

# Strict Liability in Patent Proceedings

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*Actori incumbit probatio* is a general principle used in civil trial. The principle demands those who assert must prove and leave the burden of proof on the fault of the plaintiff, as we are using liability based on the fault principle. Nevertheless, patent law provides strict liability as a system used in its burden of proof, therefore the defendant needs to prove their innocence, and the fault will be the defendant's responsibility to prove. Reconsidering the Donald Black theory on law in the book and law in action in contrast, the commercial court judges are still using the common general burden of proof which places the burden on the plaintiff and focuses on liability based on fault in patent proceeding. In this case the law enforcer behaviour is against the rule. Whereas all the conduct that is against the law will affect the effectiveness of the law.

## Introduction

Patent law has given exclusivities on the matter of its exploitation and also in the proofing process in judicial settlement. The law acknowledges strict liability of patent proofing process, aside from the liability based on fault, that is usually used in the civil trial. In this civil trial, based on article 163 of civil procedural law, judges hold the passive principle which is different with the penal trial that uses the active principle.

Article 163 regulates the burden of proof, the question of who must prove the fact that is brought to court is, is it the defendant or the plaintiff? According to the article, those who assert must prove, and those who rebut must prove vis-a-vis. The plaintiff will have the burden to prove his claim, since he is the one who submitted the lawsuit. As for the defendant, he only needs proof as long as he rebutted the claim brought by the plaintiff. But if he admits the claim, he would not have to prove anything since it is something that is acknowledged by two parties, so, there is no need to prove. The concept of burden of proof which is using the liability based on fault that was used in civil trial, is slightly different with the strict liability concept. Strict liability puts the burden of proof on the defendant even though the plaintiff took the initial claim on the defendant. On other hand, the plaintiff will need to provide evidence of their damage or financial loss. This is a special rule that is not implemented in all civil trials. Why is strict liability used in a patent trial, and how does the judge implement strict liability? Or is it really implemented by the judge? How the inquiry process is actually carried out is the information that is needed to be revealed. Previous research does not place strict liability on

the patent process yet, earlier research in general focused on strict liability on protection and the environmental case (Imamulhadi, 2013). On that background, this is an interesting issue that needs to be discussed. We decided to use socio-legal research in finding information on strict liability effectiveness. Socio-legal research is an approach that integrates multiple disciplines in examining and investigating the law phenomenon (Irianto, 2017). This approach is used in the hope that this research will find not only the aspect of law but also another facet that brings influence to strict liability implementation.

## **Discussion**

### ***Civil proofing***

Proofing is a way to convince the judge of the facts, and it is also a process to reveal the truth throughout evidence that is brought to trial. In the ordinary civil suit, the proponent must persuade the judge that the facts are more probably true than not true (Bryant, 1944). The evidence which party calls must be more persuasive than that of his opponent, if he is to succeed (Carr and Beaumont, 1996). The party with the burden persuasion, must prove his case with a preponderance of evidence (James, 1983). Meaning, there must be more evidence to show the truth of the fact, than evidence against this proposition (James, 1983). Parties should be active in providing evidence to bring out the truth, and on the other hand, the judge will be the passive, one as it happens in the adversarial system (Thaman, 2015).

Procedural law and civil law recognise the documents, witness, party confession, oath, experts, and descente (local inspection). In 2008 government enacted the law of information and electronic transaction which was revised in 2016, in which the law gave broader scope of the evidence and accepted digital evidence in the proceedings. The party and the judge are bound to use only the evidence recognised by the law, and they also need to comply with the burden of proof, as clearly stated in article 163 of civil procedural law and article 1865 civil law: “those who assert and rebutted must prove. The party is only obliged to prove the asserted fact (actori incumbit probatio principle). While, in theory, there are things that do not need to be proved: first, the irrelevant and unrebutted fact; second, reconsidering the principle of *ius curia novit* defined as an understanding of the respective law by the judge, the law will be the judge of the subject matter, so the party does not need to prove it; third, *notoir feiten* of general knowledge, the fact that occurred in the proceedings.

Another principle in rule of evidence is *negative non sunt probanda*, negative proposition cannot be proof, meaning that negative argument is difficult to prove (Mertokusumo, 2006). To prove alibi of X is the most possible thing, rather than to prove X not doing something which refers to his fault. And the burden of proof lies on X, since he rebutted not to do a fault as it is guided by article 163 of civil procedural law. According to this law the plaintiff who submitted the lawsuit needs to prove their claim (Butarbutar, 2011) and the second chance goes to the defendant to prove their rejection (Fakhriah, 2017).

### ***Strict liability as part of civil liability***

Civil liability mainly focuses on damage that can be sued, caused by the injury. Various concepts of liability are acknowledged in law and each type will bring a different consequence on the matter of burden of proof<sup>12</sup>. Liability based on civil general principle is liability based on fault (1), liability existed when there is fault. Defined by the article 1365 civil law, this liability obliged people to pay injury to others caused by conduct against the law. Evidentiary risk prevails when the plaintiff cannot prove the fault, as it is a burden on him, meaning that he cannot have the injuries' payment.

On the other hand, liability without fault (strict liability), put the burden of proof on the defendant to prove his/her innocence, meaning that there is transfer burden from plaintiff to defendant. The shifting burden of proof will bring less obligation to the plaintiff to only prove his injury, and fault will be no longer his burden to prove (Agustina, 2003). The law of consumer protection and the law of environmental management and protection explicitly mention this concept of liability on its proceedings. The law refers to a shifting burden of proof and liability without fault in implementing strict liability (Fakhriah, 2017).

Strict liability demands immediate liability compliance without having to wait for the verdict to set the defendant guilty. Meanwhile insurance will cover the loss in the amount insured. That is why strict liability is also defined as limited liability (Imamulhadi, 2013). Article 88 of environmental management and protection stated that every person whose actions, efforts and / or activities use, produce, and/or manage toxic hazardous materials, that pose a serious threat to the environment, is solely responsible for damages that occur, without the need to prove the fault. From the article we can conclude that: (1) strict liability can be used for activities that are included to be abnormally dangerous activity (Sutoyo, 2011) (2) the plaintiff<sup>1</sup> does not need to prove the fault of the defendant in doing environmental damage, however the plaintiff is still burdened to prove the injury. Fault or negligence does not need to be proven because strict liability is not based on fault but rather on the injury/risk based liability (Nur and Prabowo, 2011).

### ***Strict liability on patent settlement***

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<sup>1</sup> Several types of liability can be found in reference i.e: (1) liability based on fault, (2) liability without fault (strict liability), (3) unlimited liability, as regulated in Warsaw convention and aviation law that giving aviation company to pay all the passenger losses of their belongings due to company negligence, (4) presumption of non-liability, also regulated in aviation law (article 4 of ministry regulation no 77 / 2011), passenger burden their own liability for belonging under their own supervision (5) presumption of liability. Basically, the type only underlines two burdens of proof whether to the plaintiff or the defendant, and from that point of view we can decide on liability based on fault and liability without fault.

In addition, strict liability vaguely is found in the Patent Law, so this concept should also be used in the settlement of patent cases. Article 145 of the law no 13/2016 on patent, is the basis of the strict liability concept in patent settlement. This article stated that “the burden of proof in patent settlement lies on defendant if:

- a. A new product is produced by patented process; or
- b. The product presumes to be produced by patented process, even though with sufficient proof, the patent holder cannot decide the process to produce the product.

The article stipulates that the defendant is given the burden of proof on new products, produced through the patent process, or on products that are presumed new from the results of the patent process. In the proceeding, the defendant can submit a copy of the patent certificate and initial evidence to prove his innocence, and the judge can order him to prove that the product did not use the patented process.

The use of strict liability in patent disputes as affirmed in Patent Law in practice, has not been applied by a judge in a commercial court. The judge still uses the principle of *actori incumbit probatio* in the examination of patent disputes. If the plaintiff argues something then the plaintiff must prove the same thing to the defendant *vice versa*<sup>2</sup>. Meaning that, in strict liability issue there is a contrast between what is in reality and in the regulations. At this level it is appropriate to use Donald Black's theory which states that there is always a gap between reality and the standard in rules, doctrine, justice, and the due process of law. There is always a gap between law in a book and law in action (Black, 1988).

Furthermore, the judge showed a constant, regular, and repetitive behaviour in using the principle of the *incumbit probatio*. The Judge always used this principle in civil evidence so this is affirmed by the Soerjono Soekanto theory, which states the law as a steady or regular attitude or behaviour (Soekanto, 1985). Judges are accustomed to apply the principle of *incumbit probatio* on civil evidence that they also use it in patent disputes, even though the law has set specific provisions.

A legal conduct is considered effective if the other party's behaviour is in accordance with the desired objectives, or if the other party obeys the law (Soekanto, 1985). The effectiveness of the law not only can be seen from the element of community obedience to the law, but also in law enforcement behaviour in performing the law. In our case, judges as law enforcement officers do not obey the law, by not implementing strict liability. In fact, if viewed from the purpose of the establishment of patent law to provide legal protection to inventors, it can be achieved if legal certainty immediately prevails, one way of which is by limiting the time period for the settlement of cases in court. In other words, efficiency in case resolution is one of the crucial things in achieving the objectives of patent law. If diseased with the application

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<sup>2</sup> Research interview with commercial court judges.



of strict liability, whose purpose is to immediately find a solution, then by not doing strict liability, it will be contrary to the purpose of the establishment of patent law, and on the other hand, can hinder the achievement of the law. It can also be concluded that the behaviour of law enforcement officers, who do not carry out strict liability, also makes patent law ineffective.

## **Conclusion**

The Patent Law has regulated the use of strict liability in proving patent disputes, however in reality the judge did not use the concept of strict liability in resolving patent disputes. The absence of strict liability in the resolution of patent disputes affects the achievement of the legal purpose of patent regulations. The success of achieving the patent law objectives is hampered because of the law enforcement officers (judges) behave in a way that is not in accordance with patent law. The behaviour of law enforcers who do not comply with regulations (by not implementing strict liability) makes the law ineffective.

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