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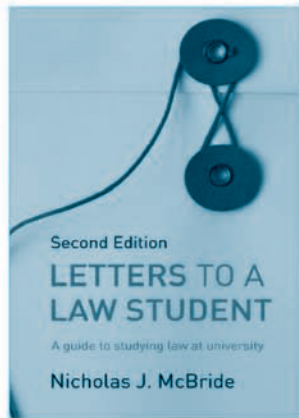
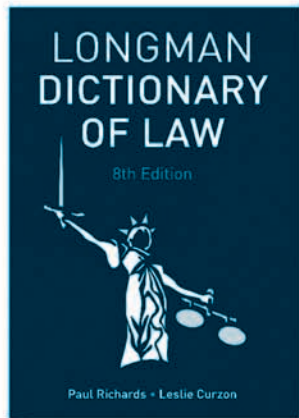
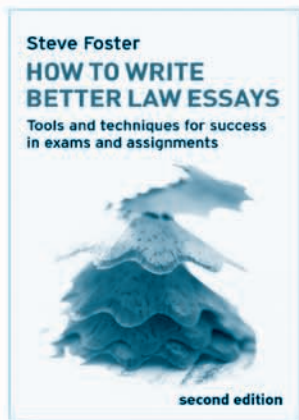
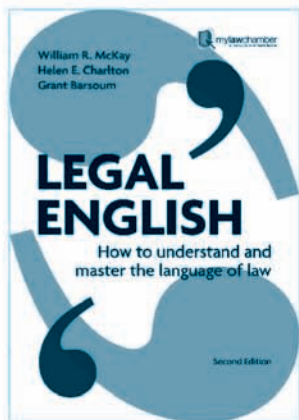
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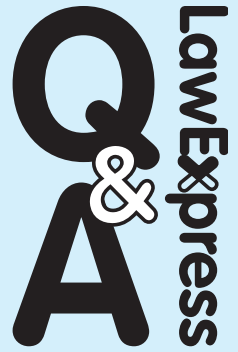
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Supporting resources

Visit the Law Express Question & Answer series companion website at www.pearsoned.co.uk/lawexpressqa to find valuable learning material including:

- Additional **essay and problem questions** arranged by topic for each chapter give you more opportunity to practise and hone your exam skills.
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Acknowledgements

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This book is dedicated to the memory of my sister Angela, whose smile and laughter we all miss.

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Finally, but not least, I wish to thank my husband and children for their patience during the writing of this book.

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Our thanks go to all reviewers who contributed to the development of this text, including students who participated in research and focus groups which helped to shape the series format.

What you need to do for every question in the Law of Evidence

HOW TO USE THIS BOOK

Books in the *Question and Answer* series focus on the *why* of a good answer alongside the *what*, thereby helping you to build your question answering skills and technique.

This guide should not be used as a substitute for learning the material thoroughly, your lecture notes or your textbook. It *will* help you to make the most out of what you have already learned when answering an exam or coursework question. Remember that the answers given here are not the *only* correct way of answering the question but serve to show you some good examples of how you *could* approach the question set.

Make sure that you refer regularly to your course syllabus frequently, check which issues are covered (as well as to what extent they are covered) and whether they are usually examined with other topics. Remember that what is required in a good answer could change significantly with only a slight change in the wording of a question. Therefore, do not try to memorise the answers given here, instead use the answers and the other features to understand what goes into a good answer and why.

The law of evidence requires analytical and problem-solving skills but most importantly students need to be able to see how key concepts interrelate rather than learning each topic in isolation. In the case of both essay and problem-solving questions you should produce a structured, reasoned and well balanced answer supported by case law. Avoid repetition and be concise in your answers and ensure that you relate your answer back to the question. There is a limit to the amount that you can write in the exam time so limit your answer to what is relevant to the question. The answers in this book are intended to reflect what a student could realistically write within the time constraints of an examination.

When answering problem-solving questions you should relate the law to the facts given and this should be done throughout the question rather than at the end. You should also focus on the current law rather than discussing the historical development of the law in that particular area.

However, for essay questions you would be expected to analyse the historical development of the law and to examine whether the current law meets its purpose. References to important reports such as Law Commission reports would be expected as well as reference to judicial commentary or any academic opinion or journal articles in the area.

Guided tour

What you need to do for every question in the Law of Evidence

HOW TO USE THIS BOOK

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What to do for every question – Find out the key things you should do and look for in any question and answer on the subject in order to give every one of your answers a great chance from the start.

How this topic might come up in exams – Learn how to tackle any question on this topic by using the handy tips and advice relevant to both essay and problem questions. In-text symbols clearly identify each question type as they occur.



Essay question



Problem question

Attack the question – Attack attack attack! Use these diagrams as a step by step guide to help you confidently identify the main points covered in any question asked.

Answer plans and Diagram plans – Clear and concise answer plans and diagram plans support the planning and structuring of your answers whatever your preferred learning style.

1

Introductory concepts

How this topic may come up in exams

The principles of admissibility, relevance, judicial discretion and weight are all interrelated and pervasive. They can appear more than once in either essay or problem question format. For example, admissibility relates to the rule of law (e.g. see s.76 PACE 1984 in Chapter 7) or exclusionary rules (e.g. see Chapters 4 and 5). Relevance and admissibility relate to improperly obtained evidence (see Chapter 7). Admissible evidence is also subject to judicial discretion (see Chapters 1, 4, 6 and 7). Issues of burden and standard of proof and presumptions are also favourable for problem style questions. But be prepared for burden of proof to appear also in essay format.

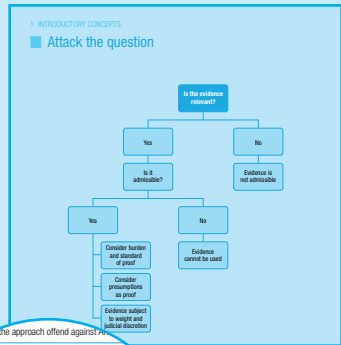
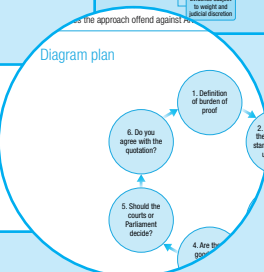


Diagram plan

Answer plan

- Explain the difference between the evidential and the legal burden.
- Explain the general principle of who bears the burden and standard of proof.
- Explain, using case law, how and when a reverse burden occurs.
- Analyse the rationale for this.
- Does the approach offend against Art.6?



Answer with accompanying guidance –

Make the most out of every question by using the guidance to recognise what makes a good answer and why. Answers are the length you could realistically hope to produce in an exam to show you how to gain marks quickly when under pressure.

Knowledge on your part as the examiner can see that you have understood that different presumptions have different evidential value.

⁶ An ability to recognise errors in the decision demonstrates that you have a command of the subject area necessary for the correct application of the law to the facts.

⁷ Comparing and contrasting cases in this way will earn you more marks as it shows

Case names clearly highlighted – Easy to spot bold text makes those all important case names stand out from the rest of the answer, ensuring they are much easier to remember in revision and in the exam.

Make your answer stand out – Really impress your examiners by including these additional points and further reading to illustrate your deeper knowledge of the subject, fully maximising your marks.

Don't be tempted to – Avoid common mistakes and losing easy marks by understanding where students most often trip up in exams.

Bibliography – Use this list of further reading to really explore areas in more depth, enabling you to excel in exams.

1 INTRODUCTORY CONCEPTS

⁴ Reaching a final view is necessary as you have been asked to consider whether the decision is capable of appeal. This shows that you are able to understand what the question requires of you.

presumption was understood had their name that it is still of negligence show the relevant. However, the produce sufficient cases such that it is fair to previous WLR

⁵ This demonstrates a deeper knowledge in your part as the examiner can see that you have understood that different presumptions have different evidential value.

⁶ An ability to recognise errors in the decision demonstrates that you have a command of the subject area necessary for the correct application of the law to the facts.

⁷ Comparing and contrasting cases in this way will earn you more marks as it shows

enquiries that were made particularly following the husband's sighting in Marbella. In the circumstances the judge was wrong to apply the presumption.⁴

(b) With regard to the second extract, this appears to be a negligence case and the judge has applied the presumption of negligence known as *res ipsa loquitur*. As shown in the case of **Scott v London and St Katherine Docks Co** (1865) 3 H & C 596, this means that the claimant may rely on this principle to show that the relevant matter was under the control or management of the defendant and that the accident would not have happened if the defendant had taken proper care. In the absence of any evidence to the contrary a presumption will arise. However, it is a rebuttable presumption.⁵ On the facts it would appear that it was reasonable for the judge to allow this presumption as it is reasonable to suggest that the bale of hay was under the control or management of the defendants as it had their name and address on it. The judge is wrong to suggest that it is still necessary for the defendant to prove the absence

arise. However, it is a rebuttable presumption.⁵ On the facts it would appear that it was reasonable for the judge to allow this presumption as it is reasonable to suggest that the bale of hay was under the control or management of the defendants as it had their name and address on it. The judge is wrong to suggest that it is still necessary for the defendant to prove the absence of negligence. The claimant in fact bears the legal burden to show the relevant matter was in the control of the defendants.⁶ However, the defendant only bears the evidential burden to produce sufficient evidence to rebut the presumption as seen in cases such as **Ng Chun Pui v Lee Chuen Tat** (1988) RTR 298. It is fair to say that the case law is conflicting in this area with previous cases, such as **Ward v Tesco Stores Ltd** [1976] 1 WLR 810, suggesting that the defendant bears a legal burden. However, recent cases such as **Ng Chun and Ratcliffe v**

**Make your answer stand out**

- Discuss in detail the factors that the court should consider when deciding whether to uphold a reverse burden as identified by Lord Steyn in *R v Johnstone* (above), e.g. the seriousness of the offence.
- Mention additional cases involving reverse burdens such as *L v DPP* [2002] 3 WLR 863 and *R v Alfie*; *R v Jordan* [2001] 2 WLR 211.
- Develop the discussion relating to s.101 Magistrates' Court Act 1980.
- Discuss Lord Clyde's argument in *Lambert* that reverse burdens should be upheld where the offence is regulatory in nature.

! Don't be tempted to...

- Write everything you know about burden and standard of proof – avoid lengthy definitions and moot points about how the standard of 'beyond reasonable doubt' and 'on a balance of probabilities' should be explained. The question requires you to focus on the issue of reverse burdens.
- Ignore the quotation given in the question – whilst a brief mention of the facts is permissible you need to analyse whether or not Parliament should legislate in this area rather than leaving the courts to use statutory interpretation.
- Discuss the facts of *R v Hunt* in detail simply because it is mentioned in the quotation – focus on the meaning of Lord Griffiths' words and the legal principle arising from the case.

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Guided tour of the companion website



Book resources are available to download. Print your own **Attack the question** and **Diagram plans**.



Additional **Essay and Problem questions** with **Diagram plans** arranged by topic for each chapter give you more opportunity to practise and hone your exam skills. Print and email your answers.



You be the marker gives you a chance to evaluate sample exam answers for different question types for each topic and understand how and why an examiner awards marks. Use the accompanying guidance to get the most out of every question and recognise what makes a good answer.

All this and more can be found when you visit
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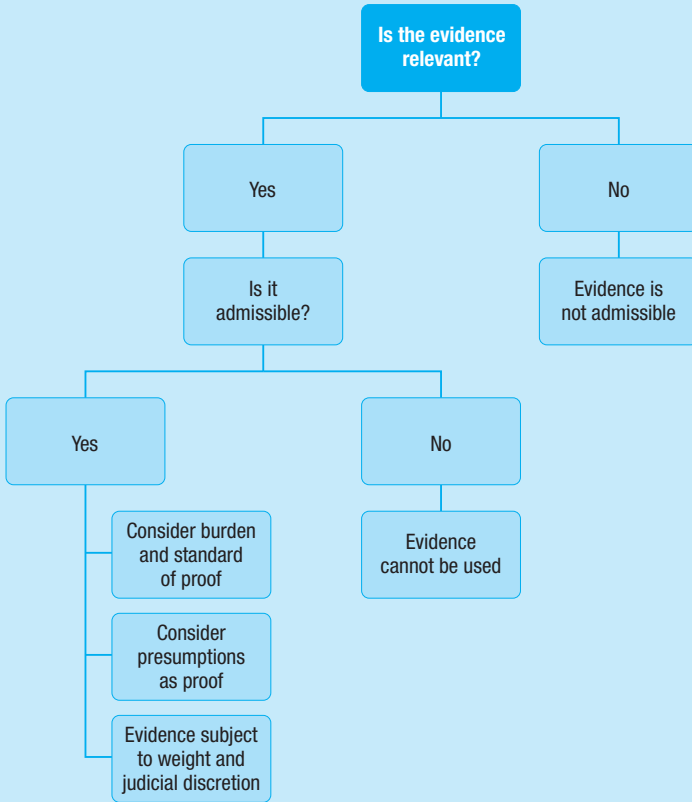
Introductory concepts



How this topic may come up in exams

The principles of admissibility, relevance, judicial discretion and weight are all interlinked and pervasive. They can appear more than once in either essay or problem question format. For example, admissibility relates to the rule of law (e.g. see s.76 PACE 1984 in Chapter 7) or exclusionary rules (e.g. see Chapters 4 and 5). Relevance and admissibility relate to improperly obtained evidence (see Chapter 7). Admissible evidence is also subject to judicial discretion (see Chapters 1, 4, 6 and 7). Issues of burden and standard of proof and presumptions are also favourites for problem style questions. But be prepared for burden of proof to appear also in essay format.

■ Attack the question



Question 1

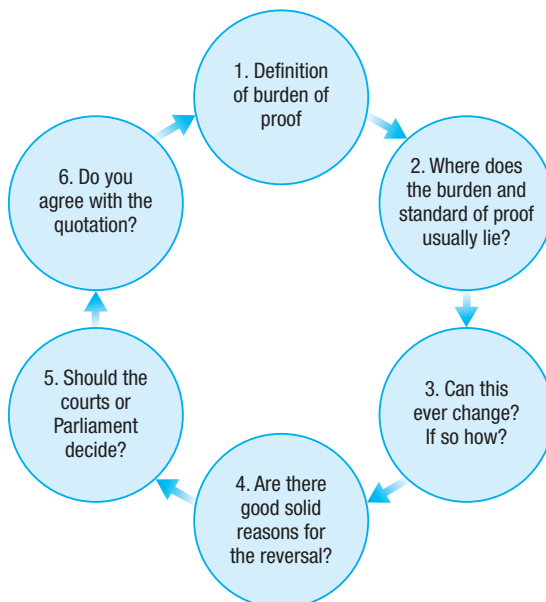
'... wherever a burden of proof is placed upon the defendant by statute the burden should be an evidential burden and not a persuasive burden ... My Lords, [this] fundamental change is, in my view, a matter for Parliament and not a decision of your Lordships' House.' (Lord Griffiths in *R v Hunt* [1987] AC 352, HL)

Critically evaluate the above quotation with reference to decided case law on the reversal of the burden of proof and consider whether the current approach offends Art.6 of the European Convention on Human Rights.

Answer plan

- Explain the difference between the evidential and the legal burden.
- Explain the general principle of who bears the burden and standard of proof.
- Explain, using case law, how and when a reverse burden occurs.
- Analyse the rationale for this.
- Does the approach offend against Art.6?

Diagram plan



1 INTRODUCTORY CONCEPTS

¹The question relates to the burden of proof, so start with a definition of this concept so that the examiner is aware that you understand there are two aspects to the burden of proof.

² It is not necessary to give the full case citation in an answer to an examination question and this would not usually earn you extra points. Usually the case name will suffice. However, some institutions will expect you to cite both the case name and the year. Full citations of cases appear throughout the answers in this book for reference purposes.

³ It is important to explain the general principle before going on to deal with reverse burdens so that the examiner can see that you understand that reverse burdens are not the norm.

⁴ Although the quotation relates to a criminal case (*R v Hunt*), the question itself is not restricted to criminal cases. You should therefore show the examiner that you understand that reverse burdens can happen in civil cases as well.

⁵ If you intend to concentrate mainly on the criminal jurisdiction it is important to explain to the examiner why you have done this.

⁶ It is important to now discuss when and how reverse burden occur in criminal proceedings as this is the focus of your answer.

Answer

The burden of proof has two elements: the legal (or persuasive) burden of proof is the obligation to prove a fact in issue whilst the evidential burden is the obligation to adduce sufficient evidence to justify the matter being left to the jury. The party who bears the legal burden will also bear the evidential burden.¹

In criminal cases the 'golden rule' is that the prosecution will bear the legal burden of proof (per Viscount Sankey LC in **Woolmington v DPP** [1935] AC 462).² This principle is based on the presumption that an accused is innocent until proven guilty which has been established as a right under Art. 6(2) of the European Convention on Human Rights (ECHR). The standard of proof is 'beyond reasonable doubt'.³

In civil proceedings Lord Maugham in **Joseph Constantine Steamship Line v Imperial Smelting Corporation** [1942] AC 154, HL said 'he who asserts must prove'. Therefore, the claimant will normally bear the legal burden. The standard of proof is 'on a balance of probabilities'.⁴

It is possible for the legal burden to be reversed in civil and criminal cases. The courts take a far more flexible approach in civil proceedings and the legal burden can be placed on the party who is in the best position to discharge it regardless of any counterclaim, as demonstrated by the facts in the **Joseph Constantine** case.

Whilst there is also a presumption of innocence in civil proceedings, the consequences of limiting that right are not as extreme as they are in criminal proceedings. As such the challenges to the reverse burden have taken place largely in the criminal arena.⁵

In criminal cases the reversal of the legal burden of proof occurs in two situations, insanity and where there is a statutory exception (implied or express). These were identified by Viscount Sankey LC in **Woolmington v DPP** [1935] AC 462. The statutory exceptions have presented the most problems with regard to possible contra-vention of the Human Rights Act 1998.⁶

⁷ The question asks you to consider reverse burdens in the context of Art.6 of the ECHR. It is necessary to mention the Human Rights Act 1998, which incorporates the Articles from the ECHR.

⁸ The question asks you to evaluate the quotation with reference to decided cases and so you must make some attempt to compare and contrast cases in this area.

⁹ As the quotation suggests that there is a movement that favours treating reverse burdens as evidential burdens, you need to discuss whether case law has followed this majority view.

¹⁰ You must put Lord Griffiths' quotation into some context and start to evaluate the next part of the question, which is whether the quotation reflects the modern day approach to reverse burdens.

Since the 1998 Act came into force there have been a number of conflicting decisions in relation to whether an express or implied legal burden on the defendant should be upheld. The consensus is no longer that the legal burden should always be treated as an evidential burden as suggested in Lord Griffiths' quotation.⁷

In the case of **R v Lambert** [2001] 3 WLR 206, HL, which was heard before the 1998 Act came into effect, Lord Steyn observed that certain defences were so closely linked with the *mens rea* that it would be unfair to transfer the legal burden to the defendant. **Lambert** followed the approach in **Salabiaku v France** (1998) 13 EHRR 379 of considering whether the limitation of the Art. 6(2) right pursues a legitimate aim (this would involve looking at the mischief at which the statute was aimed) and satisfies the principle of proportionality. Their Lordships favoured a proactive approach and read down the legal burden in s.28(3) as being no more than an evidential burden.⁸

However, the legal burden has not in fact been read down in all cases. For example, in the case of **Sheldrake v DPP, Attorney-General's Reference (No. 4 of 2002)** [2004] 3 WLR 976, whilst the court approved the 'legitimacy' and 'proportionality' approach in **Lambert**, they felt that a reverse burden did not always prevent a fair trial and it was recognised that Art. 6 is not an absolute right. The protection of members of the public was considered equally important to the outcome of this case.⁹

Lord Griffiths' quotation recognises that a blanket principle that a legal burden on the defendant should not apply would be a fundamental change that only Parliament should make.¹⁰ This recognises the need for judges to avoid making law. It is worth noting that Lord Griffiths' comments in **R v Hunt** [1987] AC 352, HL relate in particular to s.101 of the Magistrates' Court Act 1980. This is an example of an attempt by Parliament to legislate on the issue of implied statutory exceptions in the magistrates' court. The 1980 Act places a legal burden on the defendant where there is reliance on 'any exception, exemption, proviso, excuse or qualification'. Yet, despite this, the provisions have been largely ignored or the courts have