtained a $1.35 million judgment.

The insured sued Morden for negligent claims handling. Morden demurred, arguing that it had no contract with the insured and owed him no duty of care. The trial court sustained Mordens' demurrer without leave to amend. The insured appealed.

The court of appeal affirmed. The court explained that whether an independent adjuster hired by an insurer owes the insured a duty of care is a question of law and is resolved based on public policy considerations. Relying on the supreme Court's recent decision in *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397, 11 Cal.Rptr.2d 51, 834 P.2d 745, 48 A.L.R.5th 835, which held that a financial auditor does not owe third parties a duty of care in preparing financial statements, the court identified the relevant public policy considerations as the relationship between the adjuster's conduct and the injury, the blameworthiness of the adjuster's conduct, the benefits and costs of imposing a duty, and the policy of preventing future harm. On balance, these factors militated against allowing insureds to sue independent adjusters hired by insurers for negligence.

The court first found that the blameworthiness of the adjuster's conduct and the relationship between that conduct and the insured's injury are insufficient to justify imposing a duty on the adjuster. The court explained that an independent adjuster,