THE NATURE OF PROCEEDINGS BEFORE MISCONDUCT TRIBUNALS IN THEIR ORIGINAL JURISDICTION AND THE RELEVANT STANDARD OF PROOF

NATURE OF PROCEEDINGS - ORIGINAL JURISDICTION

1. At page 297 of the Fitzgerald Report it was recommended that the Misconduct Tribunals should:

> "... make original administrative decisions in relation to the more serious matters of police misconduct which do not result in charge of criminal offence or, if charges are laid, are undisposed of or result in acquittal."

2. The original jurisdiction of the Misconduct Tribunals is conferred by Section 2.36 (1) of the Criminal Justice Act 1989–1990 (the Act). In that jurisdiction, the role of the Misconduct Tribunals is to "**investigate and determine**" every charge of a disciplinary nature of official misconduct and, if the charge is established, to impose appropriate "disciplinary punishment", that is, punishment which is authorised by the Act and which the Misconduct Tribunal considers to be just. The disciplinary sanctions which may be imposed by the Misconduct Tribunals are given in Section 2.44 (1) of the Act.

3. It is clear that in their original jurisdiction Misconduct Tribunals have an investigative role. Accordingly, the Misconduct Tribunals are **inquisitorial** and may be likened to a mini commission of inquiry in its search for the truth. An officer of the Criminal Justice Commission (the Commission) who is a legal practitioner may be appointed as counsel to assist the Misconduct Tribunal in the conduct of a hearing before the Tribunal: see Sections 2.17 (5)(a), 1.4 and 2.12 (1)(b) of the Act.

   In investigating and determining a charge of a disciplinary nature of official misconduct, a Misconduct Tribunal may, by its order and for any purpose, **remit** any matter to the Director of the Official Misconduct Division of the Commission "for the making of investigations, or further investigations" and may **adjourn** its proceedings until those investigations are completed: see Section 2.44 (4) of the Act.

4. In investigating and determining a disciplinary charge in its original jurisdiction, a Misconduct Tribunal is carrying out an administrative function and **not conducting**

a criminal prosecution. In R –v– WHITE; ex parte BYRNES (1963) 109 C.L.R. 665, the High Court held that an administrative tribunal charged with the duty of dealing with breaches of discipline does not sit as a court of law and that "offences" created by a disciplinary code are not "criminal" offences.

Indeed, it has been held that the hearing of such a charge is neither a criminal prosecution nor a civil action: see the decision of Kaye J. in ATTORNEY-GENERAL (VICTORIA) –v– RIACH (1978) V.R. 301 at 305.

5. Although a disciplinary tribunal such as a Misconduct Tribunal is **not** a court of law and is **not** hearing "criminal" offences, it does **not** thereby lose its jurisdiction if the hearing of disciplinary charges involves conduct which, if proved, could constitute a criminal offence: see the unanimous decision of the Full Court of the Federal Court in HARDCASTLE –v– COMMISSIONER OF AUSTRALIAN FEDERAL POLICE (1984) 53 A.L.R. 593 at 597.

Also, the Act clearly envisages that a Misconduct Tribunal may have to examine conduct which could constitute a criminal offence because "official misconduct" includes conduct which constitutes or could constitute "a criminal offence": see Section 2.23 (1)(d) and (e) of the Act.

STANDARD OF PROOF

6. Given that the function of a Misconduct Tribunal is administrative or disciplinary and that it may have to examine conduct which constitutes a criminal offence, what is the **appropriate** standard of proof?

Although the Act is silent on this point, it is clear that the criminal standard of proof – beyond reasonable doubt – does **not** apply.

Section 2.43 (1) of the Act states:

> "a Misconduct Tribunal is not bound by rules or the practice of any court or tribunal as to evidence or procedure in the exercise of its jurisdiction, but may inform itself on any matter and conduct its proceedings as it thinks proper."

As noted by Carter J. in Re SEIDLER (1986) 1 Qd.R. 486 at 491, such a clause clearly distinguishes disciplinary proceedings from criminal proceedings.

A person aggrieved by a decision of a Misconduct Tribunal in its original jurisdiction may appeal therefrom to a judge of the Supreme Court on a number of grounds including the denial of natural justice: see Section 2.38 (1)(a) of the Act. Accordingly, it can be stated that whilst Misconduct Tribunals are not bound by the rules of evidence, they are bound by the rules of natural justice in receiving evidence.

7. Relevant authorities on the question of the standard of proof in **disciplinary** proceedings are:

- HARDCASTLE -v- COMMISSIONER OF AUSTRALIAN FEDERAL POLICE (1984) 53 A.L.R. 593 at 603;
- Re SEIDLER (1986) 1 Qd.R. 486 at 490-491; and
- ADAMSON -v- QUEENSLAND LAW SOCIETY INCORPORATED (1990) 1 Qd.R. 498 at 503-506.

8. In HARDCASTLE one of the arguments submitted by the appellant was that the decision of the Australian Federal Police Tribunal involved an error of law in that it failed to apply the proper standard of proof. Counsel for the appellant conceded that the standard of proof in the hearing of disciplinary charges is that found in the often cited passage from the judgement of Dixon J., as he then was, in BRIGINSHAW -v- BRIGINSHAW (1938) 60 C.L.R. 336 at 361-362. Having made that concession, counsel for the appellant submitted that the Tribunal did not pay regard to the gravity of the consequences flowing from its findings. However, counsel for the appellant was unable to point to any particular finding which demonstrated the alleged failure of the Tribunal to properly apply the BRIGINSHAW TEST. Counsel's submission finally rested on the proposition that, by not citing chapter and verse of the relevant part of Dixon J.'s judgement, the Tribunal must have overlooked it.

The Full Court of the Federal Court unanimously stated at page 603:

> "The submission is untenable. The Tribunal said: 'Onus in respect of all these charges is the civil onus of proof, that is, on the balance of probabilities, bearing in mind however the gravity of the charges against the officers concerned (Scanes v. Wilson 22 F.L.R. 262 at 268 and 269). In all the circumstances, I am satisfied, having regard to that onus, that the charges against both officers have been substantiated.'
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> The very reference by the Tribunal to Scanes v. Wilson at 269 is to, amongst other things, the whole of the relevant passage from Dixon J.'s judgement in Briginshaw –v– Briginshaw including the reference to the gravity of the consequences flowing from a particular finding. We reject the submission."

(**NOTE**: the BRIGINSHAW TEST is given at page 6 herein).

9. In Re SEIDLER, the applicant was employed by the Cairns Hospitals Board and was charged with stealing a switchboard, the property of the respondent Board. At his trial, the Crown entered a nolle prosequi. Subsequently, the Board charged the applicant with two disciplinary offences under the Hospitals Act. Those offences were made out before the Hospitals Board and the applicant appealed to the Hospitals Appeal Board. It was argued for the applicant on appeal that he was entitled to the benefit of the plea of **previous acquittal**: (an originating summons seeking a declaration to that effect had been filed.)

Carter J dismissed the application. Amongst other things, His Honour said at pages 490–491:–

> "In Australia and in England, the appropriate standard of proof in disciplinary actions has been closely examined by the courts, and this standard is regularly applied in practice by disciplinary bodies. **The standard of proof is proof on the balance of probabilities possessing as that standard does the required measure of flexibility so that the more serious the allegation the higher the degree of probability that is required**: see R v. Hampshire County Council, ex parte Ellerton (1985) 1 W.L.R. 749; Ex parte Attorney General for the Commonwealth; Re a Barrister and Solicitor (1972) 20 F.L.R. 234, 246; Scanes v. Commissioner of Police (1974) 3 A.C.T.R. 20, 26–27; Hart v. Jacobs (1981) 30 A.L.R. 209, 222–212; In re a Solicitor (1979) Tas. S.R. N.C. 3.
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> The applicant's submission, that disciplinary offences which provide for

punishment should be treated as being in the nature of criminal offences, with the resultant higher standard of proof, cannot therefore be accepted (see, in particular, the judgement of O'Connor L.J. in Ellerton's case, supra, at 753–754)."

(Emphasis added)

10. In ADAMSON, the Queensland Full Court was concerned with an appeal against a decision of the Statutory Committee of the Queensland Law Society which determined that certain conduct of the appellant solicitor constituted professional misconduct. As a result, the Statutory Committee ordered that his name be struck off the roll of solicitors and that he pay the costs of the Society.

The decision of the Full Court was given by Thomas J. The following relevant extracts are taken from His Honour's judgement at pages 503–506:–

"Mr Crowley QC for the solicitor submitted that the Society's allegations must be established beyond reasonable doubt ... He submitted that the Committee, and in turn this Court, was bound to apply the criminal standard of proof ..."

"... Despite the High Court's decision in **Helton v. Allen**, the Queensland Courts continued to apply the criminal standard in civil proceedings where the issue involved the proof of criminal activity, in the belief that this was made necessary by a decision of the Privy Council (in a 1941 Indian case). In 1952 the Full Court decided to adhere to this view until the law was otherwise declared by a superior court ... The High Court finally otherwise declared some 13 years later in **Rejfek v. McElroy** (1965) 112 C.L.R. 517 ... **Thereafter it has been recognised as the rule in all civil proceedings that facts amounting to the commission of a crime need be established only to the reasonable satisfaction of the tribunal. On such issues the shifting standard of Briginshaw v. Briginshaw (1938) 60 C.L.R. 336 is applied whereunder the necessary degree of satisfaction may vary according to the gravity of the fact to be proved** (Rejfek at 521)."

"It is true that prior to **Rejfek's case** there was a divergence of approach between courts in different States as to the standard of proof applicable in disciplinary proceedings when breach of a penal provision was in issue .... although due recognition was given to what might be called the serious civil standard of proof in relation to allegations involving moral turpitude or breach of statutory provision."

"Whatever the merits of the pre–1965 authorities, the post–Rejfek era has affirmed the application of the civil standard to such proceedings ...."

"... In my view disciplinary proceedings before a professional tribunal (as distinct from proceedings in a court for a penalty) cannot generally be regarded

> as 'criminal proceedings' whether or not the tribunal happens to have the additional power of imposing a fine. ..... **It can no longer be suggested that in exercising functions of discipline the courts or the statutory committees are conducting criminal proceedings** ... The power of a disciplinary tribunal to order a practitioner to pay a pecuniary penalty to the professional body (as Section 41 of the Medical Act does) may be regarded differently from the recording of a conviction and the imposing of a fine by a court, as the former proceedings are still essentially disciplinary in nature and are a form of self-regulation by a profession. **On this basis the Briginshaw standard may satisfactorily accommodate all proceedings before professional disciplinary tribunals ...** "
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> (Emphasis added)

11. What then is the BRIGINSHAW STANDARD or the BRIGINSHAW TEST?

In BRIGINSHAW -v- BRIGINSHAW (1938) 60 C.L.R. 336, Dixon J. stated at pages 361-363:

> "Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the **reasonable satisfaction** of the tribunal. **But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether an issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect references** ..... This does not mean 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.**"
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> (Emphasis added)

The BRIGINSHAW STANDARD is not an intermediate standard between the criminal and civil standards of proof but is a **process** to be used within the civil standard itself. The more serious the issue, the more demanding is the process by which reasonable satisfaction is attained.

IS THE CIVIL STANDARD OF PROOF APPROPRIATE IN NON-CRIMINAL PROCEEDINGS WHEN A QUESTION ARISES WHETHER A CRIME HAS BEEN COMMITTED?

12. Dixon J. also addressed that issue in BRIGINSHAW. At page 363 His Honour stated:

> "**When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues** ... see, further, **Wigmore on Evidence,** Second Edition (1923) volume 5, page 472, para 2498 (2)(1). But, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected.
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> These illustrations show the good sense of Professor **Wigmore's** statement that, in civil cases, it should be enough to say that the extreme caution and the unusual positiveness of persuasion required in criminal cases do not obtain."
>
> (Emphasis added)

13. In **Wigmore on Evidence** (1981) volume 9, pages 422-424, para 2498, it is stated:

> "It is sometimes said that, in general, wherever in a civil case a **criminal act is charged** as part of the case, the rule for criminal cases should apply: but this has been generally repudiated .....
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> But a stricter standard, in some such phrase as 'clear and convincing proof', is commonly applied to measure the necessary persuasion for a charge of **fraud,** or of **undue influence** ..."

14. As regards an action for fraud or deceit, the High Court (per Dixon J.) has stated in SMITH BROTHERS -v- MADDEN BROTHERS (1945) Q.W.N. 39 at page 42:

> "**In an action of deceit the burden of proof does not differ, in its measure of persuasion, from that in other civil causes: but the gravity of an issue determines the application of the measure** and to find that fraudulent representations have been made is a responsibility which a judge should discharge only when he feels **persuaded clearly** on the balance of probabilities that representations have been made which are false."
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> (Emphasis added)

15. In HELTON -v- ALLEN (1940) 63 C.L.R. 691, the High Court held that in civil proceedings, facts which amount to the commission of a crime have only to be

established to the reasonable satisfaction of the tribunal of fact, namely, on the balance of probabilities, in the absence of any statutory provision to the contrary. In that case, the High Court reversed the decision of the Full Court of the Queensland Supreme Court. Briefly stated, the facts are as follows: The appellant was executor and beneficiary of the estate of a woman who died from strychnine poisoning. There was circumstantial evidence to suggest that he had murdered her. The appellant was tried upon indictment for her murder and was acquitted.

Civil proceedings were then commenced by a next-of-kin for the purpose of establishing that the appellant unlawfully killed the testatrix and was thereby disabled at common law from occupying the office of executor or taking any benefit under her will. The evidence in support of the issue was entirely circumstantial, and the matter was heard by a civil jury.

The judge emphasised the difference between the standards of proof upon a criminal charge and upon a civil issue and laid weight on the slightness of the preponderance of probability upon which the jury might find that the appellant poisoned the testatrix. Having considered their verdict for some time, the jury sought a further direction upon the "point about probabilities". The judge gave a further direction, which amounted to an instruction to find homicide if they considered that there was any greater probability favouring that conclusion. The jury found that the defendant unlawfully killed the testatrix.

It was held by the High Court that although there was circumstantial evidence to support the jury's finding, there had been a mistrial because, though the criminal standard of persuasion did **not** apply, nevertheless the effect of the judge's direction and further direction would be to lead the jury:

(a) to disregard the gravity of the issue and to lose sight of the consideration that reasonable satisfaction is not independent of the nature of the fact to be proved so that the graver the allegation the greater should be the strictness of proof demanded, and

(b) to think that they should make a mere comparison of the probabilities of guilt with those of innocence rather than to consider whether they were really satisfied that the defendant did kill the testatrix.

Amongst other things, the High Court referred to its earlier decision in BRIGINSHAW. Three of the five judges (Dixon, Evatt, McTiernan J.J.) concluded their joint decision by saying that the matter before them illustrated:

> "... the wisdom of the observation of Professor **Wigmore** cited in **Briginshaw's case** as to undue elaboration of the simple statement that **in a civil case the same high degree of certainty is not required as in a criminal case, but reasonable satisfaction according to the nature of the case.**"
>
> (Emphasis added)

16. The leading case on this question is the decision of the High Court in REJFEK -v- McELROY (1964-1965) 112 C.L.R. 517. In its joint judgement the High Court stated at pages 519-522:

> "This Court decided in 1940 in **Helton v. Allen** that in a civil proceeding facts which amount to the commission of a crime have only to be established to the reasonable satisfaction of the tribunal of fact, a satisfaction which may be attained on a consideration of the probabilities ..... **Helton v. Allen thus established that the criminal standard of proof is inappropriate to the determination of any such fact in any civil action tried in any court in Australia where there are no statutory provisions to the contrary.** That decision is binding on all courts in Australia unless and until there is a precise decision to the contrary by the court or by the Privy Council."
>
> (At pages 519-520)

> "... the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. **The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied** and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge ..."
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> (At pages 521-522)
> (Emphasis added)

NOTE: The High Court has stated that its decision in REJFEK is binding in Australia "unless and until there is a precise decision to the contrary by the (High Court) or by the Privy Council".

There has been no later decision of the High Court which has overruled its decision in REJFEK. Also, the reference to a contrary decision by the Privy Council is no longer applicable. Following enactment of the Privy Council (Limitation of Appeals) Act 1968 (Cth) and the Privy Council (Appeals from the High Court) Act 1975 (Cth), no appeal can be taken to the Privy Council from the High Court and appeals to the Privy Council from State courts lie only on matters exclusively involving State law where no appeal has been taken to the High Court.

In VIRO –v– R (1978) 18 A.L.R. 257 the High Court unanimously held that, in view of the enactment of these two Commonwealth Acts, the High Court should no longer consider itself bound by decisions of the Privy Council. This attitude has been reinforced by the effects of the Australia Acts, so that decisions of the Privy Council are now of persuasive influence only in Australian courts.

Accordingly, Misconduct Tribunals are bound by the decision in REJFEK and must apply the rule that facts amounting to the commission of a crime need be established only to the Tribunal's reasonable satisfaction. In such cases the shifting standard of BRIGINSHAW is applied whereunder the necessary degree of satisfaction may vary according to the gravity of the fact to be proved: see REJFEK at page 521.

17. In conclusion, some assistance may be gained from the decision of the English Court of Appeal in R –v– HAMPSHIRE COUNTY COUNCIL, ex parte ELLERTON (1985) 1 W.L.R. 749.

In that case, the applicant, a fire officer, had been found guilty of a corrupt practice, contrary to the relevant disciplinary regulation, in that he had made personal use of a fire brigade vehicle. He appealed to the fire authority. That authority, applying the

civil standard of proof, dismissed his appeal. Judicial review of that decision was refused and the applicant applied to the Court of Appeal.

The Court of Appeal dismissed the application. Notwithstanding that the regulations were couched in the language of the criminal law, the court held that disciplinary proceedings were **domestic** and not criminal proceedings, and the appropriate standard of proof in those proceedings was the **civil standard** on a balance of probabilities. The standard was **flexible** and was higher or lower according to the nature and gravity of the offence.

At page 758 May L.J. said:

> "Counsel then posed the rhetorical question in the context of the present case: where on the civil scale does the burden lie? He stressed that this will necessarily vary from offence to offence. I agree that this may well be so; but I do not think that there is any good reason why this should not be so; is it not appropriate that in this field serious 'offences' should require stricter proof than relatively minor ones?"

Earlier, at pages 754–755, O'Connor L.J. discussed the meaning of the conclusion of the Privy Council's advice in the matter of BHANDARI –v– ADVOCATES COMMITTEE (1956) 1 W.L.R. 1442, where the Privy Council was concerned with disciplinary proceedings against an advocate in Kenya. At page 1452 the Judicial Committee stated:

> "With regard to the onus of proof, the Court of Appeal said: 'we agree that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgement on a colleague who would be content to condemn on a mere balance of probabilities'. This seems to Their Lordships an adequate description of the duty of a tribunal such as the Advocates Committee and there is no reason to think that either the committee or the Supreme Court applied any lower standard of proof."

O'Connor L.J. made the following observations concerning that statement:

> "I do not think that the requirement that something more than the 'mere balance of probabilities' is required to be read as requiring proof beyond reasonable doubt. It is just another way of saying what has been said ... that

the civil standard is **flexible**."

(Emphasis added)

18. Whilst recognising that the civil standard is **flexible**, it would be wrong to equate the higher end of that standard with the criminal standard of proof. As was stated by the High Court in REJFEK (at pages 521–522), such confusion must be avoided:

> "The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the charge of a conviction upon a criminal charge ..."

Although at first blush a Misconduct Tribunal may be inclined to apply the criminal standard of proof – or something near it – in determining a charge of official misconduct, the application of the criminal standard **would** constitute an error of law.

By way of example, if a Misconduct Tribunal had to determine whether a prescribed person was responsible for the homicide of another (see HELTON) as part and parcel of its investigation and determination of a disciplinary charge of official misconduct, it would be inappropriate and unlawful to apply the criminal standard of proof to the determination of that issue.

The civil standard of proof must be applied to determine that issue although it would also be inappropriate and unlawful to make a mere comparison of the probabilities and then determine, on **slight** balance, the establishment of the homicide. Having regard to the nature and gravity of the alleged conduct, the Misconduct Tribunal would require something more than a slight preponderance of probability to allow it to be **reasonably satisfied** that the prescribed person did in fact cause the homicide.

Another reason which may incline a Misconduct Tribunal to apply the criminal standard is the gravity of the consequences which could flow from a finding adverse to the prescribed person. Every charge of official misconduct will involve allegations

of conduct which constitute or could constitute a criminal offence or a disciplinary breach that provides reasonable grounds for the termination of the prescribed person's services in the relevant unit of public administration. Dismissal for misconduct is a severe consequence which may tempt a Misconduct Tribunal to apply the criminal standard. Once again the Misconduct Tribunal must resist that temptation. Although dismissal for misconduct is a severe consequence:

> "Nonetheless it is short of criminal conviction and is not to be equated with that."
>
> (see page 296 of the Fitzgerald Report)

SUMMARY

A. In investigating and determining a disciplinary charge of official misconduct, a Misconduct Tribunal performs an **administrative** or **disciplinary** function.

B. The appropriate standard of proof to be applied by the Misconduct Tribunals is the **civil standard**, namely, proof on the balance of probabilities, possessing as that standard does the required measure of flexibility so that the more serious the allegation the higher the degree of probability that is required (the Briginshaw Test).

Put another way, in determining whether a disciplinary charge of official misconduct has been established, it is sufficient if the allegation is established to the **reasonable satisfaction** of the Misconduct Tribunal according to the nature of the allegation and the consequences of the fact(s) to be proved. Reasonable satisfaction should not be produced by inexact proofs, indefinite testimony or indirect references.

C. The Briginshaw Test or standard is **not** an intermediate standard between the criminal and civil standards of proof but is a **process** to be used within the civil standard for determining reasonable satisfaction.

D. In the hearing of charges of official misconduct, a Misconduct Tribunal does **not** lose its jurisdiction if and when material is placed before it which, if proved, could

constitute the commission of a criminal offence. The Act clearly envisages that such material will come before Misconduct Tribunals in their original jurisdiction.

E. When, in original proceedings before Misconduct Tribunals, a question arises whether a crime has been committed, the application of the criminal standard of proof is **inappropriate** to the determination of that question. Such facts need only to be established to the reasonable satisfaction of the Misconduct Tribunal applying the Briginshaw Test. (REJFEK at 519–520)

F. However, in such cases, the application of the Briginshaw Test does **not** mean that the civil standard ever approaches or is equated with the criminal standard of proof. As the High Court has stated in REJFEK at pages 521–522:

> "The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. **No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied** and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge ..."
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> (Emphasis added)

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