LET'S BE CLEAR ABOUT "CLEAR AND CONVINCING"

A paper concerning the standard of proof in police discipline cases

Presented at the CACOLE Annual Conference

Halifax, N.S., October 12, 2007

By David Goetz, Legal Counsel

With the assistance of Jennifer Sloan, Articling Student

TABLE OF CONTENTS

SUMMARY **1**

I)
OVERVIEW: THE STANDARD OF PROOF AND THE PUBLIC INTEREST **2**

II)
THE PROBLEM: "SERIOUS ALLEGATIONS" AND THE CIVIL STANDARD **3**

III)
THE CANADIAN APPROACH **7**

IV)
APPLICATION OF THE CANADIAN APPROACH GENERALLY **9**

1. What types of cases have attracted the stricter approach? **9**
2. How has the stricter approach been described in Canada? **10**

V)
APPLICATION OF THE CIVIL STANDARD OF PROOF IN POLICE DISCIPLINE CASES **15**

1. The Jurisprudence **15**
2. Observations on the Jurisprudence **18**

VI)
ANALYSIS AND CONCLUSION **20**

1. Standards of Proof: the Alternatives **20**
2. In Defence of the Traditional Civil Standard (whatever it is) **20**
3. The "Clear and Convincing" Alternative is Neither **23**
a) Distinguishing "clear and convincing" from the other standards 23
b) The American experience 23
c) Is there really a middle ground? 25
d) Discipline proceedings are not akin to criminal prosecutions 26
e) A further hypothesis: proving mind over matter 27
4. Where does this leave us? **29**

SUMMARY

There are, in Canadian law, only two standards of proof: the civil standard and the criminal standard. There is no third standard of proof which requires that a trier of fact be persuaded to any greater degree of certainty than a preponderance of probabilities (i.e., the civil standard of proof) – even in cases involving "serious allegations". What has been stipulated in the case law, and in some legislation, is the need for "clear and cogent" or "clear and convincing" evidence in order to establish misconduct. Though perhaps not readily apparent, there is a real distinction between these two conceptions of how such cases are to be proven, defended and adjudicated. The issue is, of course, relevant to this conference because professional discipline, including that of police, is one of the areas where the law has indicated a need for special scrutiny of evidence offered in support of allegations of misconduct. Unfortunately, considerable confusion has been generated by a lack of clarity and consistency in judicial pronouncements on the issue and even to some extent by defects and limitations in the prevailing legal terminology. The paper takes the position that, properly interpreted, Canadian jurisprudence recognizes the "clear and convincing evidence" requirement as an approach to the evidence, rather than as a distinct and elevated civil standard of proof. The paper goes on to defend the traditional civil standard of proof as the appropriate standard in police discipline matters. Ultimately, the paper even questions whether "clear and convincing evidence" is a necessary or useful caveat in describing the applicable threshold of persuasion in civil and administrative matters, such as the discipline of police and other professionals.

I) OVERVIEW: THE STANDARD OF PROOF AND THE PUBLIC INTEREST

Generally, the standard of proof in police discipline decisions is the civil standard, often described as proof "on a balance of probabilities". In certain cases, there is an accompanying caveat that particularly cogent evidence is necessary if there are serious allegations (involving moral turpitude, criminality or significant individual consequences – i.e., potential loss of livelihood) involved.

However, a review of Canadian jurisprudence indicates that this caveat with respect to the need for "clear and convincing" or "clear and cogent" evidence is generally not consistently understood and applied in police discipline cases, any more than it is in the broader range of professional discipline and civil cases in which it is also applicable. Instead of being viewed as a more careful scrutiny of the evidence, as it has actually been accepted in Canadian law, the "clear and cogent" evidence requirement has frequently been described (indeed, misdescribed, as this paper argues) as an intermediate standard of proof, lying somewhere between the "regular" civil standard of proof and the criminal standard of proof "beyond a reasonable doubt".

Why does this matter? It matters because mechanisms of professional responsibility and accountability, which are intended to serve the public interest, must be properly responsive to legitimate allegations of professional misconduct. This is true for all professions, and certainly no less for the policing profession. Of any regulated profession, members of the public have the least choice when it comes to the individual police officers with whom they interact. If the bar is set too high, too many legitimate complaints will be dismissed, which would tend to breed public cynicism. Public trust and confidence is essential to policing.

At the same time, of course, the bar must not be set too low. Police and other regulated professionals are themselves members of the public and, as such, inadequate regard for their rights and interests as individuals cannot be in the public interest. Moreover, if complaints are too easily substantiated, it could lead to police and other professionals adopting an excessively defensive, reactive and risk-averse approach to their duties. Clearly, this too would be highly detrimental to the public interest.

Evidently then, the challenge here is not one of balancing supposedly conflicting interests of the public and the police, but rather one of balancing competing public interests. In the author's view, the traditional civil standard of proof is the approach which best serves the interests of society as a whole.

For this approach to work, however, there must be clarity about the true nature and role of the civil standard and of the clear and convincing evidence requirement, both of which appear to be in short supply in the relevant jurisprudence.

II) THE PROBLEM: "SERIOUS ALLEGATIONS" AND THE CIVIL STANDARD

These opening lines from an interesting article by English legal scholar Mike Redmayne, entitled, "Standards of Proof in Civil Litigation,"[1] aptly set the scene for this discussion:

> It is well known that the standard of proof in a civil case is proof on the balance of probabilities, and that this means that the party bearing the burden of proof must prove that her case is more probable than not. Indeed, the civil standard of proof appears to be one of the simplest concepts in the law of evidence, requiring little explanation or illustration. But scratch the surface of this most basic of evidentiary notions and an altogether more complex picture is revealed: the case law provides a range of conflicting interpretations of what the civil standard of proof requires in different contexts. When an area of law is this confused, one starts to suspect that the problem lies in more than a failure by the appellate courts to resolve conflicting authorities and to lay down clear guidance (though this has certainly added to the difficulties in this area); one is drawn instead to the conclusion that the confusion lies at a deeper, conceptual level and that it is driven by the lack of a clear understanding of the basic building blocks of forensic proof.

The origins of the confusion appear to lay with, initially English, but subsequently Canadian and other courts, grappling with the appropriate standard of proof in cases where allegations of criminal conduct or, at any rate, conduct reflecting moral turpitude,[2] arose in non-criminal proceedings. Initially, the courts in England at least were inclined to the view that such allegations should be proven to the criminal standard of proof, regardless of the forum in which they arose.[3] However, the courts soon began to reconsider this approach.[4]

Ultimately, the English courts abandoned their earlier view and held that the civil standard of proof was applicable in civil proceedings, even where allegations of criminal conduct were involved.[5] However, it was recognized in this line of jurisprudence that these types of civil (and, by extension, administrative) cases involving particularly serious allegations or consequences, called for a particular application of the civil standard.

---

[1] (1999) 62 *Modern Law Review* 167.

[2] A number of the leading cases dealing with this issue were divorce cases where adultery, cruelty, etc. were being alleged as grounds for divorce. While we would not consider these as allegations of crimes today, at the time these cases were decided, such conduct was still referred to as "matrimonial offences".

[3] See, e.g.: *New York v. Heirs of the Late John M. Phillips and Others*, [1939] 3 All E.R. 952, at p. 955, per Atkin L.J.; *Churchman v. Churchman*, [1945] P. 44 (CA); *Ginesi v. Ginesi*, [1948] P. 179 (CA); and *Bater v. Bater* (1950), [1951] P. 35 (CA), per Lord Justices Bucknill and Somervell.

[4] See, e.g.: *Davis v. Davis* (1949), [1950] P. 125 (CA); *Gower v. Gower*, [1950] 1 All E.R. 804 (CA); and *Bater v. Bater*, *supra* note 3, per Denning LJ.

[5] *Hornal v. Neuberger Products Ltd.*, [1956] 3 All E.R. 970 (CA), subsequently confirmed in: *Nishina Trading Co. Ltd. v. Chiyoda Fire and Marine Insurance Co. Ltd.*, [1969] 2 Q.B. 449 (CA); *R. v. Home Secretary, ex parte Khawaja*, [1984] 1 AC 74 (HL); and *Re H and others (minors)*, [1996] 1 All E.R. 1 (HL).

The leading English judgment which first strove to define this middle way was that of Lord Denning in the English Court of Appeal decision of *Bater v. Bater* (1950).[6] The appeal addressed the issue of whether the trial judge in a petition for divorce on grounds of cruelty had misdirected himself in determining that the petitioner had to prove her case beyond a reasonable doubt. Surprisingly, the court unanimously decided that this did not constitute legal misdirection. However, in his separate concurring judgment, Lord Denning took the position that the civil and criminal standards of proof did not represent a dichotomy, but rather formed part of a continuum. The salient portions of his judgment are as follows:

> It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of probability within that standard.
>
> As Best CJ and many other great judges have said, "in proportion as the crime is enormous, so ought the proof to be clear". So also 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. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion. …
>
> I do not think that the matter can be better put than it was by Lord Stowell in *Loveden v. Loveden*. "The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of the reasonable and just man to the conclusion." The degree of probability which a reasonable and just man would require to come to a conclusion – and likewise the degree of doubt which would prevent him coming to it – depends on the conclusion to which he is required to come. It would depend on whether it was a criminal case or a civil case, what the charge was, and what the consequences might be; and if he were left in a real and substantial doubt on the particular matter, he would hold the charge not to be established: he would not be satisfied about it.[7]

This judgment by Lord Denning clearly proposes a flexible or "sliding scale" approach where the standard of proof itself will shift in relation to the gravity of the allegations or possible consequences. It has been endorsed in subsequent English cases,[8] and has frequently been cited in Canada and elsewhere.

---

[6] *Supra* note 3.
[7] *Ibid.*, at pp. 36-38.
[8] See, e.g.: *Hornal v. Neuberger Products Ltd.*, *supra* note 5; and *Blyth v. Blyth*, [1966] AC 643 (HL).

However, while the judgment contains a useful affirmation that the criminal standard per se has no application in civil proceedings, it also does much to blur the distinction between the two standards, only to resurrect it in the end. In the author's view, while it contains some thoughtful insights and reflections on the intellectual process of adjudication, no decision has done more to sow confusion in the minds of courts and administrative decision-makers with respect to the appropriate standard of proof in civil and administrative cases involving grave allegations or consequences.[9]

How can adjudicators, let alone parties to proceedings, be expected to cope with a potentially infinite number of fine gradations in the burden of persuasion which could be held to apply in a given case? In fairness to the parties, should the tribunal not be required to articulate in advance the "degree of probability" to be used in the case? If so, how should such a standard of proof be described – by used of a percentage figure or by more qualitative language? Does not such an approach leave enormous discretion for appellate and reviewing courts to interfere with first instance decisions? What does this do for predictability, stability and, ultimately, the credibility of the law?

Recognizing the potential for increased uncertainty and confusion in the law, some subsequent English judgments have described a second approach whereby, rather than the standard of proof in civil cases varying from case to case, it is the cogency of the evidence necessary to satisfy the traditional civil standard of proof which can vary.[10]

A third approach to the standard of proof in serious civil and administrative cases is the adoption of a fixed intermediate standard of proof somewhere between the general civil standard and the criminal standard. This has been the approach taken in the United States, where civil and administrative proceedings dealing with serious allegations require that such allegations be proven to a standard of "clear and convincing evidence."[11]

It has been suggested by some that the distinction between adopting a stricter scrutiny of evidence and raising the overall standard of proof is one that is without a difference.[12] Even Lord Denning in *Bater* begins his judgment in that case with the statement: "The difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else."[13]

There is no doubt that, as noted by Justice Berger of the Alberta Court of Appeal in his dissenting opinion in *P.L. v. College of Physicians and Surgeons of Alberta* (1999), the process of assessing the weight of evidence, on the one hand, and, on the other hand, gauging its persuasive effect, are "intimately related".[14] However, while not readily apparent in all cases, there is a valid distinction to be made.

---

[9] See also: Redmayne, *supra* note 1, at 175.
[10] See, e.g.: *In re H. and Others (Minors)*, [1996] AC 563 (HL), per Lord Nicholls of Birkenhead, at pp. 586-87.
[11] See, e.g.: *McCormick on Evidence*, 4th ed. (St. Paul, Minn.: West Publishing Co., 1992), at pp. 441-45.
[12] See, e.g.: *Re Dellow's Will Trusts*, [1964] 1 All ER 771, at 773, per Ungoed-Thomas J.; *Re M (A Minor)*, [1994] 1 FLR 59 (Eng. CA), at p. 60, per Waite LJ.; and *Re X*, 2005 CanLII 53451 (Qué. CQ), at paras. 61-62, per Demers J.
[13] [1951] P. 35, at p. 36.
[14] Dissenting opinion in *P.L. v. College of Physicians and Surgeons of Alberta* 1999 CanLII – 1999 ABCA 126, at para. 96.

If one adopts the approach of stricter scrutiny of evidence in respect of allegations of misconduct, then the seriousness of the allegations will be taken into account in assessing the weight to be assigned to particular evidence. In such cases, an adjudicator will be more inclined to discount or even to disregard evidence whose reliability, credibility or probative value is particularly frail or questionable. The evidence which remains, with whatever weight has been assigned to the various elements, must then be sufficient to discharge the burden of proof, but only to the usual level of persuasion in civil matters. Whereas applying an elevated standard of proof to a case means that the party with the burden of proof must present a more compelling case than otherwise – the implication being that more evidence may have to be adduced, as opposed to the evidence needing to be of a particular quality.

Despite, as shall be seen, what one might glean from a review of professional discipline jurisprudence in this country – including police discipline cases – Canada has actually rejected both the "sliding scale" approach described by Lord Denning in *Bater* and the notion of an intermediate third standard of proof.

III) THE CANADIAN APPROACH

The Supreme Court of Canada has made it clear that the criminal standard of proof beyond a reasonable doubt does not apply in civil matters, regardless of the nature of the allegations involved.[15]

The Supreme Court's leading judgment on the standard of proof in civil cases involving serious allegations remains the court's unanimous 1982 decision of Chief Justice Laskin in *Dalton Cartage Co. Ltd. v. The Continental Insurance Co.*[16] The case involved allegations of fraud in the context of insurance litigation. The key passage in this brief judgment reads: "There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered."[17] Here, Laskin CJC is clearly conceiving of a somewhat stricter approach to the weighing of the evidence in such cases, rather than a change in the requisite degree of persuasion implicated in the civil standard of proof.

Unfortunately, Laskin CJC goes on to quote approvingly from Denning LJ's judgment in *Bater*, where the latter talks about "degrees of probability within [the civil] standard," and the need for a higher degree of probability to establish, for example, an allegation (in a civil matter) of fraud as contrasted with one of negligence. This quoted passage from *Bater* in *Dalton Cartage* could leave the reader with the impression that Laskin CJC is approving a shifting civil standard of proof. Indeed, this endorsement of Denning LJ's language in *Bater* may well be the source of the profound confusion in subsequent Canadian jurisprudence in civil and administrative cases involving serious allegations.

However, what is often overlooked in this judgment is the paragraph immediately following the quoted passage from *Bater*, where Laskin CJC imposes caveats on his endorsement of Lord Denning's words:

> ***I do not regard such an approach as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard*** [emphasis added]. The question in all civil cases is what evidence with what weight that is accorded to it will move the Court to conclude that proof on a balance of probabilities has been established.[18]

It may, with considerable justice, be argued that this qualification which Laskin CJC sought to place on his endorsement of Lord Denning's approach leaves little of the endorsement intact. Nonetheless, faced with such an apparent conflict, the only proper course is to rely on Laskin CJC's own clear words on the issue, which stipulate that both a single standard of proof which is higher that the traditional civil standard (i.e., the American approach) and a "shifting" or flexible standard (i.e., Lord Denning's approach), are rejected.

---

[15] *Smith v. Smith* [1952] 2 SCR 312; *Hanes v. Wawanesa Mutual Insurance Co.,* [1963] S.C.R. 154; and *Dalton Cartage Company Limited v. The Continental Insurance Co.*, [1982] 1 S.C.R. 164, 1982 CarswellOnt 372.
[16] *Supra* note 15.
[17] *Ibid*., at para. 12.
[18] *Ibid*., at para. 13.

Unfortunately, many lower courts and tribunals in Canada have failed to note this contradiction in *Dalton Cartage* between what Laskin CJC is saying and what he is approving from *Bater*.[19] As a result, many judges and other adjudicators have tended to focus on Lord Denning's words, which, unlike those of Chief Justice Laskin, are not binding in Canada.

[19] The contradiction is effectively noted in Linda R. Rothstein, Robert A. Centa and Eric Adams, "Balancing Probabilities: The Overlooked Complexity of the Civil Standard of Proof," in *Law Society of Upper Canada Special Lectures 2003: The Law of Evidence*, Irwin Law (Toronto, 2004), 455, at 462. However, here the authors are specifically comparing Laskin CJC's words in *Dalton Cartage* with Dickson CJC's reference in *R. v. Oakes* (discussed below) to degrees of probability within the civil standard, which the latter had borrowed from Denning L.J. in *Bater*.

IV) APPLICATION OF THE CANADIAN APPROACH GENERALLY

1. What types of cases have attracted the stricter approach?

In Canada as elsewhere, the common law requirement for a stricter scrutiny of cases involving allegations of criminal misconduct arising in a civil context – often in insurance or divorce actions – eventually spread to other types of cases. The main consideration in the newer categories of cases has been the consequences of a given non-criminal adjudication, rather than the nature of the allegations per se.

Civil and administrative cases involving allegations of child sex abuse – because of the potential consequences for all concerned, rather than just the stigma per se – have been held to require a stricter approach to the evidence.[20]

Proceedings under the federal *Citizenship Act* to revoke citizenship for concealing involvement in war crimes and crimes against humanity in the course of applying for Canadian citizenship has also attracted a stricter approach to proof.[21] In these cases, the court's finding that the individuals in question had misrepresented their past activities in their citizenship applications rendered them liable to the revocation of their citizenship by the Governor in Council and, thereafter to deportation. Also in the area of immigration law, the courts have held that in refugee cases "clear and convincing evidence" is necessary to establish the claim that another state is unable to protect its own nationals.[22]

The Supreme Court indicated in its landmark decision in *R. v. Oakes* (1986) that, in the context of litigation involving the application of the *Canadian Charter of Rights and Freedoms*, a strict application of the civil standard of proof was called for in respect of evidence tendered to show that a limitation of a Charter right is reasonable and justified under section 1.[23]

The stricter approach to proof has also found favour with administrative and judicial bodies involved in dispensing discipline to regulated professionals. This is most clearly the case with the more established professions with a tradition of self-regulation and professional licensing, such as physicians, lawyers, engineers and architects.[24] The rationale in these cases for a stricter approach to evidence is the risk to an individual's livelihood.

The scope of the affected professions is not entirely without doubt, however. There is some jurisprudence which questions the application of the stricter approach to certain regulated professions, either on the grounds that the education and training requirements are not comparable to the more established professions,[25] or the jeopardy at issue for the professional in

---

[20] See, e.g.: *Re. X, supra* note 12.
[21] *Canada* (*Secretary of State*) *v. Luitjens* (1991), 40 F.T.R. 267, [1991] F.C.J. No. 1041 (F.C.T.D.); and *Oberlander v. Canada (Attorney General*) (F.C.A.), 2004 FCA 213 (CanLII).
[22] *Ward v. the Attorney General of Canada,* 1993 CanLII 105 (S.C.C.), [1993] 2 S.C.R. 689.
[23] [1986] 1 SCR 103, 1986 CanLII 46, at paras. 67-68.
[24] For one of the earlier cases, see: *Re Bernstein and College of Physicians and Surgeons of Ontario* (1977), 15 O.R. (2d) 447 (Ont. Div. Ct.).
[25] *Rak v. B.C. (Superintendent of Brokers),* (1990) 51 B.C.L.R. (2d) 27 (B.C.C.A.). This case involved stock traders.

question was more analogous to a loss of a particular job, rather than exclusion from a profession (which involves a broad category of potential jobs).[26]

2. How has the stricter approach been described in Canada?

The short answer to the question posed in the subheading is that Canadian courts have been all over the map. Some have utilized an approach in keeping with the shifting standard favoured by Lord Denning in *Bater*. Others have effectively made reference to a third and intermediate standard of proof, the "clear and convincing" standard, as favoured in the US. Still others are consistent with Laskin CJC's approach in *Dalton Cartage*: the traditional civil standard of proof, but with a stricter scrutiny of the evidence.

Prior to the *Dalton Cartage* decision, some provincial appeals courts rendered judgments in this area which seem to have correctly anticipated the direction that the Supreme Court would take in that case.

In *Reed v. Town of Lincoln* (1974), the judgment of Martin JA for the Ontario Court of Appeal reviewed a number of leading English and Canadian cases and decided that the standard of proof in any civil matter must remain the civil standard of proof on a balance of probabilities – or "preponderance of probability" – but noted that "[t]he cogency of the evidence required to satisfy [this burden] may vary, however, according to the nature of the issue with respect of which the burden must be met".[27] Martin JA went on to endorse Professor Cross' interpretation of the jurisprudence, as expressed in the following quotation from his book (*Cross on Evidence* (1967), 3d ed., at p. 92):

> These words must not be taken to mean that there is an infinite variety of standards of proof according to the subject-matter with which the Court is concerned, but rather that this latter factor may cause variations in the amount of evidence required to tilt the balance of probability or to establish a condition of satisfaction beyond reasonable doubt. As certain things are inherently improbable, prosecutors on the more serious criminal charges and plaintiffs in certain civil cases have more hurdles to surmount than those concerned with other allegations.[28]

This description of the standard of proof, as applicable to serious allegations in civil proceedings, clearly rejects the notion of a fluctuating civil standard.

This approach in *Reed* to the civil standard in the context of serious allegations was subsequently endorsed by the Alberta Court of Appeal in *Ringrose v. College of Physicians and Surgeons of Alberta (No. 2)* (1978).[29]

---

[26] *Nand v. Edmonton Public School District No. 7*, [1994] A.J. No. 675, 157 A.R. 123 (CA) application for leave to appeal dismissed [1995] S.C.C.A. No.8 at para. 68. This case involved teachers.
[27] *Reed v. Town of Lincoln* (1974), 53 D.L.R. (3d) 14, 6 O.R. (2d) 391, at O.R. 401-02.
[28] *Ibid.*
[29] *Ringrose v. College of Physicians and Surgeons of Alberta (No. 2)* [1978], 83 D.L.R. (3d) 680, [1978] 2 W.W.R. 534 at paras. 19-20.

However, the Alberta Court of Appeal's much later judgment in *Nand v. Edmonton Public School District No. 7* (1994),[30] tends to support a higher standard in cases involving serious consequences, however, the decision also seems to approve of an approach of "careful scrutiny of the evidence", which is more in keeping with *Dalton Cartage.*[31]

The dissenting judgment of Berger JA in the 1999 Alberta Court of Appeal case of *P.L. v. College of Physicians and Surgeons of the Province of Alberta,*[32] is also interesting. This case involved criminal allegations in a professional discipline context. After a considered review of English and Canadian case law, Berger JA rejected a fixed third standard of proof, but did accept that cases involving serious allegations or consequences did require an enhanced burden of proof on those seeking to make out such allegations. However, Justice Berger felt that this should be accomplished by applying both a more careful scrutiny of the evidence *and* by applying an elevated standard of proof. He formulated his approach as follows:

> …the disciplinary body must be **convinced by clear, cogent and compelling evidence** that the allegations are true. To be "convinced" means more than "persuaded". It conveys to the trier of fact the gravity of the occasion and satisfies the requirement that the degree of belief be "perilously close to the criminal standard". In such cases, the trier of fact should also be instructed that "**clear**" evidence is evidence that is not ambiguous, doubtful or equivocal; it is evidence that, taken as a whole, is free from confusion and uncertainty. The trier should also be told that **cogent and compelling** evidence is evidence which, when taken as a whole, makes it safe to uphold the findings with all the consequences for the professional person's career and status in the community.[33] [original emphasis]

The earlier Ontario Divisional Court case of *Coates v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen* is to a similar effect:

> Nothing short of clear and convincing proof based upon cogent evidence will justify an administrative tribunal in revoking a license to practice medicine or to gain a livelihood in business.[34]

In the Cour de Québec case of *Re. X*, Demers J.,[35] noting that a judgment in child abuse or child sexual abuse cases has grave consequences for the child, the child's family and the alleged abuser, stated:

> *Il semble que la preuve qui convainc le juge devrait se situer à un niveau plus élevé que la simple prépondérance de preuve. En d'autres mots, la gravité des enjeux requiert un degré de preuve plus élevé que la simple prépondérance, sans*

[30] [1994] A.J. No. 675, 157 A.R. 123, 23 Alta. LR (3d) 63, application for leave to appeal dismissed [1995] SCC.
[31] *Ibid.*, at Alta. LR 68-70.
[32] *Supra* note 14.
[33] *Ibid.*, at para. 99.
[34] (1988), 52 D.L.R. (4th) 272, 65 O.R. (2d) 526 (Div Ct.)
[35] *Supra* note 12.

> *toutefois qu'il nécessite une preuve hors de tout doute raisonnable… Un juge qui doit examiner la preuve plus attentivement ou d'une façon plus prudente ne veut-il pas tout simplement dire qu'il applique un degré de probabilité plus élevé.*[36]

British Columbia courts seem to have been the most receptive to the notion of an intermediate standard of proof. The "clear and cogent evidence" standard used in *Jory v. College of Physicians & Surgeons (British Columbia)* [37] is routinely used in professional discipline cases. In that case, a physician appealed the decision of the college finding him guilty of infamous conduct. The appeal court determined that "the standard of proof required in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt. But it is something more than a bare balance of probabilities." McLachlin J. (as she was then) wrote that to be convinced means more than merely persuaded. Accordingly, the test to be applied in the case was whether the discipline committee was convinced that the complainant had been telling the truth. This approach has been more recently confirmed by the Court of Appeal in *Pierce v. Law Society of British Columbia* (2002).[38]

In the Ontario case of *L.C. v. Pinhas*, however, Kiteley J. also refers to an "enhanced civil standard" and the "enhanced balance of probabilities."[39]

Most recently, in its March 2007 judgment in *Law Society of Upper Canada v. Neinstein*,[40] a Divisional Court panel in Ontario has affirmed that the civil standard of proof to a balance of probabilities remains the appropriate standard of proof in matters of professional discipline. Swinton J., for the majority, ruled that "the standard of proof before the Hearing Panel was the civil standard of a balance of probabilities," however, citing the earlier professional discipline jurisprudence from the Court, she added the caveat that "given the seriousness of the allegations of professional misconduct and the possible consequences for the respondent, the allegations had to be proven by clear, convincing and cogent evidence."[41] Swinton J. further clarified that, contrary to some legal commentary suggesting otherwise, the seriousness of a case or its consequences do not elevate the standard of proof beyond the regular civil standard; rather, "the quality of the evidence required to prove the allegations increases."[42]

In his dissenting (on other grounds) opinion in *Neinstein*, Matlow J. also affirmed the application of the regular civil standard in professional discipline matters. However, he went on to take issue with jurisprudence which has suggested that this standard, in terms of the required degree of persuasion, is flexible or varies depending on the seriousness of the case. He wrote:

> …in my respectful view, it is impossible, as a matter of logic, for one to understand how a required burden of proof can be "on a balance of probabilities" and, at the same time, even more stringent than that because of the serious consequences at issue. Nor can I understand how this same burden of proof can logically be raised, in certain cases, be requiring "clear and convincing evidence"

---

[36] *Ibid.*, at paras. 61-62.
[37] [1985] B.C.J. No 320 SC
[38] [2002] B.C.J. No. 840.
[39] *L.C. v. Pinhas*, 2002 CanLII 2843 (ON S.C.)
[40] 85 O.R. (3d) 446.
[41] *Ibid.*, at para. 54.
[42] *Ibid.*, at para. 55.

> to tilt it. Either the applicable burden of proof is on a balance of probabilities or on something higher. It cannot, in my view, be both.[43]

In the Federal Court, in one of the early citizenship revocation cases, *Canada* (*Secretary of State*) *v. Luitjens*, Collier J. found that the standard of proof to be met was a "high degree of probability". "Notwithstanding the civil nature of the proceeding, the consequences of the process, once completed, are very serious and a high degree of probability is required to substantiate a finding." [44] Subsequent Federal Court decisions in citizenship-revocation cases, however, have rejected this approach and have ruled instead that the regular civil balance of probabilities standard applies, although greater care must be taken in assessing the evidence given the consequences at stake.[45] This later jurisprudence is, of course, more in line with the thinking in *Dalton Cartage*.

In the 2005 report on his review of the police complaints system in Ontario, Mr. Justice Lesage described the applicable standard of proof in professional discipline cases in a manner consistent with *Dalton Cartage*, i.e., adherence to the traditional civil standard of persuasion to a balance of probabilities, but with a need for "clear and convincing evidence" to sustain disciplinary charges.[46]

Also consistent with the approach in *Dalton Cartage* is the 2004 Saskatchewan Court of Queen's Bench decision in *C.M. v. Attorney General of Canada and W.S.*, which held that in every civil action, whether or not a court will be satisfied must depend upon the totality of the circumstances on which the court's judgment is formed including the gravity of the consequences of the findings. In such matters, "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony or indirect inferences. The Court must weigh and consider the totality of the evidence. The standard of proof does not shift or change depending on the nature of the case. But in a case involving serious allegations of misconduct of a criminal nature, the court must be satisfied of proof on a balance of probabilities by cogent and convincing evidence.[47]

For its part, the Supreme Court of Canada has had little to say directly on the issue since its decision in *Dalton Cartage*, though it has touched on the issue in passing or in *obiter* comments.

In *R v. Oakes* (1986),[48] the Court was looking for an appropriate standard of proof for evaluating proposed limits to rights under section 1 of the Charter. Dickson CJC reviewed some of the relevant jurisprudence (including *Bater*, but not *Dalton Cartage*) and determined that a "very high degree of probability" was appropriate in the circumstances. Although the Court was not

---

[43] *Ibid*., at para. 115.
[44] *Supra* note 21. See also *Canada (Minister of Citizenship & Immigration) v. Copeland*, 1997 CanLII 6392 (Fed. T.D) .
[45] *Canada (Minister of Citizenship & Immigration) v. Bogutin*, 1998 CanLII 7453 (T.D.). *Bogutin* has since been followed in a number of other such cases in the Federal Court, including: *Canada (Minister of Citizenship & Immigration) v. Kisluk* (1999), 169 F.T.R. 161; *Canada (Minister of Citizenship & Immigration) v. Katriuk* (1999), 156 F.T.R. 161; *Canada (Minister of Citizenship & Immigration) v. Odynsky*, 2001 FCT 138 (CanLII); *Canada (Minister of Citizenship & Immigration) v. Obodzinsky*, 2003 FC 1080; *Canada (Minister of Citizenship & Immigration) v. Furman*, 2006 FC 993 (CanLII); and *Canada (Minister of Citizenship & Immigration) v. Skomatchuk*, 2006 FC 994 (CanLII); and others.
[46] The Report on the Police Complaints System in Ontario by the Honourable Patrick J. Lesage, Q.C., April 22, 2005
[47] C.M. v. Attorney General of Canada and W.S. 2004 SKQB 175 (CanLII) at para 13-14.
[48] *R. v. Oakes*, [1986] 1 S.C.R. 103.

concerned with distinguishing between the two possible approaches of an enhanced standard of proof and more careful scrutiny of the evidence, Dickson CJC's analysis tends to be consistent with the former.

In *Dr. Q v. College of Physicians & Surgeons of British Columbia* (2003),[49] the Court noted that an intermediate standard of proof "on clear and cogent evidence" was routinely used in professional conduct cases in BC. McLachlin CJC for the Court clearly points out that the appropriate standard of proof in first instance was not the issue in the appeal. She notes, moreover, that all parties to the case accepted the appropriateness of the intermediate standard of proof applied by the tribunal in the case. Therefore, in this case, the correctness of the standard of proof used was assumed by the Court, rather than decided.

[49] *Dr. Q v. College of Physicians & Surgeons (British Columbia)* [2003] SCJ No 18 at para 17.

V) APPLICATION OF THE CIVIL STANDARD OF PROOF IN POLICE DISCIPLINE CASES

1. The Jurisprudence

A review of provincial legislation and case law reveals similarities and differences in the application of the standard of proof in the adjudication of complaints regarding police conduct. For a comprehensive look at the standard in all jurisdictions, the reader is referred to the table attached to this paper.

Generally, two approaches are evident in the police discipline jurisprudence in Canada: 1) a distinct intermediate standard of proof, most commonly (and confusingly) known as the "clear and convincing evidence" standard; and 2) the traditional civil standard, with varying degrees of emphasis on requiring "clear and convincing evidence" to meet that standard. In contrast with the general civil jurisprudence on standard of proof, in police discipline cases, the "shifting standard" approach tends to drop out of the picture.

In a number of jurisdictions, provincial policing legislation has expressly addressed the issue of the applicable standard of proof. However, as shall be seen, this does not necessarily resolve the matter.

In B.C., for instance, subsection 61(6) of the *Police Act* stipulates that disciplinary defaults must be proven to "the civil standard",[50] which, of course, would indicate proof on a balance of probabilities. However, in a recent complaint decision which dealt with the appropriate burden of proof in a case involving allegations of excessive force causing death,[51] the adjudicator felt bound to follow the B.C. Supreme Court's 1985 decision in *Jory v. B.C. College of Physicians and Surgeons*, which held that:

> The standard of proof required in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt. It is something more than a bare balance of probabilities. The authorities establish that the case against a professional person on a disciplinary hearing must be proved by a fair and reasonable preponderance of credible evidence.... The evidence must be sufficiently cogent to make it safe to uphold the findings with all the consequences for the professional person's career and status in the community.[52]

Thus, an intermediate civil standard was applied, although it is not clear whether this standard is properly called proof on "clear and cogent evidence" or proof "by a fair preponderance of credible evidence."

---

[50] R.S.B.C. 1996, c. 367.
[51] *Re Bruce-Thomas*, 2005 CarswellBC 1291 (Office of the Police Complaints Commissioner), at paras. 19 and 48, per Weddell, Adjud.
[52] *Supra* note 37.

It is interesting that no consideration appears to have been given to whether the intervening adoption by the Legislature of "the civil standard" in the *Police Act* might have affected the continued applicability of cases like *Jory* in police complaint proceedings.

Of course, if one takes the view that the notion of "the civil standard" is sufficiently broad to accommodate different degrees of probability – as was suggested by Lord Denning in *Bater* – then there is no apparent conflict here. However, if one takes the view that adjusting the degree of probability required to prove a fact amounts to substitution of a different standard of proof, then this application of the legislation is more problematic. But, in any event, it must surely be the case that the Act's stipulation of "*the* civil standard" is inconsistent with the application of a distinct intermediate standard of proof, which is different from the normal civil standard.

The policing legislation in Newfoundland and Labrador also stipulates the civil standard, for review of police discipline decisions. However, in this case, the Act specifies the "balance of probabilities" standard.[53] As a result, police complaint adjudicators in that province have rejected the application of either a distinct intermediate standard of proof or a shifting standard.[54] However, this has not prevented some from finding that the more serious the allegation, the more cogent the evidence required to prove misconduct on a balance of probabilities,[55] an approach consistent with *Dalton Cartage*.

Similarly, in Nova Scotia, the applicable *Police Act* regulations stipulate a standard of proof on a balance of probabilities,[56] however, it has been held that clear and convincing evidence may be required to establish serious allegations of misconduct.[57]

By contrast, the provinces of Ontario and Manitoba have both legislated in favour of a standard of proof on "clear and convincing evidence" in matters of police discipline.[58] However, interestingly, some adjudicators in both jurisdictions have resisted interpreting their legislation as displacing the traditional civil standard of proof on a balance of probabilities, insisting instead that the requirement of "clear and convincing evidence" simply refers to the quality of the evidence necessary to meet the civil standard.

In *Huard v. Romualdi* (1993),[59] in interpreting the legislative provision on the standard of proof, the Board of Inquiry noted: "These are civil proceedings, and, therefore the standard of proof is proof on a balance of probabilities, but s. 97(1) [the provision in the former Act which required

[53] *Royal Newfoundland Constabulary Act, 1992*, c. R-17, s. 33(1).
[54] See: *RNCPCC and Cst Krista Clarks et al* (1994); *RNCPCC and Cst Derek Ballard* (1996); and *Bishop v. Buckle*, per Ian F. Kelly, March 2, 2000 at page 2.
[55] *RNCPCC and Cst Krista Clarks et al* (1994); and *Bishop v. Buckle*, per Ian F. Kelly, March 2, 2000 at page 2.
[56] Nova Scotia Police Regulations made under section 46 of the *Police Act*, R.S.N.S. 1989, c. 348, Part IV-Police Review Board, s. 28(g).
[57] *Kelly v. Burt*, Nova Scotia Review Board, November 5, 2004.
[58] *Police Services Act*, R.S.O. 1990, c. P.15, s. 64(10) – the same standard has been retained in the recently adopted (but yet to be proclaimed in force) *Independent Police Review Act, 2007* (formerly, Bill 103); and *Law Enforcement Review Act, 1992*, C.C.S.M., c. L75, s. 27(2).
[59] *Huard v. Romualdi* (1993), 1 PLR 317 (Ont. Board of Inquiry).

"clear and convincing evidence" to make out misconduct allegations] speaks to the quality of the evidence necessary to meet that standard." [60]

To be sure, however, other Ontario police discipline decisions have not insisted on this distinction and have referred to "clear and convincing evidence" as the applicable standard of proof. In *Carmichael v. O.P.P.* (1998), for instance, the province's Civilian Commission on Police Services described "clear and convincing evidence" as "[t]he applicable burden of proof" in police discipline matters.[61] Although when attempting to describe this "clear and convincing" standard, adjudicators in these cases have tended to refer to the necessary quality of evidence (i.e., "weighty, cogent and reliable"), rather than to any greater persuasive threshold.[62]

On the other hand, in *Porter v. York Regional Police* (2001), a Superior Court judge deciding a motion in a civil suit interpreted the "clear and convincing evidence" requirement in the Ontario *Police Services Act* as a standard which is "much higher than that found in civil trials which are decided on the 'balance of probabilities' or a 'preponderance of evidence'."[63] However, it should be noted that the judge in this motion was trying to decide the relevance of the findings in a previous police discipline proceeding to a civil action arising out of the same events; the court in the civil case was not called upon to apply the relevant provision of the *Police Services Act*. Similarly, in a passing *obiter* comment, the Ontario Court of Appeal has also suggested that the "clear and convincing evidence" requirement in the *Police Services Act* amounts to a distinct standard of proof.[64] However, in contrast with the earlier Superior Court decision in *Porter*, the appeals court described the "clear and convincing" standard as only "slightly higher" than balance of probabilities.[65]

Consistent with this view that the ordinary civil standard remains intact and despite a requirement for a high quality of evidence, a sliding-scale approach to the standard of proof, depending on the gravity of the charge, has been rejected.[66]

Similarly, in Manitoba, the provincial court judges who hear police discipline reviews, have held that the requirement for "clear and convincing evidence" speaks to the quality of the evidence necessary to meet the traditional civil standard of proof on a balance of probabilities.[67]

Federally, however, in the leading case of *Jaworski v. Canada (Attorney General)* (2000) – a Federal Court of Appeal decision on a judicial review of an RCMP discipline adjudication – the Court described the applicable standard of proof at the discipline hearing as being the balance of probabilities, but added the qualification "albeit one located at the high end of the spectrum."[68]

---

[60] *Ibid*., at p. 328.
[61] *Carmichael v. O.P.P.*, O.C.C.P.S., May 21, 1998. To the same effect, see also: *Lloyd v. London Police Service*, O.C.C.P.S. 20 May 1999.
[62] *Ibid.*
[63] *Porter v. York Regional Police*, 2001 CarswellOnt 2030 (SCJ), per Hermiston J., at para. 11.
[64] *Canadian Civil Liberties Association v. Ontario (Civilian Commission on Police Services)*, 2002 CanLII 45090, 220 D.L.R. (4th) 86, 97 C.R.R. (2d) 271, 61 O.R. (3d) 649, at para. 50.
[65] *Ibid.*
[66] *Mowers and Hamilton-Wentworth Regional Police* OCCPS 18 March 1999 at p. 7.
[67] See, e.g.: *Graham and Csts. Gillespie and Baker* (2000).
[68] 2000 CarswellNat 929, at para. 70.

This view of the balance of probabilities standard as one which shifts within a spectrum would seem to be out of step, not only with the police discipline jurisprudence of all the provinces, but also with the Supreme Court's rejection of a shifting standard in *Dalton Cartage*. It is also worth noting that the Court in *Jaworsky* makes no reference to the Federal Court jurisprudence in citizenship-revocation cases.[69]

2. Observations on the Jurisprudence

This review of the jurisprudence relative to the application of the standard in matters of police discipline reveals a number of interesting trends and dynamics.

Apart from the Federal Court decision in *Jaworski*, the policing jurisdictions have not shown significant support for a "sliding scale" approach to the standard of proof – any variation in the scrutiny of cases is related to the weighing of the evidence, not to adjustments in the persuasive burden.

While the reference to varying "degrees of probability" within the civil standard in *Bater* has been frequently quoted with approval, it would seem that, at least in the realm of professional discipline, this approach has been subsumed into, or "read down" to mean, a stricter approach to the weighing of the evidence. This is, of course, consistent with the Supreme Court's decision in *Dalton Cartage*.

Ultimately, these two seemingly disparate approaches, are reconcilable due to the inherent ambiguity of the term "standard of proof" itself. Its usual meaning is as a legal term of art meaning the degree to which the trier of fact must be persuaded of the truth of the case to be proven. However, in the ordinary sense of the words themselves, the phrase can also mean a required quality of acceptable evidence. If one understands Lord Denning to be suggesting that the standard of proof is flexible only in the latter sense, then much of the confusion flowing from *Bater* can be quickly resolved.

If one can indeed reconcile the flexible-standard approach with the approach in *Dalton Cartage*, then the real contest is between that approach (i.e., proof on a balance of probabilities with a requirement that evidence in "serious" cases be particularly cogent) and the notion of an intermediate "clear and convincing" standard of proof that is higher than the traditional civil standard but something less than the criminal standard.

This leads to a second observation based on the review of the police discipline jurisprudence, which is that only in British Columbia has the American concept of a second, intermediate civil standard of proof been significantly embraced. Even where the legislation stipulates the need for "clear and convincing evidence" (as it does in Ontario and Manitoba), some adjudicators have resisted the temptation to replace the traditional civil standard of proof and have instead interpreted the legislation as exhorting them to be appropriately exacting in their scrutiny of evidence offered to support allegations of police misconduct.

---

[69] See *supra* note 45.

Of course, this is not a popularity contest. We should all be striving to ensure systems of police accountability that best serve the public interest. Though specifically referring to the Alberta Law Enforcement Review Board, the Alberta Court of Appeal in *Plimmer v. Calgary Police Service* (2004) aptly described the goal for all such bodies:

> …to allow an avenue for public complaint and a mechanism for inquiring into such complaints, with a view to balancing the need for public confidence with the employment rights of the officer in the context of the safe, efficient and effective operation of the police service.[70]

[70] *Plimmer v. Calgary (City Police Service)*, CanLII-2004 ABCA 175, at para. 32 per Costigan JA for the majority.

VI) ANALYSIS AND CONCLUSION

1. Standards of Proof: the Alternatives

In light of the exceptional powers and trust which society reposes in them, there is a clear public interest in ensuring effective police accountability. The complaints and discipline processes must be accessible and responsive to legitimate allegations of misconduct and must be seen to be so. At the same time, fairness to officers accused of wrongdoing is in the public interest as much as it is in the interest of the individual officers involved. Moreover, an accountability system which is unfair to subject officers, by, for instance, making it too easy to prove allegations of wrongdoing, also will not make for effective accountability and will quickly degrade police morale and effectiveness.

Police themselves, of course, have an interest in being associated with a profession where "bad apples" and bad practices can be exposed and addressed and where they are seen to be accountable for the exceptional powers they exercise.[71] Indeed, such attributes are part of what distinguishes being a member of a profession from simply having a job.

This being said, which understanding of the standard of proof best serves all these societal goals and values? The dominant view in Canadian law is that there are only two standards of proof: the criminal standard and the civil standard. It is now generally accepted that the criminal standard should be reserved for criminal cases (although the legislation some jurisdictions, such as B.C., Manitoba and Ontario, had previously stipulated the criminal standard in police discipline matters). So the main alternative to the status quo in most jurisdictions is a higher intermediate standard of proof interposed somewhere between the so-called balance of probabilities standard and the criminal standard.

2. In Defence of the Traditional Civil Standard (whatever it is)

The traditional civil standard is a venerable mainstay of our justice system, even if it has not been that well articulated. It is, after all, the standard that has long served in matters of civil justice, including those involving liability for reparation in the form of vast sums of money or substantial property interests; not to mention child custody and wardship, refugee-determination, determinations of constitutional validity of laws and state actions, and many other serious and important matters affecting, private and public rights and interests.

It seems only appropriate that it should be for those who would advocate a higher standard in matters of police discipline, or professional discipline generally, to demonstrate the inadequacy of the traditional civil standard.

Part of what seems to enhance the allure of a higher standard of proof for professional discipline matters, and for other non-criminal matters which involve serious allegations of wrongdoing or serious consequences, is an apparent perception that the traditional civil standard is somehow "too low" for the interests at stake.

---

[71] See, e.g.: Richard Steinecke, Will the Real Public Interest Stand Up, July 2003, http://www.sml-law.com/publications/print-news.asp?DocID=3331.

But how can it be that a standard that is applied everyday in civil cases involving potentially ruinous claims for damages, or other serious interests, is too low for professional discipline cases? True, civil actions are about compensation rather than condemnation, the latter being more implicit in professional disciplinary action and, of course, criminal prosecution. However, professional misconduct can also be the subject of a civil claim. Surely, a large civil judgment for malpractice has a stigmatizing effect. In any event, at some point, does financial loss from civil liability not begin to rival professional stigma as a "serious consequence"?

Part of the problem is our terminology and how we tend to describe the civil standard of proof. The commonly-used phrase "balance of probabilities" sounds like the defendant's liability need only be as likely as not, which we know is not the case. In a civil matter, if the evidence is such that the competing cases are tied, that is, if the evidence in favour of an allegation is no more compelling than the evidence against it, then the case is dismissed. Civil justice is not a coin toss. "Preponderance of evidence" or "preponderance of probabilities," which are increasingly being used in the jurisprudence and in academic writings, would seem preferable in this sense.

However, it is not universally accepted that probability comparisons are really the appropriate paradigm. Despite Lord Denning's assurance that the balance of probabilities or "more probable than not" formula for describing the civil standard of proof is "well settled",[72] it has not been universally accepted that the civil standard can be aptly reduced to such a formula. In a widely-quoted statement from a 1938 judgment of the High Court of Australia, Justice Dixon wrote:

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. … 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.[73]

The foregoing quote was part of a larger passage from Dixon J's decision which was adopted by Justice Cartwright in his concurring opinion in the Supreme Court of Canada decision in *Smith v. Smith* (1952).[74] In that same case, Justice Rand also wrote approvingly of Dixon J's analysis and added:

> There is not, in civil cases, as in criminal prosecutions, a precise formula of such standard; proof "beyond a reasonable doubt", itself, in fact, an admonition and a warning of the serious nature of the proceeding which society is undertaking, has no prescribed civil counterpart; and we are not called upon to attempt any such formulation. But I should say that the analysis of persuasion made by Dixon J. in the High Court of Australia … is of value to judges as illuminating what is implicit in the workings of the mind in reaching findings of fact. … [I]t is at all

[72] *Miller v. Minister of Pensions*, [1947] 3 All E.R. 372, at 373-74.
[73] *Briginshaw v. Briginshaw* (1938), 60 C.L.R. 336 (Aus. H.C.), at 361-62.
[74] *Supra* note 15, at para. 37.

> times desirable to have these elusive processes progressively made more explicit.[75]

There are also those who question whether one can even properly speak in terms of degrees of persuasion or belief.[76] In other words, one is either persuaded of a claim or one is not; one cannot be persuaded and have serious doubts at the same time. Speaking strictly of civil or administrative matters, there is some attraction in this view. Adjudication is about logically assessing the probative value of evidence and making appropriate inferences. It is a process of reasoning, not weighing or measuring, or some other mechanical exercise.[77]

However, there does seem to be a genuine distinction to be made between the degree of persuasion implicit in the civil standard – however one might describe it – and the criminal standard. As Lord Denning indicated in *Bater*, the distinction is really in the degree of doubt which will prevent a verdict in favour of the party with the burden of proof.[78] However one may describe the civil standard (or standards), it does seem evident that there is more room for tolerable doubt in a civil judgment for the plaintiff than in a criminal conviction. In other words, a civil judgment for the plaintiff can obviously tolerate a "reasonable doubt" in its accuracy (otherwise, it would be the same as the criminal standard). The trick, of course, is to articulate how much more room for doubt there can be in a civil judgment for the plaintiff than in a criminal conviction.

It seems likely that there is no "one size fits all" standard which can elucidate the minimum degree of persuasion, or conversely, the maximum level of permissible doubt, consistent with civil liability. Different issues lend themselves to different forms of evidence. Different events and evidence will, in turn, potentially lend themselves to different manners of reasoning and analysis. Even if persuasion and doubt were capable of quantitative measurement, one would likely need different instruments for measuring them in respect of different issues and evidence. It is the same with the criminal standard of proof beyond a reasonable doubt. "Reasonable" denotes quality not quantity. What is sufficient or not to constitute "reasonable doubt" is entirely context-specific and will depend on the issues in the case and the evidence adduced.

This is perhaps what Lord Denning was getting at in *Bater* with his reference to "degrees of probability" within both the civil and criminal standards of proof. Unfortunately, his choice of words gave the impression of a standard of proof which fluctuates from case to case, rather than it being the evidentiary challenge to meet the standard which fluctuates.

As Justice Dixon put it in *Briginshaw*:

> …[R]easonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved.

---

[75] *Ibid.*, at para. 34.
[76] *R. v. Hepworth and Fearnley*, [1955] 2 Q.B. 600, at 603, per Lord Goddard CJ; *R. v. Home Secretary; ex parte Khawaja*, *supra* note 5, at 113-14, per Lord Scarman; and Charles Nesson, "The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts," (1985) 98 Harv. L. Rev. 1357.
[77] See also Rothstein, Centa and Adams, *supra* note 19, at pp. 473-74.
[78] *Supra* note 3, at pp. 37-38.

> This does not meant that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained.[79]

3. The "Clear and Convincing" Alternative is Neither

a) Distinguishing "clear and convincing" from the other standards of proof

But if describing the traditional civil standard of proof in a meaningful way is itself problematic, how much more so to describe a distinct and elevated version of it? For that matter, to the extent that the traditional civil standard is an elusive or flexible concept, how do we know that it is "too low" for certain civil or administrative cases?

The phrase "proof on clear and convincing evidence", certainly on its ordinary meaning, speaks to the quality of the evidence, and does not actually describe a requisite degree of persuasion on the part of the trier of fact which would distinguish it from the traditional civil or criminal standard.

Some have suggested that the difference between the traditional civil standard and the intermediate standard of "clear and convincing evidence" can be captured by using the term "convinced" rather than merely "persuaded".[80] Certainly, "convinced" is stronger than "persuaded". When one is "convinced", this suggests a very high degree of persuasion or belief, one which is generally accompanied by very little, if any, doubt.[81] How can such a level of persuasion be distinguished from the criminal standard?

Indeed, some of those judges who have attempted to define what they believe to be the necessarily higher standard of proof appropriate in professional discipline proceedings have acknowledged that it comes "perilously close to the criminal standard."[82]

b) The American experience

Despite having adopted an intermediate civil standard of proof some time ago, U.S. jurisprudence seems to have had no greater success in defining such a standard in a useful way which sufficiently distinguishes it from the "ordinary" civil standard or the criminal standard.

---

[79] *Briginshaw v. Briginshaw* (1938), 60 C.L.R. 336 (Aus. H.C.), at 362-63.

[80] Taylor, J. (as he then was) in *J.C. v. College of Physicians and Surgeons of British Columbia*, (1988), 31 B.C.L.R. (2d) 383 (S.C.B.C.). In that case a psychiatrist was found guilty by the College of infamous conduct and struck from the practising register. at page 398-399; *Jory*, *supra* note 37, per McLachlin J. (as she then was); and *P.L.*, *supra* note 14.

[81] For example, the *Concise Oxford Dictionary* (10th ed., 1999), in the entry for the adjective "convincing" (at p. 312) says: "leaving no margin of doubt."

[82] *McKee v. College of Psychologists of B.C.* (1991) Vancouver No. 900383 (B.C.S.C.), per Thackray J.; and *P.L.*, *supra* note 14.

In a 1999 article entitled, "Clear and Convincing Evidence: How Much is Enough?", California insurance litigator, Robin Meadow, makes the following observation and quotes an even more pessimistic appraisal from a learned article on the subject published fifty years earlier:

> The efforts of courts to create a meaningful definition of "clear and convincing evidence" have not been particularly successful – "the decisions relating to the meaning of 'clear and convincing evidence' and similar expressions are confused and confusing.'[83]

In California, the leading case defining the "clear and convincing evidence" standard sets a very high persuasive threshold, requiring evidence that is "so clear as to leave no substantial doubt" and "sufficiently strong to command the unhesitating assent of every reasonable mind."[84] Meadow notes, however, that this is difficult if not impossible to distinguish from the criminal standard of proof and that California courts have themselves rejected similar language in jury instructions purporting to describe the civil standard on the basis that it could not be distinguished from the criminal standard.[85]

The accepted description of the "clear and convincing" standard in Tennessee also seems perilously close to the criminal standard of proof beyond a reasonable doubt: "[such] evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence…such evidence should produce in the fact-finder's mind a firm belief or conviction as to the truth of the allegations sought to be established."[86]

The courts in other states have also had difficulty finding language which manages to distinguish "clear and convincing" from the ordinary civil standard, but without coming too close to the criminal standard of proof beyond a reasonable doubt.[87]

In U.S. federal courts, the most widely accepted description of the "clear and convincing evidence standard of proof is simply that the evidence renders the fact to be proven "highly probable".[88] However, this seems even more unintelligible than either the ordinary civil

---

[83] *California Insurance Law and Regulation Reporter* (May 1999) 116, at p. 118, including quote from McBaine, "Burden of Proof: Degrees of Belief," (1944) 32 *California Law Review* 242, at p. 254. To similar effect, see also: *McCormick on Evidence* (4th ed., 1992) § 340, p. 442; and James, "Burdens of Proof," (1961) 47 *Virginia Law Review* 51, at pp. 54-55; Lisa Pennekamp, "Recent Case: Before a State May Sever Permanently the Rights of Parents in Their Natural Child, Due Process Requires That the State Support Its Allegations by at Least Clear and Convincing Evidence – *Santosky v. Kramer*," 51 *University of Cincinnati Law Review* 933, at 942-43; and Rebecca C. Mandel, "The Evidence is 'Clear and Convincing': Santosky v. Kramer is Harmful to Children," (2006) *Harvard Law School Student Scholarship Series*, Paper 11, at p. 17.

[84] *Sheehan v. Sullivan* (1899), 126 Cal. 189, at p. 193 (California Supreme Court), reaffirmed in *In re Angelica P.* (1981), 28 Cal. 3d 908, at p. 919.

[85] Meadow, *supra* note 78, at p. 119; *People v. Miller* (1916), 171 Cal. 649, at p. 651; and *In re Ross' Estate* (1919), 179 Cal. 629.

[86] *In the Matter of J.L.E.*, 2005 Tenn. App. LEXIS 384.

[87] See, e.g.: *Molyneux v. Twin Falls Canal Co.* (1934), 54 Idaho 619 (Idaho Supreme Court) (rejecting the phrase "clear, positive and unequivocal"); and *State v. King* (1988), 158 Ariz. 419 (Arizona Supreme Court) (rejecting "certain" and "unambiguous").

[88] O'Malley, *Federal Jury Practice and Instructions* (West, 2000 and 2005 supp.), § 19.03; *Colorado v. New Mexico* (1984), 467 U.S. 310, at 316-17; *Pattern Jury Instructions of the District Judges Association of the Sixth Circuit* (2005), Instruction No. 6.04; and, with respect to defence pleas of insanity in criminal proceedings (which is also a

standard or the criminal standard. While triers of fact will likely have a sense for the notion of "more likely than not" (an accepted description of the traditional civil standard) or the "moral certainty" said to be involved in proof beyond a reasonable doubt, it is less clear that someone can intuitively discern what level of probability between these two standards would qualify as "high"?

If courts and legal scholars themselves have had difficulty articulating a meaningful description of the "clear and convincing" standard, some research suggests that jurors and other lay persons involved in the justice system make little distinction between various standards of proof, at least when expressed in their usual legal terms.[89]

In its 1979 decision in *Addington v. Texas*, the U.S. Supreme Court was likely putting it mildly when it noted that: "We can probably assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence."[90]

c) Is there really a middle ground?

Based on the limited Canadian jurisprudential experience in this direction and the much longer and more widespread American experience at trying to define this supposed intermediate standard, one is entitled to wonder if there really is a tenable middle ground between the traditional civil and criminal standards of proof.

Authors Linda Rothstein, Robert Centa and Eric Adams, in their contribution to the Law Society of Upper Canada's 2003 Special Lectures on the law of evidence, indicate that marking out such a middle ground is indeed problematic for, as they put it, "while the concept of '51 percent probability,' or 'more likely than not' can be understood by decisionmakers [sic], the concept of 60 percent or 70 percent probability cannot."[91]

If there is, in fact, no tenable intermediate standard, or it cannot be properly articulated, there would seem to be some risks involved in trying to apply one. Courts and adjudicators may be tempted to define an intermediate standard by effectively denigrating and diminishing the "ordinary" civil standard. To the extent that such a movement is successful, this would appear to be detrimental to civil and administrative justice.

---

matter requiring "clear and convincing evidence" in the U.S.), see: *Pattern Jury Instructions of the First Circuit, Criminal Cases* (1998), Instruction No. 5.07, and *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* (2000), Instruction No. 6.4.

[89] See: Kagehiro and Stanton, "Legal vs. Quantified Definitions of Standards of Proof" (1985), 9:2 *Law and Human Behaviour* 159; and Levine, "Do Standards of Proof Affect Decision-Making in Child Protection Investigations?" (1998) 22:3 *Law and Human Behaviour* 341.

[90] *Addington v. Texas* (1979), 441 U.S. 418, at 425.

[91] *Supra*, note 19, at pp. 466-67.

The more likely risk, however, as the U.S. case law in particular seems to demonstrate, is that tribunals purporting to apply an intermediate standard will end up using a standard that is, *de facto* if not *de jure*, indistinguishable from the criminal standard.[92]

d) Discipline proceedings are not akin to criminal prosecutions

Some might welcome a shift to a quasi-criminal standard of proof in disciplinary proceedings. However, I would argue that the high criminal standard of proof really must be reserved for its own special forum. The criminal standard plays a unique role in safeguarding liberty – and formerly, life, limb and property – and protecting against the particular stigma of a criminal conviction. This cannot be compared with professional disciplinary action.

Moreover, the evolution of the criminal standard seems to be inextricably tied to the particular dynamic of criminal prosecutions. In the period when it was recognized that the standard of proof necessary to secure a criminal conviction was very high, the then-prevailing common law rules rendered criminal trials a distinctly one-sided affair. Sworn witnesses for the accused were only permitted for treason and certain other felonies by legislation passed at the end of the 17th and beginning of the 18th century and, in all criminal cases, not until 1843.[93] Meanwhile, following the English Revolution of 1688, in reaction against previous abuses, the accused, for his own protection, was deemed incompetent to testify in his own trial. In Canada, this state of affairs lasted, with some exceptions, until the adoption of the first *Criminal Code* in 1892, and for a further six years in England.[94]

In these circumstances, where one has to decide the case on the basis of only one side of the story, it is only reasonable to resolve any remaining doubt against the party with the burden of proof.

Even today, criminal litigation is primarily oriented around the testing of the Crown's case. While the accused can now lead evidence in his own defence, the extent of the burden on the prosecution coupled with the right to silence gives the accused less of an incentive to actively present a competing case for the defence than would otherwise be the case.

This is not to suggest, of course, that the inability of the accused to defend himself in a criminal trial is the main rationale for the standard of proof beyond a reasonable doubt. That high standard is still justified by the risk to liberty and the value we place on that interest, and by the unique stigma of a criminal conviction. It is to say, however, that the high criminal standard imposed on the prosecution is particularly compatible with a process that is focused on the strength of only one side of the case.

Of course, this has not been the accepted paradigm in either civil litigation and professional discipline proceedings, where the adjudicator will generally expect to have the benefit of both sides of the story. A respondent or subject of a complaint, is, unlike the criminal accused,

[92] See also *ibid.*, at p. 470.
[93] Alan W. Mewett, *Witnesses*, Carswell, Toronto (1995), at p. 3-13.
[94] *Ibid.*, at pp. 3-13 – 3-14.

expected to present a competing case, except where evidence tendered in favour of the plaintiff or complainant is incomplete or so weak that even a *prima facie* case is not made out.

However, if a significantly higher standard of proof is applied in such proceedings, one possible consequence is that there will be less of an incentive for those who are the subject of allegations of professional misconduct to provide their story to the adjudicator. It may be strategically preferable to simply attack and weaken the complainant's case. More cases may be dismissed without hearing from the subject. Corroborating evidence may become a *de facto* necessity.

Such developments may be seen as preferable from the subject's perspective, but then the process would become less responsive to the community. Those who hold themselves out as serving the public good, and who exercise special powers or duties as a consequence, should be expected to answer allegations of misconduct.

Yes, the potential consequences to police and other professionals of misconduct charges can be serious, both in terms of reputation and financially in terms, ultimately, of loss of livelihood. However, no one is forced to join a profession. By contrast, the criminal justice system applies to everyone automatically – there is no opting out.

More generally, to say that it should be artificially made harder to prove allegations of serious misconduct seems rather one-sided, and appears to discount the interests of victims and of the public to ensure that such misconduct is detected and addressed. Fairness and due consideration to the interests of professionals who are the subject of misconduct allegations describes how professional discipline bodies must function – but it is not why they function. As Rothstein, Centa and Adams put it:

Setting the standard of proof too high risks overemphasizing the rights of the professional and under-appreciating the public interest in professional regulation. As the courts have often noted, professional regulation must be done in the public interest. In Ontario, for example, the professional regulatory legislation of teachers, architects, engineers, and all of the health disciplines explicitly the "public interest" in their regulatory function. The public clearly has an interest in effective and reliable professional discipline and regulation. A standard of proof that too closely resembles the criminal standard risks unduly inhibiting the ability of professional regulators to discipline in the public interest.[95]

e) A further hypothesis: proving mind over matter

Even where the courts have rejected a higher civil standard of proof, their exhortations to use "clear and convincing evidence" to satisfy the traditional civil standard of proof in certain "serious" cases seem odd. In precisely which civil justice cases do courts give judgment on the basis of evidence that is *un*clear or *un*convincing?

It is worth considering why courts and tribunals perceive the need to stipulate either an elevated standard of proof or a "special" approach to the evidence in cases involving "serious allegations" or "serious consequences".

[95] *Supra* note 19, at p. 470.

As is apparent from the case law reviewed, this impulse for a more careful approach by courts and tribunals has been derived primarily from civil actions involving allegations of criminal conduct, or conduct at least implying moral turpitude, and professional discipline matters. No such exhortations for special care have come out of cases involving negligence, no matter how high the amount of damages sought. Yet, as has been already been suggested, surely at some point, an award of damages is serious, even if the successful cause of action implies no criminality.

In my view, it is not a coincidence that the "clear and convincing" doctrine (however one conceives of it) has arisen in cases involving criminal-like allegations or professional misconduct, but not to matters of mere accident or ordinary negligence.

Actions involving criminal conduct or moral turpitude, or professional misconduct, usually if not always bring an essential mental element to the cause of action or complaint, which is not a necessary factor in matters of mere negligence or accident. Suing someone for fraud is more difficult than suing someone for negligent misrepresentation – not because "better" evidence is required, but because there are additional elements involved in proving fraud on which evidence is required.[96]

It is the same in the context of professional discipline. Even where professional misconduct does not involve criminal behaviour, there is usually a mental element involved because professional misconduct allegations relate to the exercise of professional judgment. Proving that a surgical procedure did not improve the patient's condition, or even made it worse, is one thing; proving malpractice, is another. Likewise, proving that a police officer struck or shot a suspect is one thing; proving excessive use of force, is another.

In all these situations, one needs some evidence of, or proper basis to infer, a certain state of mind or knowledge on the part of the subject of the allegations. Evidence of what the person did or did not do, and the objective context in which they acted or failed to act, only gets you so far in these matters, though these facts alone may well be sufficient for an action in negligence. But if this type of evidence is accompanied by other evidence which *is* probative of the person's state of mind, then the case may be strengthened, even if the evidence in terms of its source and quality are in no way superior to the evidence tendered in respect of who did what.

Take, for example, the scenario of a police officer who is the subject of a complaint of excessive use of force against a suspect. If there is only eyewitness evidence to the effect that the officer physically dragged the suspect out of his vehicle and pushed his face into the pavement, this alone may not prove excessive use of force. If, however, the eyewitness is able to further testify that she overheard the officer make contemporaneous remarks which are consistent with a

[96] An alternative explanation (sometimes called the "prior probability" theory) that has appeared in the legal literature as well as in some of the jurisprudence, is that the more serious the allegation, the lower the probability of its occurrence in everyday life (i.e., people are more apt to accidentally bump into each other, than to commit assault). As such, proving less probable events will simply require stronger evidence because they are simply less likely. See, e.g.: *Re H (minors)*, *supra* note 10, at pp. 586-87, per Lord Nicholls of Birkenhead; and Redmayne, *supra* note 1, at pp. 176-77. However, this theory involves some unproven empirical assumptions that will often be context-dependent. This view also does not explain why the "clear and convincing" doctrine has not arisen in, e.g., tort cases which involve statistically rare events or modes of causation.

motivation other than concern for his safety, then this could well prove the allegation against the officer, depending on the officer's evidence and the assessments on relative credibility of the witnesses.

What is required to prove such a case is evidence on the various elements of the misconduct charged which is assessed to be more credible than the opposing evidence given by the officer. But how is this more than what is required to prove negligence or some other type of case which has not attracted the "clear and convincing" approach? In my view, the only difference is that there are additional elements to the misconduct charge versus a negligence claim, and that as these additional elements relate to an individual's state of mind, probative evidence on these elements is simply harder to come by than is evidence of observable facts and events.

In other words, discipline of professionals, including police, is not a matter of strict liability. There is almost always an element of intent, knowledge and/or judgment. These elements often require further evidence beyond that which may be necessary to make out the underlying physical acts or omissions, which can be open to interpretation. But this does not mean that these cases necessarily require "better" or "stronger" evidence than is necessary to prove claims based purely on physical acts or omissions, which is what the "clear and convincing" approach seems to imply.

Of course, there will often be no direct evidence on the subject's state of mind, so inferences will have to be made from the available evidence to the extent possible. But the reality is that, due to the nature of the issue, it will frequently not be possible for a complainant to establish the necessary mental ingredient of the alleged professional misconduct. A tribunal cannot get inside the subject officer's head at the time of the incident. It is submitted that these types of cases are simply inherently harder to prove than others, as a result. It does not mean that either a higher standard of proof, or even a stricter weighing of evidence, is being, or ought to be, applied, than that which applies generally in civil and administrative matters.

If this analysis is correct, it suggests that the "clear and convincing evidence" requirement is really being driven by the need establish some level of intent in the context of certain civil and administrative proceedings, rather than by the "seriousness" of the allegations or the gravity of their consequences per se. Of course, the distinction may not be readily apparent as, in our legal system, liable conduct which involves intent – whether in the context of a criminal, civil or administrative proceeding – is always considered more blameworthy and, as a result, generally attracts greater sanctions.

Even more radically, however, this analysis suggests that the need for "clear and convincing evidence" may even be a red herring, resulting from courts essentially misconstruing the true nature of the greater evidentiary challenge faced by those with the onus of establishing allegations of misconduct involving a mental element.

4. Where does this leave us?

Whether or not the foregoing hypothesis is ultimately validated and accepted, there is certainly enough to give those involved in police discipline decisions pause to consider what the "clear

and convincing evidence" rule really requires of them and those with the burden of proving allegations of misconduct.

In the meantime, of course, the state of the law in Canada is such that "clear and convincing" is part of the civil and administrative law landscape, and is something with which most discipline adjudicators must continue to reckon. Indeed, for Ontario and Manitoba, "clear and convincing evidence" is a matter of legislative direction in police discipline matters. Given the recent timing of the overhaul of the legislation, at least in Ontario, this is not likely to change terribly soon.

However, as has been stressed in this paper, the dominant position in Canadian jurisprudence is that, where it is applicable, the requirement for "clear and convincing evidence" properly refers to the quality of the evidence, not the amount, and not to a higher persuasive burden. If police disciplinary decision-makers and reviewing courts pay sufficient attention to this distinction, then they will be better able to guard against inadvertently applying an elevated standard of proof in respect of police misconduct allegations. But, whatever view of the law they decide to take, by being alive to the distinct approaches to "clear and convincing evidence", discipline decision-makers and courts can at the very least be that much more clear about what they are doing and why.