PROOF AND SUSPICION*

INTRODUCTION

Section 105(1) of the South Australian Lottery and Gaming Act 1936-1966 provides:

> If on the hearing of any complaint against any person for unlawful gaming, the evidence for the prosecution is such as to raise in the mind of the special magistrate or justices hearing the complaint a reasonable suspicion that that person is guilty of the offence charged against him in the complaint, that evidence shall be deemed to be *prima facie* evidence that that person is guilty of that offence.

It is, to quote from the joint judgment of Rich and Dixon JJ. in *Powell v. Lenthall*[1] in 1930, 'a very unusual provision'. The judges were referring to the almost identical provision[2] in the 1921 Act, but even in 1921 the parts of the section material for the purposes of this paper—evidence raising a reasonable suspicion being deemed prima facie evidence of guilt—were not new in South Australia. They can be traced back[3] to section 11 of the Gaming Further Suppression Act of 1897. And more recently the section has provided a pattern which has been copied in Queensland in section 138(2) of The Racing and Betting Acts 1954 to 1966, and in Western Australia in section 51 of the Totalisator Agency Board Betting Act 1960-1966.

There are a spate of South Australian cases reported on the provision.[4] Two cases have been reported in Queensland, none in Western Australia. There has been only the one High Court decision—*Powell v. Lenthall.*[5]

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* This paper was read to the Annual Conference of the Australian Universities Law Schools Association, August 1968.

1 44 C.L.R. 470, 474.

2 s. 14(1) of the Lottery and Gaming Act 1921.

3 Through s. 73 of the Lottery and Gaming Act 1917, and s. 4 of the Gaming Law Amendment Act 1902.

4 Twenty-three cases reported during the period 1922 to 1953 are listed, each with a short summary, as a footnote to s. 105 in the 1959 annual volume of the South Australian Statutes.

5 May v. O'Sullivan, (1955) 92 C.L.R. 654, the leading case on the effect of a prima facie case in criminal trials, was an appeal from a conviction under the South Australian Lottery and Gaming Act but for some reason the "reasonable suspicion" section was not in issue.

In *Powell v. Lenthall* the accused had been charged with betting in a public place. At the close of the prosecution case the magistrate upheld a submission that there was no case to answer stating that 'the evidence was too weak for him to hold that there was a reasonable suspicion'.[6] The Full Court of the Supreme Court of South Australia reversed this decision and the accused appealed by special leave to the High Court. Starke J., who dissented, would have allowed the appeal: the magistrate's want of suspicion in the circumstances did not strike him, the judge, as being unreasonable or perverse, and it was the mind of the magistrate that had to be affected with suspicion and not that of any appellate tribunal. Rich and Dixon JJ., who constituted the majority, held, in a joint judgment, that the jurisdiction of the appellate court extended to considering not only whether the magistrate did entertain a suspicion but whether he ought to have, and in their view the facts necessarily raised a reasonable suspicion of guilt. The statements in the judgment do not offer any useful guide for the interpretation and application of what their Honours themselves refer to as 'this highly drastic section'.[7] The section, they state,[8]

> requires the justices [or magistrate] to exercise a judgment upon a matter of fact by reference to a standard which, if not unique, is at least extremely unusual in English Law, and requires them to estimate the effect of evidence which does not amount to proof in a way which, while not discretionary, yet involves discrimination and discernment or judgment of a different order from that needed in satisfying the judicial mind of a state of fact.

But, they continue,[9]

> [t]he questions . . . what is a suspicion and when it is reasonable are susceptible of a great deal of subtlety and refinement of argument. . . . Attempts to define such conceptions are seldom helpful. Indeed, it does not seem possible to paraphrase this expression, still less to arrive at any nice definition of the precise stages which the mind must have travelled from complete incredulity to comfortable belief before its condition answers the description "reasonable suspicion".

That there has been considerable difference of opinion regarding the meaning and effect of the section, is apparent from the South Australian and Queensland cases. *Powell v. Lenthall* has done little to

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6 See 44 C.L.R. 470, 474.
7 Id. at 478.
8 Id. at 477.
9 Id. at 478.

help solve or dispel these differences. The section is not extensive in its application but a consideration of it does raise the rather more general issue of the extent to which the Legislature can vary the burden of proof, and this in turn raises the issue of what precisely the phrase burden, or onus, of proof means.

The phrase is used primarily in the context of the question of where the burden lies. Related to this is the question of the standard of proof or degree of persuasion required, a question of the quantum or sufficiency of the evidence involving issues of credibility and weight.

There can be no denying (in law anyhow) that there are degrees of positiveness of persuasion that the human mind can reach. One may be persuaded of the existence or otherwise of a fact absolutely or barely. The probability of its existence may decline from the highest degree 'by an infinite number of gradations, until it produce in the mind nothing more than a mere preponderance of assent in favour of [it]'.[10] There is nothing essentially incongruous about a state of mind which, while having reservations or doubts, is persuaded on balance about a fact.

In *Briginshaw v. Briginshaw*[11] Dixon J. (as he then was) emphasised that at common law there were two and only two different standards of proof. 'Fortunately', so his Honour considered 'at common law no third standard of persuasion was definitely developed'.[12]

THE STANDARD OF PROOF IN CRIMINAL TRIALS

The standard of proof in criminal trials is precise. The tribunal of fact must be satisfied beyond reasonable doubt. In Australia any court or judge who departs from or tries to explain this formula runs a considerable risk of reversal on appeal. In the words of Barton A.C.J. in *Brown*:[13]

> one embarks on a dangerous sea if he attempts to define with precision a term which is in ordinary and common use with relation to this subject matter, and which is usually stated to a jury without embellishment as a well understood expression.

Yet trial judges have persisted in embarking on this dangerous sea, often no doubt prompted by a desire to offset advocacy and get back

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10 STARKIE, LAW OF EVIDENCE (1st ed., 1824), 450, 451, as quoted by Dixon J. (as he then was) in Briginshaw v. Briginshaw, (1938) 60 C.L.R. 336, 360. Cf. the statement in the joint judgment in Powell v. Lenthall, n. 9 above.

11 (1938) 60 C.L.R. 336.

12 Id. at 361.

13 (1913) 17 C.L.R. 570, 584, quoted with approval by Fullagar J. in Thomas, (1960) 102 C.L.R. 584, 593.

into perspective over-emphasis by counsel. Among the "embellishments" which have been disapproved on appeal are the following: 'If . . . you come to a feeling of comfortable satisfaction that the accused is guilty, then you should find him so guilty';[14] 'substantial doubt';[15] 'a well grounded belief that to do so [i.e. find him guilty] you will be doing an injustice to the prisoner';[16] satisfied 'to a point of reasonable certainty';[17] and 'a remote possibility in his favour which you can dismiss with the sentence "Of course it is possible but not in the least probable" '.[18]

The use of the expression "reasonable doubt" to describe the criminal standard seems to have become established after the first edition of Starkie's Law of Evidence was published in 1824.[19] Starkie also gave support to the expression "moral certainty" and in *Thomas,*[20] Windeyer J. stated that jurymen had been directed in terms of "reasonable doubt", "moral certainty" and "the benefit of the doubt" for generations. But the expression "moral certainty" seems to have gone out of fashion and in *Simpson (No. 2),*[21] presumably after counsel for the accused had pressed on the jury that they must be morally certain of the accused's guilt before convicting him, the trial judge directed them that '[t]hat term "moral certainty" has nothing whatever to do with the law'. Philp J. (speaking for the Court of Criminal Appeal of Queensland which dismissed the appeal from conviction) stated that the expression "moral certainty" could mislead the jury unless carefully explained and that though the trial judge had 'perhaps used over-strong language' he had 'fairly and fully directed the jury on this head'.

The High Court has insisted that the propriety of a direction on the standard is not a purely verbal one. 'It is a question', as McTiernan J. said in *Thomas,*[22] 'whether what the jury is told means that

14 In Thomas, (1960) 102 C.L.R. 584. This was the formula approved by Rich J. in Briginshaw v. Briginshaw, (1938) 68 C.L.R. 336, 350, as appropriate on an issue of adultery.

15 In Burrows, (1937) 58 C.L.R. 249; and Thompson, [1960] V.R. 523.

16 In Polytynski, [1941] St.R.Qd. 262.

17 In Hilderbrandt, (1963) 81 W.N. (Pt. 1) (N.S.W.) 143.

18 This is the formula suggested by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 All E.R. 372, 373-4. It has been disapproved as a direction in a criminal trial in McKenna, (1964) 81 W.N. (Pt. 1) (N.S.W.) 330; [1964-5] N.S.W.R. 433, and Vassiliev, (1967) 68 S.R. (N.S.W.) 4.

19 See Briginshaw v. Briginshaw, (1938) 60 C.L.R. 336, 360; WIGMORE, EVIDENCE (3rd ed., 1940), §2497, Vol. ix, 317 (hereafter cited as WIGMORE).

20 (1960) 102 C.L.R. 584, 605.

21 [1958] Q.W.N. 44.

22 (1960) 102 C.L.R. 584, 587.

they must be satisfied beyond any reasonable doubt that the accused is guilty'.[23] The Court may perhaps have been over-rigid in its insistence on no "embellishments". The Court of Criminal Appeal in England has not taken quite such a consistent or positive stand.[24] But the time-honoured formula has for long been well understood by laymen and, to quote Windeyer J.,[25] '[t]he expression . . . conveys a meaning without lawyers' elaborations. Othello's meaning was clear enough: ". . . so prove it, that the probation bear no hinge nor loop to hang a doubt on" '. Elaboration does tend to become a mere matter of words,[26] and a trial judge would be unwise to do any more than caution the jury against any excesses of advocacy by counsel.

THE STANDARD OF PROOF IN CIVIL CASES

The other of the common law standards of persuasion is that applicable in civil cases. In *Cooper v. Slade*[27] in 1858 Willes J. asked (rhetorically) to be excused 'for referring to an authority in support of the elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict'. The authority he referred to was *Newis v. Lark*[28] in which in 1572 'Chief Justice Dyer and a majority of the other Justices of the Common Pleas laid down this distinction between pleadings and evidence': whereas in pleadings certainty was to be required, once the parties were at issue 'then, if the matter [was] doubtful, [the jury] may found their verdict on that which appears the most probable'.

How slight may be the probability in favour of a verdict in a civil case is well illustrated by some of the negligence on the highway or running down cases which have been taken on appeal to the High Court.

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23 See also Burrows, (1937) 58 C.L.R. 249, in which Dixon J. at 258 expressed the view that he did not think that the Court 'should draw fine distinctions between various expressions used to convey to a jury that the proof must establish guilt beyond all reasonable doubt' but he shared 'the regret of the Chief Justice [Latham] that the learned judge did not see fit to use the time-honoured formula which is designed to give the prisoner the full benefit of the high degree of proof which must be reached before he is to be found guilty'.

24 For an assessment of the position in England see CROSS, EVIDENCE, 87 et seq.

25 In Thomas, (1960) 102 C.L.R. 584, 605.

26 See WIGMORE §2497, 319.

27 6 H.L.C. 746, 772; 10 E.R. 1488, 1498.

28 Plowd. 412; 75 E.R. 621.

In 1956 in *Holloway v. McFeeters*[29] the plaintiff, a widow, had brought an action against a nominal defendant claiming damages under the Victorian Wrongs Act 1928. Her husband's body had been found on a road in circumstances suggesting that he had been run down by a motor car. The claim that he had been killed as a result of the negligence of the driver of an unidentified vehicle rested entirely on circumstantial evidence. The trial judge, having reserved leave to the defendant to move for judgment, took the verdict of the jury who found both negligence and contributory negligence, assessed the damages at £4000, and awarded the plaintiff fifty per cent. The judge then, on the defendant's application, ordered judgment for the defendant on the ground that there was insufficient evidence. The plaintiff's appeal to the Full Court of the Supreme Court of Victoria having been allowed, the defendant appealed to the High Court.

In a joint judgment, Williams, Webb and Taylor JJ., who constituted the majority, adopted the test laid down in the unanimous judgment of the Court (consisting of Dixon J., as he then was, Williams, Webb, Fullagar and Kitto JJ.) in *Bradshaw v. McEwans Pty. Ltd.*:[30]

> In a civil cause 'you need only circumstances raising a more probable inference in favour of what is alleged . . . where direct proof in not available it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture[31]. . . . All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than that on a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood'.

Applying this test the judges concluded that the inferences which appeared from the circumstances made it 'at least more probable than not that the unidentified vehicle was being driven in a negligent manner at the time of the accident and that this was the cause of the accident'. They also quoted[32] as being 'not out of place' a passage

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29 (1956) 94 C.L.R. 470.

30 Unreported.

31 Citing Richard Evans & Co. Ltd. v. Astley, [1911] A.C. 674 per Lord Robson at 687.

32 (1956) 94 C.L.R. 470, 483.

from the judgment of Kay L.J. in *Smith v. South Eastern Railway Co.*[33] in which the Lord Justice said: 'it should be a very exceptional case in which the judge [when deciding whether to allow the case to go to the jury] could so weigh the facts and say that their weight on the one side and the other was exactly equal'.

Dixon C.J. and Kitto J. dissented. The Chief Justice was of opinion that the difficulty in the case of finding a foundation for a satisfactory inference, even one resting only on a balance of probabilities. was insuperable. He said:[34]

> The state of facts reached by inferences is itself compatible with a number of hypotheses, some of them implying fault on one side, some on the other, some on both sides. Hypotheses of this kind are not inferences. What is required is a basis for some positive inference involving negligence on the part of the driver as a cause of the deceased's death.

And Kitto J. stated[35] that it seemed to him that

> when all [was] said and done the true explanation of the collision was left wholly in the realm of conjecture. It provided [the jury] with no foundation . . . for reaching any state of mind which could properly be called a satisfaction.

Luxton v. Vines,[36] heard four years earlier, offers an interesting comparison. The facts, for present purposes, were sufficiently comparable. On this occasion Dixon C.J. and Kitto J. constituted, together with Fullagar J., the majority. In a joint judgment dismissing the plaintiff's appeal the distinction between conjecture and positive inference was again made. 'The circumstances' they said,[37] '[gave] rise to nothing but conflicting conjectures of equal degrees of probability and no affirmative inference of fault . . . [could] reasonably be made'. McTiernan and Webb JJ., dissenting, would have allowed the appeal.

The Court was faced with a similar issue again in 1965 in *Nesterczuk v. Mortimer*.[38] The plaintiff and defendant driving in opposite

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33 [1896] 1 Q.B. 178, 188, approved by the House of Lords in Jones v. Great Western Railway Co., (1930) 144 L.T. 194.

34 (1956) 94 C.L.R. 470, 477.

35 Id. at 488.

36 (1952) 85 C.L.R. 352.

37 Id. at 360.

38 115 C.L.R. 140. See also Jones v. Dunkel, (1959) 101 C.L.R. 298 in which Dixon C.J. would have dismissed the appeal because he could not 'see how a jury might reasonably [have inferred] that [the plaintiff's] husband was killed by the negligence of [the driver of the other vehicle involved]. The accident [was] simply left unexplained'. Taylor J. agreed. But the majority

directions had collided, the vehicles each striking the other a glancing blow. Apart from the evidence of the parties, each of whom stated that he had been driving on his correct side and that the other must have veered over, there was nothing to indicate whereabout on the road the collision had occurred. The trial judge dismissed both the claim and counterclaim stating that he was unable to say that the account given by one party was more probably correct than that given by the other. The Full Court of the Supreme Court of South Australia having by a majority of two to one dismissed an appeal, the matter was brought on appeal to the High Court. On this occasion the Court split four to one, the four (Kitto, Menzies, Windeyer and Owen JJ.) holding that the trial judge had been right, and the one (McTiernan A.C.J.) dissenting. There was no difference of opinion about the principle applicable: the tribunal of fact was entitled to draw logical or positive inferences but should not indulge in speculation, conjecture or guesswork. But there was a difference about whether it was properly open on the evidence to draw an inference. As McTiernan A.C.J. put it:[39]

> In the absence of any evidence of a swerve by either vehicle and in view of the proved damage to both vehicles which is consistent with their having brushed against each other it is, in my opinion, a probable inference that the vehicles were running on converging courses and the drivers failed to appreciate this state of affairs. If this view is right it is open to find that, in the circumstances, both parties were driving carelessly and without proper attention. In my opinion such a conclusion can be drawn from the evidence not as a mere conjecture but as a proper inference.

In contrast with this Owen J., who may be quoted as expressing generally the view of the majority, said:[40] 'In the circumstances of the case, to say that the probabilities favour the view that both drivers were to blame rather than that one or the other was wholly responsible would be a mere guess'. But if there had been some evidence that the collision had occurred in or near the centre of the road this apparently would have sufficed to take a conclusion that both drivers

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(Kitto, Menzies and Windeyer JJ.) ordered a new trial on the ground that the jury had not been adequately directed on the significance of the failure of the driver of the other vehicle to give evidence: the inference that the vehicle driven by the deceased had been on its correct side of the road was also open.

39 115 C.L.R. 140, 146-7.

40 Id. at 155.

were negligent out of the realm of conjecture or guess-work and make it a logical or positive inference.[41]

A THIRD STANDARD?

While all that may be required to prove negligence in running down cases, particularly when based on circumstantial evidence, is that the evidence should give rise on a balance of probabilities to a positive inference of negligence, the civil standard of proof it would seem is not an inflexible one. In *Briginshaw v. Briginshaw*[42] Dixon J. quoted from Starkie's Law of Evidence:[43]

> 'a mere preponderance of evidence on either side *may*[44] be sufficient to turn the scale. . . . But even where the contest is as to civil rights only, a mere preponderance of evidence, such as would induce a jury to incline to the one side rather than the other, is frequently insufficient. It would be so in all cases where it fell short of fully disproving a legal right once admitted or established, or of rebutting a presumption of law'.

His Honour pointed out that '[t]his mode of stating the rule . . . appears to acknowledge that the degree of satisfaction demanded may depend rather on the nature of the issue'. And then, quoting from Wigmore,[45] he continued: 'It is evident that Professor *Wigmore*

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41 See the judgment of Menzies J. 115 C.L.R. 140, 151 and that of Owen J. at 158 (after distinguishing Hummerstone v. Leary, [1921] 2 K.B. 664 and Bray v. Palmer, [1953] 1 W.L.R. 1455 and disapproving statements of Denning L.J. in Baker v. Market Harborough Industrial Co-operative Society Ltd., [1953] 1 W.L.R. 1472.) Kitto and Windeyer JJ. each expressed his agreement with Owen J.'s discussion of these cases.

42 (1938) 60 C.L.R. 336, 360.

43 (1st ed., 1824) 450, 451; (4th ed., 1853) 817, 818.

44 Emphasis added. Note too that the rule appears in this permissive form in the reports both of Cooper v. Slade (1858) and Newis v. Lark (1572), see notes 27 and 28 above.

45 EVIDENCE (2nd ed., 1923), Vol. v, §23: 'In *civil cases* it should be enough to say that the extreme caution and the unusual positiveness of persuasion required in criminal cases do not obtain. But it is customary to go further, and here also to attempt to define in words the quality of persuasion necessary. It is said to be that state of mind in which there is felt to be a '*preponderance of evidence*' in favour of the demandant's proposition. Here, too, moreover, this simple and suggestive phrase has not been allowed to suffice; and in many precedents sundry other phrases—'satisfied', 'convinced', and the like—have been put forward as equivalents, and their propriety as a form of words discussed and sanctioned or disapproved, with much waste of judicial effort'. Wigmore however did accept that 'a stricter standard, in some such phrase as 'clear and convincing proof', is commonly applied to measure the necessary persuasion', in certain cases which he listed. (WIGMORE, §2498, 329.)

countenances as much flexibility in the statement and application of the civil requirement as did Mr. *Starkie*'. His Honour went on to say:

> Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.

In *Helton v. Allen*[46] in 1940, the Court gave further support both to the proposition that this standard is flexible and to stating it in terms of "reasonable satisfaction" rather than "balance of probability". The issue in a civil case propounding a will was whether Helton, the chief beneficiary named in the will, had unlawfully killed the testatrix. He had been twice tried of having murdered her by strychnine poison. On the first trial he was convicted but the conviction was quashed on appeal and a new trial ordered. On the second trial he was acquitted. In the civil case the jury found against him and he appealed, one of the grounds being that the trial judge had emphasised to the jury that being a civil trial a preponderance of evidence would suffice to prove the fact of the unlawful killing. In a joint judgment allowing the appeal and directing a new trial,[47] Dixon, Evatt and McTiernan JJ., citing and quoting from *Briginshaw v. Briginshaw,* stated[48] that

> unfortunately [the summing up read as a whole produced] an impression that to discharge their duty the jury should simply estimate the probabilities and if they thought that the probabilities in favour of the opinion that Helton poisoned Mrs. Roche outweighed in any degree, however slight, the probabilities against that opinion they should find against him. . . . [The summing up would] make the jury think that their task was a mere mechanical comparison of probabilities and take their minds away from the simple truth that they should not find that Helton committed a murder unless they were satisfied he did so.

The judges also disapproved as being very likely to mislead the jury, a 'somewhat elaborate' redirection (on what in their request the jury

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46 (1940) 63 C.L.R. 691.

47 In separate judgments Rich and Starke JJ. agreed that the appeal be allowed and a new trial ordered.

48 (1940) 63 C.L.R. 691, 711.

had called the 'point about probabilities') contrasting the measure of certainty required in the two jurisdictions. The effect was to tell them that it was enough for them to feel that there was some preponderance of probability in the plaintiff's favour.

In *Murray v. Murray*[49] in 1960 Dixon C.J. confirmed that '[w]hat the civil standard of proof requires is that the tribunal of fact . . . shall be "satisfied" or "reasonably satisfied" '. His Honour continued:

> The law goes on to say that he is at liberty to be satisfied upon a balance of probabilities. . . . If in the end he has no opinion as to what happened, well it is unfortunate but he is not "satisfied" and his speculative reactions to the imaginary behaviour of the metaphorical scales will not enable him to find the issue mechanically. . . . But [the authorities cited in *Briginshaw's* case] show that from the beginning of the nineteenth century courts did not . . . claim from the parties, the same strictness or exactness of proof about all questions arising in a civil trial without regard to their triviality or importance, the unlikelihood or the probability of their occurring.

While the language generally used—onus or burden of proof, weight of evidence, balance of probabilities—does tend to encourage consideration of the questions arising in terms of scales and mathematical tables, Sir Owen Dixon's warnings against reliance on any 'mechanical comparison of probabilities' or 'the imaginary behaviour of metaphorical scales' are well given. The thought processes involved in reaching a state of persuasion, satisfaction or certainty must generally, if not always, be too involved to be reduced to simple questions that can be solved by such mathematical concepts as a juryman, or even a judge, can bring to bear on them. Even when the issue is a simple one, it is doubtful whether the application of mathematical formulae will provide the solution. To take as an example the questions posed by Mr. Justice Eggleston in his article on Probabilities and Proof:[50] 'If A proves that B has tossed a coin a certain number of times, the result of each toss being unknown to A, and the issue for the jury being whether any one or more of the tosses resulted in a head, is there evidence on which a jury could find in favour of A? If so, how many tosses must be proved to justify a finding in A's favour?' Assuming the issue can arise in this simple form, if A proves that the coin was tossed twice, the mathematical probabilities in favour of at least one head, are three to one, or seventy-five per cent, and the

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49 33 A.L.J.R. 521, 524.

50 (1963) 4 M. U. L. REV. 180. Note also Denning L.J.'s discussion in terms of percentages in Bater v. Bater, [1951] P. 35, 37.

metaphorical scales would certainly come down in favour of an affirmative. But is there evidence on which a jury could find that at least one toss resulted in a head? Is this inference or conjecture? And could the seriousness of the issue involved make any difference? There can be no doubt that as the number of tosses increases the conclusion becomes more and more difficult to resist.

It can hardly be denied that 'the seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a finding' are factors which must be taken into account by the tribunal of fact in reaching its state of mind. But the denial of the existence of any third standard, while accepting that the standard is a flexible one, emphasising the consideration to be given to the nature of the issue, and avoiding when the issue is considered a grave one the expression "balance of probabilities"[51] in favour of "reasonable satisfaction", all tend to some confusion. One cannot help feeling some sympathy for the trial judge in *Murray v. Murray*[52] for example. In *Briginshaw's* case the trial judge had shown what Lord Denning has referred to as 'an uncommon nicety of approach'.[53] Dismissing the petition he had said that he was not satisfied beyond reasonable doubt but if it were a civil case he 'might well consider that the probabilities were in favour of the petitioner'. The High Court held that he had been wrong to apply the criminal standard but at the same time he had not really been satisfied that adultery had occurred even though he found 'that perhaps in the probabilities arising upon the evidence there was some preponderance for those for, over those against, such a conclusion'.[54] In *Murray v. Murray* the trial judge also adopted the uncommon nicety approach, rejected the criminal standard, but with *Briginshaw's* case well in mind found that the adultery had not been proved. 'I felt at the conclusion of the hearing' he said, 'that there [was] too much doubt in my mind for me to feel comfortably satisfied that adultery was committed', and he dismissed the wife's petition. An appeal taken direct to the High Court was allowed, because in the

51 Note however the statement of the Court (Barwick C.J., Kitto, Taylor, Menzies and Windeyer JJ.) in Rejfek v. McElroy, (1965) 112 C.L.R. 517, 519: 'This Court decided in 1940 in Helton v. Allen, (1940) 63 C.L.R. 691, that in a civil proceeding facts which amount to the commission of a crime have only to be established to the reasonable satisfaction of the tribunal of fact, a satisfaction which may be attained on a consideration of the probabilities'.

52 (1960) 33 A.L.J.R. 521.

53 In Hornal v. Neuberger Products Ltd., [1957] 1 Q.B. 247, 258.

54 (1935) 60 C.L.R. 336 per Dixon J. (as he then was) at 369.

Court's view adultery had been proved. In his judgment Dixon C.J. said:[55] 'It is possible that . . . his Honour [the trial judge] was testing the case according to a third standard of persuasion *notwithstanding* what was said on that subject in *Briginshaw v. Briginshaw*'.

Sir Owen Dixon has, in none of his judgments, stated that there are degrees of probability within the civil standard,[56] but the reference to flexibility and the markedly different approach to the matrimonial causes cases and proof of crimes in civil cases on the one hand,[57] and the running down cases on the other, suggest strongly that in fact it is not merely a matter of flexibility but of separate standards, and it would, it is submitted, be profitable to adopt the American approach. As put by Professor J. P. McBaine:[58]

> The only sound and defensible hypotheses are that the trier, or triers, of facts can find what (a) *probably* has happened, or (b) what *highly probably* has happened, or (c) what *almost certainly* has happened.

Or, as suggested by Professor Morgan,[59] the jury should be directed[60]

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55 (1960) 33 A.L.J.R. 521, 524. Emphasis added.

56 Cf. Bater v. Bater, [1951] P. 35 per Denning L.J. at 37: 'in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter'.

57 Apart from matrimonial offences and the proof of criminal conduct in civil cases there are other civil cases in which something more than a mere balance of probabilities is required—for example, to rebut the presumption of marriage from cohabitation and reputation. (See the authorities discussed in re Taylor deceased, [1961] 1 W.L.R. 9—'the evidence . . . must be strong, distinct, satisfactory and conclusive'; 'unless the contrary be clearly proved'; 'evidence of the most cogent kind'.) McCORMICK in his book on EVIDENCE, 679 states that the 'more exacting measure of persuasion [i.e. clear and convincing evidence] seems to have had its origins in the standards prescribed for themselves by the chancellors in determining questions of fact in equity cases', and cites Henkle v. Royal Exchange Assurance Co., (1749) 1 Ves. Sen. 317, 319; 27 E.R. 1055, 1056, and Marquis Townshend v. Strangroom, (1801) 6 Ves. Jun. 328, 333; 31 E.R. 1076.

58 McBaine, *Burden of Proof: Degrees of Belief*, (1944) 32 CALIF. L. REV. 242, 246.

59 Reporter of the American Law Institute's Committee on Evidence which produced the Model Code of Evidence.

60 MORGAN, BASIC PROBLEMS OF EVIDENCE, 24. The American academics seem to have been not very happy with the language of the law in this area. PROFESSOR MORGAN in his book SOME PROBLEMS OF PROOF, 86, writes 'The truth is that in allocating the burden of persuasion and explaining to the jury their duties with reference to it, the courts have been performing their functions with a minimum of efficiency and with what President Eliot of Harvard once described as a maximum of intellectual frugality'. See also WIGMORE, §2498, and n. 45 above.

> in the ordinary civil case, that the existence of the fact in dispute is more probable than its non-existence; in the unusual civil case, that its existence is *much* more probable than its non-existence; and in a criminal case, that its existence is so highly probable as to banish all reasonable doubts.

Accepting that the mind can reach varying degrees of conviction, the law it would seem has developed at least three separate standards of persuasion and it should openly recognise this. The expression "proof beyond reasonable doubt" has probably now become well settled in its meaning, but it is doubtful whether "proof on the balance of probability" has for the community at large any one fixed meaning. It is more than doubtful that it would have the flexible connotation given to it in law. In any event the formulation of a third standard in the light of the development of law should not offer insuperable obstacles.

THE PRELIMINARY QUESTION

Before he gets to the stage of having to persuade the fact-finding tribunal in any case, the party concerned is faced with a preliminary question. He has to establish a prima facie case, that is, a case which as a matter of law is fit to be left to the fact-finding tribunal. As Wigmore put it,[61] in a jury trial he must 'first satisfy the judge that he has a quantity of evidence fit to be considered by the jury and to form a reasonable basis for the verdict'. Or to quote Willes J. in *Ryder v. Wombwell*[62] 'there is in every case . . . a preliminary question which is one of law, viz., whether there is any evidence on which the jury could properly find the questions for the party on whom the onus of proof lies'. The question may arise with reference to any particular fact, any wider issue, or to the whole case. It may also arise in non-jury trials, (particularly on a submission of no case to answer) there being the notional separation in the functions of the court as a tribunal of law and a tribunal of fact.

In the first edition of his book on Evidence[63] Professor Cross, adapting the language used by Brett J. in *Bridges v. North London Rail Co.*,[64] put the preliminary question thus: 'whether there is evidence which, if uncontradicted, would justify men of ordinary reason and fairness in affirming the proposition which the proponent is bound

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61 WIGMORE, §2478, 279.
62 (1868) L.R. 4 Ex. 32, 38.
63 At 54.
64 (1874) L.R. 7 H.L. 213, 233.

to maintain', and added 'having regard to the degree of proof demanded by the law with respect to the particular issue'. In the subsequent editions of the book,[65] he abandoned the words he had added, stating that '[e]ven in a criminal case the evidence sufficient to constitute a case to answer need, at most, be such as would satisfy a reasonable tribunal on the balance of probability', and cited *Wilson v. Buttery*[66] and a 1962 English practice note.[67]

In *Wilson v. Buttery* Napier J. speaking for the Full Court of the Supreme Court of South Australia did say that for the purpose of raising a prima facie case there was no distinction between civil and criminal cases,[68] and cited in support a dictum of Blackburn J. in *Smith*[69]—'there must be more than a mere scintilla of evidence before the case is submitted to the jury'. The Supreme Court of South Australia has persisted with this view.[70]

It is doubtful whether the practice note supports the *Wilson v. Buttery* proposition. It is a direction by the Queens Bench Division to justices:

> If . . . a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating

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65 (2nd ed., 1963), 57; (3rd ed., 1967), 61.

66 [1926] S.A.S.R. 150.

67 [1962] 1 All E.R. 448.

68 [1926] S.A.S.R. 150, 154. His Honour went on to say that at this stage the question was, 'do they [the facts] establish a *substantial* balance of probability in favour of the inference which the prosecution seeks to draw?' Emphasis added, but perhaps in the context not too much should be made of the adjective.

69 (1865) 34 L.J.M.C. 153. It is submitted with respect that the Court in Wilson v. Buttery read rather more out of the dictum of Blackburn J. than is warranted. Smith had been charged with manslaughter in having failed as a mistress to provide her servant with proper food and clothing. The jury brought in a verdict of guilty but the trial judge Smith J. stated a case for the Court of Crown Cases Reserved, on two points—the first relating to the admissibility of a dying declaration, and the second, to whether there was evidence which ought to have been left to the jury. Erle C.J. and Blackburn J. were of opinion that the case did not disclose such evidence. Mellor J. thought there was some evidence but not enough to support the conviction and Channel B. seemed of similar view. And Smith J. who was himself a member of the appellate court stated that he had thought at the trial and still thought that there had been enough evidence to go to the jury. The conviction was quashed.

70 E.g. in King v. McDonald, [1943] S.A.S.R. 3, Napier C.J. at 5, refers to 'the preponderance of probability, which would normally make out a prima-facie case' in a criminal trial, and in Duthie v. Brebner, [1961] S.A.S.R. 183, Mayo J. at 189 said: 'The probability the charge was true would be sufficient [statutory provisions apart] to raise a prima-facie case for the defence to answer' and cited King v. McDonald.

> tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict.

The test of evidence on which a reasonable tribunal could or might convict is repeated in two other parts of the short note, and of course a reasonable tribunal could only convict if satisfied beyond reasonable doubt.

The test is put similarly in the judgment of the High Court (Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.) in the leading Australian case of *May v. O'Sullivan*:[71]

> the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he *could* lawfully be convicted.

And here too it may be said that he could not lawfully be convicted unless the evidence is sufficient to establish his guilt beyond reasonable doubt.

In *May v. O'Sullivan* the Court did refer to *Wilson v. Buttery,* and while expressly disapproving of a suggestion that on the establishment of a prima facie case the onus shifted to the defendant, made no comment on the statement immediately following (and which the High Court included in the extract quoted) that for the purpose of raising a prima facie case there was no distinction between civil and criminal cases.

In theory at least there certainly should be a distinction. In practice, the issue could be insignificant. Where a case depends on circumstantial evidence and undisputed evidence, the issues to be faced on the preliminary question and in determining whether the burden of proof has in fact been discharged at the appropriate standard, and indeed for the appellate court if the matter is taken on appeal,[72] are similar.

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71 (1955) 92 C.L.R. 654, 658. See also Zanetti v. Hill, (1962) 108 C.L.R. 433 per Kitto J. at 442: 'The question whether there is a case to answer . . . is simply the question of law whether the defendant could lawfully be convicted on the evidence as it stands'. The proposition as stated by WIGMORE, §2487, 279—the parties '*must first satisfy the judge that they have a quantity of evidence fit to be considered* by the jury, and to form a reasonable basis for the verdict'—also lends itself to the same interpretation.

72 See e.g. Benmax v. Austin, [1955] A.C. 370 per Lord Moreton at 374: 'the learned [trial] judge did not doubt the credibility of any witness, and formed his views by inference from the evidence as a whole. The Court of Appeal formed the opposite view and I agree with that court'. And per Lord Reid at 376: 'in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge'.

There is little scope for the discretion of the fact-finding tribunal. How slight is this scope is exemplified by the running down cases[73] discussed earlier in the article. Where the evidence is disputed, consideration of its quality, of the credibility of the witnesses and the weight to be given to the evidence allows for such a wide range of effect that it would tend to overshadow any subtle differences in the degrees of persuasion which are ultimately to be reached. What the court is primarily concerned with on the preliminary question is the *quantity* of the evidence. The question of its quality is of course so closely related that to some extent it must be taken into account, but any suggestion that in such cases the court should on the preliminary question try the case assessing the credibility of the witnesses and the weight to be given to the evidence for the purpose of determining whether the accused is at least on the balance of probabilities guilty,[74] would, it is submitted, be wrong. The court is concerned with the sufficiency of the evidence as a matter of law, not its sufficiency as a matter of fact at some lower standard.

From a practical point of view there is also something to be said for equating the test on the preliminary question with that which faces the appellate court, and this has been stated as being 'whether [the] Court thinks that upon the evidence it was open to the jury to be satisfied beyond reasonable doubt'.[75] When the question arises on a submission of "no case to answer" the court must of course decide the issue on the evidence as it then stands, in the appropriate case taking into account for what it may legally be worth, the effect of the possible silence of the defendant or accused on the tribunal of fact.[76]

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73 Holloway v. McFeeters, (1956) 94 C.L.R. 470; Luxton v. Vines, (1952) 85 C.L.R. 352 and Nesterczuk v. Mortimer, (1965) 115 C.L.R. 140. Cf. the *res ipsa loquitur* cases—Mummery v. Irvings Pty. Ltd., (1956) 96 C.L.R. 99; Anchor Products v. Hedges, (1966) 115 C.L.R. 493; and Nominal Defendant v. Haslbauer, (1967) 41 A.L.J.R. 1. As a criminal law example see Plomp, (1963) 110 C.L.R. 241.

74 The dicta in the South Australian cases are open to this interpretation. See Wilson v. Buttery, [1926] S.A.S.R. 150, 154: 'At this stage . . . the question is . . . do [the facts] establish a substantial balance of probability'; King v. McDonald, [1943] S.A.S.R. 3 per Napier C.J. at 5: 'the preponderance of probability, which would normally make out a prima-facie case'; Duthie v. Brebner, [1961] S.A.S.R. 183 per Mayo J. at 189: 'The probability the charge was true would be sufficient to raise a prima-facie case for the defence to answer'.

75 To quote Menzies J. in Plomp, (1963) 110 C.L.R. 241, 247. When in any doubt on the preliminary issue the judge should of course tend to let the matter go to the jury to avoid a new trial in case he is wrong.

76 Regarding the effect of the accused's silence see Morgan v. Babcock & Wilcox Ltd., (1929) 43 C.L.R. 163 per Isaacs J. at 177; May v. O'Sullivan,

THE EVIDENTIAL BURDEN

As the party who bears the burden of proof of any fact, wider issue or case, 'must first with his evidence pass the gauntlet of the judge',[77] that is, establish his prima facie case, before he gets to the jury or fact-finding tribunal, the burden of proof, presumptions and statutory provisions apart, necessarily carries with it the burden of adducing evidence. But a prima facie case having been established the effect is not to cast any burden of proof on the opponent. The opponent may of course adduce evidence to refute the prima facie case or to be considered by the fact-finding tribunal on any issue before the court, but if he wishes to raise an issue not already before the court he does bear what is sometimes referred to as an evidential burden:[78] he now has to get past the judge.

The question can arise in two types of situation which should be considered separately. The first is well illustrated by *Woolmington's* case.[79] The accused, a young man, was charged with having murdered his young wife by shooting her. The prosecution had to prove that he killed her and did so with malice aforethought, which in the circumstances meant that he had done it intentionally. He claimed that he had fired the gun accidentally, and it can be said he bore an evidential burden 'in the sense that he ran a grave risk of being convicted unless he took steps to negative malice'[80] and this he could do, of course, by introducing the evidence of accident. But his act and his state of mind at the time were already material issues before the Court. They were issues on which the prosecution bore the burden but to which his evidence was relevant. It is easy in such circumstances to say that he did not bear any burden of proof, that it was for the

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(1955) 92 C.L.R. 654; Paterson v. Martin, (1966) 40 A.L.J.R. 313; Ex parte Jones; re Macreadie, (1957) 75 W.N. (N.S.W.) 136; Coghlin v. Gaynor, [1961] Qd.R. 351; McLeod v. Maynard, (1962) 57 Q.J.P.R. 157; Cheatle v. Considine, [1965] S.A.S.R. 251; Hall v. C.I.R., [1965] N.Z.L.R. 184; Purdie v. Maxwell, [1960] N.Z.L.R. 599; Brennan v. Coghlan, [1967] A.L.R. 345.

77 WIGMORE, §2487, 278.

78 Several expressions have been used to describe and differentiate between the burden of proof and the lesser evidential burden. 'The burden of proof of the issues has been called the general burden, the burden on the pleadings, the legal burden, the fixed burden, the burden of persuasion, the persuasive burden and simply the burden of proof. The burden of adducing evidence has been called the particular burden, the tactical burden, the provisional burden and the evidential burden'. COCKLE, CASES AND STATUTORY EVIDENCE (10th ed., 1963), 361. See also CROSS, EVIDENCE (3rd ed., 1967), 67-69.

79 Woolmington v. The Director of Public Prosecutions, [1935] A.C. 462.

80 CROSS, EVIDENCE (3rd ed., 1967), 20. Woolmington is used as an example to illustrate the evidential burden by Professor Cross.

prosecution to prove every element of the charge beyond reasonable doubt and that this included negating accident.

In the second type of situation, the party concerned wishes to raise an issue not already before the court, an issue if not 'strictly and properly by way of confession and avoidance'[81] then at least in the nature of confession and avoidance—on a charge of murder, for example, say provocation, or self-defence, or duress, or possibly, mistake of fact.[82] These are issues separate and apart from what the prosecution has necessarily to prove in the first instance to establish the charge. It is arguable that the same principles should apply to them as apply to the proof of exceptions and provisoes. In the words of Dixon C.J. in *Dowling v. Bowie*:[83]

> A qualification or exception to a general principle of liability may express an exculpation excuse or justification or ground of defeasance which assumes the existence of the facts upon which the general rule of liability is based and depends on additional facts of a special kind. If that is the effect of the statutory provisions,[84] considerations of substance may warrant the conclusion that the party relying on the qualification or exception must show that he comes within it.

But these principles have not been applied. Subject to the proof of insanity and any statutory exceptions the rules regarding burden of proof have followed in the wake of *Woolmington's* case. The accused, it has been frequently held, does not bear any burden of proof on these issues. He bears only an evidential burden. He still however has to get past the judge, and on this preliminary question the prosecution bears no burden other than that, if it chooses, of refuting the accused's case. It need do nothing. The task of getting past the judge

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81 To use the words of Dixon J. (as he then was) in Mullen, (1938) 59 C.L.R. 124, 135.

82 See the discussion of the statutory defence of mistake of fact under the Tasmanian Criminal Code in Martin, [1963] Tas. S.R. 103.

83 (1952) 86 C.L.R. 136, 140. See also Vines v. Djordjevich, (1955) 91 C.L.R. 512, and Nominal Defendant v. Dunstan, (1962) 109 C.L.R. 143, both civil cases but in which nevertheless the same questions arose and the same principles were considered.

84 The question arises usually in the context of statutory provisions but the principle is not necessarily confined to them. See Lee, (1950) 82 C.L.R. 133 per the Court (Latham C.J., McTiernan, Webb, Fullagar and Kitto JJ.) at 152-3: 'The discretion rule [i.e. the rule under which the trial judge may exclude evidence of a confession notwithstanding that it was obtained voluntarily] represents an exception to a rule of law, and we think that it is for the accused to bring himself within the exception'.

falls squarely on the accused. Once he is past the judge he is entitled to the benefit of any doubt, and at this stage the prosecution takes on a new burden. In addition to having to prove all the elements of the offence, it now has the burden of proof on the new issue. It has to prove that the accused was not provoked, acting in self-defence or as the case may be. This does create, in theory anyway, a dilemma, because the evidence which the accused must produce as being fit to be left to the jury need not go so far as being sufficient to *prove*[85] that he was provoked or acting in self-defence or as the case may be. It need only suffice to introduce some reasonable doubt on the issue, to be the obverse, as it were, of the burden borne by the prosecution. Something less than proof even on the slightest balance of probabilities should be enough.

In the direction to the jury on the ultimate burden this seems to have offered no difficulty, but in the consideration of the preliminary question it has. *Bratty's* case[86] is an example. The accused had been charged with the murder of a young girl. Three defences were raised at the trial—automatism, lack of mental ability to form the required intent, and insanity. The trial judge refused to leave the first and second defences to the jury. The accused was convicted. His appeals in turn to the Court of Criminal Appeal and House of Lords were dismissed.

In the House of Lords, Viscount Kilmuir L.C., having referred to the Australian cases of *Carter*[87] and *Cooper v. McKenna,*[88] said[89] that 'none of the judges would question the proposition that, for a defence of automatism to be "genuinely raised in a genuine fashion,"[90] there must be evidence on which a jury could find that a state of automatism exists'. But this is not so, unless the accused bears the burden of proof, which it is generally accepted he does not, and Lord Kilmuir himself concludes that 'once the defence have surmounted the initial hurdle . . . the proper direction is that, if the evidence leaves them in a real state of doubt, the jury should acquit'.

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85 If one were to persist in the use of the metaphorical scales or percentage tables then on the particular issue (which is separate and apart from the elements of the offence which the prosecution has to prove) the accused may succeed on evidence which tilts the scale against him or on which the probability per cent operates against him.

86 Bratty v. Attorney-General for Northern Ireland, [1963] A.C. 386.

87 [1959] V.R. 105.

88 [1960] Qd.R. 225.

89 [1963] A.C. 386, 406.

90 Using Sholl J.'s terminology in Carter, [1959] V.R. 105, 111.

Lord Denning's judgment too contains hints of the dilemma. He said:[91]

> To use the words of Devlin J.,[92] the defence of automatism "ought not to be considered at all until the defence has produced at least prima facie evidence," . . . and the words of North J.[93] in New Zealand "unless a proper foundation is laid," . . . The necessity for laying the proper foundation is on the defence: and if it is not so laid, the defence of automatism need not be left to the jury, any more than the defence of drunkenness . . . provocation . . . or self-defence . . . need be.

Thus far there is nothing in his Lordship's statement to quarrel with. But he then poses the question of what is a proper foundation and provides as an answer that there should be some evidence from which the automatism (or the cause assigned for it) can reasonably be inferred, and this, if indeed the accused has only to raise a doubt, is setting the standard too high.

If these statements in *Bratty's* case lay down the law, then the evidential burden of getting past the judge by an accused is no different from that faced by a party who bears a burden of proof. In practice it may well be that on the preliminary question the distinction between evidence which could be sufficient to prove an issue, and evidence which could be sufficient to throw doubt on it, is insignificant, and that the simple test of whether there is evidence fit to be left to the jury without a close analysis of what "fit" means in the context is good enough, but in principle the trial judge should at least have in mind that all the accused is required to do is raise some doubt.

Bratty's case, like *Woolmington,* falls into the first of the two types of situation which I have suggested should be considered separately. The evidence which the accused was seeking to have considered, bore (and it makes no difference whether automatism is regarded as relevant to *mens rea,* or *actus reus,* or both) on issues already before the court. In principle the position should be no different from that applying to any evidence tendered on the material issues. The emphasis should be rather on relevance and admissibility than on sufficiency. Looked at from this point of view what the case has decided

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91 [1963] A.C. 386, 413. Lord Denning also referred to the presumption of mental capacity, and said: 'if the defence wish to displace that presumption they must give some evidence from which the contrary may reasonably be inferred'.

92 In Hill v. Baxter, [1958] 1 Q.B. 277, 285.

93 In Cottle, [1958] N.Z.L.R. 999, 1025.

in effect is that evidence in the form of a statement by the accused that he was in a state of automatism or black-out is either irrelevant or inadmissible on the issue of whether he did the act intentionally,[94] an issue, the burden of proving which lies on the prosecution.

STATUTORY VARIATIONS OF THE STANDARDS OF PROOF

Next to consider the question of how far the Legislature may vary the standards of proof. When the High Court expressed the civil standard of proof in terms requiring that the court be satisfied or reasonably satisfied, it in fact did so in the context of a case based on a statutory provision. The petition for the divorce in *Briginshaw v. Briginshaw*[95] was made under the Victorian Marriage Act 1928, section 80 of which makes it 'the duty of the court to satisfy itself so far as it reasonably can' of the facts alleged in the petition. The High Court however was not influenced to any great extent, if at all, by this provision.[96]

In marked contrast is the consideration of the word "satisfied" in section 4(2) of the English Matrimonial Causes Act 1950,[97] by the House of Lords in *Blyth v. Blyth*.[98] Lord Morris of Borth-y-Gest[99] stated that

> [n]o one, whether he be judge or juror, would in fact be "satisfied" if he was in a state of reasonable doubt . . . [and that he was] "unable to subscribe to the view which . . . has had its adherents, namely, that on its true construction the word "satis-

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94 Cf. D.P.P. v. Smith, [1961] A.C. 290.

95 (1938) 60 C.L.R. 336.

96 The standard of "reasonable satisfaction" was adopted by the Commonwealth Parliament when in 1959 it exercised its powers to make laws for divorce and matrimonial causes under s. 51 (xxii) of The Constitution—see Matrimonial Causes Act 1959 (Cth.) s. 96.

97 The sub-section provides: 'If the court is satisfied on the evidence that— (a) the case for the petition has been proved; and (b) where the ground of the petition is adultery, the petitioner has not in any manner . . . condoned, the adultery . . . the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition: . . .'

98 [1966] A.C. 643.

99 Id. at 660, citing dicta from Bater v. Bater, [1951] P. 35; Davis v. Davis, [1950] P. 125 and Preston-Jones v. Preston-Jones, [1951] A.C. 391. Lord Morris of Borth-y-Gest also said, in answer to the contention that the word "satisfied" meant different things in different parts of the statute: 'it cannot mean that the court had to be satisfied that the wife committed adultery but need only be half satisfied or not quite satisfied that the husband had not condoned it'.

> fied" is capable of connoting something less than proof beyond reasonable doubt".[100]

Lord Moreton of Henryton held similar views. He said:[101]

> If a judge says to himself: "I feel a doubt on this matter and, in my opinion, the doubt is a reasonable one," can he possibly go on to say that he is satisfied? I think not. If, on the other hand, the statute uses the words "finds" or "holds" or "decides," it is clearly open to a judge to give a decision on the balance of probabilities.

Lord Denning took a different view.[102] As far as he was concerned the word in the context

> deals only with the incidence of proof, not with the standard of proof. It shows *on whom* the burden lies to satisfy the court, and not the degree of proof which he must attain.

Lord Pearce was of opinion similar to that of Lord Denning. And Lord Pearson said:[103]

> The phrase "is satisfied" means, in my view, simply "makes up its mind". . . . The degree or quantum of proof required by the court before it comes to a conclusion may vary according to the gravity of the subject matter to which the conclusion relates . . .

What *Blyth v. Blyth* does establish is the fact that words can mean different things to different people and the draftsman must be careful in selecting his words to give effect to the legislative intent. It may also be taken, and there can be no disputing this, that the Legislature may say on whom the burden of proof should lie. But to what extent it may vary the degrees of proof required is another question, the answer to which is better provided by a consideration of the South Australian statutory provision set out at the beginning of this paper.

During the committee stage of the debates on the Western Australian measure, the Attorney-General interjected:[104] 'It is nothing to do with onus of proof. . . . That is all it is—*prima facie* evidence'. The Courts certainly have not treated it as such.

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100 Quoting with approval from Lord MacDermott's judgment in Preston-Jones v. Preston-Jones, [1951] A.C. 391, 417.

101 Id. at 664.

102 Id. at 667. He also quoted with approval from the judgment of Dixon J. (as he then was) in Wright v. Wright, (1948) 77 C.L.R. 191, 210.

103 Id. at 676.

104 (1960) 156 WESTERN AUSTRALIAN PARL. DEB. (N.S.) 2057. The Attorney-General also indicated that there were over seventy other statutes in the State containing similar provisions. He did not name them but presumably was referring to provisions relating to prima facie evidence.

In South Australia despite the numerous occasions on which the section has been considered there would still seem to be some differences of opinion about its effect. And in the two Queensland cases markedly different views have been taken. All this, it is submitted with deference, is because the courts have failed to consider the concepts of burden and standards of proof with sufficient clarity.

The first point that arises for consideration is the significance of the word "reasonable". Speaking about the word "reasonably" in the context of the phrase "reasonably satisfied", Dixon C.J. in *Murray v. Murray*[105] said:

> as in other parts of the law the word "reasonably", which in origin was concerned with the use of reason, makes its appearance without contributing much in meaning. However, its use as a qualifying adjective seems to relieve lawyers of a fear that too much unyielding logic may be employed.

The expression "reasonable suspicion" would seem to contain within itself a contradiction in terms. Suspicion by itself may be imaginative or fanciful conjecture or guesswork. If it is to be reasonable, it is arguable that it ceases to be fanciful and becomes positive inference or proof. The Legislature was probably seeking to achieve something between mere guess-work on the one hand and proof on the other—a state of mind which may well be compared with that which the jury in theory has to reach to conclude that the accused is to have the benefit of the doubt on the issue of whether he was provoked or acted in self-defence.

In any event to be reasonable the suspicion must presumably be based on reason but to suggest as has been frequently done 'that the reasonable suspicion must be established on facts proved beyond reasonable doubt'[106] is artificial and unsustainable. Even on a final assessment of the evidence to ascertain whether the standard of proof had been satisfied, it would be unreal to require that each particular fact or incident and each inference drawn be considered separately by the fact-finding tribunal, and only taken into consideration if it

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105 (1960) 33 A.L.J.R. 521, 524.

106 Lampard v. West, [1926] S.A.S.R. 293 per Poole J. at 311. See also Duthie v. Brebner, [1961] S.A.S.R. 183 per Mayo J. at 189-190: 'Both counsel seemed to agree that every fact upon which suspicion is founded must be proved as beyond such [reasonable] doubt'; Proberts v. Dulley, [1961] Qd.R. 1 per Mack J. at 15: 'In my opinion a reasonable suspicion can only be raised if the evidence establishes facts which give rise to it and such facts are proved beyond reasonable doubt', citing in addition to Lampard v. West, King v. McDonald, [1943] S.A.S.R. 3, and Kenny v. O'Sullivan, [1953] S.A.S.R. 75.

is found to have been proved beyond reasonable doubt. 'It is generally and properly said', to quote Wigmore[107] (and conceding that there are contrary statements), 'that this measure of reasonable doubt need not be applied to the specific detailed facts'. The better view regarding the basis for the suspicion would seem to be that propounded by Mayo J. in *Duthie v. Brebner*:[108]

> In such a prosecution some facts may be completely established, there may be other circumstances that tend to lend probability to other elements not so proved, and there may be in lieu of that, or in addition to it, evidence not rejected but not fully accepted, that give rise . . . to a reasonable suspicion.

But the process of deciding whether there is a reasonable suspicion is not the same as that for deciding whether the prosecution has made out a prima facie case. In the latter what the court has to decide as a matter of law is whether a tribunal of fact (which may of course be the court itself, albeit in a different role) *could* lawfully convict after it has weighed the evidence and '[a] magistrate who has decided that there is a "case to answer" may *quite consistently*, if no evidence is called for the defendant, refuse to convict on the evidence for the prosecution'.[109] In the former, what the court has to decide, having itself weighed the evidence, is, whether it has in fact a reasonable suspicion. There is no question at this stage of the establishing of a prima facie case.

The evidence having raised in the mind of the court a reasonable suspicion, the statute converts that evidence into prima facie *evidence* of guilt. This too is not the same as a prima facie case. It does not bring into play the principles of *May v. O'Sullivan*. Stanley J. in *Proberts v. Dulley*[110] stated that it did. There are also dicta in other cases[111] on "prima facie evidence" which equate it with a prima facie case and suggest that the effect is permissive. But the weight of authority[112] is the other way and it would hardly be "consistent" for

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107 WIGMORE, §2497, 324. This is not to say that every *element* of the offence must not be proved beyond reasonable doubt.

108 [1961] S.A.S.R. 183, 190.

109 Per the Court in May v. O'Sullivan, (1955) 92 C.L.R. 654, 659. Emphasis added.

110 [1961] Qd.R. 1, 8.

111 Ewen v. McMullen, [1965] V.R. 367 (on the interpretation of a "prima facie evidence" provision) per Dean J. at 368 (after referring to Bunker v. Mahoney, [1917] V.R. 65: 'The magistrate is entitled not bound to convict').

112 Kenny v. O'Sullivan, [1953] S.A.S.R. 45; Campbell v. Inkley, [1960] S.A.S.R. 273. See also Hush, (1932) 48 C.L.R. 487 per Dixon J. at 507: 'Section 30R (1) of the *Crimes Act* provides that in a prosecution of the present

the court, having already weighed the evidence in order to reach the position of prima facie evidence of guilt, to refuse to convict if no further evidence were called.

It is when any further acceptable evidence is tendered that difficulties arise. The prima facie evidence must now lose its statutory force. It becomes evidence to be considered by the tribunal of fact along with the other evidence tendered and the question which arises is what standard of proof is now to be required for conviction. The question was considered by the Full Court of the Supreme Court of South Australia in *Lampard v. West*[113] in 1926 and reconsidered by it in *Kenny v. O'Sullivan*[114] in 1953. In the latter case Reed J. was of opinion (following the earlier case) that the effect of the statutory prima facie evidence of guilt was to throw on the accused the burden of proving his innocence on the civil standard. Ligertwood and Abbott JJ., took the view that the court should consider the whole of the evidence and if still reasonably suspicious it should convict. In 1960 in *Campbell v. Inkerley*[115] Brazel J. took a similar view, and in the earlier of the Queensland cases, *Gorman v. Newton,*[116] Mansfield C.J. relying on *Kenny v. O'Sullivan* said:

> Once a reasonable suspicion has been established by the prosecution, the onus[117] then lies upon the defendant to produce further material. It is then the duty of the tribunal to consider all the evidence, and, if on the whole of the evidence there is still a reasonable suspicion that the defendant is guilty, then he must be convicted.

Decidedly opposed to this was the attitude of the majority of the Full Court of the Supreme Court of Queensland in *Proberts v. Dulley.*[118] In the words of Stanley J.:[119]

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description the averments of the prosecutor contained in the information shall be prima facie evidence of the matter averred. . . . [t]his provision . . . while leaving the prosecutor the onus, initial and final, of establishing the ingredients of the offence beyond reasonable doubt, provides, in effect, that the allegations of the prosecutor shall be sufficient in law to discharge that onus'. And Powell v. Battle, [1963] W.A.R. 32 per Hale J. at 35: evidence 'which Parliament has declared, if standing alone, to be sufficient evidence to convict'.

113 [1926] S.A.S.R. 293.
114 [1953] S.A.S.R. 45.
115 [1960] S.A.S.R. 273.
116 [1958] Qd.R. 169, 182.
117 Cf. Hush, n. 112 above.
118 [1961] Qd.R. 1.
119 Id. at 8.

> The standard of proof is still proof beyond reasonable doubt. The statute does not supply suspicion as a substitute for proof.

Wanstall J. was also of opinion that the ordinary standard of proof was required. Mack J. seemed to be prepared to accept that reasonable suspicion would suffice to convict if based on facts proved beyond reasonable doubt.

If the stand of the majority in the South Australian cases is rejected then one is faced with this anomaly: the prosecution having given sufficient evidence to create the reasonable suspicion, the accused must be convicted if he gives no evidence, but if he gives evidence, even if it adds to the prosecution case and deepens the suspicion without satisfying the court beyond reasonable doubt, he must be acquitted. Reed J.'s opinion and the case of *West v. Lampard* offer an easy solution—the prima facie evidence throws the burden of proof on to the accused—except that there is no warrant for this. The statute at most has cast an evidential burden on him.

It would seem, despite the anomaly, that the Queensland view is preferable. If the Legislature was seeking to throw the burden of proof on to the accused or to make his conviction possible on something less than proof of his guilt, it has not done so effectively. As soon as any other acceptable evidence, particularly if it refutes the prosecution evidence, is introduced, the statutory prima facie evidence of guilt resulting from the reasonable suspicion of the court based on the prosecution evidence ceases to operate, and all the evidence should be considered on its merits under the normal rules relating to the burden and standards of proof.

Finally, to answer the question: to what extent may the Legislature vary the standards of proof? As already stated, the Legislature can certainly declare on whom the burden should lie and there are several statutory formulae by which this has been achieved.[120] The courts have also on occasion[121] shown a readiness to interpret statutory provisions so as to cast on to the accused the burden of proof of issues such as provocation, issues which I have described as being in the nature of

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120 E.g. 'the proof of which lies on him'; a presumption 'unless the contrary be proved'.

121 E.g. The New South Wales Crimes Act 1900, s. 23 provides that murder is not to be reduced to manslaughter by provocation 'unless the jury find' that the provocation was not intentional etc. In Parker, [1964] Argus L.R. 1153 the Privy Council held that the effect of the requirement that 'the jury find' the various matters was to throw on the accused the burden of proof. See also Martin, [1963] Tas. S.R. 103 for a discussion of statutory provisions throwing on the accused the burden of proof of mistake of fact.

pleas by way of confession and avoidance. The Legislature can also enjoin that the party who bears the burden be required to discharge it at one of the two well-established standards—on the balance of probability, and beyond reasonable doubt—or (assuming it can find the appropriate words) at an intermediate standard, one requiring more than a mere balance of probabilities but less than the degree of certainty required to be satisfied beyond reasonable doubt. In *McLean v. Dawkins,* a case on the South Australian section under discussion, it was said:[122] 'There is a natural disinclination of the judicial mind, trained as it is . . . to act on suspicion, but it is the Court's duty to obey the legislation'. Not only the trained judicial mind but the lay mind as well distinguishes between suspicion and proof and even the Legislature cannot introduce a standard which requires something less or other than proof and require it to be accepted in the mind of the tribunal (legally trained or otherwise) as proof. What it can do, is place an evidential burden, a burden of producing some acceptable evidence, on a party, on the discharge of which the burden of proof at any of the accepted standards may be cast on the opponent, very much as in common law on the discharge by the accused of the evidential burden of circumstances of excuse or extenuation the burden of proof on the issue then falls on the prosecution. The South Australian statutory provision could have been drafted to achieve a similar effect (though in reverse); but as framed, though the first part can be interpreted to cast an evidential burden—even a light one—on the prosecution, the second fails properly to cast the burden of proof on the accused. The Legislature can indeed by astute drafting use a combination of any of the burdens and standards of proof already developed by the courts, but any attempted variations introducing other standards or concepts is bound to cause difficulties.

ERIC J. EDWARDS

122 [1930] S.A.S.R. 94 per Angas Parsons J. at 97. See also joint judgment of Rich and Dixon JJ. in Powell v. Lenthall, notes 8 and 9 above.