Presented:
Conference on State and Federal Appeals

June 2-3, 2011
Austin, TX

Standards for appellate review for sufficiency of the evidence in civil cases and criminal cases: When the worlds of money and liberty collide.

Sharon McCally

Author contact information:
Sharon McCally
14th Court of Appeals
Houston, TX

The purpose of this paper is to provide civil practitioners with an overview of the variances between the Texas high courts, reviewing the sufficiency of evidence, in their application of the standards of review in criminal and civil cases. This overview is intended to provide context for the potential direction of sufficiency-of-the-evidence analysis in the Texas Supreme Court.

The Texas Supreme Court and the Texas Court of Criminal Appeals say they do not use the same standard to review sufficiency of evidence. In fact, as outlined fully below, the Court of Criminal Appeals recently abandoned any notion that it was using the civil construct for legal sufficiency reviews.[1] But, the *Brooks* Court suggested that the Texas Supreme Court is drifting from its prior legal-sufficiency analysis as well.[2] To the extent that the courts stated standards of review actually differ, the Courts justify the divergence by reference to the differing burdens of proof in civil and criminal courts.

Unmistakably, however, the Texas Supreme Court and the Texas Court of Criminal Appeals do not use the same qualitative analysis to credit or dismiss evidence admitted under a uniform set of rules.[3] The justification for divergent, if not opposite, treatment of evidence is less clear.

My ultimate conclusion is that the more the Supreme Court and the Court of Criminal Appeals clarify the standard of review, the more alike the stated standards appear. Yet, as the Courts have also refined their treatment of evidence, their application of that same standard of review yields opposite results: money-judgments are less likely to be affirmed and convictions are less likely to be reversed.

I. What do we know about the standards of review

Standards of review involve several components: (1) the scope of the review; (2) the "light" of the review; (3) the quantity of evidence to affirm; (4) the treatment of the evidence adduced; and, finally, (5) the catch all - reasonable/rational jury minimum. The standards and the elements of the standards are, to say the very least, complicated.[4] The complication derives not only from the challenge to define "scintilla" or "modicum" in such a way that every trial

---

[1] *See Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality opinion); s*ee also Brooks v. State*, 323 S.W.3d 893, 912, 926 (Tex. Crim. App. 2010) (Cochran, J., concurring) (stating that "we have never been successful in our attempts to superimpose the five-zone civil standards for sufficiency review on top of the constitutionally mandated legal sufficiency review of a criminal conviction").

[2] *Brooks v. State*, 323 S.W.3d at 910, n. 41.

[3] Effective March 1, 1998, the Texas Supreme Court and the Court of Criminal Appeals jointly promulgated the uniform Rules of Evidence to govern both civil and criminal cases. *See* Order on Final Approval of Revisions for the Texas Rules of Evidence in Civil Cases, Misc. Docket No. 989043 (Tex. Feb. 25, 1998), *printed in* 61 Tex. Bar J. 373 (Apr. 1998). Prior to that time, separate rules of civil and criminal evidence governed court proceedings. The rules explicitly state that "[e]xcept as otherwise provided by statue, these rules govern civil and criminal proceedings (including examining trials before magistrates) in all courts of Texas, except small claims courts. *See* Tex. R. Evid. 101(b). While the Rules further exempt specified criminal proceedings, the plain language of the Texas Rules of Evidence nonetheless apply simultaneously to civil and criminal trials on the merits.

[4] *See* Wendell W. Hall, *The Texas Hold Out: Trends in the Review of Civil and Criminal Jury Verdicts*, 49 S. Tex. L. Rev. 539, 549 (Spring 2008).

lawyer, trial judge, and appellate judge is looking for the same quantum or quality of evidence; but also from the reality that the standard of review is in a persistent state of evolution.

A. Sufficiency of Evidence Review in Civil Cases.

1. Legal sufficiency.

As a bright line for many years, civil practitioners learned that legal sufficiency or "no-evidence" points should be sustained when the record discloses one of the following:

(a) a complete absence of evidence of a vital fact (not disregarding contrary evidence if there is no favorable evidence[5]); or

(b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact (such that contrary evidence renders supporting evidence incompetent);

(c) the evidence offered to prove a vital fact is no more than a mere scintilla (viewing the evidence in its most favorable light in support of the finding of the vital fact, considering only the evidence and the inferences which support the finding and rejecting the evidence and the inferences which are contrary to the finding); and

(d) the evidence establishes the opposite of the vital fact (such that contrary evidence conclusively establishes the opposite).[6]

In 2002, the Texas Supreme Court modified the quality (or quantity) of evidence to affirm in certain cases. Specifically, in cases where the burden of proof is heightened, so, too, is the standard of review heightened.[7] As Texas adopted multiple burdens of proof, the standard for review changed because as, the Supreme Court reiterated, "whenever the standard of proof at trial is elevated, the standard of appellate review must likewise be elevated.'" [8]

Then, in 2005, with *City of Keller v. Wilson*, the Court altered the scope of evidence reviewable. Specifically, although the Court embraced Justice Calvert's 45-year old statement of standards of review as accurate, the Court rejected the four-point analysis as a finite statement of the scope of review – or the quantity of evidence to be considered. For example, the Court

---

[5] In this circumstance, the Court explains that whether the reviewing court considers contrary evidence or not is irrelevant – the absence of evidence to support a fact is still an absence of evidence when you examine the evidence that does not support the fact. *Id.*at 811.

[6] *See City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005) (*citing* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 Tex. L. Rev. 361, 362-62 (1960)).

[7] *See In re J.F.C.*, 96 S.W.3d 256, 264-67 (Tex. 2002).

[8] *Southwestern Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 627 (Tex. 2004). For example, the standard for review of the legal sufficiency of the evidence to support a finding made by clear and convincing evidence is elevated. "Clear and convincing evidence" means the measure or degree of proof that will product in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." Tex. Civ. Prac. & Rem. Code § 41.001(2) (Vernon 2008). The reviewing court should look at the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. *Southwestern Bell Tel. Co. v. Garza*, 164 S.W.3d at 627 (Tex. 2004); *see also State v. K.E.W.*, 315 S.W.3d 16, 20 (Tex. 2010). Evidence that merely exceeds a scintilla is not legally sufficient when the burden of proof is clear and convincing. *Id.*

Title search: Standards for appellate review for sufficiency of the evidence in civil cases and criminal cases: When the worlds of money and liberty collide.

First appeared as part of the conference materials for the
21st Annual Conference on State and Federal Appeals session
"Standard of Review"