

## Evidence Meets Civil Procedure

**Author :** Howard M. Wasserman

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Michael S. Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation*, [51 B.C.L. Rev. 1451](#) (2010).

Perhaps the highest praise for any piece of scholarship is “I wish I had thought of that.” As someone who writes in civil procedure and dabbles in evidence, that was my reaction to Michael Pardo’s *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation*. Pardo, for arguably the first time, links non-trial dispositive procedures in civil litigation (Dismissal for Failure to State a Claim, Summary Judgment, and Judgment as a Matter of Law) to the underlying law of evidence that would control the claim at trial. The result is a theory of “procedural accuracy,” under which evidentiary proof rules (especially as to burden and standard of persuasion) inform and provide content to the operation of dispositive procedures, ensuring that those devices produce procedural outcomes that align with the outcomes and policies dictated by evidentiary proof rules. By drawing these links, Pardo both justifies the use of non-trial dispositive procedure and shows how those procedures should properly function.

Courts and commentators have largely ignored this procedure-evidence link. Perhaps this is another by-product of the “disappearing trial.” Because civil actions, especially in federal court, so rarely get to trial (in 2009, trial began in approximately 3 % of civil cases, which actually represented a slight increase from a few years prior), the tendency is not to think about civil actions or civil procedure in trial terms, but only in terms of dispositive non-trial procedure. There has been no systematic effort to link the ordinary operation of dispositive procedure to the controlling evidentiary standards. The Supreme Court has twice drawn these connections.

This is the gap that Pardo fills.

He starts from the premise that, however rare trials may be, trial rules can and should influence the operation of the litigation process as a whole. Evidentiary proof rules seek to increase material accuracy (the outcome is grounded on factual conclusions that match reality), while procedural rules seek to increase procedural accuracy (the outcome of the process matches what material accuracy demands). The standards for implementing those dispositive procedural devices thus must be informed by those underlying proof rules.

Pardo then proposes a different conception of evidentiary proof rules (one that he and Ron Allen had previously explored) as grounded not in probabilistic relationships between evidence and facts, but in explanatory relationships between evidence and facts. This conception asks whether the explanation proffered by the party with the burden of persuasion, if true, better explains the evidence and disputed events than alternative explanations (either explanations proffered by the opposing party or alternative explanations not offered by either party). Thus a party carries its burden of persuasion by a preponderance of the evidence when the explanation it proffers is the best explanation for what the evidence shows happened in the real world, even if only slightly better. A party carries its burden of persuasion by clear-and-convincing evidence when its explanation is clearly and convincingly better than alternative explanations.

This evidentiary framing then controls non-trial dispositive procedural devices. For example, on summary judgment and judgment as a matter of law (both of which ask the same procedural question), a non-moving party with the burden of persuasion must show that a reasonable jury could find its explanations of the evidence, facts, and events to be a better explanation than the explanations favoring the defendant. That is, summary judgment should be entered only if a reasonable jury could not find the non-moving party’s explanation to be better than any other explanations that favor the moving party. And if the standard of proof is the elevated clear and convincing evidence, that explanation must be clearly and convincingly better. Similarly, the question on a 12(b)(6) motion is whether a reasonable jury could find the

explanation of the events as pled the best explanation or whether there is an alternative explanation that a reasonable jury must find at least as likely than the plaintiff's preferred explanation.

Pardo argues that this model both explains existing law and can guide courts as to the proper approach to these devices going forward. Importantly, the model provides content to the much-discussed, much-criticized, and still-undefined concept of "plausibility" in pleading introduced in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*. Pardo argues that plausibility means that the explanation of events as alleged seems (to a reasonable fact-finder) as if it could be true and provides a "tentative, acceptable account of the disputed events." A complaint is plausible if a reasonable jury could find it to be the best explanation. He also argues (*contra* Suja Thomas) that the "reasonable jury" inquiry is neither a legal fiction nor impossible to separate from the judge's own view of the facts. In fact—returning to the way evidence informs procedure—Pardo argues that the reasonable-jury standard is a well-established feature in the law of evidence, where the admissibility of one piece of evidence often turns on whether there is evidence sufficient to support a finding of some preliminary fact—meaning whether a reasonable jury could find that fact. Thus, if the reasonable-jury standard works on discreet evidentiary matters, it should work in all procedural devices that rely on evidentiary concepts.

This article represents a giant step in linking civil procedure and the law of evidentiary proof, a project that also remains a work in progress. For example, Pardo is a bit too forgiving of the Supreme Court's recent pleading decisions, particularly *Iqbal*, which invites judges to dismiss claims whenever they identify, through their common sense and experience, alternative explanations for some events, without necessarily comparing which explanations a reasonable jury might accept. Under Pardo's model, if a court finds two equally good explanations for some events, that should mean that a reasonable jury could find the plaintiff's explanation better, meaning a case should pass that procedural hurdle. Otherwise, it is hard to see how the judge controlling these dispositive procedural devices is not acting as a fact-finder.

But Pardo provides the essential insight that civil litigation is a unified whole—in its pre-trial and trial processes—designed to reach a materially accurate result through factual allegations and evidence, and every procedural step in the process works towards that end. That insight can shape and guide further consideration of dispositive procedure.

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