Case Comment
Commentaire d'arrêt

The Two Forms of Legal Proof: The Third Standard of Proof and *F.H. v. McDougall*

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1. Introduction

F. H. v. McDougall[1] is one of a trilogy of judgments released by the Supreme Court of Canada on October 2, 2008, along with *R. v. H.S.B.*[2] and *R. v. R.E.M.*[3] All three cases involved allegations of sexual assault, and in all three cases the decisions of the British Columbia (B.C.) Court of Appeal were overturned and the decisions at trial restored. We write this article because we are concerned that the Court, while thinking it was only attacking the "variable" balance of probabilities standard in *McDougall*, may inadvertently have abrogated a third standard of proof and perhaps changed the test in *R. Oakes*,[4] making it easier for the Crown to justify a violation of the Canadian *Charter of Rights and Freedoms*.[5] For the purposes of the present discussion, the facts of the case are succinctly set out in the headnote of the Court's decision:

> From 1966 to 1974, [F.H.] was a resident of the Sechelt Indian Residential School in British Columbia, an institution operated by the Oblates of Mary Immaculate and funded by the Canadian government. [McDougall] was an Oblate Brother at the school and also the junior and intermediate boys' supervisor from 1965 to 1969. [F.H.] claimed to have been sexually assaulted by [McDougall] in the supervisors' washroom when he was approximately ten years of age. These assaults were alleged to have occurred when the children were lined up and brought, one by one, into the washroom to be inspected by the supervisors for cleanliness. [F.H.] told no one about the assaults until 2000, when he confided in his wife. He then commenced this action against the respondents. Despite inconsistencies in his testimony as to the frequency and gravity of the sexual assaults, the trial judge found that [F.H.] was a credible witness and concluded that he had been anally raped by[McDougall] on

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1 *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 [*McDougall* cited to S.C.R].

2 2008 SCC 52, [2008] 3 S.C.R. 32 [*H.S.B.*].

3 2008 SCC 51, [2008] 3 S.C.R. 3 [*R.E.M.*].

4 [1986] 1 S.C.R. 103 [*Oakes*].

5 Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

> four occasions during the 1968-69 school year. In addition, she found that [McDougall] had physically assaulted [F.H.] by strapping him on numerous occasions. A majority of the Court of Appeal overturned the decision with respect to the sexual assaults on the grounds that the trial judge had failed to consider the serious inconsistencies in [F.H.'s] testimony in determining whether the alleged sexual assaults had been proven to the standard of proof that was "commensurate with the allegation," and had failed to scrutinize the evidence in the manner required.[6]

Though *H.S.B.* and *R.E.M.* were criminal decisions and *McDougall* is a civil decision, all three cases importantly stand for the proposition that an appellate court must not just *say* it is deferring to a trial judge on findings of fact or credibility, it must actually *do so*. In all three cases, the Supreme Court of Canada restated what was, to us, an obvious and well-established legal principle: it is legally sufficient for a trial judge to recognize that credibility is a live issue in a trial, without giving extensive reasons on that issue. The Court commented:

> With respect, I cannot interpret the reasons of the majority of the Court of Appeal other than that it disagreed with the trial judge's credibility assessment of F.H. in light of the inconsistencies in his evidence and the lack of support from the surrounding circumstances. Assessing credibility is clearly in the bailiwick of the trial judge and thus heightened deference must be accorded to the trial judge on matters of credibility. As explained by Bastarache and Abella JJ. in *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17, at para. 20:
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> > Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in H.L., that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.[7]

This is simply a reflection of reality, in that a trial judge enjoys a unique position to see and hear witnesses. Logically, this means a court of appeal should not be allowed to substitute its own views on credibility by impugning a trial judge's reasons.

While we find the foregoing a useful restatement of the law which had been ignored by the Court of Appeal in these three cases, *McDougall* in our view does one thing, and one thing only: it holds that the third standard of proof is not to be used in Canada. This is the

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6 *McDougall*, *supra* note 1 at 42.

7 *Ibid*. at 68-69.

conclusion the Newfoundland and Labrador Court of Appeal reached when applying the Supreme Court's reasoning in a recent decision:

> Whether a different standard of proof applies to civil cases where morally blameworthy conduct is alleged, and exactly what that standard is, has been an issue before Canadian courts for a long time. Since this appeal was argued the matter has been resolved by the Supreme Court of Canada. In [*F. H.*] *v. McDougall*, 2008 SCC 53 (S.C.C.), Rothstein J. summarized the various standards and decided the approach that Canadian courts should now adopt. He wrote:
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> > [49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.
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> …
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> Acknowledging that [*F. H.*] *v. McDougall* was decided long after the trial judge made the decision under appeal before us, it must be indicated that his determination that "a claim of fraud requires proof beyond the normal civil standard of proof for negligence" is in error. To quote Rothstein J., in [*F. H.*] *v. McDougall*, "there is only one civil standard of proof at common law and that is proof on a balance of probabilities."[8]

Sinclair-Prowse J. of the B.C. Supreme Court recently noted the same point, without deciding the issue:

> In [*Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678 at para. 41] the Court held that rectification requires a higher standard of proof than the balance of probabilities – that it requires "convincing proof." This standard "may fall well short of the criminal standard, but which goes beyond the sort of proof that only reluctantly and with hesitation scrapes over the low end of the civil 'more probable than not' standard."
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> This may no longer be the standard of proof given the recent decision of the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53 that there is only one civil standard of proof and that standard is the balance of probabilities.
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> However, I find that I do not have to determine that issue, as I find that regardless of which standard was used, the evidence did not prove this claim.[9]

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8 *Dinn v. Snow*, 2008 NLCA 59, 67 C.C.L.I. (4th) 1 at 12 and 15.

9 *Taggart v. No. 236 Seabright Holdings Ltd.*, 2008 BCSC 1412, [2008] B.C.J.

In order to place in context, and properly understand what we suggest to be the effect of the Court's judgment in *McDougall*, it is useful to note that there are two different ways to think about proving something. One is the ordinary form of legal proof; the other is a special form of legal proof devised in the 1700s and applicable primarily in criminal cases. The two different forms of proof have been explained as follows:

> 1) Ordinary Proof: This form of proof is known as the balance of probabilities, which weighs two competing cases against one another and decides which is stronger.
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> 2) Proof of Guilt: This form of legal proof is utilized whenever the presumption of innocence applies to an action. Proof of guilt weighs one case against a fixed standard which is outside the case before the court. We stress that this standard is fixed, and does not vary with the circumstances. Within proof of guilt, there are two separate but related standards of proof:
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> a) Proof Beyond a Reasonable Doubt: This is commonly known as the criminal standard.
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> b) Clear and Convincing Evidence: Like proof beyond a reasonable doubt, this standard of proof weighs one case against a fixed standard which is external to the case before the court. This standard is called several things, but is often referred to as "clear and convincing evidence."[10]

These two standards of proof are subsets of the form of legal proof known as proof of guilt. The difference between the standards of proof beyond a reasonable doubt and proof by clear and convincing evidence is the "height" or "weight" of the external standard.

Over forty years ago, MacPherson J. of the Saskatchewan Court of Queen's Bench stated that the "issue of the degree of proof has been and probably always will be the subject of judicial dialectics."[11] The *McDougall* decision appears to have ended this conversation. Without explicit reference to it, the Supreme Court of Canada has effectively abrogated the clear and convincing evidence standard, which a unanimous Court of nine judges applied a mere five years earlier in *Doctor Q v. College of Physicians and Surgeons of British Columbia*, a

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No. 2004 at paras. 77-79 (QL).

[10] Stephen M. Wexler, "Legal Proof and Tort Law" (2007) 33 *Advocates' Q.* 296.

[11] *Miller v. College of Physicians and Surgeons of Saskatchewan*, 59 D.L.R. (2d) 736 at 739 (Sask. Q.B.) [*Miller*].

case we will discuss below.[12] While the Court undoubtedly has the authority to change common law rules, it is regrettable that the Court's attention in *McDougall* was directed solely at the "variable" balance of probabilities which comes from Lord Denning's decision in *Bater v. Bater*.[13] Rothstein J. correctly disavowed Lord Denning's opinion as articulating an illogical and improper standard of proof.[14] We will examine *Bater* in detail below.

While we wholeheartedly agree that linking ordinary legal proof to the seriousness of the allegations raised in a pleading is an erroneous concept as it implies that in less serious cases the evidence need not be scrutinized with care, we are concerned that by looking only at *Bater*, the Court's judgment may have the effect of weakening the presumption of innocence, and has resulted in the third standard of proof being abolished without a considered opinion on the issue by the Court.

Before moving into an analysis of the effect of *McDougall* and discussing the points raised above, it will be helpful for us to expand upon what we mean by ordinary proof and proof of guilt, and provide a general theory of legal proof.[15]

2. What is Legal Proof?

We mean two things by the words "legal proof." One we will call "ordinary legal proof." The other we call "proof of guilt." In ordinary legal proof, a trier of fact uses a comparative standard of proof. In proof of guilt, a fixed, external and abstract standard is utilized. This marks the difference between two fundamentally different ideas of what it means to prove something. Ordinary legal proof and proof of guilt are two different things. Proof of guilt is a result of the presumption of innocence and is only utilized when this doctrine applies. As such, it is naturally associated with criminal trials. But the line between ordinary legal proof and proof of guilt is not the same as the line between civil and criminal trials.[16] When an allegation of moral guilt is made in a

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12 2003 SCC 19, [2003] 1 S.C.R. 226 at 239 [*Doctor Q*].

13 [1950] 2 All E.R. 458 [*Bater*].

14 *McDougall*, supra note 1 at 239.

15 This general theory is first expounded in Wexler, *supra* note 10.

16 At the same time as it abolished an intermediate standard of proof, the House of Lords acknowledged that "There are some proceedings, though civil in form, whose nature is such that it is appropriate to apply the criminal standard of proof;" see *In Re B (Children)*, [2008] UKHL 35, [2008] 3 W.L.R. 1 at 22 [*In Re (B)* cited to W.L.R.].

civil trial the law has been that a weakened presumption of innocence applies and proof of guilt is used, not ordinary legal proof:

> That there is, in the law of evidence, a legal presumption against the imputation of crime, requiring, before crime can be held to be established, proof of a more cogent character than in ordinary cases where no such imputation is made, does not appear to admit of doubt. In criminal cases this rule is often expressed by saying that the crime imputed must be proved to the exclusion of reasonable doubt. *There is authority for the proposition that the same presumption of innocence from crime should be applied with equal strictness in civil as well as in criminal cases* (Taylor, Evidence, 11th ed., vol. 1, par. 112, and cases referred to).[17]

The House of Lords and academic commentators have also recognized that the presumption of innocence applies in civil actions where allegations of moral wrongdoing are pled:

> In addition, the ordinary rule is that a man is not held guilty of fault unless fault is established and found by the Court. This rule, which is sometimes described as the presumption of innocence, is no doubt peculiarly important in criminal cases or matters, but it is also true in civil disputes.[18]

This makes perfect sense to us. When dealing with allegations of morally-blameworthy conduct in a civil matter, such as the sexual assaults in the *McDougall* case, it is right that the presumption of innocence should apply. Persons found liable for such conduct may not have their liberty placed at stake, but they will likely face social ostracism and other consequences not normally faced by a tortfeasor who simply behaved "negligently."[19]

Just as some issues in civil cases are *quasi*-criminal, attracting the presumption of innocence and the use of proof of guilt, some issues in criminal cases are *quasi*-civil and proof of guilt is not utilized as a form of legal proof. When an issue that does not involve an allegation of fault or guilt arises in a criminal trial, the presumption of innocence does not

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17 *London Life Ins. Co. v. Trustee of the Property of Lang Shirt Co. Ltd.*, [1929] S.C.R. 117 at 125 [emphasis added].

18 *Constantine Line v. Imperial Smelting Corporation Ltd.*, [1942] A.C. 154 at 192; see also J.H. Buzzard, Richard May and Michael N. Howard, eds., *Phipson on Evidence*, 12th ed. (London: Sweet & Maxwell, 1976) at 114: "In civil cases, too, the so-called *presumption of innocence* throws the burden of proof upon the party alleging an unlawful act."

19 This practical reality may explain why courts have always required that fraud be "distinctly alleged and as distinctly proved;" see *Davy v. Garrett*, [1877] Ch. D. Vol. 7 473 at 489.

apply and ordinary legal proof is used, rather than proof of guilt. A criminal defendant who claims that the police entrapped him or her into committing the crime has the burden of convincing the judge or jury of that fact on a balance of the probabilities:

> I have come to the conclusion that it is not inconsistent with the requirement that the Crown prove the guilt of the accused beyond a reasonable doubt to place the onus on the accused to prove on a balance of the probabilities that the conduct of the state is an abuse of process because of entrapment.[20]

Entrapment is not seen as an issue to which the presumption of innocence applies:

> [T]he guilt or innocence of the accused is not in issue. The accused has done nothing that entitles him or her to an acquittal; the Crown has engaged in conduct, however, that disentitles it to a conviction.[21]

Proof of guilt is about "truth" as this idea was reshaped in the seventeenth century as part of the revolution in science, which forced humans to accept that we could make the claim to know facts, even though we did not know them certainly.[22] Proof of guilt is thus about moral certainty. Ordinary legal proof is not. Proof of guilt is a method used for finding what we call the "truth." Ordinary legal proof is merely a means to make a decision. Whether proof beyond a reasonable doubt or proof by clear and convincing evidence is used, when a juror finds that a fact has been proven to that standard, it makes sense to say the juror has sifted out "the truth." People might disagree with a jury's verdict of guilty, but no one could disagree that each juror who voted to find someone guilty should be able to say, "My conscience is satisfied. The facts alleged are true."

A major difference between ordinary legal proof and proof of guilt is that in an ordinary legal situation which does not attract the ideological presumption of innocence, "the truth" is not involved. It may seem surprising, but when applying ordinary legal proof, a juror's conscience should be satisfied if he or she was impartial and turned his or her mind seriously to the evidence. After that it is not a matter of "truth" or "knowledge." It is simply a matter of which side was more believable. As Sir Richard Eggleston notes:

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20 *R. v. Mack*, [1988] 2 S.C.R. 903 at 975, 44 C.C.C. (3d) 513.

21 *Ibid*.

22 Barbara Shapiro, *Certainty and Predictability in Seventeenth Century England*: *A Study of the Relationships Between Natural Science*, *Religion*, *History*, *Law and Literature* (Princeton: Princeton University Press, 1983).

> There are of course cases in which there is a direct conflict of evidence and the task of the tribunal is to decide which of the witnesses are telling the truth. In such a case, to express a preference for one story rather than another is often put in terms of "believing" the witnesses who tell that story, even if all the tribunal has done is to conclude that those witnesses are more probably telling the truth.[23]

If a juror happens to think one side's case is so much stronger than the other's that he or she is truly convinced of the facts, that is an added bonus, but it is not required for ordinary legal proof. To put the matter numerically, a plaintiff is entitled to win if the relationship between the plaintiff's case and the defendant's case is 98/2, 75/25, 51/49, or even 50.0001/49.9999.

When ordinary legal proof is involved and a trier of fact applies the standard of the balance of the probabilities, he or she judges two cases against each other and decides which of the two to accept. When the presumption of innocence is in play, proof of guilt is utilized and the trier of fact applies the standard of beyond a reasonable doubt or clear and convincing evidence. In doing so, he or she judges one case only and decides whether to accept it by measuring it against a fixed, abstract, external standard. Deciding whether a fact has been proven on a balance of probabilities is like deciding which of two people is taller. Deciding whether a fact has been proven where proof of guilt is involved is like deciding whether a person is more than six feet tall.

3. The Presumption of Innocence

As we have shown, *proof of guilt is only used when the presumption of innocence applies*. As a corollary, ordinary legal proof is inapplicable when the presumption of innocence applies to a given fact pattern. Lord Denning's decision in *Bater* to speak of a variable balance of probabilities dependent on the allegations raised in a civil action was wrong, and the Court in *McDougall* rightly rejected his reasoning, though by doing so it abolished the third standard of proof without even acknowledging its existence. In *Bater*, Lord Denning correctly noted that the "degree of probabilities" required to discharge a burden in a civil case is not so high as is required in a criminal contest. Where his Lordship fell into error is where he stated that reasonable doubt was "simply that degree of doubt which would prevent a reasonable and just man from coming to a conclusion… [w]hen this is realized, the phrase

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[23] *Evidence*, *Proof*, *and Probability*, 2nd ed. (London: Weidenfeld & Nicolson, 1983) at 130.

'reasonable doubt' can be used just as aptly in a civil case… as in a criminal one."[24]

This is clearly wrong. The phrase reasonable doubt cannot be used just as aptly in a civil case as in a criminal one. As the Supreme Court of Canada noted in *Oakes*,[25] the phrase "reasonable doubt" is inextricably linked to the presumption of innocence, which has no applicability in an *ordinary* civil action. The presumption of innocence is in large part an ideological construct, and applies in all criminal cases, even where the consequences may be minor when compared with a civil suit which could cost a defendant his or her home and accumulated life savings. As the Court noted in *Oakes*:

> The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct… This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.[26]

For this same reason, the Court in *McDougall* was also correct to reject Southin J.A.'s suggestion in the Court below that Cory J.'s rejection in *R. v. W.(D.)*[27] of the "either/or" approach to evaluating evidence of the Crown and the accused also applied to civil cases. As the Court noted, the *W.(D.)* framework essentially *is* the "beyond a reasonable doubt" standard of proof:

> These charges to the jury are not sacrosanct but were merely put in place as guideposts to the meaning of reasonable doubt, as recently explained by Binnie J. in R. v. J.H.S., [2008] 2 S.C.R. 152, 2008 SCC 30, at paras. 9 and 13:
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> > . . . Essentially, W. (D.) simply unpacks for the benefit of the lay jury what reasonable doubt means in the context of evaluating conflicting testimonial accounts. It alerts the jury to the "credibility contest" error. It teaches that trial judges are required to impress on the jury that the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt.[28]

The presumption of innocence *does* apply in civil cases where it is alleged that a person committed an immoral or illegal act, as we noted above. Because the presumption of innocence is weaker in a civil

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24 *Bater*, *supra* note 13 at 459.
25 *Supra* note 4.
26 *Ibid*. at 119-20.
27 [1991] 1 S.C.R. 742 [*W.(D.)*].
28 *McDougall*, *supra* note 1 at 73.

setting, however, that relative weakness is manifested through a second abstract external standard against which proof is judged, which we call "clear and convincing evidence."

4. Clear and Convincing Evidence: The Third Standard of Proof

Before *McDougall*, in a civil case where one of the parties alleged that the other party had done something criminal or morally blameworthy, the law was that a third standard of proof applied to that allegation. Though this third standard of proof has generally been described as being higher than the balance of the probabilities and lower than proof beyond a reasonable doubt, it is a fixed, external, abstract standard, and is thus much more closely related to proof beyond a reasonable doubt. The same thing is true of the movement of the burden of proof. The presumption of innocence makes us reluctant to say that a person who is accused of doing something morally wrong has to establish his or her innocence. We are prepared to shift the evidentiary burden of proof to the defendant, but not the ultimate burden of proof. Accordingly, the third standard of proof was most often used when the defendant had the burden of proof, such as when an insurance company alleged fraud, but it could also apply to plaintiffs. Thus, for example, in divorce proceedings it used to be said that the plaintiff had to prove adultery upon a higher standard of proof.[29]

There is no universal formulation of the third standard of proof. In *Jory v. College of Physicians and Surgeons of British Columbia*, McLachlin J. had occasion to consider allegations concerning a doctor accused of having sexual relations with his patient. She deemed these allegations to be of "infamous conduct," and said:

> The standard of proof required in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt, but it is something more than the bare balance of probabilities. The authorities establish that a case against a professional person on a disciplinary hearing must be proven by a fair and reasonable preponderance of credible evidence. The evidence must be sufficiently cogent to make it safe to uphold the findings with all the consequences for a professional person's career and status in the community.[30]

Jory was preceded by a decision of the Saskatchewan Court of Queen's Bench, where after a review of the relevant Canadian authorities, MacPherson J. held where a medical practitioner is accused of making indecent and improper advances to a female patient in the

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29 *Bastable v. Bastable and Saunders*, [1968] 3 All E.R. 701 at 704 (C.A.).

30 [1985] B.C.J. No. 320 (B.C.S.C.) (QL) at para. 14.

course of a physical examination, "the proof of guilt of the doctor must be clear and convincing."[31]

McLachlin J. wrote the judgment of the Supreme Court in *Doctor Q*, another case involving an allegedly immoral doctor. The Court's decision referred to the earlier decision in *Jory*, and clearly accepted the existence of the third standard of proof:

> The standard of clear and cogent evidence does not permit the reviewing judge to enter into a re-evaluation of the evidence. Indeed, *Jory*, *supra*, upon which the reviewing judge relied, emphasized that findings of fact or credibility are generally due considerable deference (paras. 12-13). The requirement for "clear and cogent evidence" is a matter relating to the standard of proof employed at the Committee level, ensuring that the Committee is alive to the gravity of the consequences of their decision. It is a legal standard that the administrative decision-maker must apply to the evidence in order to determine the outcome of the case. It does not instruct a reviewing court on how to scrutinize the decision of the administrative decision-maker. This is solely a question of standard of review, to be resolved by applying the pragmatic and functional approach. [32]

As noted, the third standard of proof was lower than beyond a reasonable doubt and was often described in the cases as "clear and convincing evidence."[33] It can have other names as well, and was used when a grievance was brought against an employer for an unjust dismissal and the employer alleged in reply that the worker was fired because he or she was guilty of criminal conduct:

> In discipline cases, the onus is on the [employer] to prove that it had just and reasonable cause to discipline an employee… [W]hile it is not appropriate to require management to meet the burden of proof imposed in a criminal prosecution, i.e. beyond a reasonable doubt, at the same time, there should be some difference on the standard of proof necessary to show cause for alleged misconduct which might have involved a criminal offence as opposed to other grounds for industrial discipline… [T]he company must prove these allegations by clear and convincing evidence.[34]

Not all courts have accepted the existence of the third standard.[35] However, the third standard of proof was not unique to Canadian jurisprudence.

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31 *Miller*, *supra* note 11 at 741.

32 *Doctor Q*, *supra* note 12 at 235.

33 *U.S. v. Fatico*, 458 F. Supp. 388 at 404 (E.D.N.Y. 1978).

34 *Canex Placer Ltd. v. CAIMAW*, *Loc. 17 (Re)* (1978), 18 L.A.C. (2d) 130 at 133-35 (Weiler).

35 On this point, see *Dingwall v. J Wharton (Shipping) Ltd*, [1961] 2 Lloyds

Writing for the United States Supreme Court, Burger C.J. recognized the existence and validity of the third standard of proof. In the context of civil commitment proceedings concerning a person who was alleged to be emotionally disturbed, the Chief Justice made the following general remarks:

> Generally speaking, the evolution of this area of the law [standards of proof] has produced across a continuum three standards or levels of proof for different types of cases… The intermediate standard, which usually employs some combination of the words "clear," "cogent," "unequivocal," and "convincing," is less commonly used, but nonetheless "is no stranger to the civil law"… One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant.[36]

The Court cited the following rationale for the third standard of proof:

> Nonetheless, even if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a "standard of proof is more than an empty semantic exercise." In cases involving individual rights, whether criminal or civil, "[t]he standard of proof [at a minimum] reflects the value society places on individual liberty."[37]

In a more recent decision, Chief Judge Posner of the United States Court of Appeals for the Seventh Circuit pointed out similar concerns. In *United States of America v. Rodriguez*,[38] it was found on the balance of probabilities at a sentencing hearing that Ms. Rodriguez had sold more than a stipulated amount of marijuana, which triggered a mandatory sentence of life imprisonment. On appeal, the government did not claim to have established that the defendant had sold the stipulated amount by clear and convincing evidence or beyond a reasonable doubt. As the Court noted, "[T]he jurors were actually rather troubled by the issue of guilt – enough so that the judge had to give an Allen-type charge to blast a verdict out of them."[39] A rehearing *en banc*

Rep. 213 at 216. In response to the argument that a long delay in making a claim or commencing proceedings gave rise to a standard of proof higher than a balance of probability, Lord Tucker stated that "with all respect to those Judges who have from time to time used expressions of this kind I am quite unable to accede to the proposition that there is some intermediate onus between that which is required in criminal cases and the balance of probability which is sufficient in timeous civil actions."

36 *Addington v. Texas*, 441 US 418 at 423-24, 99 S.Ct. 1804 (1979) [citations omitted].

37 *Ibid*. at 425[citations omitted].

38 73 F.3d 161 (1996)[citations omitted].

39 *Ibid*. at 162.

was denied, but Posner C.J. in dissent stated the following, which is of importance for the present purposes:

> It might be argued that the difference between the preponderance standard and the standard of clear and convincing evidence is too gossamer to change the outcome in any actual case. I doubt that. I agree that fine distinctions between standards of proof or of appellate review have little significance in practice… But the difference between the standard of proof by a preponderance of the evidence, a standard that in this case permitted the judge to send the defendant away for life if he thought the odds 51-49 in favor of the defendant's having sold the 1,000 kilograms, and proof beyond a reasonable doubt, is so large that there is room for an intermediate standard that can be practically, not merely conceptually, distinguished from the extremes.[40]

In our view, these remarks are consistent with the law of Canada prior to the *McDougall* decision, and explain why proof of guilt should be the applicable standard whenever the presumption of innocence applies to an action.

5. A Variable Standard?

As noted above, Rothstein J.'s attack in *McDougall* was directed to the variable balance of probabilities, which earlier cases had provided should be "commensurate with the occasion." As he said:

> To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.[41]

Prior to *McDougall*, some commentators had resisted the idea that there is a third standard of proof, and instead, referred to the third standard as if it was simply a "variation" on ordinary legal proof:

> …the balance of the probabilities is a variable rather than a precise formula and one which will change with the circumstances of the case. On this view, the more serious or reprehensible the alleged misconduct, the more stringent the standard of proof that is required to be satisfied.[42]

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40 *Ibid*. at 163.

41 *McDougall*, *supra* note 1 at 60.

42 David M. Beatty and Donald J.M. Brown Q.C., *Canadian Labour Arbitration*, 2nd ed., (Aurora: Canada Law Book Ltd., 1984) at para. 7.2500.

> The notion of a 3rd and intermediate standard of proof lying between the standards required in criminal and civil cases has not found favour in the Courts.[43]

To say that the balance of the probabilities is a variable rather than a precise standard is sometimes taken to imply that the standards of proof lie on a continuum. Thus, Lord Denning said:

> It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond a reasonable doubt, but there may be degrees of proof within that standard… So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees within that standard.[44]

It is correct to say that the more serious the outcome, the more convinced a judge or jury should have to be before ordering that outcome. This is a simple matter of common sense, but there are no degrees of proof within either the criminal standard or the civil standard. To speak about either standard of proof as if it varied according to the seriousness of the case is simply wrong. We are in complete agreement with the *McDougall* Court on this point.

While common sense tells us that some trials are more serious than others, the law cannot admit this. All cases must be treated as equal. The law cannot imply that one civil case is more or less "serious" than another, unless the presumption of innocence applies. Can a judge or jury be cavalier in less serious cases? While a suit may be of little importance to society generally, it may be of great importance to one or both litigants. To vary the burden of proof on the purported seriousness of the case would require an infinite number of gradations in the balance of the probabilities. To specify those gradations would be an impossible task, particularly given the difficulty of assessing the seriousness or importance of a case before evidence has been adduced, and the fact that cases may be of differing importance even to the parties to a particular piece of litigation as where an impecunious litigant brings a suit for a few hundred dollars against a large corporate litigant.

We refer back to the comments on credibility we made at the outset of this article. Those who say the standard of proof varies from case to case really mean the onerousness of the burden of proof varies from

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43 Adrian Keane, *The Modern Law of Evidence*, 7th ed., (Oxford: Oxford University Press, 2008) at 104.

44 *Bater*, *supra* note 13 at *459*.

case to case. As noted, this is nothing but a matter of common sense. It is harder to prove some facts than others, but this is not because the standard of proof varies. Some assertions are simply more credible than others, as are some denials. This is what we mean when we say "that is a likely story." The *McDougall* Court appreciated this, and cited the following example given by Baroness Hale of Richmond:

> Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.[45]

Though we concede the obvious point that some facts are easier to prove than others, the balance of the probabilities does not vary based on the allegations raised in a civil action. The balance of the probabilities is nothing more than a technique of thinking, which requires the party who bears the burden of proof on a point to convince the trier of fact that their story is more credible than the opponent's position. It cannot and does not vary, as it is essential to law. It is rational and means there can be no undecidable cases, as the legal status quo does not move unless the party who has the burden of proof convinces the judge or jury their case is stronger. If this onus is not discharged the other party succeeds.[46]

6. An Unintended Consequence?

In attacking the variable standard of proof, the Court in *McDougall* failed to mention or even tacitly acknowledge that the third standard of proof existed, focusing its attack entirely upon the variable balance of the probabilities standard. None of the cases on proof of guilt cited in this article appear in the Court's reasons. It would appear that the jurisprudence and commentary surrounding the "clear and convincing

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45 *In re B*, *supra* note 16 at 23, cited in *McDougall*, supra note 1 at 60.

46 In *Rhesa Shipping Co. SA v. Edmunds*, [1985] 2 All E.R. 712 at 718 (H.L.), Lord Brandon expressed this idea as follows:

> [Where a judge is unable to decide which party should prevail, the principle of the burden of proof decides which party is to prevail]; …the judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.

evidence standard" were not argued before the Court, or were ignored in the Court's reasons. We do not quarrel with the Court's ability to change the common law rules surrounding the standard of proof. We are of the opinion, however, that absent a considered judgment on the merits of doing so, it is dangerous for the Court to abrogate longstanding common law principles. Having said this, it is clear that the Court has decided that there is no presumption of innocence in a civil action even though their earlier jurisprudence had stated the contrary. The only authority cited on this point by the Court was a leading text on evidence:

> By contrast, in civil cases, there is no presumption of innocence. As explained by J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 154:
>
> > Since society is indifferent to whether the plaintiff or the defendant wins a particular civil suit, it is unnecessary to protect against an erroneous result by requiring a standard of proof higher than a balance of probabilities.
>
> It is true that there may be serious consequences to a finding of liability in a civil case that continue past the end of the case. However, the civil case does not involve the government's power to penalize or take away the liberty of the individual.[47]

From this, and the following statement, it seems clear that proof of guilt and the standard of clear and convincing evidence are no longer to be used in a Canadian civil courtroom:

> An intermediate standard of proof presents practical problems. As expressed by Rothstein, Centa and Adams, at pp. 466-67:
>
> > As well, suggesting that the standard of proof is "higher" than the "mere balance of probabilities" inevitably leads one to inquire: what percentage of probability must be met? This is unhelpful because while the concept of "51 percent probability," or "more likely than not" can be understood by decisionmakers, the concept of 60 percent or 70 percent probability cannot.[48]

This last statement seems to us quite unfortunate. Though it coincides with our argument against recognizing a variable standard of proof on a preponderance of the probabilities, it completely ignores the reality that the third standard of proof is one of the two forms of proof of guilt, and is therefore *proof judged against an external standard*. Concerns about the number being 60, 70, 80, or 82.35% are ill-founded. This is

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47 *McDougall*, *supra* note 1 at 59.

48 *Ibid*.

because there is an external standard against which the case is weighed. The exact statement of the two abstract standards is difficult. The seventeenth-century standard of proof beyond a reasonable doubt has become a hallowed phrase in law, though the Court still struggles to provide a definitive definition of the term.[49] Similarly, clear and convincing evidence is convenient shorthand for an important concept, nothing more.

Quite aside from the presumption of innocence in civil actions being weakened (or, as the Court says in *McDougall*, never having existed at all), we express concern that the presumption of innocence in general, and the *Oakes* test in particular may have been weakened by *McDougall*.

As the Court noted in *McDougall*, the *Oakes* test relies upon the variable balance of the probabilities. As Rothstein J. stated:

> In the constitutional context, Dickson C.J. adopted the *Bater* approach in *R. v. Oakes*, [1986] 1 S.C.R. 103. In his view a "very high degree of probability" required that the evidence be cogent and persuasive and make clear the consequences of the decision one way or the other. He wrote at p. 138:
>
> > Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion." Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit.[50]

Rothstein J. then stated that the *Bater* approach utilized by Dickson C.J.C. in *Oakes* is inapplicable to Canadian jurisprudence, and that "it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities."[51] We are unsure what exactly Rothstein J. meant by this comment. Has the Court overruled the standard of proof to be applied to constitutional questions? Or is "common law" limited to civil law suits between private litigants, mandating a different standard of proof for constitutional questions?

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49 See e.g. *R. v. Lifchus*, [1997] 3 S.C.R. 320, 118 C.C.C. (3d) 1.

50 *McDougall*, *supra* note 1 at 53 [emphasis added].

51 *Ibid*. at 58.

We agree that Dickson C.J.C. was wrong to utilize Lord Denning's variable balance of the probabilities. Dickson C.J.C. also appeared, however, to be obliquely referring to the third standard of proof when he utilized the words "cogent and persuasive" in the passage quoted by Rothstein J. above. Before *Oakes*, courts spoke of the significant burden imposed upon a party who sought to justify limiting rights guaranteed by the *Charter*.[52] The Supreme Court itself has noted the importance of imposing a stringent onus and a strict burden of proof upon a government which relies upon section 1 of the *Charter*:

> The question of the standards which the Court should use in applying s. 1 is, without a doubt, a question of enormous significance for the operation of the *Charter*. If too low a threshold is set, the courts run the risk of emasculating the *Charter*. If too high a threshold is set, the courts run the risk of unjustifiably restricting government action. It is not a task to be entered upon lightly.[53]

While we take no position on this issue, we note that Wilson J.'s comments can perhaps be construed as supportive of applying the standard of clear and convincing evidence to section 1, the middle ground between the "low threshold" of the balance of the probabilities and the "high threshold" of proof beyond a reasonable doubt.

The implications of *McDougall* are not entirely clear to us. In attempting to add certainty to the previously confused jurisprudence surrounding the "variable" balance of probabilities, it appears that the Court has indirectly abolished the third standard of proof in civil actions where allegations of moral fault arise, and may by necessary implication have weakened the *Oakes* test and eased the government's burden of proof to justify *Charter* violations. This question will likely be litigated another day.

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52 *Re Southam Inc. and The Queen (No. 1)*(1983), 146 D.L.R. (3d) 408 at 424 (Ont.C.A.).

53 *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422 at 217 S.C.R., per Wilson J.