A METAPHOR FOR A PROOF[1] — OF EVIDENCE IN MATRIMONIAL CAUSES

By FRANK BATES*

> 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 .... civil actions.[2]

There can be no doubt that the self-satisfaction which is characteristic of Australia as a nation has spread to her attitude towards the law, particularly her own.[3] But, in some respects at least, this complacency is perfectly justified when one considers the solutions which she has adopted to problems which are still bedevilling lawyers in both New Zealand and England. Almost inevitably, one such is the 'annual blister'[4] of standard of proof in matrimonial causes. By s.96 of the Matrimonial Causes Act 1959-1966, which provides that any matter shall be regarded as proved if it is established to the reasonable satisfaction of the court, the Australians appear to have settled the matter,[5] thus showing a healthy independence of mind. Close relations between England and other Commonwealth countries are, in political terms, entirely desirable, but, in legal terms, the effect of such a link may be rather less advantageous. In neither England nor New Zealand can the law relating to the standard of proof to be employed in matrimonial causes be said to be in a happy state and, furthermore, the confusion in New Zealand may be readily attributed to the courts' excessive willingness to follow the latest English decision, however problematical that decision might be. The cases on this particular topic too, provide a fascinating example of what might be described as the 'judicial euphemism', by pointing out the difference between what the courts actually *are* doing and what they *say* they are

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1 'The folly of mistaking a paradox for a discovery, a metaphor for a proof, a torrent of verbiage for a spring of capital truths, and oneself for an oracle is born in us.' Paul Valéry, *Introduction to the Method of Leonardo da Vinci* 1895.

2 Lord Tucker in *Dingwall* v. *F. Wharton (Shipping) Ltd.* [1961] 2 Lloyds Rep. 213 at p. 216.

3 See, for example, the preface to Toose, Watson and Benjafield, *Australian Divorce Law and Practice*.

4 Originally, of course, 'marriage with deceased wife's sister' *viz*: W. S. Gilbert, *Iolanthe*, Act I.

5 For a history of the Australian legislation see *Cross on Evidence* (Aust. ed.) at p. 117. Toose, Watson and Benjafield (*op. cit.* p. 565) state that it may be presumed that the section was enacted to resolve the conflict of judicial opinion between the High Court of Australia's decision in *Briginshaw* v. *Briginshaw* (1938) 60 C.L.R. 336 and the English Court of Appeal's decision in *Ginesi* v. *Ginesi* [1948] P. 179. In the case of *Dewer* v. *Dewer* [1968] V.R. 470, McInerney J. described s.96 as a legislative adoption of the rule in *Briginshaw*.

doing. It is these aspects of the problem which justify the present writer's adding to the volume of writing on an already fairly inflated subject.[6]

The English law, prior to 1948, was characterised by the absence of any real decision on the matter. There were, however, a succession of confusing and conflicting *dicta*, the best known of which was that of Sir William Scott in *Loveden* v. *Loveden*,[7] who said that the circumstances must be such as, '... would lead the guarded discretion of a reasonable and just man to the conclusion'. That a directly conflicting view was taken by other judges may be seen from the remarks of Lord Merriman in *Churchman* v. *Churchman*[8] who was of the opinion that connivance, at any rate, must be proved with the same strictness of proof as was required in criminal cases. On the other hand, New Zealand, as early as 1902, had the benefit of a decision of the Court of Appeal, albeit one which propounded a test castigated by Professor Inglis as 'too vague'.[9] In *Hall* v. *Hall*,[10] the three judges expressed themselves in terms which showed that they regarded a high standard of proof as requisite. Edwards J.[11] considered the rule to be '... that the evidence must be such as is consistent only with adultery having been committed'. Williams J. stated[12] that mere suspicion was insufficient and that, '... the evidence must be incompatible with innocence' and Stout C. J. took the view[13] that, '... there must be evidence which goes far enough to show that guilt must be inferred'. Accordingly, on the particular facts in *Hall*, the court found that adultery had not been proved. The Court of Appeal in *Webster* v. *Webster*[14] distinguished *Hall* on the facts and Callan J., in delivering the judgment of the court, considered that tests which had been enunciated in *Hall* were still relevant. The essential difference between *Hall* and *Webster* was concerned with evidence: in the former case the husband had, on various occasions, taken his housekeeper to theatres and other entertainments. It is also interesting to note that in *Webster* it was argued[15] for the husband that the standard of proof to be applied in cases of adultery was higher than in other civil cases, because of the change of status which was likely to be involved, but not so high as in a criminal case. The relevance of these two cases today is likely to be slight, not because of any inherent vagueness, but because of the different terminology employed. The fact that the words used to describe the standard of proof have changed does not of course mean that the *actual* test is any the less imprecise.

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6 See, for example: Coutts, 'The Standard of Proof of Adultery' (1949) 65 *L.Q.R.* 220, 'Standards of Proof in the Divorce Court' (1951) 14 *M.L.R.* 411, Fridman, 'Standards of Proof' (1955) 33 *Can. B.R.* 665.
7 (1810) 2 Hag. Con. 1 at p. 3.
8 [1945] P. 44 at p. 51. See also *Rix* v. *Rix* (1777) 3 Hag. Con. 74; *U.* v. *J.* (1867) L.R. 1 P. & D. 460; *C.* v. *C.* [1921] P. 399; *Statham* v. *Statham* [1929] P. 131; *D.B.* v. *N.B.* [1935] P. 80.
9 *Family Law* (2nd ed.) at p. 101.
10 (1902) 21 N.Z.L.R. 251.
11 At p. 263.
12 At p. 262.
13 At p. 261.
14 [1945] N.Z.L.R. 537.
15 At p. 538.

In 1948 the English Court of Appeal loosed upon an unsuspecting (and perhaps undeserving) Commonwealth the decision in *Ginesi* v. *Ginesi*.[16] Whatever else *Ginesi* was or was not, it did provide a simple and logically coherent test, free from the 'double-think' which was to become such a feature of later English cases. It was all the more regrettable, therefore, that it was based on entirely false premises. The Court of Appeal came to the conclusion that the relevant standard was proof beyond reasonable doubt. Tucker L. J. discussed[17] such relevant authorities as there were, including Sanchez's *Disputationem* of 1626 and Oughton's *Ordo Judicorum*, and stated,

> Adultery was regarded by the ecclesiastical courts as a quasi-criminal offence, and must be proved with the same degree of strictness as is required in a criminal case. That means that it must be proved beyond reasonable doubt.

Vaisey J. treated it[18] as axiomatic that adultery and offences properly described as criminal were closely similar. He went on to say that

> The finding that the offence has been committed may be far more serious in its consequences both to the individual and society than conviction of a crime.

The close analogy which the court drew with the Criminal Law was clearly misleading, particularly in view of the well established rule in *Mordaunt* v. *Moncrieff*[19] which stated that the precedents of the criminal law had no place in the civil sphere of the divorce court. In addition, as Professor Coutts has pointed out,[20] there was no discussion of the wider policy issues whatever. Almost immediately the decision in *Ginesi* was adopted in New Zealand by Fair J. in the case of *Andrews* v. *Andrews*.[21] The learned judge did not consider the previous authorities in any detail, as a very considerable portion of his judgment was spent discussing the value of evidence provided by private inquiry agents. He mentioned *Ross* v. *Ross*[22] and *Webster* by way of introduction, but relied almost entirely on the *ratio* of *Ginesi*, albeit with a significantly important difference. Fair J. stated[23] that,

> In view of the serious consequences to both parties concerned, the same strict proof is required upon charges of adultery as in criminal cases. The commission of the offence must be proved by establishing it beyond any reasonable doubt to the satisfaction of the court.

Thus it seems right to say that Fair J. did not base his decision on any analogy with the criminal law as such but on the wider issues involved. In *Andrews* the petitioner husband and his wife lived apart, and during a period of something over three months she and the co-respondent had, on several occasions, met in the evening a short distance from the board-

16 *Supra*. n. 5.
17 At p. 181.
18 At p. 186.
19 (1874) L.R. 2 Sc. & D. 374.
20 (1949) 65 *L.Q.R.* 220 at p. 229.
21 [1949] N.Z.L.R. 173.
22 [1930] A.C. 1.
23 At p. 176.

ing house where she lived. The co-respondent had taken her for drives unaccompanied and left her, at times late at night, a short distance from her place of residence. Apart from these drives there was no evidence of undue familiarity between the respondent and the co-respondent except for evidence given by the petitioner and a private inquiry agent of alleged adultery in highly improbable circumstances. Fair J. held that adultery had not been proved.

Andrews v. *Andrews* was not considered in any detail by Fell J. in the succeeding case of *Price* v. *Price.*[24] In that case it was held that adultery had been proved when the husband and the intervener had been in a darkened house for almost an hour. However, when the petitioner entered the house there was no sign that either the clothes of the parties, or the room in which they had been sitting, were in any way disarranged. It is significant, on the other hand, that the husband had admitted previous acts of adultery, which Fell J. specifically took into account when making his decision.[25] *Price* is notable for the careful review of the authorities by Fell J., who concentrated first, on the decisions which were critical of *Ginesi*[26] and secondly, on the relationship between *Ginesi* and ss.6 and 17 (1) (c) of the Divorce and Matrimonial Causes Act 1928, which he considered to be in conflict as the statutory provisions merely required the court to be 'satisfied'. As will be seen from subsequent cases, Fell J. was alone in this regard: He further considered that *Ginesi* was decided *per incuriam*, as the Court of Appeal had taken into account neither *Mordaunt* v. *Moncrieff* nor the later case of *Allen* v. *Allen.*[27] His view that the applicable standard was the preponderance of probabilities was reinforced by the decisions of the High Court of Australia in *Briginshaw* and *Wright.*[28] On the other hand, despite his erudite examination of the authorities, the learned judge nowhere considered the wider social and personal implications of the relevant standards.

In the same year as *Price*, 1951, the matter came before the House of Lords in the crucial case of *Preston-Jones* v. *Preston-Jones.*[29] Despite the fact that *Preston-Jones* has been subject to considerable criticism, both academic and judicial, it is to the present writer the least unsatisfactory decision in a line of unsatisfactory decisions, for its emphasis was, it is suggested, rightly placed and formulated in a consistent manner. The facts are well known. The immediate question before the House was whether it was sufficient proof of adultery if the husband petitioner showed that his last opportunity of access to the respondent was three hundred and sixty days before the birth of a child to her. He

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24 [1951] N.Z.L.R. 1097.
25 At p. 1104.
26 See, for example, *Davis* v. *Davis* [1950] P. 125; *Gower* v. *Gower* [1950)] 1 All E.R. 804 and *Bater* v. *Bater* [1951] P. 35. See also a sceptical note by G. H. Treitel in (1951) 14 *M.L.R.* 225.
27 [1894] P. 248.
28 (1948) 77 C.L.R. 191.
29 [1951] A.C. 391.

also called certain medical evidence to show that the interval was too long for him to be the father. It was held that, on the *whole* evidence, adultery had been proved beyond reasonable doubt. In fact it was never argued on behalf of the petitioner that the standard was any lower. Unlike *Ginesi* however, their Lordships did not derive their conclusions from any analogy with the criminal law. Lord Macdermott, in a closely argued judgment, said,[30]

> The true reason as it seems to me, why both accept the same standard — proof beyond reasonable doubt — lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned.

Lord Oaksey took a similar view when he stated,[31]

> In such circumstances the law, as I understand it, has always been that the onus upon the husband in a divorce petition for adultery is as heavy as the onus which rests upon the prosecution in criminal cases...

He went on to comment that such onus was founded upon the notion of fostering the interests of relevant children.[32] The decision in *Preston-Jones* signified, in New Zealand, a return to the criterion of beyond reasonable doubt. In *McDonald* v. *McDonald*[33] adultery was held to have been proved on the strength of two separate incidents, both of which were observed by the petitioner and a corroborating witness. The first consisted of the co-respondent's remaining in a darkened room with the respondent until 2 a.m., and the second of observations made by the petitioner and a private inquiry agent through lightly curtained windows. The defence to the first was a general denial and, to the second, that such an observation was impossible. F. B. Adams J. relied[34] on the wider view of *Preston-Jones*, adopting Lord Macdermott's *dictum*[35] basing the standard, not on an analogy with the criminal law, but on the public importance of the issues. He went on to say[36] that he considered that any such analogy was unnecessary and probably undesirable. He also dismissed[37] the preceding New Zealand decision of *Price*, by saying that Fell J. had effectively applied the standard of beyond reasonable doubt, when he had said that there must be no other reasonable solution than that of guilt.[38] In view of the thorough discussion of previous authority by Fell J. in *Price*, such a cursory dismissal would seem to be unwarranted although, as will be observed, dismissals of this variety are not unknown in the cases on the standard of proof in matrimonial causes. However, such difficulty as the New Zealand case law presented was

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30 At p. 417.
31 At p. 409.
32 Lord Morton (at p. 412) also said that the standard was, '... certainly no heavier' than beyond reasonable doubt.
33 [1952] N.Z.L.R. 924. See also a note approving the decision in (1953) 1 *V.U.W.L.R.* 64.
34 At p. 925.
35 *Supra.*
36 At p. 925.
37 *Ibid.*
38 At p. 1101.

overcome by F.B. Adams J.'s express reliance on *Preston-Jones*. Despite the fact that he had eschewed analogy with the criminal law in *McDonald*, F.B. Adams J., in the case of *Watkins v. Watkins*[39] derived an explanation of the requirement of beyond reasonable doubt by reference to the English criminal case of *R.* v. *Summers*.[40] There Lord Goddard C. J. said,[41]

> I have never yet heard any court give a real definition of what is reasonable doubt, and it would be very much better if courts did not use that expression. Whenever a court attempts to explain what is meant by it, the explanation tends to result in confusion rather than clarity. It is far better, instead of using the words 'reasonable doubt' and then trying to say what is a reasonable doubt, to say to a jury: 'You must not convict unless you are satisfied by the evidence given by the prosecution that the offence has been committed.' The jury should be told that it is not for the prisoner to prove his innocence, but for the prosecution to prove his guilt and that it is their duty to regard the evidence and see if it satisfies them so they can feel sure, when they give their verdict, that it is a right one.

F.B. Adams J., took the view[42] that there was no distinction between the statutory provisions and *R.* v. *Summers*, and hence differed from Fell J. in *Price*. By his reliance on *R.* v. *Summers* therefore, F.B. Adams J. appeared to be adopting a different standpoint towards the analogy with the criminal law from that he had taken up in *McDonald*.

In 1966 the problem came once more before the House of Lords in the difficult case of *Blyth* v. *Blyth*.[43] The parties had been married in 1940, but the wife had left the husband in 1954 and had committed adultery. In 1958 the parties met by chance and the wife persuaded the husband to have sexual intercourse with her, but he did not forgive her adultery. In 1962 he petitioned on the grounds of his wife's adultery, but explained the delay by saying that he had waited as he had always hoped for a reconciliation. The proceedings were begun before the Matrimonial Causes Act 1963 came into force, but the case was heard afterwards. The House of Lords held by a majority that since s.1 of the 1963 Act[44] was concerned with a procedural matter, the husband's evidence of absence of intent to condone the wife's adultery was admissible, even though the relevant events took place before the passing of the Act. Furthermore, the standard of proof relating to both the grounds for, and the bars to, divorce was preponderance of probability. Since the husband had successfully discharged this onus, he was entitled to a decree. *Blyth* v. *Blyth* is a particularly important case, not only with

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39 [1956] N.Z.L.R. 754.
40 [1952] 1 All E.R. 1059.
41 At p. 1060.
42 At p. 756.
43 [1966] A.C. 643. See also a note by C. F. H. Tapper in (1966) 29 *M.L.R.* 692.
44 Which later became s.42 (1) of the Matrimonial Causes Act 1965, which laid down that, 'Any presumption of condonation which arises from the continuance or resumption of marital intercourse may be rebutted by evidence sufficient to negative the necessary intent.'

regard to the standard of proof in matrimonial causes, but in relation to the standard in civil cases generally. In addition, it is suggested that *Blyth* has been accepted far too uncritically in both England and New Zealand, thus leading to decisions which are even more self-contradictory and confusing than the case itself, and there can be no doubt that *Blyth* is a far from satisfactory decision.

How unsatisfactory[45] may be gauged by Lord Denning's dismissal, in delivering the majority's most detailed judgment, of Lord Macdermott's closely reasoned discussion in *Preston-Jones* as '... obiter and without argument'. Comment is indeed superfluous. His Lordship went on to ignore totally the wider issues raised by Lord Macdermott and concentrated on a destruction of the already discredited analogy with the criminal law, by saying

> ... the analogies and precedents of the criminal law have no place in the Divorce court, a civil tribunal. It is wrong, therefore, to apply the analogy of criminal law. We should not say that adultery must be proved with the same strictness as is required in a criminal case. We should say simply that it must be proved to the satisfaction of the court.

He also commented that s.1 of the 1963 Act could not be considered alone, but had to be construed with s.5 of the 1950 Act,[46] which provided that the court was required to be

> ... *satisfied* on the evidence that (a) the case for the petition has been proved; and (b) the petitioner has not in any manner been accessory to, or connived at, or condoned the adultery.[47]

Lord Denning also reiterated his view that,

> ... so far as the *grounds* for divorce are concerned, the case, like any civil case, may be proved by preponderance of probability, but the degree of probability depends on the subject matter.

Lord Pearce and Lord Pearson agreed with Lord Denning as to the result, but were rather more circumspect in their reasoning. Both appeared to be of the view that the gravity of the issue should determine the standard of proof, and also that condonation need only be disproved on the balance of probabilities. The difficulties which are likely to arise if this view is accepted are, as Mr. Tapper[48] has pointed out, only too apparent — particularly in cases involving a multiplicity of issues. These complexities are further heightened by the fact that Lord Pearce considered that the standard should be applied to each individual issue within the case separately. Lord Pearce distinguished[49] *Preston-Jones* on the grounds that that case was concerned solely with the question as to whether on the facts sufficient proof had been given. This it is suggested is a difficult distinction to maintain, even though the question of

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45 At p. 667.
46 Which became s.5 of the 1965 Act.
47 Much of this is now, of course, irrelevant in English law as the Divorce Reform Act 1969 abolishes the bars to divorce, except in proceedings before magistrates.
48 *Loc. cit.* at p. 695
49 At p. 673.

standard of proof was never actually argued, for the judgments of Lord Oaksey and, more particularly, Lord Macdermott were of a thorough and wide-ranging nature. The judgments of the minority in *Blyth*, although simpler and more consistent, added nothing to any discussion of the wider social issues involved in the problem. Lord Morris considered[50] that the standard was proof beyond reasonable doubt since no-one could be said to be 'satisfied' within the terms of the Act if he were in a state of reasonable doubt. Lord Morton, who had also taken part in *Preston-Jones*, laid considerable emphasis on the statutory provisions, thus ignoring the strength of reasoning in the earlier case that the standard should be determined by the gravity of the broad class of issue. In view therefore of the discrepancies which can be clearly seen to exist throughout the reasoning employed in the case, it is suggested that *Blyth* v. *Blyth*, despite its being a decision of the House of Lords, cannot be regarded as strong authority.

Nonetheless, few decisions can have been awarded such an uncritical reception as was *Blyth* in New Zealand. In *F.* v. *F.*,[51] Macarthur J. applied its standard, but did not see fit to consider any other case nor to analyse its judgments; he merely relied on the headnote, which he took to be[52] a correct statement of the view expressed by Lord Denning. On its particular facts *F.* v. *F.* is a somewhat strange case. The petitioner's evidence was that he had discovered his wife and the co-respondent, semi-clothed, in bed together. Macarthur J. was of the view that the petitioner was a credible witness and that the wife and the co-respondent were not, but he refused to hold that, on the balance of probabilities, adultery had been proved, as he was not satisfied that penetration had actually taken place.[52] Even though he apparently accepted the *Blyth* standard, Macarthur J. implied that the relevant standard of proof was, in the circumstances, a high one, when he said,[53] 'The charge is a grave one, and to me the proof of it is not clear'.

Despite the peculiarities of *F.* v. *F.*, the English courts were not to be outdone. In 1968, the Court of Appeal decided *Bastable* v. *Bastable*,[54] a case which has been described, in a most kindly manner, by Professor Bromley[55] as being, '... vague and unhelpful'. In that case, the husband and wife had got to know the co-respondent and his wife as social friends during 1963. In the following year, the husband and the co-respondent's wife were both working away from home, and the wife and the co-respondent, neither of whom were working at all, associated with each other as friends. The husband petitioned on the grounds of the wife's desertion (which was not contested) and her adultery with the co-respondent. There was no evidence of any affectionate behaviour between the wife and the co-respondent, or that they had ever been

50 At p. 660.
51 [1966] N.Z.L.R. 894.
52 At p. 896. See also *Dennis* v. *Dennis* [1955] P 153.
53 At p. 896.
54 [1968] 2 All E.R. 701.
55 *Family Law* 3rd ed., p. 92 (Second Supplement p. 24).

caught in a compromising situation. Such evidence as the husband did adduce in support of his petition was entirely circumstantial, but nevertheless it was held, at first instance, that the husband had discharged the burden of proof which lay on him, and that adultery had been proved. The Court of Appeal reversed this decision on the grounds that mere suspicion was insufficient and that, accordingly, the husband had not adduced enough evidence to discharge the burden of proof. In what may be described as the leading judgment, Willmer L. J. agreed[56] with the principle expressed by Lord Denning in *Blyth*, but then went on to say,[57]

> It is for the husband petitioner to satisfy the court that the offence has been committed. Whatever the popular view may be, it remains true to say that in the eyes of the law the commission of adultery is a serious matrimonial offence. It follows, in my view, that a high standard of proof is required in order to satisfy the court that the offence has been committed.

Certainly, Willmer L. J. specifically refuted any analogy with the criminal law, thus destroying any link with the basis for the decision in *Ginesi*, but his emphasis[58] on the seriousness of the conduct involved brings him, it is suggested, very close to the position adopted by Lord Macdermott in *Preston-Jones*. Winn L. J. concurred with the judgment delivered by Willmer L. J. Edmund Davies L. J., however, by emphasising the difficulties involved in directing juries as to the differing standards of proof, took a somewhat different view. He questioned[59] whether Lord Denning's notion that the clarity of proof varied in proportion to the gravity of the issues involved was, indeed, intelligible either to jurors or, for that matter, to judges and lawyers. His view of *Blyth* was that it '... decisively and authoritatively...' laid down that the petitioner need only show on a balance of probabilities that he had not connived at or condoned the offence. Lord Denning's remarks on the wider issues he regarded, of necessity, as *obiter*. He did, however, apply the preponderance of probabilities test to the facts of *Bastable*. Like its English predecessor, *Bastable* v. *Bastable* is by no means an easy case. Edmund Davies L. J.'s judgment, though lacking a close analysis of the differing authorities, is clear and consistent in its argument. On the other hand, Wilmer L. J.'s acceptance of the *Blyth* principle coupled with his emphasis on the high standard of proof required in such cases seems to indicate a standard of proof lying somewhere between the usually recognised criteria.[60]

In 1970 the question, for the first time since *Webster* v. *Webster*, came before the New Zealand Court of Appeal in *Green* v. *Randle and An-*

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56 At p. 703.
57 At p. 704.
58 At the conclusion of his judgment Willmer L. J. (at p. 706) stated also, 'Bearing in mind, however, that the standard of proof to be expected in a matrimonial cause of this sort is on any view a high one...'
59 At p. 707.
60 Indeed, Willmer L. J. suggested (at p. 703) that Lord Pearson in *Blyth* had adopted such a standpoint.

other.[61] By this time, a new factor had been introduced by the Legislature, namely s.28 of the Matrimonial Proceedings Act 1963[62] which provided,

> On every petition for divorce, the court shall satisfy itself so far as it reasonably can as to the facts alleged and as to any other relevant facts, and shall inquire into any counter-charge that is made against the petitioner.

Thus, as Turner J. pointed out,[63] in delivering the judgment in *Green* v. *Randle*, no standard of proof is prescribed by the Act. Turner J. went on to comment, however, that it was impossible to treat the change in terminology as other than having been deliberately made and, hence, that the duty of prescribing a standard of proof in such cases fell upon the court. He then adopted the standard of balance of probabilities, relying on the High Court of Australia's decision in *Wright* v. *Wright*, but added the proviso that as the offence was grave so must the proof be clear. Turner J. also emphasised[64] the importance of the statutory provisions in relation to both the English and New Zealand decisions. Clearly, *Green* v. *Randle* is the strongest available authority in New Zealand on the problem, and is the more valuable since Turner J. most skilfully avoided the dangers inherent in following the most recent English authority too closely — even though he did adopt Lord Denning's view with regard to the relative gravity of the particular charge. Unfortunately, Turner J. nowhere considered which standard should be applied from the point of view of social policy.

The problems which the body of case law present are of fundamental interest. The difference between the two standards of proof is, as the High Court of Australia put it in the leading case of *Rejfek* v. *McElroy*,[65]

> ... no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indisputable to the support of a conviction on a criminal charge.

The reason for there being nominate standards of proof is so that the litigant, and his legal representative, will know what kind of evidence they may be required to adduce. The view expressed by Lord Denning in *Blyth* v. *Blyth* would appear to be antithetical to this aim for, if they are to be adopted as uncritically in the future as they have recently been, the matter would depend entirely on the particular facts and the attitude of the individual judge towards them. Fortunately, as Turner J. pointed out[66] in *Green* v. *Randle*, few matrimonial cases are heard by juries for, as Edmund Davies L. J. said in *Bastable*,[67] the difficulties involved in

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61 [1970] N.Z.L.R. 237.
62 Which replaced the Divorce and Matrimonial Causes Act 1928, s.17.
63 At p. 244.
64 At p. 242.
65 (1967) 112 C.L.R. 517 at p. 521.
66 At p. 244.
67 *Supra.*

their direction would be considerable. Although in strictly practical terms the effect of their adoption would probably be small, Lord Denning's views seem to be contrary to well established and desirable principle. However vague standards of proof may be, ones which are fixed are surely preferable to ones which are continually shifting. Furthermore, it is suggested that judges in both England and New Zealand have used Lord Denning's remarks in *Blyth* as a means of applying the criminal standard whilst using the civil terminology.[68] There are obvious reasons why matrimonial cases should be treated differently from other civil cases, and this distinction has been emphasised recently in England by s.1 of the Administration of Justice Act 1970 which creates a Family Division of the High Court. There is, it is suggested, good cause for judges to insist on a high standard of proof in such cases.

It was argued in *Webster* that the standard lay between the civil and criminal standards and such a notion is not without judicial support. For example, Turgeon J. A. of the Saskatchewan Court of Appeal, in the case of *Lichstein* v. *Lichstein*,[69] suggested that in some divorce cases, notably those where the only available evidence was circumstantial, the applicable standard was neither the strict rule of the civil or criminal law. Again, Hyndman J. A., in *Leboef* v. *Leboef*,[70] stated that the rule as to the preponderence of evidence in civil cases,

> ... of course applies to actions for divorce, but ... this rule should not be weakened, but owing to the nature of such cases and the consequences usually resulting, it should, if anything, be stronger and more preponderating.

In an article which postulates the ideas which were later to be expressed by Lord Denning in *Bater* and *Blyth*, however, Professor Fridman has described[71] these statements as being '... confusing and useless', a view which is heartily endorsed by the present writer. The notion of an intermediate standard, particularly as expressed by Hyndman J. A., is likely to give rise to problems similar to those arising if a nominate standard were to be altogether abandoned.

If therefore one accepts the view that one of the two accepted standards must be applied, the question then arises as to which it ought to be, and there are various criteria which may help to resolve the matter. Professor Coutts has argued[72] for consistency throughout the field of matrimonial law and some measure of this has been achieved in England by legislation. The Family Law Reform Act 1969, s.26 provides that the presumption of legitimacy may now be rebutted on the balance of probabilities which, if one accepts *Blyth* and *Bastable* at their face value, makes the situation uniform. Even so, Rees J., in the case of *F.* v. *F.*,[73]

68 This kind of judicial euphemism is not confined to this area of the law. See the case of *Slatter* v. *British Railways Board* [1966] 2 Lloyds Rep. 395. See also Fridman: *Modern Tort Cases*, p. 67.
69 (1922) 28 D.L.R. 581 at p. 584.
70 [1928] 2 D.L.R. 23 at p. 26. Canada now appears to have accepted the civil standard. See *George* v. *George* [1951] 1 D.L.R. 278.
71 (1955) 33 *Can. B.R.* 665 at p. 684.
72 (1951) 14 *M.L.R.* 411.
73 [1968] P. 506.

followed the *dicta* in *Preston-Jones*, where the effect of a decree would have been to have bastardised a child. In New Zealand the view of Lord Lyndhurst in *Morris* v. *Davies*[74] appears to have been accepted: that[75] the evidence necessary to rebut the presumption of legitimacy must be, '... strong, distinct and conclusive' and that the presumption was, '... not to be broken in upon or shaken by a mere balance of probabilities'. Whether this view continues to be acceptable after the English legislation and *Green* v. *Randle* remains to be seen, particularly in view of the Status of Children Act 1969 and s.115 of the Domestic Proceedings Act 1968 which applies the lower standard to proceedings under that Act. The only excuse for lowering the standard in such cases is a civilised law of illegitimacy.

In general, the policy aspects of the question have scarcely been explored. Only Lord Macdermott in *Preston-Jones* has made any real contribution to the discussion in this respect and his views seem, to the present writer, to have much to commend them. Mr. Gobbo has claimed[76] that Lord Macdermott's views, although preferable to the *Ginesi* analogy, are unconvincing. He contends that the sanctity of marriage is unlikely to be fostered by a finding that a spouse who has *probably*[77] committed adultery is innocent of the charge. This is unconvincing and confusing, and is at odds with the ground for divorce itself. Commission of adultery is grounds for divorce, not probable commission of adultery, and the aim of the law must surely be to ascertain what has *actually* happened. Thus the higher standard would appear to be applicable. The public, to answer the rhetorical question asked later by Mr. Gobbo, have a great deal to gain by a finding that those who have probably committed adultery have not done so. The public will, it is suggested, have the opportunity of seeing that the courts are not prepared to stamp a spouse with a judicial Scarlet Letter[78] without the most cogent possible evidence. The application of the higher standard is unlikely to damage the law in the eyes of the public generally and is also less likely to encourage hotel-room cases of supposed adultery, of which the courts are very properly suspicious and which do bring the law into social disrepute.

The law relating to the standard of proof in matrimonial causes, therefore, is in a state of confusion resulting largely, it is suggested, from the courts' unwillingness to consider underlying questions of social values and policy. Furthermore, it is suggested that the path which the law has recently taken in both England and New Zealand is the wrong one. In such cases, the law should require more for a proof than a metaphor — particularly a mixed metaphor.

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74 (1873) 5 Cl. & F. 163. See Inglis *op. cit.* p. 405.
75 At p. 265.
76 *Cross on Evidence* (Aust. ed.) at p. 119.
77 Author's italics.
78 As was Hester Prynne in Hawthorne's novel; the letter of course, being 'A' for adulteress.