4.02 Direct and Circumstantial Evidence Defined

(1) Direct evidence is evidence of a fact based on a witness's personal knowledge of that fact acquired by means of the witness's senses. Direct evidence may prove guilt of a charged offense or liability for a civil wrong if, standing alone, that evidence satisfies a jury that guilt of the offense has been proved beyond a reasonable doubt or that liability for a civil wrong has been proven by a preponderance of the evidence or other applicable burden of proof.

(2) Circumstantial evidence is direct evidence of a fact from which a person may reasonably infer the existence or nonexistence of another fact. Circumstantial evidence may prove guilt of a charged offense or liability for a civil wrong, if that evidence, while not directly establishing guilt of the offense or liability for a civil wrong, gives rise to an inference of guilt beyond a reasonable doubt or of liability for the civil wrong by a preponderance of the evidence or other applicable burden of proof.

(3) The law draws no distinction between circumstantial evidence and direct evidence in terms of weight or importance. Either type of evidence or a combination of both may be enough to meet the applicable burden of proof, depending on the facts of the case as determined by the finder of fact.

(4) In a criminal proceeding, a defendant's confession of guilt constitutes direct evidence. A defendant's admission, not amounting to a confession because it does not directly acknowledge guilt but includes inculpatory statements from which a jury may infer guilt, is circumstantial evidence.

Note

Subdivisions (1) and (2) are derived from CJI2d(NY) Evidence—Circumstantial Evidence and PJI 1:70 (General Instruction—Circumstantial Evidence). Those definitions summarize the law of New York, beginning with *People v Bretagna* (298 NY 323, 325-326 [1949]):

> "Evidence is direct and positive when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses. * * * Circumstantial evidence . . . never proves directly the fact in question. In other words, direct . . . evidence, as the term is commonly used, means statements by witnesses, directly probative of one or more of the principal . . . facts of the case, while circumstantial evidence puts before the tribunal facts which, alone or with others, are in some degree but indirectly, probative of one or more of those principal . . . facts, and from which one or more of those principal facts may properly be inferred" (*id.* [internal quotation marks omitted]; *see People v Hardy*, 26 NY3d 245, 251 [2015] ["This Court has described circumstantial evidence as evidence that never proves directly the fact in question. (*People v Bretagna*, 298 NY 323, 325 [1949]). By contrast . . . direct evidence . . . requires no inference to establish (a particular fact)" (internal quotation marks and citations omitted)]; *Schneider v Kings Hwy. Hosp. Ctr*., 67 NY2d 743, 744 [1986] ["To establish a prima facie case of negligence based wholly on circumstantial evidence, '(i)t is enough that (plaintiff) shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred.' The law does not require that plaintiff's proof 'positively exclude every other possible cause' of the accident but defendant's negligence. Rather, her proof must render those other causes sufficiently 'remote' or 'technical' to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (citations omitted)]; *Markel v Spencer*, 5 AD2d 400 [4th Dept 1958], *affd without op* 5 NY2d 958 [1959]).

In *Hardy*, the defendant was charged with larceny of a purse. A surveillance video inside a club showed the defendant positioning himself between the complainant and her purse; putting the purse underneath him; and, when the complainant left, "rifling through its contents" and walking away with the purse in hand (26 NY3d at 248). The surveillance video therefore was direct evidence, proving the actus reus, that is, the "taking" element, of larceny. That the "defendant offered the jury an alternative explanation of his behavior, one that was inconsistent with [the element of] larcenous intent, does not change the character of the evidence from direct to circumstantial" (*id*. at 251). As *Hardy* explained, "a particular piece of evidence is not required to be wholly dispositive of guilt in order to constitute direct evidence, so long as it proves directly a disputed fact without requiring an inference to be made. In other words, even if a particular item of evidence does not

conclusively require a guilty verdict, so long as the evidence proves directly a fact in question [in *Hardy*, the actus reus], the evidence is direct evidence of guilt" (*id.* at 248, 250-251; *e.g. People v Daddona*, 81 NY2d 990, 992 [1993] ["The criminal possession counts charged were amply supported by direct evidence: there was eyewitness testimony that defendant directed the stolen vehicles in and out of the driveway, thereby establishing, with direct evidence, that he was in constructive possession of the stolen vehicles, or that he was acting in concert with those in physical possession of the stolen vehicles"]; *People v Roldan*, 88 NY2d 826, 827 [1996] ["This case involves direct evidence . . . . Eyewitness testimony, if believed by the jury, established that defendant engaged in acts which directly proved that at the very least he acted as a lookout while the crime was being committed"]).

Perhaps the most important reason for distinguishing between direct and circumstantial evidence is that "a trial court must grant a defendant's request for a circumstantial evidence charge when the proof of the defendant's guilt rests solely on circumstantial evidence. By contrast, where there is both direct and circumstantial evidence of the defendant's guilt, such a charge need not be given" (*Hardy* at 249 [citations omitted]; *see People v Silva*, 69 NY2d 858, 859 [1987] [The complainant "was unable to make an identification of defendant and there was no direct evidence linking him to the robbery. Thus, . . . the case against defendant on the robbery counts was wholly circumstantial. It was, therefore, error for the court to refuse to give a circumstantial evidence charge"]).

Each subdivision refers to the burden of proof in a civil case by the terminology "preponderance of the evidence or other applicable burden of proof." The other applicable burdens of proof utilized in varying civil cases include "clear and convincing evidence" and "substantial evidence" (*see e.g.* Guide to NY Evid rule 3.01 [3] [c] and the note thereto).

Subdivision (3) is also derived from CJI2d(NY) Evidence—Circumstantial Evidence and PJI 1:70, which reflect the views expressed in *People* v *Benzinger* (36 NY2d 29, 32 [1974] [The reason for the rule on how to evaluate circumstantial evidence "is not that circumstantial evidence is thought to be weaker than direct evidence, since the reverse is frequently true. Rather, the rule draws attention to the fact that proof by circumstantial evidence may require careful reasoning by the trier of facts"]) and *People v Cleague* (22 NY2d 363, 367 [1968] [The rule on how to evaluate circumstantial evidence does not stem "from any distrust of circumstantial evidence or any vaunted favoring of direct evidence. The myth of innate superiority of direct testimonial evidence was exploded long ago. Indeed, circumstantial evidence is generally stronger, at least when it depends, as it often does, upon undisputed evidentiary facts about which human observers are less likely to err as a matter of accuracy or to distort as a matter of motivation, emotional shock, or external suggestion. On the other hand, direct evidence almost always, even in the instance of bystanders, is subject to one or more of these psychological infirmities. Hence, the occasional superior reliability of the evidentiary circumstances" (citation omitted)]).

Subdivision (4) is derived from *People v Bretagna* (298 NY 323, 326 [1949] ["a confession of guilt by a defendant in a criminal cause . . . is not circumstantial evidence" but an admission "not amounting to a confession because not directly acknowledging guilt, but including inculpatory acts from which a jury may or may not infer guilt, is circumstantial, not direct evidence"]) and *People v Hardy* (26 NY3d 245, 249-250 [2015]):

> "[The defendant's] statement to the prosecution witness that he did not have the purse but could get it was not direct evidence of his guilt. A defendant's statement is direct evidence only if it constitutes a relevant admission of guilt. . . .
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> "By contrast, where the defendant makes an admission that merely includ[es] inculpatory acts from which a jury may or may not infer guilt, the statement is circumstantial and not direct evidence. . . .
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> "Here, defendant's statement—that he did not have the purse but could get it—was not a direct admission of his guilt of larceny. Rather, defendant's statement was also consistent with an inference that although he did not steal the purse, he knew where the purse was located and thought he could obtain it. Inasmuch as his statement merely included inculpatory facts from which the jury may or may not have inferred guilt, his statement was circumstantial rather than direct evidence" (internal quotation marks and citations omitted).