

# The Briginshaw Principle

*Briginshaw v Briginshaw (1938) 60 CLR 336 at 362*

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The common law recognizes two different standards of proof. Civil claims must be proved on the 'balance of probabilities' while criminal charges must be proved to the higher standard of 'beyond reasonable doubt'. The Briginshaw principle is often misunderstood as creating a third standard of proof between these two. This is not the case and every lawyer should understand the principle and when it applies.

## 50% plus one?

A majority is often described as '50% plus one'. Analogous to this, many lawyers assert that if the court is 51% certain of an alleged fact then it is 'more likely than not' and so the civil standard is met. This explanation was specifically rejected by Sir Owen Dixon J who held at page 362:

*“ . . . when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence ... It cannot be found as a result of a mere mechanical comparison of probabilities.”*

He went on to say that, in all but criminal issues, it is enough if the affirmative of an allegation is made out to the 'reasonable satisfaction of the tribunal'.

## Reasonable Satisfaction

For some issues, the balance of probabilities may be enough for reasonable satisfaction. But other issues would require a higher level of certainty to reach that same level. It means that the strength of the evidence necessary to establish a fact or facts to the civil standard vary according to the nature of what it is sought to prove.<sup>1</sup>

Factors that should be taken into account include:

1. The nature of the allegation (fraud or misconduct),
2. The inherent unlikelihood of the allegation, and
3. The consequences that would flow from the finding of fact.

Sir Owen Dixon J held at 362:

*‘ . . . 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.... In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.’*

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<sup>1</sup> Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1992] HCA 66; (1992) 110 ALR 449 at 449–50

## Section 140(2) Evidence Act

The Briginshaw principle is now incorporated into s140(2) Evidence Act which provides:

- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account—
  - (a) the nature of the cause of action or defence, and
  - (b) the nature of the subject-matter of the proceeding, and
  - (c) the gravity of the matters alleged.

## Relevance to Criminal Law

Criminal charges must be proved to the criminal standard of 'beyond reasonable doubt'. Fact finders reach this conclusion by relying on admissible evidence. Whether a particular piece of evidence is admissible or not is determined by a judicial officer who must decide on the civil standard - the 'balance of probabilities'.<sup>2</sup> This is where the Briginshaw principle is relevant to criminal law.

The Briginshaw principle applies to every application to exclude evidence. Section 142(2) modifies the test by requiring the court to take into account:

- (a) the importance of the evidence in the proceeding, and
- (b) the gravity of the matters alleged in relation to the question.

So, in every instance, counsel must make submissions referring to the three factors in s140(2) Evidence Act. This is particularly important when applying to exclude evidence which is unreliable or improperly obtained. The degree of reliability and the seriousness of the misconduct will affect whether the judicial officer feels an 'actual persuasion' and 'reasonable satisfaction'.

## Conclusion

The Briginshaw principle is not a separate standard of proof, but rather a standard of satisfaction. The more serious the allegation, the more serious should be the consideration given by the decision maker. Serious allegations with serious consequences require more compelling evidence for the decision maker to feel an 'actual persuasion' and reach the necessary state of reasonable satisfaction that the facts in dispute are more likely than not to exist.<sup>3</sup>

I am available every day should you require further assistance.

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<sup>2</sup> s142(1) Evidence Act

<sup>3</sup> Justice Rachel Pepper – '*Briginshaw in Land and Environment Court Proceedings – Introductory Observations from the Judicial Perspective*' at [25]