PERFECTLY SAFE, FIVE TIMES OUT OF SIX: THE *BRIGINSHAW* PRINCIPLE AND ITS PARADOXES

HARRY STRATTON*

When a method of risk assessment would endorse playing Russian roulette, something has gone badly wrong with its logic. Yet the current understanding of Briginshaw v Briginshaw means courts cannot properly account for the risks presented in just this sort of situation. In this article, I explain the Briginshaw principle by comparison to intuitive and mathematical models of decision-making under conditions of uncertainty. I show that, while Briginshaw itself left the High Court of Australia deeply divided about where the so-called principle was enlivened and its consequences, subsequent judicial consideration has partly resolved this confusion. However, these subsequent authorities depart from our models, because courts wrongly assume serious allegations are inherently unlikely, insufficiently account for the consequences of 'false negatives', and have contradictory attitudes towards economic consequences. More fundamentally, while no theory of decision-making can totally avoid risk, I show that the accepted interpretation of Briginshaw as a fixed standard of proof means courts cannot properly account for improbable but grave consequences. Adopting a variable standard of proof would resolve some of these issues, but current authority is inconsistent with this approach.

I INTRODUCTION

Civil cases frequently involve serious allegations that have grave consequences but are difficult to prove.[1] As in criminal cases, civil allegations of

* BSc (Adv), LLB (Hons I, Medal), University of Sydney; BCL candidate, Magdalen College, Oxford. I would like to thank Professor David Hamer, Professor Peter Cashman, John Stratton SC, Beverly Parungao, Patrick Hall, Maria Mellos, Alyssa Glass, Timothy Smartt, Dr Ananya Chakravorty, and the three anonymous reviewers for their helpful comments on earlier drafts of this article. Any errors are my own.

1 See, eg, *M v M* (1988) 166 CLR 69, 76–7 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ); *S v R* (1999) 149 FLR 149, 173 [109] (Kay, Holden and Mullane JJ); Patrick Parkinson, 'Family Law and Parent-Child Contact: Assessing the Risk of Sexual Abuse' (1999) 23 *Melbourne University Law Review* 345, 347–9; John Faulks, '"Condemn the Fault and Not the Actor?" Family Violence: How the Family

fraud and sexual misconduct can involve criminality[2] and serious immorality,[3] and damage defendants' reputations[4] and livelihoods,[5] but sometimes turn on competing witnesses' credibility[6] or mental states ultimately known only to defendants.[7]

In such cases, defendants sometimes rely on the so-called *Briginshaw* principle, that special requirements apply when proving allegations that are serious or unlikely, or have grave consequences[8] (on one view, that they must be proved more likely than not with particularly strong evidence;[9] on another, that

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Court of Australia Can Deal with the Fault and the Perpetrators' (2010) 33 *University of New South Wales Law Journal* 818, 825.

2 See, eg, *Rejfek v McElroy* (1965) 112 CLR 517, 521 (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ); *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219, 226 (Mahoney JA); *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449–50 (Mason CJ, Brennan, Deane and Gaudron JJ); *Volanne Pty Ltd v International Consulting and Business Management (ICBM) Pty Ltd* [2016] ACTCA 49, [86] (Refshauge ACJ, Perry J and Walmsley AJ).

3 See, eg, *Briginshaw v Briginshaw* (1938) 60 CLR 336, 347 (Latham CJ), 350 (Rich J), 353 (Starke J), 368 (Dixon J), 373–4 (McTiernan J) ('*Briginshaw*'). See also *Wright v Wright* (1948) 77 CLR 191, 198–9 (Latham CJ), 205–6 (Rich J), 210 (Dixon J), 213–4 (McTiernan J); *Watts v Watts* (1953) 89 CLR 200, 203 (Fullagar J); *Paterson v Paterson* (1953) 89 CLR 212, 218 (Dixon CJ and Kitto J); *Mann v Mann* (1957) 97 CLR 433, 439–40 (Dixon CJ and Williams J); *Locke v Locke* (1956) 95 CLR 165, 167–8 (Dixon CJ, Williams and Fullagar JJ).

4 See, eg, *Piggott v Piggott* (1938) 61 CLR 378, 428–9 (McTiernan J); *Watts v Watts* (1953) 89 CLR 200, 207 (Kitto and Taylor JJ); *Anderson v Blashki* [1993] 2 VR 89, 96 (Gobbo J); *Secretary, Department of Health and Community Services v Gurvich* [1995] 2 VR 69, 74 (Southwell J); *Chief Commissioner of Police v Hallenstein* [1996] 2 VR 1, 19 (Hedigan J); *Ashby v Slipper* (2014) 219 FCR 322, 345–6 [68]–[71] (Mansfield and Gilmour JJ). See also Victor Harcourt, 'Contribution to Cause of Death' (1998) 6 *Journal of Law and Medicine* 50, 56.

5 See, eg, *Willcox v Sing* [1985] 2 Qd R 66, 72 (Connolly J; Campbell CJ agreeing at 67; Thomas J agreeing at 87); *Barten v Williams* (1978) 20 ACTR 10, 12 (Blackburn CJ); *Australian Securities and Investments Commission v Reid* (2005) 55 ACSR 152, 156 [23] (Lander J); *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1, 29 [146] (Giles JA; Mason P agreeing at 5 [1]; Beazley JA agreeing at 5 [2]); *Australian Securities and Investments Commission v Plymin* (2003) 175 FLR 124, 206–7 [366]–[367] (Mandie J); *Mustac v Medical Board of Western Australia* [2004] WASCA 156, [73] (Simmonds J); *Lindsay v Health Care Complaints Commission* [2005] NSWCA 356, [7] (Hunt AJA; Mason P agreeing at [1]; Hodgson JA agreeing at [2]); *Aneve Pty Ltd v Bank of Western Australia Ltd* [2005] NSWCA 441, [60] (Hodgson JA; Santow JA agreeing at [76]; Bryson JA agreeing at [77]). See also Danuta Mendelson, 'Disciplinary Powers of Medical Practice Boards and the Rule of Law' (2000) 8 *Journal of Law and Medicine* 142, 150; Loretta de Plevitz, 'The *Briginshaw* "Standard of Proof" in Anti-Discrimination Law: "Pointing with a Wavering Finger"' (2003) 27 *Melbourne University Law Review* 308, 318; Anne Rees, 'Civil Penalties: Emphasising the Adjective or the Noun' (2006) 34 *Australian Business Law Review* 139, 143–5.

6 See, eg, Peter Bayne, 'Natural Justice, Anti-Discrimination Proceedings and the Feminist Critique' (1995) 3 *Australian Journal of Administrative Law* 5, 14; *Magill v Magill* [2005] VSCA 51, [62] (Eames JA; Ormiston JA agreeing at [1]).

7 Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31 *Sydney Law Review* 579, 582; David Hamer, 'A Dynamic Reconstruction of the Presumption of Innocence' (2011) 31 *Oxford Journal of Legal Studies* 417, 427; Belinda Smith and Tashina Orchiston, 'Domestic Violence Victims at Work: A Role for Anti-Discrimination Law?' (2012) 25 *Australian Journal of Labour Law* 209, 221.

8 *Briginshaw* (1938) 60 CLR 336, 362 (Dixon J).

9 Peter Gillies, *Law of Evidence in Australia* (Legal Books, 2nd ed, 1991) 64, 69; Andrew Palmer, *Principles of Evidence* (Cavendish Publishing, 1998) 342; Jonathon Hunyor, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 535, 539–40; C R Williams, 'Burdens and Standards in Civil Litigation' (2003) 25 *Sydney Law Review* 165, 185; de Plevitz,

they must be proved to a higher standard of probabilistic satisfaction, such as 60 per cent likelihood, or beyond reasonable doubt).[10] The principle is very important to the civil justice system. First, it is frequently invoked.[11] The Federal Court of Australia and Supreme Court of New South Wales have each cited *Briginshaw* more than 400 times in the last 25 years,[12] making it either the sixth[13] or seventh[14] most cited decision in Australian legal history. Second, the cases it applies to are, by definition, serious. Some involve allegations of murder,[15] fraud,[16] discrimination,[17] and sexual misconduct,[18] with severe consequences for parties' liberty,[19] reputations,[20] and livelihoods.[21] Indeed, in the United States, the

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above n 5, 311; Allen, above n 7, 585; David Field, *LexisNexis Questions and Answers: Evidence for Common Law States* (LexisNexis Butterworths, 2011) 16; David Field, *Uniform Evidence Law* (LexisNexis, 2012) 18; Richard Chisholm, 'Child Abuse Allegations in Family Law Cases: A Review of the Law' (2011) 25 *Australian Journal of Family Law* 1, 18; LexisNexis, *Halsbury's Laws of Australia*, vol 13 (at 20 April 2018) 195 Evidence, 'I(3)(C) Standard of Proof' [195-325]–[195-330].

10 Sir Richard Eggleston, 'Probabilities and Proof' (1963) 4 *Melbourne University Law Review* 180, 191; Andrew Ligertwood, 'The Uncertainty of Proof' (1976) 10 *Melbourne University Law Review* 367, 372; David Hamer, 'The Civil Standard of Proof Uncertainty: Probability, Belief and Justice' (1994) 16 *Sydney Law Review* 506, 513; Mike Redmayne, 'Standards of Proof in Civil Litigation' (1999) 62 *Modern Law Review* 167, 175; Mendelson, above n 5, 150; Suzanne B McNicol and Debra Mortimer, *Evidence* (LexisNexis, 3rd ed, 2005) 7; Joanna Manning, 'Criminal Allegations in Disciplinary Cases Involving Medical Practitioners' (2008) 16 *Journal of Law and Medicine* 393, 396–7.

11 *Porter v Gordian Runoff Ltd* [2004] NSWCA 171, [18] (Bryson JA; Sheller JA agreeing at [1]; Giles JA agreeing at [2]); *Palmer v Dolman* [2005] NSWCA 361, [42] (Ipp JA; Tobias JA agreeing at [125]; Basten JA agreeing at [126]); Peter Heerey, 'Generalia: The Ballad of *Briginshaw*' (2008) 1 *Northern Territory Law Journal* 56, 57; *Granada Tavern v Smith* (2008) 173 IR 328, 345 [96] (Heerey J); Justice Stephen Gageler, 'Evidence and Truth' (2017) 13 *Judicial Review* 249, 254.

12 Australasian Legal Information Institute, *Search Results: 'Briginshaw' by Database* (20 April 2018) AustLII <http://www.austlii.edu.au/cgi-bin/sinosrch.cgi?method=auto;query=briginshaw;view=database>.

13 Adam Weir, 'FirstPoint's Quality Assortment: Australia's Most-Cited Cases', *FirstPoint* (online), 7 July 2015 <https://support.thomsonreuters.com.au/product/westlaw-au/updates-alerts/firstpoints-quality-assortment-australias-most-cited-cases>; Felicity Nelson, 'The 25 Most-Cited Cases in Australian History', *Legal Week* (online), 17 July 2015 <https://www.lawyersweekly.com.au/news/16841-the-25-most-cited-cases-in-australian-history>.

14 Daniel Reynolds and Lyndon Goddard, *Leading Cases in Australian Law: A Guide to the 200 Most Frequently Cited Judgments* (Federation Press, 2016) 13.

15 See, eg, *Helton v Allen* (1940) 63 CLR 691, 696 (Rich J), 701 (Starke J), 711–2 (Dixon, Evatt, and McTiernan JJ); *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533, 595 [170] (Callinan J); *Hurley v Clements* [2010] 1 Qd R 215, 232–4 [25]–[27] (McMurdo P, Keane and Fraser JJA); *Sands v South Australia* (2015) 122 SASR 195, 256–7 [253] (Blue, Stanley and Nicholson JJ).

16 See, eg, *Rejfek v McElroy* (1965) 112 CLR 517, 521 (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ); *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449–50 (Mason CJ, Brennan, Deane and Gaudron JJ).

17 See, eg, *Department of Health v Arumugam* [1988] VR 319, 331 (Fullagar J); *Sharma v Legal Aid (Queensland)* [2002] FCAFC 196, [40] (Heerey, Mansfield and Hely JJ).

18 See, eg, *M v M* (1988) 166 CLR 69, 76–7 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ); *S v R* (1999) 149 FLR 149, 173 [109] (Kay, Holden and Mullane JJ); *Amador & Amador* [2009] FamCAFC 196, [47] (May, Coleman and Le Poer Trench JJ).

19 See, eg, *Jendell Australia Pty Ltd v Kesby* [1983] 1 NSWLR 127, 136–7 (McLelland J); *R v Schafferius* [1987] 1 Qd R 381, 383 (Thomas J; Andrews CJ agreeing at 381; Ryan J agreeing at 384); *McGarry v The Queen* [1999] WASCA 276, [24] (Kennedy J); *Pendleton v The Queen* [2002] WASCA 4, [24] (Kenny J; Wallwork J agreeing at [48]; Pidgeon AJ agreeing at [49]); *Thompson v The Queen* [2002] WASCA 230, [42] (Templeman J; Murray J agreeing at [51]; McKechnie J agreeing at [64]); *Yarran v*

standard of proof in such cases has become politically controversial, especially in relation to civil claims for sexual assault.[22] But despite *Briginshaw*'s importance, the principle remains persistently misunderstood,[23] notwithstanding frequent High Court consideration[24] and apparent replication in the *Uniform Evidence Law* ('*UEL*').[25]

In this article, I attempt to make sense of the *Briginshaw* principle and examine to what extent it reflects intuitive and mathematical approaches to decision-making.

Part II introduces two models for decision-making under conditions of uncertainty. The first is the *Prior Probability Model*, that whether we should believe allegations are true given certain evidence depends not just on the

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The Queen (2003) 27 WAR 427, 430–2 [11]–[12] (McKechnie J; Malcolm CJ agreeing at 428 [1]; Anderson J agreeing at 428 [2]). See also Bernadette McSherry, 'Legal Issues: Criminal Detention of Those with a Mental Impairment' (1999) 6 *Journal of Law and Medicine* 216, 217.

20 See, eg, *Piggott v Piggott* (1938) 61 CLR 378, 428–9 (McTiernan J); *Watts v Watts* (1953) 89 CLR 200, 207 (Kitto and Taylor JJ); *Anderson v Blashki* [1993] 2 VR 89, 96 (Gobbo J); *Secretary, Department of Health and Community Services v Gurvich* [1995] 2 VR 69, 74 (Southwell J); *Chief Commissioner of Police v Hallenstein* [1996] 2 VR 1, 19 (Hedigan J); *Ashby v Slipper* (2014) 219 FCR 322, 345–6 [68]–[71] (Mansfield and Gilmour JJ). See also Harcourt, above n 4, 56.

21 See, eg, *Willcox v Sing* [1985] 2 Qd R 66, 72 (Connolly J; Campbell CJ agreeing at 67; Thomas J agreeing at 87); *Barten v Williams* (1978) 20 ACTR 10, 12 (Blackburn CJ); *Australian Securities and Investments Commission v Reid* (2005) 55 ACSR 152, 156 [23] (Lander J); *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1, 29 [146] (Giles JA; Mason P agreeing at 5 [1]; Beazley JA agreeing at 5 [2]); *Australian Securities and Investments Commission v Plymin* (2003) 175 FLR 124, 206–7 [366]–[367] (Mandie J); *Mustac v Medical Board of Western Australia* [2004] WASCA 156, [73] (Simmonds J); *Lindsay v Health Care Complaints Commission* [2005] NSWCA 356, [7] (Hunt AJA; Mason P agreeing at [1]; Hodgson JA agreeing at [2]); *Aneve Pty Ltd v Bank of Western Australia Ltd* [2005] NSWCA 441, [60] (Hodgson JA; Santow JA agreeing at [76]; Bryson JA agreeing at [77]). See also Mendelson, above n 5, 150; de Plevitz, above n 5, 318; Rees, above n 5, 143–5.

22 See, eg, Jeannie Suk Gersen, 'The Trump Administration's Fraught Attempt to Address Campus Sexual Assault', *The New Yorker* (online), 15 July 2017 <https://www.newyorker.com/news/news-desk/the-trump-administrations-fraught-attempt-to-address-campus-sexual-assault>; Stephanie Saul and Kate Taylor, 'Betsy DeVos Reverses Obama-Era Policy on Campus Sexual Assault Investigations', *The New York Times* (online), 22 September 2017 <https://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html>; Tessa Berenson, 'The Country is Torn over Betsy DeVos' New Campus Sexual Assault Guidelines', *Time Magazine* (online), 22 September 2017 <http://time.com/4954158/betsy-devos-title-ix-sexual-assault-guidelines/>.

23 Gageler, above n 11, 254; John Fogarty, 'Unacceptable Risk: A Return to Basics' (2006) 20 *Australian Journal of Family Law* 249, 295; *NU v Secretary, New South Wales Department of Family and Community Services* (2017) 95 NSWLR 577, 589 [53] (Beazley P; McColl JA agreeing at 596 [85]; Schmidt J agreeing at 596 [86]). See also J D Heydon, 'Are There Stresses and Strains in the Remedial Structure of the *Competition and Consumer Act 2010* (Cth)?' (2013) 41 *Australian Business Law Review* 354, 361.

24 See, eg, *Helton v Allen* (1940) 63 CLR 691, 711–2 (Dixon, Evatt, and McTiernan JJ*); Locke v Locke* (1956) 95 CLR 165, 167–8 (Dixon CJ, Williams and Fullagar JJ); *M v M* (1988) 166 CLR 69, 76–7 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ); *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449–50 (Mason CJ, Brennan, Deane and Gaudron JJ); *G v H* (1994) 181 CLR 387, 399–400 (Deane, Dawson and Gaudron JJ); *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 576 (Gummow J); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, 84–5 [201] (Hayne J); *Re Day* (2017) 91 ALJR 262, 268 [15] (Gordon J).

25 See *Evidence Act 1995* (Cth) s 140; *Evidence Act 2011* (ACT) s 140; *Evidence Act 2004* (NI) s 140; *Evidence Act 1995* (NSW) s 140; *Evidence (National Uniform Legislation) Act 2011* (NT) s 140; *Evidence Act 2001* (Tas) s 140; *Evidence Act 2008* (Vic) s 140.

strength of the evidence but also the allegations' inherent unlikelihood. The second is the *Consequences of Error Model*, that allegations' consequences might mean we need a higher standard of satisfaction than 'more likely than not' before acting on those allegations. I show each model accords with our intuitions and mathematical insights into probability.

Part III introduces *Briginshaw*. Commentators treat Dixon J's judgment as the classic statement of the *Briginshaw* principle.[26] I show that in fact, *Briginshaw* left the High Court divided about where the so-called principle was enlivened and its consequences.

Part IV considers *Briginshaw*'s subsequent application. I show later authorities resolve the division about what the *Briginshaw* principle is, in favour of Dixon J's three-factor test (that *Briginshaw* is enlivened if allegations are serious, inherently unlikely, or have grave consequences)[27] and a fixed standard of proof (that even serious allegations need only be proved more likely than not, not to a higher degree of probabilistic satisfaction). This approach seems to be replicated in the *UEL*.

Part V compares *Briginshaw* to Part II's models. I show applications of *Briginshaw* deviate from the models in assuming serious allegations are inherently unlikely, are overly concerned with the consequences of 'false positives' rather than 'false negatives', and have contradictory attitudes towards economic consequences. More fundamentally, *Briginshaw*'s interpretation as a fixed standard of proof means it cannot properly account for improbable but grave consequences, such as those posed by the 'Russian roulette' class of cases, because it disregards risks that are *less* likely than not. We could better give effect to our intuitions by using a variable standard of proof to reflect the consequences of error, and prior probabilities to determine the evidence required to satisfy that standard, but current authority is inconsistent with this approach.

II TWO MODELS OF DECISION-MAKING UNDER CONDITIONS OF UNCERTAINTY

Briginshaw is sometimes said to reflect intuitive[28] or mathematical[29] approaches to probability. This part introduces two models of decision-making

26 See, eg, Jill Anderson, Jill Hunter and Neil Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (LexisNexis, 2002) 527; Andrew Ligertwood, *Australian Evidence* (LexisNexis, 4th ed, 2004) 82; P K Waight and C R Williams, *Evidence: Commentary and Materials* (Lawbook, 7th ed, 2006) 93–5; Kenneth J Arenson and Mirko Bagaric, *Rules of Evidence in Australia: Text & Cases* (LexisNexis Butterworths, 2nd ed, 2007) 24–5; John Anderson and Peter Bayne, *Uniform Evidence Law: Text and Essential Cases* (Federation Press, 2nd ed, 2009) 75; J D Heydon, *Cross on Evidence* (LexisNexis, 10th ed, 2015) 354–5; Miiko Kumar, Stephen Odgers, and Elisabeth Peden, *Uniform Evidence Law: Commentary and Materials* (Lawbook, 5th ed, 2015) 627; Reynolds and Goddard, above n 14, 13; Andrew Hemming and Robyn Layton, *Evidence Law in Qld, SA and WA* (Lawbook, 2017) 138.

27 *Briginshaw* (1938) 60 CLR 336, 362.

28 *Briginshaw* (1938) 60 CLR 336, 350 (Rich J); *Kyriackou v Law Institute of Victoria Ltd* (2014) 45 VR 540, 547 [26] (Warren CJ, Osborn JA and Ginnane AJA).

29 Eric Edwards, 'Proof and Suspicion' (1969) 9 *University of Western Australia Law Review* 169, 179; Ligertwood, 'The Uncertainty of Proof', above n 10, 372.

under conditions of uncertainty. I show these models reflect our intuitions and mathematical insights into assessing probability and minimising risk.[30] Part V considers to what extent *Briginshaw* accords with the models.

This part involves some probability calculations, and it is important to clarify their purpose. I am not suggesting judges should perform such calculations in making decisions (although some have).[31] While human beings have intuitive *qualitative* concepts of probability,[32] precisely quantifying probabilities and outcomes' desirability may be alien to our intuitions[33] and impossible in light of limited information. Indeed, judges' attempts to do so sometimes lead them into error.[34] However, Probability Theory's formal mathematical structure forces us to examine the assumptions behind our intuitions,[35] and helps distinguish between two related but distinct concepts: the standard of proof we should set, and the strength of evidence required to satisfy that standard. I use calculations to rationalise our intuitive assessments of likelihood and risk, and to explain why arguments against those intuitions are wrong.

For the purposes of illustration, the calculations approximate various hypotheses' probabilities and outcomes' desirability. My aim is not to calculate the relevant quantities exactly, but to demonstrate how Probability Theory reflects our intuitions.[36] The hypotheticals are selected so that the figures are likely to be uncontroversial: for the purposes of the hypothetical, if we agree that a sophisticated rat religion is highly unlikely, we need not determine *exactly* how unlikely. I have deliberately adopted *generous* approximations that are *unfavourable* to my argument to show it is the *structure* of Probability Theory, rather than the precise figures chosen, that supports our models of decision-making.

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30 See Hamer, 'The Civil Standard of Proof Uncertainty: Probability, Belief and Justice', above n 10, 512–3.

31 See, eg, *Re Winship*, 397 US 358, 370–1 (Harlan J) (1970); *TNT Management Pty Ltd v Brooks* (1979) 23 ALR 345, 351–4 (Murphy J).

32 Gerd Gigirenzer and Adrian Edwards, 'Simple Tools for Understanding Risks: From Innumeracy to Insight' (2003) 327 *British Medical Journal* 741, 742–3; Robin M Hogarth, 'Intuition: A Challenge for Psychological Research on Decision Making' (2010) 21 *Psychological Inquiry* 338, 344–5.

33 Edwards, above n 29, 179; David Kaye, 'The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation' (1982) 7 *American Bar Foundation Research Journal* 487, 488; Gillies, above n 9, 65; David Hodgson, 'Probability: The Logic of the Law – A Response' (1995) 15 *Oxford Journal of Legal Studies* 51, 64–5.

34 See, eg, *People v Collins* 438 P 2d 33, 38 (Sullivan J) (Cal, 1968); *R v Clark* [2003] EWCA Crim 1020, [178] (Kay LJ); *R v Matthey* [2007] VSC 398, [162]–[168] (Coldrey J). See also William C Thompson and Edward L Schumann, 'Interpretation of Statistical Evidence in Criminal Trials: The Prosecutor's Fallacy and the Defense Attorney's Fallacy' (1987) 11 *Law and Human Behaviour* 167, 170–2.

35 Edmond Cahn, 'Jerome Frank's Fact-Skepticism and Our Future' (1957) 66 *Yale Law Journal* 824, 827; David Hamer, 'The Significant Probative Value of Tendency Evidence' (2018) 42(2) *Melbourne University Law Review* (Advance) 23–4.

36 For further discussion of how Probability Theory can inform our intuitive understanding of likelihood, see Ligertwood, 'The Uncertainty of Proof', above n 10, 374, 386; Shane Simpson and Michael Orlov, 'An Application of Logic to the Law' (1980) 3 *University of New South Wales Law Journal* 415, 417; Hodgson, 'Probability: The Logic of the Law – A Response', above n 33, 56; Jonathan Cohen, 'What Are the Standards of Proof in Courts of Law?' in Peter Murphy (ed), *Evidence, Proof, and Facts: A Book of Sources* (Oxford University Press, 2003) 298, 299–300.

A The *Prior Probability Model*: 'Extraordinary Claims Require Extraordinary Proof'[37]

The first model is the *Prior Probability Model*: that whether we should be satisfied allegations are true given certain evidence depends not just on the evidence's strength but also the allegations' inherent unlikelihood. Thus, we should require *stronger* evidence for inherently unlikely claims, and be satisfied by *weaker* evidence for inherently likely ones.

1 An Intuitive Demonstration of the Model: Rats in the Attic

The following hypothetical demonstrates that this model accords with our intuitions.[38] Suppose, last night, you heard movement coming from your attic. You are trying to decide which of two explanations for the noise is more likely. The *Rats Hypothesis* is that there are rats in your attic, and rats usually tend to run around. The *Ratto Hypothesis* is that there are rats in your attic, but their movement is a highly coordinated dance as part of the festival of Ratto the Rat God, a key ceremony in the surprisingly sophisticated rat religion, which happened to occur last night.

Consider the following argument that, given the evidence, the *Ratto Hypothesis* is more likely. If the *Rats Hypothesis* is true, it is *quite* likely you would hear noises, but not certain. The rats might have been asleep that night. However, if the *Ratto Hypothesis* is true, it is *almost certain* you would hear noises from last night's festival: the rats would hardly sleep through such an important event. The noises are more likely to occur if the *Ratto Hypothesis* is true; therefore they are stronger evidence for the *Ratto Hypothesis*; therefore the *Ratto Hypothesis* is more likely.

The reason we intuitively reject this argument is that the likelihood of hypotheses being true given certain evidence does not *just* depend on the strength of the evidence in their favour. It *also* depends on the hypotheses' *inherent* likelihood. What I mean by this is the likelihood that the hypotheses are true *in general*, by reference to our common knowledge about the world *generally*, before we come to consider the evidence adduced in this particular case. That is, before considering the noises in your roof, we look at the hypotheses of rats in the roof and the festival of Ratto, and ask to what extent they seem likely in light of our knowledge about the world generally. (As we will see in Part V(A)(1), *Briginshaw* does this by reference to the likelihood of this *type* of allegation – for example, the likelihood of murder *generally* – rather than by reference to the likelihood of the particular events occurring between the particular parties.) A previously undiscovered rat culture with highly specific dancing rituals is inherently *much* less likely than the *Rats Hypothesis*. Therefore, we need *much*

37 Marcello Truzzi, 'On the Extraordinary' (1978) 1 *Zetetic Scholar* 11, 11; Public Broadcasting Service, 'Encyclopedia Galatica', *Cosmos*, 14 December 1980 (Carl Sagan).

38 David Braddon-Mitchell, 'Bayes' Theorem and Belief in God' (Speech delivered at the Reality, Ethics and Beauty Lecture Series, The University of Sydney, 22 September 2012). See also Thompson and Schumann, above n 34, 170.

stronger evidence to believe the former than the latter. The *Ratto Hypothesis*' extraordinary nature demands extraordinary proof.

2 Probability Theory's Support for the Model: Bayes' Theorem

This model accords with a result in Probability Theory called Bayes' Theorem. Bayes' Theorem calculates *P(H|E)*, the probability that hypothesis *H* is true given evidence *E*. The Theorem states:[39]

$$P(H|E) = P(H) \times \frac{P(E|H)}{P(E)}$$

where

- *P(H)* is the probability hypothesis *H* is true;
- *P(E)* is the probability evidence *E* exists;
- *P(H|E)* is the probability hypothesis *H* is true, if particular evidence *E* exists; and
- *P(E|H)* is the probability particular evidence *E* exists, if hypothesis *H* is true.

Bayes' Theorem means *P(H|E)* depends on the inherent likelihood of hypothesis *H*, *P(H)*, and the strength of the evidence *E*, represented by how much more likely evidence *E* is to exist if *H* is true, $\frac{P(E|H)P(E)}{}$. If *P(H|E)* is held constant, the more inherently likely the hypothesis (the greater *P(H)* is), the less strong evidence we need to confirm it is true (the smaller $\frac{P(E|H)}{P(E)}$ can be). Conversely, the more inherently *unlikely* the hypothesis (the smaller *P(H)* is), the stronger evidence we need to confirm it is true (the larger $\frac{P(E|H)}{P(E)}$ must be).[40]

In our hypothetical, let 'Noises' be the fact you heard noises from your attic. That fact serves as evidence for the Rats and Ratto Hypotheses. We are trying to determine which hypothesis is more likely, given that evidence. In Probability Theory, another way of asking that question is determining which of *P(Rats Hypothesis|Noises)* and *P(Ratto Hypothesis|Noises)* is greater.[41]

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39 Tony Lancaster, *An Introduction to Modern Bayesian Econometrics* (Blackwell, 2004) 3; William H Jefferys and James O Berger, 'Ockham's Razor and Bayesian Analysis' (1992) 80(1) *American Scientist* 64, 67. Other forms of Bayes' Theorem use 'odds' and 'likelihood ratios': Hamer, 'The Significant Probative Value of Tendency Evidence', above n 35, 17. I prefer probabilities, because readers are more likely to be familiar with this notation and how it corresponds to the real world; for example, that *P(H)*=0 means *H* is certainly false, and *P(H)*=1 means *H* is certainly true.

40 Sir Richard Eggleston, *Evidence, Proof and Probability* (Weidenfeld and Nicolson, 2nd ed, 1983) 22–4, 235–6.

41 Ligertwood, 'The Uncertainty of Proof', above n 10, 384.

By Bayes' Theorem,

$$P(Rats\ Hypothesis \mid Noises) = P(Rats\ Hypothesis) \times \frac{P(Noises|Rats\ Hypothesis)}{P(Noises)}$$

$$P(Ratto\ Hypothesis \mid Noises) = P(Ratto\ Hypothesis) \times \frac{P(Noises|Ratto\ Hypothesis)}{P(Noises)}$$

The argument in Part II(A)(1), that the noises are stronger evidence for the *Ratto Hypothesis*, is reflected in the quantities *P(Noises|Rats Hypothesis)* and *P(Noises|Ratto Hypothesis)*. True,

$$P(Noises \mid Ratto\ Hypothesis) > P(Noises \mid Rats\ Hypothesis)$$

After all, the rats are *much* more likely to be awake and making noise if their sophisticated rat religion requires it. The precise probabilities are hard to estimate, but for argument's sake, suppose

$$P(Noises|Rats\ Hypothesis) = 0.6\ (quite\ likely)$$

$$P(Noises|Ratto\ Hypothesis) = 0.999\ (almost\ certain)$$

However, this does *not* mean

$$P(Ratto\ Hypothesis \mid Noises) > P(Rats\ Hypothesis \mid Noises)$$

That is, that the *Ratto Hypothesis* is more likely given the noises. Rather, Bayes' Theorem tells us that those quantities *also* depend on *P(Ratto Hypothesis)* and *P(Rats Hypothesis)*, each hypothesis' *inherent* likelihood. The *Rats Hypothesis*' inherent likelihood is low; rats do not infest every attic. However, the *Ratto Hypothesis*' likelihood is *extremely* low. It requires us not just to believe there are rats in your attic, but that there is a previously undiscovered rat culture, with this particular ritual, occurring on this particular night. Suppose

$$P(Rats\ Hypothesis) = 0.01\ (somewhat\ unlikely)$$

$$P(Ratto\ Hypothesis) = 0.000001\ ('one\ in\ a\ million';\ a\ generous\ overapproximation)$$

By Bayes' Theorem,

$$P(Rats\ Hypothesis \mid Noises) = P(Rats\ Hypothesis) \times \frac{P(Noises|Rats\ Hypothesis)}{P(Noises)}$$

$$= 0.01 \times \frac{0.6}{P(Noises)}$$

$$= \frac{0.006}{P(Noises)}$$

$$P(Ratto\ Hypothesis \mid Noises) = P(Ratto\ Hypothesis) \times \frac{P(Noises|Ratto\ Hypothesis)}{P(Noises)}$$

$$= 0.000001 \times \frac{0.999}{P(Noises)}$$

$$= \frac{0.000000999}{P(Noises)}$$

Because *P(Noises)* is a probability, by definition, it is greater than or equal to zero.[42] Therefore

$$\frac{0.006}{P(Noises)} \gg \frac{0.000000999}{P(Noises)}$$

That is,

$$P(Rats\ Hypothesis|Noises) \gg P(Ratto\ Hypothesis \mid Noises)$$

Even on our generous assumptions, the *Rats Hypothesis* is more than *six thousand times* more likely than the *Ratto Hypothesis*.

Therefore, given the noises, the *Rats Hypothesis* is more likely than the *Ratto Hypothesis*, even though the noises are more likely under (and thus stronger evidence for) the *Ratto Hypothesis*. Thus, to believe inherently unlikely claims (like the *Ratto Hypothesis*), we require stronger evidence than to believe inherently more likely claims (like the *Rats Hypothesis*).

This hypothetical may seem far-fetched. But courts frequently encounter similar problems. Suppose a court is trying to determine whether false statements have been made fraudulently or innocently. Innocent mistakes are more common than fraud.[43] Therefore the fraud hypothesis is inherently less likely than the

42 John Skellam, 'A Probability Distribution Derived from the Binomial Distribution by Regarding the Probability of Success as Variable Between the Sets of Trials' (1948) 10 *Journal of the Royal Statistical Society: Series B (Methodological)* 257, 257; Karl Menger, 'Statistical Metrics' (1942) 28 *Proceedings of the National Academy of Sciences* 535, 535.

43 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449–50 (Mason CJ, Brennan, Deane and Gaudron JJ); *Re H* [1996] AC 563, 586 (Lord Nicholls); *Magill v Magill* (2006) 226 CLR 551, 617 [211] (Heydon J).

innocent mistake hypothesis, and we require stronger evidence to establish the former than the latter on the balance of probabilities.[44]

B The *Consequences of Error Model*: 'When in Doubt, Err on the Side of Caution'[45]

The second model is the *Consequences of Error Model*, that allegations' consequences sometimes mean we need a higher standard of satisfaction than 'more likely than not' before acting on them. Indeed, sometimes the consequences of error are so grave that we should be *almost certain* before acting on allegations.

1 An Intuitive Demonstration of the Model: Russian Roulette

The following hypothetical demonstrates that this model accords with our intuitions. Suppose you are deciding whether to play Russian roulette. (For the purposes of the hypothetical, deciding whether to play or not is analogous to judges deciding whether or not to make orders sought; like judges, you cannot 'decide not to decide' whether to play.)

Russian roulette's rules are simple.[46] A bullet is placed into one of a revolver's six chambers. The revolver is spun, and chamber is randomly selected. To play, you put the revolver to your temple and pull the trigger. If the chamber does *not* contain the bullet (five times out of six), you win a sum of money, say $100. If it *does* (one time out of six), you die.[47]

Consider the following argument that you should play. Because one chamber is randomly chosen from six, it is more likely than not that the chamber chosen has no bullet in it. Therefore it is rational to *believe* the chamber has no bullet in it, and to *act* on that belief by playing.

The reason we intuitively reject this argument is that just because it is rational to *believe* the chamber contains no bullet does not mean it is rational to *act* on that belief. Rather, the consequences of error also need to be considered. Because the consequences of error in Russian roulette are so grave, we require a *much* higher level of certainty than 'more likely than not' before playing (if we are willing to play *at all*).

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44 See, eg, *Rejfek v McElroy* (1965) 112 CLR 517, 521 (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ); *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449–50 (Mason CJ, Brennan, Deane and Gaudron JJ).

45 This 'Precautionary Principle' – that when dealing with uncertainty, we should 'err on the side of caution' – is well established in international environmental law: see James Cameron and Juli Abouchar, 'The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment' (1991) 14 *Boston College International and Comparative Law Review* 1, 2; Daniel Bodansky, 'Remarks' (1991) 85 *Proceedings of the American Society of International Law* 413, 413.

46 See James A Gorry III, 'Criminal Liability of Participants in Fatal Russian Roulette' (1964) 21 *Washington and Lee Law Review* 121, 121.

47 See also Peter Marzuk, Kenneth Tardiff and Dennis Smyth, 'Cocaine Use, Risk Taking, and Fatal Russian Roulette' (1992) 267 *Journal of the American Medical Association* 2635, 2636.

2 Decision Theory's Support for the Model: Expected Utility Maximisation

Decision Theory is a branch of mathematics concerned with how we make decisions under conditions of uncertainty.[48] The *Consequences of Error Model* accords with a result in Decision Theory called Expected Utility Maximisation.[49] Expected Utility Maximisation evaluates decisions by considering all the possible consequences of the decision, weighted by their likelihood. When making decisions under conditions of uncertainty, risks of error cannot be *totally* avoided. However, Expected Utility Maximisation minimises the expected *costs* of error, and can help determine when it is rational to take risks.

Suppose you have *utility function U(X)*. This function converts a situation *X* (for example, winning $100) into a quantity measuring the situation's desirability (in arbitrary units). The more desirable *X* is, the larger *U(X)* is.[50] For reference purposes, define *U(Status Quo)* as zero. *U(X)* is positive if situation *X* is more desirable than the status quo, and negative if *X* is less desirable.[51]

Decision Theory assumes we wish to maximise *U(X)*, the desirability of our situation.[52] In conditions of uncertainty, we do this by maximising the *expectation value* of *U(X)*, *E[U(X)]*, an average of the desirability of all possible outcomes weighted by their likelihood.[53] The expected utility of a decision with only one possible outcome is defined as[54]

$$E[U(Decision)] = U(Outcome\ A)$$

However, the expected utility of a decision with two possible outcomes is defined as[55]

$$E[U(Decision)] = P(Outcome\ A) \times U(Outcome\ A) + P(Outcome\ B) \times U(Outcome\ B)$$

48 James G March, *Primer on Decision Making: How Decisions Happen* (Simon and Schuster, 1994) 36; José Luis Bermúdez, *Decision Theory and Rationality* (Oxford University Press, 2009) 14.

49 See John W Pratt, Howard Raiffa, and Robert Schlaifer, *Introduction to Statistical Decision Theory* (Massachusetts Institute of Technology Press, 1995) 1; Martin Peterson, *An Introduction to Decision Theory* (Cambridge University Press, 2017) 2–3.

50 James P Quirk and Rubin Saposnik, 'Admissibility and Measurable Utility Functions' (1962) 29 *Review of Economic Studies* 140, 140; Niels Erik Jensen, 'An Introduction to Bernoullian Utility Theory: I. Utility Functions' (1967) 69 *Swedish Journal of Economics* 163, 173.

51 This definition is conventional and simplifies the calculation. In our model, nothing turns on it; if *U(Status Quo)=n*, adding *n* to all quantities defined later produces the same result. See Amos Tversky, 'Additivity, Utility, and Subjective Probability' (1967) 4 *Journal of Mathematical Psychology* 175, 179; Daniel Kahneman, 'Experienced Utility and Objective Happiness: A Moment-Based Approach' in Daniel Kahneman and Amos Tversky (eds), *Choices, Values, and Frames* (Cambridge University Press, 2000) 673, 678.

52 Fuad Aleskerov and Bernard Monjardet, *Utility Maximization, Choice and Preference* (Springer, 2013) 1; Peterson, above n 49, 79.

53 Takeshi Amemiya, *Introduction to Statistics and Econometrics* (Harvard University Press, 1994) 61; R J Barlow, *Statistics: A Guide to the Use of Statistical Methods in the Physical Sciences* (John Wiley & Sons, 2013) 36.

54 Amemiya, above n 53, 61; Barlow, above n 53, 36.

55 Amemiya, above n 53, 62; Barlow, above n 53, 36.

Let

- 'Play' be the decision to play Russian roulette;
- 'Bullet' be the outcome that you play and the chamber contains a bullet; and
- 'No Bullet' be the outcome that you play and the chamber does not contain a bullet.

We are trying to determine whether to play. In Decision Theory, another way of asking that question is to determine whether

$$E[U(Play)] > E[U(Status\ Quo)]$$

That is, if the expected utility of playing is more than the expected utility of not playing (preserving the status quo).[56] The status quo has only one possible outcome and is not dependent on whether the chamber contains a bullet, so

$$E[U(Status\ Quo)] = U(Status\ Quo) = 0$$

Playing Russian roulette has two possible outcomes, so

$$E[U(Play)] = P(Bullet) \times U(Bullet) + P(No\ Bullet) \times U(No\ Bullet)$$

The argument in Part II(B)(1), that it is more likely than not that the chamber chosen contains no bullet, is reflected in the quantities *P(Bullet)* and *P(No Bullet)*. Because one chamber is randomly chosen from six,

$$P(No\ Bullet) = \frac{5}{6} > P(Bullet) = \frac{1}{6}$$

However, this does *not* mean that

$$E[U(Play)] > 0$$

and that we should play. Rather, *E[U(Play)]* also depends upon the desirability of the different *outcomes*, *U(Bullet)* and *U(No Bullet)*.[57] Suppose

$$U(No\ Bullet) = 100\ (representing\ winning\ \$100)$$

56 Ligertwood, 'The Uncertainty of Proof', above n 10, 368–9; Dale A Nance, 'Evidential Completeness and the Burden of Proof' (1998) 49 *Hastings Law Journal* 621, 622–4; David Hamer, 'Probabilistic Standards of Proof, Their Complements and the Errors That Are Expected to Flow from Them' (2004) 1 *University of New England Law Journal* 71, 83.

57 Redmayne, above n 10, 169–70.

U(Bullet) represents the undesirability of losing your life. This is *significantly* more undesirable than winning $100 is desirable: after all, if you knew you would lose your life, you would want *much* more compensation than $100. Suppose

$$U(Bullet) = -1\,000\,000$$

If anything, this *underestimates* how undesirable death is. Indeed, some would argue the undesirability of death is infinite, or incommensurable with mere dollars, and we should *never* take *any* risks with human life. However, assigning death a very large but finite disutility better models our intuitions. If the disutility of death were infinite, we would *never* be willing to run even trivial risks of death, such as crossing the road, no matter *what* the benefits;[58] and *one* death would be considered just as bad as a *million* deaths. Indeed, many policy decisions depend on similar evaluations of human life: for example, how much public money we should spend on experimental medical treatments with *some* chance of saving lives.[59] (However, if you are unpersuaded by this reasoning, you could substitute another negative outcome with large disutility, such as losing $1 million, and follow the calculation with similar conclusions.)

Applying these approximations,

$$E[U(Play)] = P(Bullet) \times U(Bullet) + P(No\ Bullet) \times U(No\ Bullet)$$

$$= \frac{1}{6} \times -1\,000\,000 + \frac{5}{6} \times 100$$

$$= -166\,583.33\ldots$$
$$\ll 0$$

and we should *not* play.

Indeed, we can use the Probability Theory concept of *fair odds* to determine how sure we should be the chamber has no bullet in it before we would be willing to play. A game has fair odds if it would leave us with the same expected utility whether or not we choose to play.[60] In that case,

$$E[(U(Play)] = E[U(Status\ Quo)] = 0$$

58 Steven Shavell, 'Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent' (1985) 85 *Columbia Law Review* 1232, 1241–2; Greg Hill, *Rousseau's Theory of Human Association: Transparent and Opaque Communities* (Springer, 2006) 165.

59 See Richard A Hirth et al, 'Willingness to Pay for a Quality-Adjusted Life Year: In Search of a Standard' (2000) 20 *Medical Decision Making* 332, 336–8; Scott Braithwaite et al, 'What Does the Value of Modern Medicine Say About the $50 000 per Quality-Adjusted Life-Year Decision Rule?' (2008) 46 *Medical Care* 349, 349.

60 Philip J Cook and Daniel A Graham, 'The Demand for Insurance and Protection: The Case of Irreplaceable Commodities' (1977) 91 *Quarterly Journal of Economics* 143, 152; Sean R Eddy, 'What is Bayesian Statistics?' (2004) 22 *Nature Biotechnology* 1177, 1177.

If the odds of winning are more favourable than the fair odds, we should play. Conversely, if the odds of winning are less favourable than the fair odds, we should not.[61] Even on our *underestimation* of death's undesirability, the fair odds of winning Russian roulette would exceed 99.99 per cent:

$$E[U(Play)] = 0$$

$$P(Bullet) \times U(Bullet) + P(No\ Bullet) \times U(No\ Bullet) = 0$$

$$P(Bullet) \times -1\,000\,000 + P(No\ Bullet) \times 100 = 0$$

$$P(Bullet) + P(No\ Bullet) = 1, so$$

$$\{1 - P(No\ Bullet)\} \times -1\,000\,000 + P(No\ Bullet) \times 100 = 0$$

$$P(No\ Bullet) \times 100 = 1\,000\,000 - P(No\ Bullet) \times 1\,000\,000$$

$$P(No\ Bullet) \times 1\,000\,100 = 1\,000\,000$$

$$P(No\ Bullet) = 0.99990000999$$

Therefore, even on our approximations, we should not play Russian roulette unless we are more than 99.99 per cent sure we will win. Thus, in cases where there are grave consequences of error, it might make sense not to act on claims *even if they are more likely than not*, until they are proved to a higher standard of probability.

Our hypothetical may seem far-fetched. But again, courts frequently encounter similar problems. Suppose courts are trying to determine whether asylum seekers are genuine refugees, who will be persecuted if deported to their home country. The consequences of making the wrong decision, and returning genuine refugees home to persecution or even death, are grave.[62] As with Russian roulette, our model indicates courts should be satisfied to a high degree of probability that people are *not* refugees before deporting them.[63] However, as Part V(B) will show, courts have taken a different approach.[64]

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61 David Stirzaker, *Probability and Random Variables: A Beginner's Guide* (Cambridge University Press, 1999) 79; Simon M Huttegger, *The Probabilistic Foundations of Rational Learning* (Cambridge University Press, 2017) 13.

62 *QAAH v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 145 FCR 363, 390 [103]–[104] (Madgwick J); *DZACE v Minister for Immigration and Citizenship* [2012] FCA 945, [19] (Mansfield J); *DPE16 v Minister for Immigration and Border Protection* [2018] FCA 61, [16] (Farrell J).

63 This accords with international practice for the standard of proof in assessing refugee claims: see Office of the United Nations High Commissioner for Refugees, 'Note on Burden and Standard of Proof in Refugee Claims' (16 December 1998) [12]; Hilary Evans Cameron, *Refugee Law's Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake* (Cambridge University Press, 2018) 83. See also *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1, 7 [12] (French CJ and Gageler J).

64 See, eg, *Ngaronoa v Minister for Immigration and Citizenship* (2007) 244 ALR 119, 122 [12] (Bennett and Buchanan JJ; Moore J agreeing at 119 [1]).

C The Models and the Criminal Standard of Proof

The strands of reasoning behind our models are widely applied to scientific[65] and philosophical[66] searches for the truth or most rational decision. Similarly, administrative decision-makers not strictly bound by the rules of evidence[67] often follow similar intuitions.[68]

Because evidence law shares similar goals,[69] it partly reflects the same intuitions.[70] For example,[71] at common law[72] and under the *UEL*,[73] the prosecution

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65 See, eg, D H Frankel, 'Think Horses, Not Zebras' (1987) 2 *Lancet* 1515, 1516; Edward Christie, 'The Eternal Triangle: The Biodiversity Convention, Endangered Species Legislation and the Precautionary Principle' (1993) 10 *Environmental and Planning Law Journal* 470, 484; Kathryn Hunter, '"Don't Think Zebras": Uncertainty, Interpretation, and the Place of Paradox in Clinical Education' (1996) 17 *Theoretical Medicine* 225, 226–7; Jennifer Scott and Judith Preston, 'When Is a Climate Change Adaptation Model Good Enough to Inform Public Policy? Climate Change Adaptation Risk Management in Local Government' (2011) 16 *Local Government Law Journal* 152, 161.

66 See, eg, Ian Hacking, 'The Logic of Pascal's Wager' (1972) 9 *American Philosophical Quarterly* 186, 188; Elliott Sober, 'Intelligent Design and Probability Reasoning' (2002) 52 *International Journal for Philosophy of Religion* 65, 69; Alan Hájek, 'Waging War on Pascal's Wager' (2003) 112 *Philosophical Review* 27, 36.

67 *Ngaronoa v Minister for Immigration and Citizenship* (2007) 244 ALR 119, 122 [12] (Bennett and Buchanan JJ; Moore J agreeing at 119 [1]); *Kyriackou v Law Institute of Victoria Ltd* (2014) 45 VR 540, 547 [26] (Warren CJ, Osborn JA, and Ginnane AJA); *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555, 564–5 [29] (Logan J), 585 [115] (Flick and Perry JJ); *Tarrant v Australian Securities and Investments Commission* (2015) 317 ALR 328, 359 [121] (Rares, Yates and Griffiths JJ); *Bronze Wing International Pty Ltd v SafeWork New South Wales* [2017] NSWCA 41, [127] (Leeming JA; Basten JA agreeing at [1]; Gleeson JA agreeing at [37]); Stephen Thompson, 'Good Administrative Decision-Making Not Bound by *Briginshaw*' (2018) 41 *Law Society Journal* 82, 83.

68 See, eg, *Gad v Health Care Complaints Commission* [2002] NSWCA 111, [33]–[40] (Stein JA; Meagher JA agreeing at [1]; Sheller JA agreeing at [2]); *Howe v Administrative Decisions Tribunal of New South Wales* [2003] NSWCA 120, [3] (Giles JA); *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388, [54] (Santow JA; Ipp JA agreeing at [80]; Brownie AJA agreeing at [83]); *Rivera v Health Care Complaints Commission* [2006] NSWCA 216, [36] (McColl JA; Mason P agreeing at [1]; Santow JA agreeing at [2]); *Physiotherapists Registration Board v Townsend* [2008] WASCA 25, [4] (Pullin and Buss JJA and Beech AJA); *Stanoevski v Council of the Law Society of New South Wales* [2008] NSWCA 93, [36] (Campbell JA; Hodgson JA agreeing at [1]; Handley AJA agreeing at [86]); *Tung v Health Care Complaints Commission* [2011] NSWCA 219, [45] (Giles JA); *Skehan v Medical Board of Australia* [2012] VSCA 9, [12] (Neave JA and Kyrou AJA); *Lee v Health Care Complaints Commission* [2012] NSWCA 80, [51] (Barrett JA; Macfarlan JA agreeing at [1]; Tobias AJA agreeing at [80]); *Gorman v New South Wales Health Care Complaints Commission* [2012] NSWCA 251, [127] (Hoeben JA; Campbell JA agreeing at [1]; Sackville AJA agreeing at [175]); *Karakatsanis v Racing Victoria Ltd* (2013) 42 VR 176, 189 [37] (Osborn JA; Breach JA agreeing at 196 [61]); *Cook v The Psychologists Board of Queensland* [2015] QCA 250, [15] (Flanagan J; Philippides JA agreeing at [1]; Douglas J agreeing at [2]); *Pham v Legal Services Commissioner* [2016] VSCA 256, [228] (Cavanough AJA); *Davis v New South Wales Land and Housing Corporation* [2016] NSWCA 325, [32] (McColl JA; Meagher and Leeming JJA agreeing at [114]).

69 See *R v War Pensions Entitlement Tribunal; Ex parte Bott* (1933) 50 CLR 228, 256 (Evatt J); Anderson, Hunter and Williams, above n 26, xv; McNicol and Mortimer, above n 10, 3; Arenson and Bagaric, above n 26, xlii; Anderson and Bayne, above n 26, 1; Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* (LexisNexis, 5th ed, 2010) 5; I H Dennis, *The Law of Evidence* (Sweet & Maxwell, 5th ed, 2013) 28–30; Roderick Munday, *Evidence* (Oxford University Press, 8th ed, 2015) 2–4; Adrian Keane and Paul McKeown, *The Modern Law of Evidence* (Oxford University Press, 11th ed, 2016) 2–3; Hemming and Layton, above n 26, 5–6.

70 See Alan L Tyree, 'Probability Theory and the Law of Evidence' (1984) 8 *Criminal Law Journal* 224, 228–9; Brook Hely, 'The Standard of Proof in Discrimination Claims: The Full Court Lightens the Load,

must generally[74] prove criminal guilt beyond reasonable doubt. This can be understood in terms of the *Prior Probability Model*: because community members do not ordinarily commit crimes,[75] strong evidence is required to demonstrate inherently unlikely criminal guilt. It can also be understood in terms of the *Consequences of Error Model*. Wrongly convicting the innocent is considered more undesirable than wrongly acquitting the guilty;[76] therefore courts demand a higher standard of satisfaction than simply that guilt is more likely than not, to reduce the likelihood of this more undesirable outcome.[77] (The different consequences of wrongful conviction on different charges – for example, imprisonment for life as opposed to a small fine – might even mean that the required probability of proof 'beyond reasonable doubt' varies with the severity of the penalty imposed.)[78] Indeed, while courts have resisted the quantification of 'beyond reasonable doubt', Blackstone's frequently cited ratio that it is better to acquit ten guilty people than convict one innocent can be mathematically approximated as requiring the probability of guilt to exceed 90 per cent.[79]

As we will see, *Briginshaw* partly reflects these insights in relation to the *civil* standard of proof. However, the correspondence is imperfect.

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a Little' (2008) 5 *Balance: Journal of the Northern Territory Law Society* 18, 18; David Hamer, 'Presumptions, Standards and Burdens: Managing the Cost of Error' (2014) 13 *Law, Probability, and Risk* 221, 221; Gageler, above n 11, 256.

71 See Justice David Hodgson, 'A Lawyer Looks at Bayes' Theorem' (2002) 76 *Australian Law Journal* 109, 110–1; John Kaplan, 'Decision Theory and the Factfinding Process' in Peter Murphy (ed), *Evidence, Proof, and Facts: A Book of Sources* (Oxford University Press, 2003) 346, 351–2.

72 *Woolmington v DPP* [1935] AC 462, 481 (Viscount Sankey LC; Lord Hewart CJ, Lord Tomlin and Lord Wright agreeing at 483); *R v Mullen* (1938) 59 CLR 124, 127 (Latham CJ), 132 (Rich J), 134 (Starke J), 136 (Dixon J), 138–9 (McTiernan J).

73 *Evidence Act 1995* (Cth) s 141(1); *Evidence Act 2011* (ACT) s 141(1); *Evidence Act 2004* (NI) s 141(1); *Evidence Act 1995* (NSW) s 141(1); *Evidence (National Uniform Legislation) Act 2011* (NT) s 141(1); *Evidence Act 2001* (Tas) s 141(1).

74 But see *Zanetti v Hill* (1962) 108 CLR 433, 438 (Dixon CJ), 449 (Menzies J), 450 (Owen J); Gillies, above n 9, 72.

75 See *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449–50 (Mason CJ, Brennan, Deane and Gaudron JJ); *Re H* [1996] AC 563, 586 (Lord Nicholls).

76 Hamer, 'Probabilistic Standards of Proof, Their Complements and the Errors That Are Expected to Flow from Them', above n 56, 81; David Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66 *Cambridge Law Journal* 142, 147; Hamer, 'A Dynamic Reconstruction of the Presumption of Innocence', above n 7, 422.

77 Jonathan Cohen, *The Probable and the Provable* (Clarendon Press, 1977) 255–6.

78 See Erik Lillquist, 'Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability' (2002) 36 *University of California Davis Law Review* 85, 148–50; but see Frederico Picinali, 'Two Meanings of "Reasonableness": Dispelling the "Floating" Reasonable Doubt' (2013) 76 *Modern Law Review* 845, 873.

79 Hamer, 'Probabilistic Standards of Proof, Their Complements and the Errors That Are Expected to Flow from Them', above n 56, 83.

III A CLOSE STUDY OF THE DECISION IN *BRIGINSHAW*

This part introduces the decision in *Briginshaw*. Commentators treat Dixon J's judgment as the classic statement of the *Briginshaw* principle.[80] In fact, *Briginshaw* left the High Court divided about where the principle was enlivened and its consequences.

A *Briginshaw*'s Facts and Procedural History

In *Briginshaw*, a married couple had been separated for two years.[81] The husband sought to divorce his wife under the *Marriage Act 1928* (Vic).[82] Unlike modern 'no-fault' divorce legislation, the Act did not allow divorce after a certain period of continuous separation.[83] Rather, it required petitioners to establish 'grounds' for divorce. Under section 76, adultery was one such ground. However, section 80 established a particular standard of proof: 'Upon any petititon for the dissolution of marriage, it shall be the duty of the Court to satisfy itself, so far as it reasonably can, as to the facts alleged'.

The husband petitioned for divorce on the grounds of adultery.[84] He claimed that, during their separation, his wife had sex with a lover. His case relied on hearsay evidence. First, the husband's associates testified that the wife and lover had admitted the affair, but that they had refused to sign statements to that effect.[85] Second, a witness testified that the lover had admitted the affair to him,[86] but a second witness present during the conversation denied hearing any admission,[87] and a third witness present was not called.[88] The wife and lover denied the affair[89] and making any admissions.[90]

At trial, Martin J rejected the husband's petition.[91] His Honour noted the evidence was entirely oral,[92] each witness' demeanour was unimpeachable,[93] and the key third witness had not been called,[94] such that 'I do not know what to believe'.[95] Ultimately, the husband failed to meet the required standard of proof:

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80 See, eg, Anderson, Hunter and Williams, above n 26, 527; Ligertwood, *Australian Evidence*, above n 26, 82; Waight and Williams, above n 26, 93–5; Arenson and Bagaric, above n 26, 24–5; Anderson and Bayne, above n 26, 75; Kumar, Odgers, and Peden, above n 26, 627; Reynolds and Goddard, above n 14, 13; Hemming and Layton, above n 26, 138.

81 *Briginshaw* (1938) 60 CLR 336, 354–5 (Dixon J).

82 Ibid 346 (Latham CJ), 351 (Starke J).

83 Cf *Family Law Act 1975* (Cth) s 48. See D M Selby, 'The Development of Divorce Law in Australia' (1966) 29 *Modern Law Review* 473, 474; Heydon, *Cross on Evidence*, above n 26, 356.

84 *Briginshaw* (1938) 60 CLR 336, 340 (Latham CJ).

85 Ibid 356–8 (Dixon J).

86 Ibid 358 (Dixon J).

87 Ibid.

88 Ibid 359 (Dixon J).

89 Ibid 356–7 (Dixon J).

90 Ibid 356–8 (Dixon J).

91 Ibid 337 (headnote).

92 Ibid 336–7 (headnote).

93 Ibid 348 (Latham CJ), 359 (Dixon J), 374 (McTiernan J).

94 Ibid 337 (headnote).

95 Ibid 348 (Latham CJ), 359 (Dixon J).

> I have done my best to decide, but [the husband] must satisfy me that his story is true. I think I should say that if this were a civil case I might well consider that the probabilities were in favour of [the husband], but I am certainly not satisfied beyond reasonable doubt that the evidence called by [the husband] should be accepted.[96]

The husband appealed to the High Court.[97] The Commonwealth Law Report summarises his argument:

> The standard of proof applied by the trial judge was incorrect. He should not have required to be satisfied beyond reasonable doubt. In divorce cases, even where the ground is adultery, the standard of proof required is the same as in civil cases, remembering always the gravity of the offence charged.[98]

B Dixon J's Formulation of the *Briginshaw* Principle

The High Court dismissed the husband's appeal by majority (Rich,[99] Starke,[100] Dixon[101] and McTiernan JJ).[102] Latham CJ dissented[103] as to the proper interpretation of the trial judgment,[104] but agreed with the majority that special proof requirements applied (though not, as we will see, on the requirements' content).[105] Commentators treat Dixon J's judgment as the classic statement of the *Briginshaw* principle.[106] Dixon J first explained the common law standards of proof:

> At common law two different standards of persuasion developed. It became gradually settled that in criminal cases an accused person should be acquitted unless the tribunal of fact is satisfied beyond reasonable doubt … In civil cases such a degree of certainty is not demanded … 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.[107]

The divorce petition was a civil action, so the applicable standard was proof to reasonable satisfaction (that adultery was more likely than not), not beyond reasonable doubt.[108] However, in deciding whether that standard was met, particular circumstances might require more from the party making the allegation. Dixon J described where this principle was enlivened as follows:

> 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

96 Ibid 348 (Latham CJ), 359 (Dixon J).
97 Ibid 337 (headnote).
98 Ibid 337 (headnote).
99 Ibid 351 (Rich J).
100 Ibid 354 (Starke J).
101 Ibid 370 (Dixon J).
102 Ibid 370 (McTiernan J).
103 Ibid 350 (Latham CJ).
104 Ibid 349 (Latham CJ).
105 Ibid 347 (Latham CJ).
106 See, eg, Anderson, Hunter and Williams, above n 26, 527; Ligertwood, *Australian Evidence*, above n 26, 82; Waight and Williams, above n 26, 93–5; Arenson and Bagaric, above n 26, 24–5; Anderson and Bayne, above n 26, 75; Kumar, Odgers, and Peden, above n 26, 627; Reynolds and Goddard, above n 14, 13; Hemming and Layton, above n 26, 138.
107 *Briginshaw* (1938) 60 CLR 336, 360–2.
108 Ibid 368 (Dixon J).

> particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.[109]

Here, Dixon J considered the allegation's 'importance and gravity' enlivened the principle.[110] His Honour described its consequences as follows:

> In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences … [But] [t]his 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.[111]

The trial judge's references to not being 'satisfied beyond reasonable doubt'[112] could be interpreted as wrongly applying the criminal standard.[113] However, Dixon J interpreted the trial judge's reasons as applying the correct standard:

> If I thought that [the trial judge] had formed a definite opinion that the [wife] had committed adultery with the [lover], and had abstained from giving effect to his opinion because he applied the standard of persuasion appropriate to criminal cases, I should regard a rehearing as necessary … [But] I think that it clearly appears that his Honour found himself unable to arrive at any satisfactory or firm and definite conclusion that adultery had been committed although conceding that perhaps in the probabilities arising upon the evidence there was some preponderance of those for, over those against, such a conclusion.[114]

Accordingly, Dixon J dismissed the appeal.[115]

C The Differences of Opinion in *Briginshaw*

The orthodox account of *Briginshaw* ends with Dixon J's conclusion.[116] However, Dixon J's judgment was not the only formulation of the principle in *Briginshaw*. Rather, each member of the High Court (including the dissenting Latham CJ) provided their own formulation of where the principle was enlivened and its consequences.[117] Thus, immediately after *Briginshaw*, it was difficult to say what the so-called principle was.[118]

1 When is Briginshaw Enlivened?

As to where the principle is enlivened, Dixon J proposed a three-factor test, considering 'the seriousness of an allegation made, the inherent unlikelihood of

109 Ibid 362.
110 Ibid 368.
111 Ibid 362–3.
112 Ibid 348 (Latham CJ), 359 (Dixon J).
113 See ibid 349 (Latham CJ).
114 Ibid 369.
115 Ibid 370.
116 See, eg, Anderson, Hunter and Williams, above n 26, 527; Ligertwood, *Australian Evidence*, above n 26, 82; Waight and Williams, above n 26, 93–5; Arenson and Bagaric, above n 26, 24–5; Anderson and Bayne, above n 26, 75; Reynolds and Goddard, above n 14, 13; Hemming and Layton, above n 26, 138.
117 Hayley Bennett and G A Broe, 'The Civil Standard of Proof and the "Test" in *Briginshaw*: Is There a Neurobiological Basis to Being "Comfortably Satisfied"?' (2012) 86 *Australian Law Journal* 258, 262, 264–5.
118 See *Ho v Powell* (2001) 51 NSWLR 572, 576 [14] (Hodgson JA; Beazley JA agreeing at 573 [1]).

an occurrence of a given description, or the gravity of the consequences'.[119] The other judges also considered the allegation's seriousness.[120] However, none considered its inherent unlikelihood, and only McTiernan J joined Dixon J in considering the finding's consequences.[121]

These differing formulations could lead to different outcomes. First, while some allegations such as murder seem both serious and unlikely,[122] others seem serious but not unlikely or vice versa.[123] Domestic violence is serious but not uncommon;[124] conversely, the crime of obstructing clergymen in discharge of their duties[125] seems comparatively minor and rare.[126] Second, allegations can be serious without corresponding findings having grave consequences or vice versa. As Part V(A)(3) will show, allegations are *Briginshaw* serious if they involve criminal or moral wrongdoing,[127] assessed by reference to community standards at the time of the conduct.[128] For example, premarital sex is not criminal or immoral by modern Australian standards,[129] but allegations of premarital sex might have significant reputational consequences for certain people, such as traditionalist Muslims.

2 What are Briginshaw's Consequences?

As to the principle's consequences, commentators analysing *Briginshaw* identify three different interpretations.

The first is the Evidentiary Requirement Interpretation. On this view, allegations are proved if courts are satisfied they are more likely than not (that is, their probability exceeds 50 per cent). However, where *Briginshaw* applies,

119 *Briginshaw* (1938) 60 CLR 336, 362.

120 Ibid 343–4 (Latham CJ), 350 (Rich J), 353 (Starke J), 372 (McTiernan J).

121 Ibid 372.

122 Australian murder rates are extremely low and continue to decline: see Willow Bryant and Samantha Bricknell, 'Homicide in Australia 2012–13 to 2013–14: National Homicide Monitoring Program Report' (Report, Australian Institute of Criminology, 2017) 2; New South Wales Bureau of Crime Statistics and Research, 'New South Wales Recorded Crime Statistics' (Quarterly Update, Department of Justice, December 2017) 16. See also Office for National Statistics, 'Crime in England and Wales' (Statistical Bulletin, December 2017) [7].

123 See Andrew Bainham, 'Sexual Abuse in the Lords' (1996) 55 *Cambridge Law Journal* 209, 211; Redmayne, above n 10, 184–5; *R (N) v Mental Health Review Tribunal* [2006] QB 468, 498 [64] (Richards LJ); Manning, above n 10, 396; *Re B (Children) (Care Proceedings: Standard of Proof)* [2009] AC 11, 36 [72]–[73] (Baroness Hale); Hely, above n 70, 40; Keane and McKeown, above n 69, 116.

124 Anthony Morgan and Hannah Chadwick, 'Key Issues in Domestic Violence' (Summary Paper No 7, Australian Institute of Criminology, December 2009) 2; Faulks, above n 1, 820; New South Wales Bureau of Crime Statistics and Research, above n 122, 16; Office for National Statistics, above n 122, [11].

125 *Crimes Act 1900* (NSW) s 56.

126 There do not appear to be any reported cases of this crime being charged. See also New South Wales Bureau of Crime Statistics and Research, above n 122, 16.

127 *Department of Health v Arumugam* [1988] VR 319, 331 (Fullagar J); *Clark v NZI Life Ltd* [1991] 2 Qd R 11, 16 (Thomas J); *G v H* (1994) 181 CLR 387, 399–40 [16] (Deane, Dawson and Gaudron JJ).

128 *Clark v NZI Life Ltd* [1991] 2 Qd R 11, 16 (Thomas J).

129 See Chris E Rissel et al, 'Attitudes Towards Sex in a Representative Sample of Adults' (2003) 27 *Australian and New Zealand Journal of Public Health* 118, 120.

particularly strong evidence is required to show allegations are more likely than not.[130]

The second is the Evidentiary Treatment Interpretation. As with the first interpretation, allegations are proved if courts are satisfied they are more likely than not. However, unlike the first interpretation, where *Briginshaw* applies, courts should scrutinise evidence with *particular care* (as opposed to requiring it to be *particularly strong*) before finding allegations are more likely than not.[131]

The third is the Variable Standard Interpretation. On this view, allegations are *generally* proved if the court is satisfied they are more likely than not. However, where *Briginshaw* applies, allegations need to be proved to a *higher probabilistic standard*, such as 60 per cent, or beyond reasonable doubt.[132] (Indeed, there might even be civil cases where the consequences of error are *so* grave that we should require proof to a standard *higher* than the criminal standard. For example, in reviewing planning permission for nuclear power plants, judges may be required to assess the likelihood of nuclear meltdown and the consequent disastrous loss of life. The adverse consequences of wrongly granting planning permission are arguably even graver than the consequences of wrongfully convicting one person for a minor crime. Therefore the judge should arguably be satisfied to a higher standard that the plant is safe before approving it.)[133]

To some extent, the judgments in *Briginshaw* support all three interpretations.

First, Latham CJ seems to endorse the Evidentiary Treatment Interpretation. His Honour stressed that 'the ordinary standard of proof in civil matters must be applied … subject only to the rule of prudence that any tribunal should act with much care and caution before finding that a serious allegation such as that of adultery is established'.[134]

Second, Starke and McTiernan JJ seem to endorse the Variable Standard Interpretation. Starke J said that in cases like adultery, 'If the proof … does not satisfy the tribunal beyond reasonable doubt of the fact alleged … then the

130 Gillies, above n 9, 64, 69; Palmer, above n 9, 342; Hunyor, above n 9, 539–40; Williams, above n 9, 185; de Plevitz, above n 5, 311; Allen, above n 7, 585; Field, *Evidence for Common Law States*, above n 9, 16; Field, *Uniform Evidence Law*, above n 9, 18; Chisholm, 'Child Abuse Allegations in Family Law Cases: A Review of the Law', above n 9, 18.

131 Ashley Files, 'Upsetting the Standard: Allegations of Child Abuse and the Family Court' (2001) 5 *Flinders Journal of Law Reform* 247, 257–8; Anderson, Hunter and Williams, above n 26, 527–8; Neil Andrews, 'If the Dog Catches the Mice: The Civil Settlement of Criminal Conduct under the *Corporations Act* and the *Australian Securities and Investments Act*' (2003) 15 *Australian Journal of Corporate Law* 137, 145; John Goldring, 'An Introduction to Statistical "Evidence"' (2003) 23 *Australian Bar Review* 239, 251. See also Transcript of Proceedings, *Witham v Holloway* [1995] HCATrans 7 (10 February 1995) 10.

132 Eggleston, 'Probabilities and Proof', above n 10, 191; Ligertwood, 'The Uncertainty of Proof', above n 10, 372; Hamer, 'The Civil Standard of Proof Uncertainty: Probability, Belief and Justice', above n 10, 513; Redmayne, above n 10, 175; Mendelson, above n 5, 150; McNicol and Mortimer, above n 10, 7; Manning, above n 10, 396–7.

133 My thanks to one of the anonymous reviewers for this point.

134 *Briginshaw* (1938) 60 CLR 336, 347.

allegation remains unproved'.[135] McTiernan J agreed: 'It is impossible to say that [the trial judge] ought to have felt that degree of satisfaction which the law requires … while he was oppressed with a reasonable doubt'.[136]

Third, Rich J's judgment contains statements arguably supporting all three interpretations. Consistent with the Evidentiary Requirement Interpretation, his Honour said 'the satisfaction of a just and prudent mind cannot be produced by slender and exiguous proofs'.[137] Consistent with the Evidentiary Treatment Interpretation, his Honour required 'the careful weighing of testimony [and] the close examination of facts proved'.[138] Ultimately, however, his Honour seemed to require the Variable Standard Interpretation's higher degree of probabilistic satisfaction. His Honour stated that '[t]he nature of the allegation requires… a *comfortable satisfaction* that the tribunal has reached both a correct and just conclusion'.[139] In dismissing the appeal, his Honour noted that

> [n]o doubt [the trial judge] demanded a *high degree of certainty*, and it is not surprising that the inclination of his mind was towards the view that the balance of probabilities made it more likely than not that adultery had been committed. But I gather from his judgment that he did not feel *reasonably satisfied* that adultery had been committed.[140]

'Reasonable' or 'comfortable' satisfaction here seems to require more than proof that allegations are 'more likely than not'.

Finally, Dixon J's judgment seems to support the Evidentiary Requirement Interpretation. Dixon J rejected a 'third standard of persuasion'[141] 'fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction … in a civil issue'.[142] Rather, '[w]hen, 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'.[143] Instead, his Honour required evidence stronger than 'inexact proofs, indefinite testimony, or indirect inferences'.[144]

However, some of Dixon J's statements appear more consistent with the Variable Standard Interpretation.[145] That interpretation's supporters could argue Dixon J's rejection of a 'mechanical comparison of probabilities'[146] rejects the more likely than not standard. Instead, they could focus on his statement that 'reasonable satisfaction … in a civil issue may, *not must*, be based on the preponderance of probability'.[147] Further, in dismissing the appeal, Dixon J said the trial judge

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135 Ibid 353.
136 Ibid 374.
137 Ibid 350.
138 Ibid.
139 Ibid (emphasis added).
140 Ibid 350–1 (emphasis added).
141 Ibid 361.
142 Ibid 363.
143 Ibid (citations omitted).
144 Ibid 362.
145 Gillies, above n 9, 68; Ligertwood, *Australian Evidence*, above n 26, 83.
146 *Briginshaw* (1938) 60 CLR 336, 361.
147 Ibid 363 (emphasis added).

> found himself unable to arrive at any satisfactory or firm and definite conclusion that adultery had been committed *although conceding that perhaps in the probabilities arising upon the evidence there was some preponderance of those for, over those against, such a conclusion*.[148]

Indeed, Dixon J's rejection of a 'third standard of persuasion' could be read not as rejecting the Variable Standard Interpretation, but as rejecting a third standard 'fixed intermediate' at a particular probability between the criminal and civil standards (such as at 60 per cent), as opposed to one which varies according to the particular allegation.[149]

The better view, however, is that these statements do not support the Variable Standard Interpretation, but go to the 'satisfaction' required under the Evidentiary Requirement Interpretation.[150] English law only requires that allegations are more likely than not.[151] By contrast, Australian law *also* requires that judges *subjectively believe* allegations are true.[152] This additional requirement is well supported in the authorities,[153] but slightly nebulous.[154] It does not require proof to a higher *quantitative* probability (such as 60 per cent likelihood),[155] but of a *qualitatively* different kind, about the particular events that

148 Ibid 369 (emphasis added).

149 Ligertwood, *Australian Evidence*, above n 26, 83.

150 Ligertwood and Edmond, above n 69, 103; Gageler, above n 11, 255.

151 *Davies v Taylor* [1974] AC 207, 212 (Lord Reid), 219 (Viscount Dilhorne), 219 (Lord Simon); *Tenax Steamship Co Ltd v The Brimnes (Owners)* [1975] QB 929, 951 (Davies LJ), 970 (Cairns LJ). See, eg, *Rowley v London and North Western Railway Co* (1873) LR 8 Ex 221, 227 (Blackburn J); *M'Donald v M'Donald* (1880) 5 App Cas 519, 532 (Lord Hatherley), 541 (Lord Blackburn). See also Eggleston, *Evidence, Proof and Probability*, above n 40, 132; Sir Richard Eggleston, 'The Philosophy of Proof' (1991) 65 *Australian Law Journal* 130, 145; Redmayne, above n 10, 177–8.

152 Eggleston, *Evidence, Proof and Probability*, above n 40, 132–3; Ankon Rahman, 'The "Real Chance" Interpretation of "Likely"' (2012) 40 *Australian Business Law Review* 196, 198–9; Justice D H Hodgson, 'The Scales of Justice: Probability and Proof in Legal Fact-Finding' (1995) 69 *Australian Law Journal* 731, 732.

153 *Helton v Allen* (1940) 63 CLR 691, 711 (Dixon, Evatt, and McTiernan JJ); *Jones v Dunkel* (1959) 101 CLR 298, 304–5 (Dixon CJ); *Nesterczuk v Mortimore* (1965) 115 CLR 140, 149 (Kitto J); *Holloway v McFeeters* (1956) 94 CLR 470, 477 (Dixon CJ); *West v Government Insurance Office of New South Wales* (1981) 148 CLR 62, 65–6 (Stephen, Mason, Aickin and Wilson JJ); *Kelly v Roads & Traffic Authority* [2000] NSWCA 292, [27] (Mason P; Giles JA agreeing at [37]; Davies AJA agreeing at [38]); *Brear v James Hardie & Co Pty Ltd* (2000) 50 NSWLR 388, 399 [50] (Mason P; Spigelman CJ agreeing at 390 [1]; Priestley JA agreeing at 399 [56]); *Moukhayber v Camden Timber & Hardware Co Pty Ltd* [2002] NSWCA 58, [23] (Heydon JA; Beazley JA agreeing at [54]; Santow JA agreeing at [55]); *Sleboda v Sleboda* [2008] NSWCA 122, [49] (Campbell JA; Bell JA agreeing at [61]; Handley AJA agreeing at [62]); *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246, [44] (McDougall J; McColl JA agreeing at [1]; Bell JA agreeing at [2]); *Strong v Woolworths Ltd* (2012) 246 CLR 182, 211–2 [75]–[76] (Heydon J); *Curtis v Harden Shire Council* (2014) 88 NSWLR 10, 52 [176] (Beazley P); *Perpetual Trustees Victoria Ltd v Cox* [2014] NSWCA 328, [142] (Leeming JA; Macfarlan JA agreeing at [1]; Emmett JA agreeing at [8]). See also Simpson and Orlov, above n 36, 416; Jonathan Cohen, 'Should a Jury Say What It Believes or What It Accepts?' (1991) 13 *Cardozo Law Review* 465, 469; Paolo F Ricci and Natalie J Gray, 'Toxic Torts and Causation: Towards an Equitable Solution in Australian Law – Part 1: Legal Reasoning with Uncertainty' (1998) 21 *University of New South Wales Law Journal* 787, 794–6. But see *Luxton v Vines* (1952) 85 CLR 352, 359 (Dixon, Fullagar and Kitto JJ); *TNT Management Pty Ltd v Brooks* (1979) 23 ALR 345, 351–4 (Murphy J); Sir Richard Eggleston, 'Focusing on the Defendant' (1987) 61 *Australian Law Journal* 58, 62.

154 Redmayne, above n 10, 179–80.

155 Hamer, 'The Civil Standard of Proof Uncertainty: Probability, Belief and Justice', above n 10, 509–10.

actually took place.[156] Thus, in proving which of two taxi companies' vehicles was involved in an accident, it is insufficient to note that one company has more taxis on the road and is thus more likely to have accidents *in general*. Rather, proof must be adduced of *this particular accident*.[157]

These different interpretations could lead to differences in applying *Briginshaw*. Eyewitness evidence tested through rigorous cross-examination might be sufficiently direct for the Evidentiary Requirement Interpretation, and sufficiently scrutinised for the Evidentiary Treatment Interpretation, but still fail to satisfy the Variable Standard Interpretation.

Because of these different views, immediately after *Briginshaw*, it was difficult to say what the so-called principle was.[158] As Part IV will show, subsequent consideration partly resolved these ambiguities. However, as Part V will show, it also took the principle further away from Part II's models.

IV *BRIGINSHAW*'S APPLICATION AND REPLICATION IN THE *UEL*

Practitioners in 1938 might have thought that, notwithstanding its broad language, *Briginshaw*'s application would be limited. First, as emphasised in argument[159] and various judgments[160] (albeit not Dixon J's),[161] *Briginshaw* did not strictly concern the *general law* standard of proof, but the *particular* standard of proof applied to Victorian divorce petitions by section 80 of the *Marriage Act 1928* (Vic).[162] Section 80's reference to 'the duty of the Court to satisfy itself, so far as it reasonably can, as to the facts alleged' differs from the usual common law language of proof on the balance of probabilities, and the judgments' use of the word 'satisfaction'[163] perhaps originated from this particular provision.[164] Second, the judgments partly drew upon the ecclesiastical law which had developed around English divorce proceedings, but did not apply to common law proceedings generally.[165] Indeed, as with a similar line of English authority,[166]

156 Eggleston, *Evidence, Proof and Probability*, above n 40, 134; Hamer, 'The Civil Standard of Proof Uncertainty: Probability, Belief and Justice', above n 10, 511.

157 Williams, above n 9, 180. For further discussion of the dilemma in an (albeit American) legal context, see *Sargent v Massachusetts Accident Co*, 29 NE 2d 825, 827 (Lummus J) (Mass, 1940); Cohen, *The Probable and the Provable*, above n 77, 80; Judith Jarvis Thomson, 'Liability and Individualized Evidence' (1986) 49 *Law and Contemporary Problems* 199, 203. For discussion of the dilemma more generally, see Daniel Kahneman, Paul Slovic and Amos Tversky, *Judgment under Uncertainty: Heuristics and Biases* (Cambridge University Press, 1982) 153–63.

158 *Ho v Powell* (2001) 51 NSWLR 572, 576 [14] (Hodgson JA; Beazley P agreeing at 573 [1]).

159 *Briginshaw* (1938) 60 CLR 336, 337 (headnote).

160 Ibid 346 (Latham CJ), 350 (Rich J), 351 (Starke J), 370 (McTiernan J).

161 Edwards, above n 29, 190.

162 Chris Davies, 'The "Comfortable Satisfaction" Standard of Proof: Applied by the Court of Arbitration for Sport in Drug-Related Cases' (2012) 14 *University of Notre Dame Law Review* 1, 3.

163 *Briginshaw* (1938) 60 CLR 336, 350 (Rich J), 353 (Starke J), 362–3 (Dixon J), 374 (McTiernan J).

164 See *Morley v Australian Securities and Investments Commission* (2010) 247 FLR 140, 173–4 [737] (Spigelman CJ, Beazley and Giles JJA).

165 *Briginshaw* (1938) 60 CLR 336, 350 (Rich J), 352–3 (Starke J), 363–4 (Dixon J), 372–3 (McTiernan J). See also *Kantor v Vosahlo* [2004] VSCA 235, [19] (Ormiston JA). But see *Briginshaw* (1938) 60 CLR 336, 345 (Latham CJ); P E Joske, 'Uniformity of Empire Law' (1951) 5 *Res Judicatae* 8, 11.

early citations of *Briginshaw* solely concerned proof of adultery in divorce proceedings.[167]

However, *Briginshaw*'s later application was not so limited. Beginning with the High Court's unanimous application of the principle to murder allegations in *Helton v Allen*,[168] it was applied to a broad range of allegations including fraud,[169] discrimination[170] and sexual misconduct.[171] This subsequent consideration has partly resolved *Briginshaw*'s ambiguities. Moreover, the principle seems to be replicated in the *UEL*.

A When is *Briginshaw* Enlivened? The High Court's Early Adoption of Dixon J's Three Factors

Part III(C)(1) identified three different tests for when the principle is enlivened which emerge from *Briginshaw*. The broadest is Dixon J's three-factor test:

> The *seriousness of an allegation made*, the *inherent unlikelihood of an occurrence* of a given description, or the *gravity of the consequences flowing from a particular finding* are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.[172]

The High Court has repeatedly quoted this passage verbatim in describing when the principle is enlivened,[173] in contrast to the remaining judges' narrower formulations.[174] Accordingly, Dixon J's three-factor test seems to be accepted law.

B What are *Briginshaw*'s Consequences? The High Court's Eventual Adoption of the Evidentiary Requirement Interpretation

Part III(C)(2) showed the judgments in *Briginshaw* arguably support three different interpretations of the principle's consequences. After some confusion,

166 *Ginesi v Ginesi* [1948] P 179; see *Wright v Wright* (1948) 77 CLR 191, 198–9 (Latham CJ), 210–1 (Dixon J), 213–4 (McTiernan J); *Watts v Watts* (1953) 89 CLR 200, 206 (Kitto and Taylor JJ).

167 See, eg, *Greenfield v Greenfield* [1938] SASR 435, 440 (Cleland J); *Piggott v Piggott* (1938) 61 CLR 378, 415 (Dixon J); *Williams v Williams* [1939] SASR 20, 24 (Napier J).

168 (1940) 63 CLR 691, 696 (Rich J), 701 (Starke J), 711–12 (Dixon, Evatt, and McTiernan JJ).

169 See, eg, *Rejfek v McElroy* (1965) 112 CLR 517, 521 (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ); *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449–50 (Mason CJ, Brennan, Deane and Gaudron JJ).

170 See, eg, *Department of Health v Arumugam* [1988] VR 319, 331 (Fullagar J); *Sharma v Legal Aid (Queensland)* [2002] FCAFC 196, [40] (Heerey, Mansfield and Hely JJ).

171 See, eg, *M v M* (1988) 166 CLR 69, 76–7 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ); *S v R* (1999) 149 FLR 149, 173 [109] (Kay, Holden and Mullane JJ); *Amador v Amador* [2009] FamCAFC 196, [47] (May, Coleman and Le Poer Trench JJ).

172 *Briginshaw* (1938) 60 CLR 336, 362 (emphasis added).

173 See, eg, *Helton v Allen* (1940) 63 CLR 691, 711–12 (Dixon, Evatt, and McTiernan JJ); *Locke v Locke* (1956) 95 CLR 165, 167–8 (Dixon CJ, Williams and Fullagar JJ); *M v M* (1988) 166 CLR 69, 76–7 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ); *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449–50 (Mason CJ, Brennan, Deane and Gaudron JJ); *G v H* (1994) 181 CLR 387, 399 (Deane, Dawson and Gaudron JJ); *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 576 (Gummow J); *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, 84–5 [201] (Hayne J); *Re Day* (2017) 91 ALJR 262, 268 [15] (Gordon J).

174 *Briginshaw* (1938) 60 CLR 336, 343–4 (Latham CJ), 350 (Rich J), 353 (Starke J), 372 (McTiernan J).

the High Court seems to have adopted the Evidentiary Requirement Interpretation.

Immediately following *Briginshaw*, the division as to the principle's consequences continued. Various individual High Court judges reiterated their support for[175] or opposition to[176] the Variable Standard Interpretation in obiter. Dixon J's statements could be read to support either view.[177]

However, when the issue next squarely arose, the High Court appeared to adopt the Variable Standard Interpretation.[178] In *Morrison v Jenkins* ('*Morrison*'),[179] a mother claimed a hospital had swapped her baby with another family's, and sought custody of 'her' child. Because of the grave consequences for both families, *Briginshaw* applied.[180] Rich, Dixon, and McTiernan JJ required a higher degree of probabilistic certainty to find for the mother: that she must exclude 'every other reasonable hypothesis',[181] 'all real doubt',[182] or 'all reasonable doubt'.[183] This majority is noteworthy, since Dixon J apparently preferred the Evidentiary Requirement Interpretation in *Briginshaw*.[184] By contrast, Latham CJ rejected any requirement beyond proof on the balance of probabilities,[185] and Webb J endorsed the Evidentiary Requirement Interpretation.[186]

That resolution was short-lived. In two decisions, the High Court seems to have decisively adopted the Evidentiary Requirement Interpretation. *Rejfek v McElroy* ('*Rejfek*')[187] concerned the tort of deceit. Because the allegation involved fraud, the trial judge applied the criminal standard of proof beyond reasonable doubt.[188] The High Court allowed the appeal, and held the civil standard and *Briginshaw* applied instead.[189] It appeared to unanimously endorse the Evidentiary Requirement Interpretation:

> [I]n 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 … Before parting with this aspect of the matter, we might mention that in *Slaughter v Storm and Storm Press Pty Ltd* … [Mansfield CJ] said that the plaintiff must prove allegations of fraud 'as clearly as they would have to be proved in a criminal proceeding' ... If this phrase is used to mean no more than that proof of fraud should be clear and cogent such as to induce, on a balance of probabilities, an

175 *Piggott v Piggott* (1938) 61 CLR 378, 428–9 (McTiernan J); *Helton v Allen* (1940) 63 CLR 691, 701 (Starke J); *Wright v Wright* (1948) 77 CLR 191, 213–4 (McTiernan J).
176 *Wright v Wright* (1948) 77 CLR 191, 198–9 (Latham CJ).
177 *Piggott v Piggott* (1938) 61 CLR 378, 415 (Dixon J); *Hocking v Bell* (1945) 71 CLR 430, 500 (Dixon J).
178 Eggleston, *Evidence, Proof and Probability*, above n 40, 139–40; Williams, above n 9, 186. But see Eggleston, 'Probabilities and Proof', above n 10, 208–9.
179 (1949) 80 CLR 626.
180 Ibid 648 (McTiernan J).
181 Ibid 640 (Rich J).
182 Ibid 642 (Dixon J).
183 Ibid 648 (McTiernan J).
184 *Briginshaw* (1938) 60 CLR 336, 363.
185 *Morrison* (1949) 80 CLR 626, 636.
186 Ibid 654.
187 (1965) 112 CLR 517.
188 Ibid 519 (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ).
189 Ibid 522 (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ).

> actual persuasion of the mind as to the existence of the fraud, it is in accordance with the decision of this Court in *Helton v Allen* … 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.[190]

The Variable Standard Interpretation's supporters could argue this language is ambiguous. Their interpretation also involves 'consideration of the probabilities', and because the consequences of criminal conviction are graver than any civil finding, perhaps the variable standard never requires 'that degree of certainty which is indispensable to the support of a conviction upon a criminal charge'. Further, the judgment notes 'the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved',[191] which could be read to refer to a variable degree of *probabilistic* satisfaction. In any event, the passage is an *obiter* comment on a case mentioned in argument, not crucial to the ratio rejecting the criminal standard.[192]

However, remaining doubts were dispelled by *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* ('*Neat*'),[193] which also concerned the tort of deceit. The trial judge applied the standard of the balance of probabilities, without citing *Briginshaw*.[194] The Full Court of the Supreme Court of Western Australia allowed the appeal because the trial judge had not applied the principle.[195] By majority, the High Court restored the trial judge's decision.[196] It held that, because both parties accused the other of fraud, *Briginshaw* did not require stricter proof of *either's* allegation.[197] The majority also endorsed the Evidentiary Requirement Interpretation:

> The ordinary standard of proof … is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove … [The authorities] should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.[198]

In dissent on the facts, Toohey J did not consider the point.[199]

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190 *Rejfek* (1965) 112 CLR 517, 519–20, 521–2 (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ) (citations omitted).

191 Ibid 521 (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ).

192 Ibid 521–2 (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ).

193 (1992) 110 ALR 449.

194 Ibid 450 (Mason CJ, Brennan, Deane and Gaudron JJ); see *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1991] WASC 343, 57–8 (Wallwork J).

195 *Neat* (1992) 110 ALR 449, 451 (Mason CJ, Brennan, Deane and Gaudron JJ), 456 (Toohey J); see *Karajan Holdings Pty Ltd v Neat Holdings Pty Ltd* [1992] WASC 188, 14–5, 19 (Seaman J; Nicholson J agreeing at 6).

196 *Neat* (1992) 110 ALR 449, 453 (Mason CJ, Brennan, Deane and Gaudron JJ; Toohey J dissenting at 458).

197 Ibid 450–1 [3] (Mason CJ, Brennan, Deane and Gaudron JJ).

198 Ibid 449–50 [2] (Mason CJ, Brennan, Deane and Gaudron JJ).

199 Ibid 457–8 [14] (Toohey J).

Neither *Rejfek* nor *Neat* acknowledged the differing views in *Briginshaw*[200] and authorities immediately after it,[201] or the majority's contrary conclusion in *Morrison*.[202] However, the two decisions (one unanimous, the other a four-member joint judgment) carry significant weight. Since then, the High Court has repeatedly endorsed *Neat*'s statement of the Evidentiary Requirement Interpretation.[203] Thus, it is now the 'textbook' understanding of *Briginshaw*'s consequences.[204] (While the Australian cases do not cite them, the English authorities developed similarly, initially favouring something like the Variable Standard Interpretation[205] but now preferring something closer to the Evidentiary Requirement Interpretation.)[206] Accordingly, the Evidentiary Requirement Interpretation is now the accepted interpretation of *Briginshaw*'s consequences.

C The *UEL*'s Replication of the Common Law Principle

After some confusion, the better view is that *Briginshaw* is replicated in section 140 of the *UEL*. Like *Briginshaw*, that provision imposes a particular standard of proof and requires courts to consider particular factors in deciding whether it is met:

> (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
>
> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
>
> (a) the nature of the cause of action or defence, and
>
> (b) the nature of the subject-matter of the proceeding, and
>
> (c) the gravity of the matters alleged.

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200 *Briginshaw* (1938) 60 CLR 336, 347 (Latham CJ), 350 (Rich J), 352 (Starke J), 362–3 (Dixon J), 371 (McTiernan J).

201 See, eg, *Piggott v Piggott* (1938) 61 CLR 378, 415 (Dixon J), 428–9 (McTiernan J); *Helton v Allen* (1940) 63 CLR 691, 701 (Starke J); *Hocking v Bell* (1945) 71 CLR 430, 500 (Dixon J); *Wright v Wright* (1948) 77 CLR 191, 198–9 (Latham CJ), 213–4 (McTiernan J).

202 *Morrison* (1949) 80 CLR 626, 640 (Rich J), 642 (Dixon J), 648 (McTiernan J).

203 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 160 ALR 588, 603 [49] (Gaudron, Gummow and Hayne JJ), 628 [130] (Callinan J); *Barwick v Law Society of New South Wales* (2000) 169 ALR 236, 270–1 [159] (Callinan J); *Henderson v Queensland* (2014) 255 CLR 1, 29–30, [91] (Gageler J); *Re Day* (2017) 91 ALJR 262, 268 [15] (Gordon J).

204 Jill Anderson, Neil Williams and Louise Clegg, *The New Law of Evidence: Annotation and Commentary on the Uniform Evidence Acts* (LexisNexis, 2nd ed, 2009) 691; Ligertwood and Edmond, above n 69, 105.

205 *Bater v Bater* [1951] P 35, 37 (Denning LJ); *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, 258 (Denning LJ); *Blyth v Blyth* [1966] AC 643, 673 (Lord Pearce); *Bastable v Bastable* [1968] 1 WLR 1684, 1685 (Wilmer LJ). See Eggleston, *Evidence, Proof and Probability*, above n 40, 131; Heydon, *Cross on Evidence*, above n 26, 354; Christopher Allen, Chris Taylor and Janice Nairns, *Practical Guide to Evidence* (Routledge, 5th ed, 2015) 168–9.

206 *Re H* [1996] AC 563, 586–7 (Lord Nicholls); *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, 193–4 [55] (Lord Hoffmann); *Re D* [2008] 1 WLR 1499, 1508 [25] (Lord Carswell); *Re B (Children) (Care Proceedings: Standard of Proof)* [2009] 1 AC 11, 35–6 [70]–[73] (Baroness Hale); *Re S-B (Children) (Care Proceedings: Standard of Proof)* [2010] 1 AC 678, 692 (Baroness Hale). See Colin Tapper, *Cross & Tapper on Evidence* (Oxford University Press, 12th ed, 2010) 155–6; Dennis, above n 69, 484–5; Keane and McKeown, above n 69, 116. But see Redmayne, above n 10, 177. Contrast Edmund Morris Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation* (Columbia University Press, 1956) 82; *Addington v Texas*, 441 US 418, 431–3 (Burger CJ) (1979).

1 Properly Construed, Section 140 Replicates Briginshaw

Previously, much ink was spilled over the extent to which the *UEL* should be construed according to the common law.[207] The better view is the starting point must be the words of the *UEL* itself: accordingly, each provision should be examined to see to what extent its language and purpose reflect common law principles.[208] Adopting this approach, section 140 replicates *Briginshaw*.

First, section 140's language favours this outcome. Section 140(1) mirrors[209] *Briginshaw*'s language of 'satisfaction'[210] on 'the balance of probabilities'.[211] (Similarly, section 141's criminal standard of proof adopts the common law language of 'beyond reasonable doubt'.)[212] This use of the same language suggests the same legal meaning is intended.[213] Further, like Dixon J's three-factor test, section 140(2) identifies three considerations relevant to deciding whether the standard is met. Section 140(2)(c)'s 'gravity of the matters alleged' is in similar terms to Dixon J's 'seriousness of an allegation made'.[214] Sections 140(2)(a)–(b) use different language, referring to the 'nature' and 'subject matter' (rather than 'unlikelihood' or 'gravity') of the 'cause of action' or 'proceedings' (rather than allegations or their consequences).[215] However, properly construed, they encompass Dixon J's remaining considerations.

Consider, for example, proceedings for the tort of deceit. Dixon J's three-factor test considers the inherent unlikelihood of fraud[216] and the gravity of the

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207 See Dyson Heydon, *A Guide to the Evidence Acts 1995 (NSW) and (Cth)* (Butterworths, 2nd ed, 1997) 4–9; Arenson and Bagaric, above n 26, xliii–xliv; Anderson and Bayne, above n 26, 10; Anderson, Williams and Clegg, above n 204, xiii; Ligertwood and Edmond, above n 69, 50–1; Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 9th ed, 2010) 12–4; Heydon, *Cross on Evidence*, above n 26, 3; Stephen Odgers, 'Uniform Evidence Law and the Common Law' in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (The Federation Press, 2017) 53, 56–60.

208 *Lee v The Queen* (1998) 195 CLR 594, 602–4 [32]–[40] (Gleeson CJ, Gummow, Kirby, Hayne, and Callinan JJ); *Papakosmas v The Queen* (1999) 196 CLR 297, 302 [10] (Gleeson CJ and Hayne J), 312 [46] (Gaudron and Kirby JJ), 324 [88] (McHugh J); Anderson, Hunter and Williams, above n 26, xix; Heydon, *Cross on Evidence*, above n 26, 152–3; *IMM v The Queen* (2016) 257 CLR 300, 311 [35] (French CJ, Kiefel, Bell and Keane JJ), 325 [95] (Gageler J), 347–8 [164]–[165] (Nettle and Gordon JJ); Hemming and Layton, above n 26, vii.

209 *Morley v Australian Securities and Investments Commission* (2010) 247 FLR 140, 176 [750] (Spigelman CJ, Beazley and Giles JJA).

210 *Briginshaw* (1938) 60 CLR 336, 350 (Rich J), 353 (Starke J), 362–3 (Dixon J), 374 (McTiernan J); see also *Rejfek* (1965) 112 CLR 517, 519–20 [5], 521–2 [10]–[11] (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ).

211 *Briginshaw* (1938) 60 CLR 336, 350–1 (Rich J), 353 (Starke J), 367–8 (Dixon J).

212 *Woolmington v DPP* [1935] AC 462, 481 (Viscount Sankey LC; Lord Hewart CJ, Lord Tomlin and Lord Wright agreeing at 483); *R v Mullen* (1938) 59 CLR 124, 127 (Latham CJ), 132 (Rich J), 134 (Starke J), 136 (Dixon J), 138–9 (McTiernan J).

213 Bennett and Broe, above n 117, 275–6. See *Gutheil v Ballarat Trustees, Executors & Agency Co Ltd* (1922) 30 CLR 293, 299 (Knox CJ); *Fisher v Bell* [1961] 1 QB 394, 400 (Lord Parker CJ), 401 (Ashworth J), 401 (Elwes J).

214 *WK v SR* (1997) 22 Fam LR 592, 602 (Baker, Kay and Morgan JJ); *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419, [54]–[61] (Beazley, Giles and Santow JJA); *Johnson v Page* (2007) FLC 93-344, 81891 [72] (May, Boland and Stevenson JJ).

215 *Kantor v Vosahlo* [2004] VSCA 235, [20] (Ormiston JA).

216 *Neat* (1992) 110 ALR 449, 449–50 [2] (Mason CJ, Brennan, Deane and Gaudron JJ); *Re H* [1996] AC 563, 586 (Lord Nicholls). See also Frank Bates, 'Child Sexual Abuse and the Standard of Proof' (2005)

consequences of such a finding, including curial consequences like exemplary damages[217] and extra-curial consequences like reputational damage.[218] Similarly, applying section 140(2)(b), 'the nature of the subject-matter' is that it is an allegation of dishonesty, which is inherently unlikely and stains reputations. Applying section 140(2)(a), 'the nature of the cause of action' is that it is the tort of deceit, for which exemplary damages are available.[219] Thus, 'the inherent unlikelihood of an occurrence' is captured by section 140(2)(b),[220] and 'the gravity of the consequences' is captured by sections 140(2)(a)–(b), depending on whether the consequences are curial (arising from 'the nature of the cause of action') or extra-curial (arising from 'the nature of the subject matter', the allegations themselves).[221] Further, even if Dixon J's considerations were *not* captured by section 140(2)'s factors, the explanatory material stresses[222] that section 140(2) begins 'without limiting the matters that the court may take into account'. Therefore courts *could* still consider the *Briginshaw* factors themselves, although such consideration would be discretionary, not mandatory.[223]

Second, the extrinsic material supports this construction.[224] In its first report on the proposed *UEL*, the Australian Law Reform Commission expressly identified Dixon J's three-factor test as the existing common law.[225] Some of the Acts' Explanatory Memoranda state the *UEL* leaves the common law of proof unchanged[226] or expressly state the *Briginshaw* principle is retained.[227]

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13 *Tort Law Review* 51, 52; but see Stephen Warne, 'The Consequences of Serious Allegations without an Adequate Foundation' (2014) 121 *Precedent* 4, 5.

217 *Backwell v AAA* [1997] 1 VR 182, 211 (Ormiston JA; Brooking and Tadgell JJA agreeing at 184); *Allam v Aristocrat Technologies Australia Pty Ltd* [2012] FCAFC 34, [173] (Bennett, Middleton and Yates JJ); see also Michael Tilbury, 'Exemplary Damages in Medical Negligence' (1996) 4 *Tort Law Review* 167, 171.

218 *Piggott v Piggott* (1938) 61 CLR 378, 428–9 (McTiernan J); *Watts v Watts* (1953) 89 CLR 200, 207 (Kitto and Taylor JJ).

219 *James v Hill* [2004] NSWCA 301, [74] (Tobias JA; Sheller JA agreeing at [1]; Hodgson JA agreeing at [2]); *Su v So* [2010] NSWCA 119, [32]–[40] (Allsop P and Sackville AJA; Tobias JA agreeing at [66]).

220 See *Bartlett v Australia & New Zealand Banking Group Ltd* (2016) 92 NSWLR 639, 653 [59] (Macfarlan JA; Meagher JA agreeing at 662 [98]; Simpson JA agreeing at 664 [108]).

221 *Morley v Australian Securities and Investments Commission* (2010) 247 FLR 140, 175 [742] (Spigelman CJ, Beazley and Giles JJA).

222 Australian Law Reform Commission, *Evidence*, Report No 38 (1987) Appendix A: Draft Explanatory Memorandum, [367]; Explanatory Note, Evidence Bill 1995 (NSW) 28; Explanatory Memorandum, Evidence Bill 2008 (Vic) 53; Explanatory Statement, Evidence Bill 2011 (ACT) 53.

223 *Qantas Airways Ltd v Gama* (2008) 167 FCR 537, 576 [138] (Branson J); *Morley v Australian Securities and Investments Commission* (2010) 247 FLR 140, 173–4 [737] (Spigelman CJ, Beazley and Giles JJA); *NOM v DPP (Vic)* (2012) 38 VR 618, 654–5 [119] (Redlich and Harper JJA and Curtain AJA); *Bibby Financial Services Australia Pty Ltd v Sharma* [2014] NSWCA 37, [204] (Gleeson JA; Beazley P agreeing at [1]; Barrett JA agreeing at [13]).

224 *Acts Interpretation Act 1901* (Cth) s 15AB(2)(b); *Legislation Act 2001* (ACT) s 142(1); *Interpretation Act 1979* (NI) s 8A(1); *Interpretation Act 1987* (NSW) s 34(2)(b); *Interpretation Act 1987* (NT) s 62B(2)(b); *Acts Interpretation Act 1931* (Tas) s 8B(3)(b); *Interpretation of Legislation Act 1984* (Vic) s 35(b)(iv).

225 Australian Law Reform Commission, *Evidence (Interim)*, Report No 26 (1985) [97]–[99].

226 Explanatory Memorandum, Evidence Bill 1991 (Cth) 3 [8].

227 Explanatory Statement, Evidence (National Uniform Legislation) Bill 2011 (NT) 87–8.

Third, the authorities support this construction. One member of the High Court[228] and various intermediate appellate courts[229] have explicitly endorsed it. Further, other members of the High Court have *implicitly* endorsed it by continuing to apply Dixon J's three-factor test and *Neat*'s explanation of

228 *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345, 430–1 [228], 435–6 [241], 441 [250] (Heydon J), compare 381–2 [73] and 405 [144] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). See *NOM v DPP (Vic)* (2012) 38 VR 618, 655 [122] (Redlich and Harper JJA and Curtain AJA).

229 *WK v SR* (1997) 22 Fam LR 592, 602 (Baker, Kay and Morgan JJ); *Employment Advocate v Williamson* (2001) 111 FCR 20, 40–1 [65] (Branson J; Kenny J agreeing at 50 [108]); *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1, 30 [148] (Giles JA; Mason P agreeing at 5 [1]; Beazley JA agreeing at 5 [2]); *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203, 223 [83] (Mason P; Sheller JA agreeing at 261 [293]; Hodgson JA agreeing at 261 [294]); *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466, 480 [31] (Weinberg, Bennett and Rares JJ); *Re Sophie* [2008] NSWCA 250, [50] (Sackville AJA; Giles JA agreeing at [1]; Handley AJA agreeing at [2]; *Morley v Australian Securities and Investments Commission* (2010) 247 FLR 140, 173 [735] (Spigelman CJ, Beazley and Giles JJA); *R v DG* (2010) 28 VR 127, 137 [48] (Buchanan, Weinberg and Bongiorno JJA); *Setka v Gregor [No 2]* (2011) 195 FCR 203, 208 [24] (Lander, Tracey and Yates JJ); *Commonwealth v Fernando* (2012) 200 FCR 1, 28–9 [128]–[130] (Gray, Rares and Tracey JJ); *Nigro v Secretary, Department of Justice* (2013) 41 VR 359, 403 [160] (Redlich, Osborn and Priest JJA); *Karakatsanis v Racing Victoria Ltd* (2013) 42 VR 176, 188 [32] (Osborn JA; Beach JA agreeing at 196 [61]); *Vu v New South Wales Crime Commission* [2013] NSWCA 282, [77] (McColl JA; Meagher JA agreeing at [105]; Emmett JA agreeing at [112]); *Bibby Financial Services Australia Pty Ltd v Sharma* [2014] NSWCA 37, [205]–[208] (Gleeson JA; Beazley P agreeing at [1]; Barrett JA agreeing at [13]); *Petrovic v Brett Grimley Sales Pty Ltd* [2014] VSCA 99, [16] (Neave and Osborn JJA and McMillan AJA); *Telfer v Telfer* (2014) 87 NSWLR 176, 188 [69] (Sackville AJA; McFarlan JA agreeing at 177 [1]; Gleeson JA agreeing at 177 [2]); *Curtis v Harden Shire Council* (2014) 88 NSWLR 10, 51–2 [174] (Beazley P); *Chong v CC Containers Pty Ltd* (2015) 49 VR 402, 420 [48] (Redlich, Santamaria and Kyrou JJA); *Giarrusso v Veca* (2015) 13 ASTLR 132, 138 [25]–[27] (Garde AJA; Beach JA agreeing at 133 [1]); *Solomons v Pallier* [2015] NSWCA 266, [40] (Meagher JA; Macfarlan JA agreeing at [1]; Simpson JA agreeing at [97]); *Marriner v Australian Super Developments Pty Ltd* [2016] VSCA 141, [78] (Tate ACJ, Kyrou and Ferguson JJA); *Giles v Jeffrey* [2016] VSCA 314, [121], [188] (Santamaria and Kyrou JJA, Elliot AJA); *Griffin v Council of the Law Society of New South Wales* [2016] NSWCA 364, [99]–[100] (Sackville AJA; Gleeson JA agreeing at [1]; Ward JA agreeing at [2]); *FFF v BBB* [2017] VSCA 156, [29] (Priest and Beach JJA, Keogh AJA); *NU v Secretary, New South Wales Department of Family and Community Services* (2017) 95 NSWLR 577, 589 [54] (Beazley P; McColl JA agreeing at 596 [86]; Schmidt J agreeing at 596 [86]); *Nadinic v Drinkwater* (2017) 94 NSWLR 518, 529–30 [47] (Leeming JA; Beazley P agreeing at 520 [1]; Sackville AJA agreeing at 553 [159]); *Anderson v Anderson* (2017) 94 NSWLR 591, 600 [44] (Leeming JA; Basten JA agreeing at 593 [1]; Sackville AJA agreeing at 605 [70]); *Saba v Plumb* [2018] NSWCA 60, [83] (Macfarlan JA; Sackville AJA agreeing at [111]; Emmett AJA agreeing at [130]).

Briginshaw even in cases governed by the *UEL*.[230] Finally, it is the construction endorsed by most academic commentators.[231] Even the minority suggesting section 140 differs from *Briginshaw* do not argue the section excludes the principle, but that section 140(2)'s language is broad enough to *also* capture *other* common law considerations about whether the standard has been satisfied, such as each side's power of proof[232] and the thoroughness of cross-examination.[233]

2 Properly Understood, Qantas Airways Ltd v Gama ('Gama') Supports that Conclusion

However, some confusion has arisen from the Full Federal Court's decision in *Gama*.[234] That case concerned racial discrimination in employment. Branson J (with whom French and Jacobson JJ 'generally' agreed)[235] made comments that some trial judgments interpreted to suggest *Briginshaw* and section 140 differed.[236] Branson J said:

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230 *Commissioner of the Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 576 [219] (Gummow J); *Barwick v Law Society of New South Wales* (2000) 169 ALR 236, 270–1 [159] (Callinan J); *Cassell v The Queen* (2000) 201 CLR 189, 193 [18] (Gleeson CJ, Gaudron, McHugh and Gummow JJ); *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507, 546 [127] (Kirby J), 588 [265] (Callinan J); *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533, 593–4 [167] (Callinan J); *Magill v Magill* (2006) 226 CLR 551, 617 [211] (Heydon J); *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278, 292 [34] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 162 [170] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Thomas v Mowbray* (2007) 233 CLR 307, 355–6 [113] (Gummow and Crennan JJ); *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, 325 [117] (Heydon, Kiefel and Bell JJ); *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, 84–5 [201] (Hayne J); *Re Day* (2017) 91 ALJR 262, 268 [15]–[17] (Gordon J). See also *Rana v University of South Australia* [2007] FCAFC 188, [31]–[34] (Branson, Sundberg and Dowsett JJ); *Minister for Immigration and Citizenship v SZLIX* [2008] FCAFC 17, [33] (Tamberlin, Finn and Dowsett JJ); *Fortnum & Fortnum [No 3]* [2008] FamCAFC 133, [292] (Faulks DCJ, Coleman and Cronin JJ); *Granada Tavern v Smith* (2008) 173 IR 328, 345, [96] (Heerey J); *Carlisle Homes Pty Ltd v Barrett Property Group Pty Ltd* [2009] FCAFC 31, [63] (Tamberlin, Sundberg and Besanko JJ); *Marriner v Australian Super Developments Pty Ltd* (2012) 46 VR 213, 237 [95] (Neave and Mandie JJA and Judd AJA); *Kaufman v Kozak* [2013] ACTCA 30, [111] (Penfold, Burns and Cowdroy JJ); *Defteros v Scott* [2014] VSCA 154, [16] (Santamaria JA; Neave JA agreeing at [1]); *Volanne Pty Ltd v International Consulting and Business Management (ICBM) Pty Ltd* [2016] ACTCA 49, [86] (Refshauge ACJ, Perry J and Walmsley AJ); *Folett & Langley* [2016] FamCAFC 191, [118]–[121] (Strickland, Kent and Austin JJ); *Reardon v Magistrates' Court of Victoria* (2018) 331 FLR 291, 319 [136] (Weinberg, Beach and Kyrou JJA).

231 Heydon, *A Guide to the Evidence Acts 1995 (NSW) and (Cth)*, above n 207, 67; McNicol and Mortimer, above n 10, 300; Bates, 'Child Sexual Abuse and the Standard of Proof', above n 216, 52; Waight and Williams, above n 26, 95; Fogarty, above n 23, 266; Chisholm, 'Child Abuse Allegations in Family Law Cases: A Review of the Law', above n 9, 18; Field, *Uniform Evidence Law*, above n 9, 18; Lisa Young, Sandeep Dhillon and Laura Groves, 'Child Sexual Abuse Allegations and s 60CC(2A): A New Era?' (2014) 28 *Australian Journal of Family Law* 233, 253–4; but see Anderson and Bayne, above n 26, 76.

232 Anderson, Hunter and Williams, above n 26, 527–8.

233 Anderson, Williams and Clegg, above n 204, 693.

234 (2008) 167 FCR 537.

235 Ibid 571 [110] (French and Jacobson JJ).

236 See, eg, *Hemiro & Sinla* [2009] FamCA 181, [45] (Brown J); *Wang & Dennison* [2009] FamCA 206, [45] (Bennett J); *Denning & Denning [No 3]* [2011] FamCA 160, [47] (Young J); *Russell & Russell*

> references to, for example, 'the *Briginshaw* standard' or 'the onerous *Briginshaw* test' … have a tendency to lead a trier of facts into error. The correct approach to the standard of proof in a civil proceeding in a federal court is that for which s 140 of the *Evidence Act* provides.[237]

However, later appellate decisions confirm that on the proper interpretation of Branson J's judgment, there is no difference between section 140 and *Briginshaw*.[238] Branson J's criticism was *not* directed at consideration of *Briginshaw* as opposed to section 140. Rather, it was directed at the so-called '*Briginshaw* standard', that is, the Variable Standard Interpretation of *Briginshaw* as a variable standard of proof *between* the usual civil and criminal standards.

First, Branson J described section 140 by reference to the High Court's language in the *Briginshaw* line of authority.[239] Her Honour noted section 140

> recognises, adopting the language of the High Court in *Neat Holdings*, that the strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved ...[240]

That language does not reject *Briginshaw*, but endorses the Evidentiary Requirement Interpretation.

Second, Branson J[241] and the judges agreeing with her[242] cited decisions equating section 140 to *Briginshaw* with approval. Indeed, Branson J expressed that view before *Gama*,[243] and later applied *Briginshaw* to proceedings governed by the *UEL*.[244]

Third, in applying section 140(2)'s considerations, Branson J mirrored Dixon J's test for when *Briginshaw* is enlivened. Branson J considered that the allegation involved no moral odium,[245] which courts applying *Briginshaw* considered relevant to allegations' seriousness.[246] Further, her Honour considered

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[2012] FamCA 99, [122] (Young J); *Ballard v Multiplex Ltd* [2012] NSWSC 426, [129]–[130] (McDougall J); *Senior & Anderson* [2012] FamCA 540, [45] (Young J).

237 *Gama* (2008) 167 FCR 537, 573 [123], 576–7 [139] (Branson J).

238 *Morley v Australian Securities and Investments Commission* (2010) 247 FLR 140, 173 [735] (Spigelman CJ, Beazley and Giles JJA); *NOM v DPP (Vic)* (2012) 38 VR 618, 655 [120] (Redlich and Harper JJA and Curtain AJA); *Owens & Benson* [2014] FamCAFC 243, [26] (Austin J; Finn and Strickland JJ agreeing at [1]); *Curtis v Harden Shire Council* (2014) 88 NSWLR 10, 51–2 [174] (Beazley P); *Sandri v O'Driscoll* [2014] VSCA 88, [21] (Maxwell P, Neave JA and McMillan AJA); *Kyriackou v Law Institute of Victoria Ltd* (2014) 45 VR 540, 546 [24] (Warren CJ, Osborn JA and Ginnane AJA).

239 *Gama* (2008) 167 FCR 537, 575 [133], 576–7 [139] (Branson J).

240 Ibid 576–7 [139] (Branson J).

241 Ibid 574 [128], 574–5 [130]–[131] (Branson J), citing *Employment Advocate v Williamson* (2001) 111 FCR 20, 40–1 [65] (Branson J; Kenny J agreeing at 50 [108]); *Sharma v Legal Aid (Queensland)* [2002] FCAFC 196, [40] (Heerey, Mansfield and Hely JJ); and *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466, 479–82 [29]–[38] (Weinberg, Bennett and Rares JJ).

242 *Gama* (2008) 167 FCR 537, 571 [110] (French and Jacobson JJ), citing *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419, [54]–[61] (Beazley, Giles and Santow JJA).

243 *Employment Advocate v Williamson* (2001) 111 FCR 20, 40–1 [65] (Branson J; Kenny J agreeing at 50 [108]).

244 *Rana v University of South Australia* [2007] FCAFC 188, [31]–[34] (Branson, Sundberg and Dowsett JJ).

245 *Gama* (2008) 167 FCR 537, 575 [133], 576 [137] (Branson J).

246 *Department of Health v Arumugam* [1988] VR 319, 331 (Fullagar J); *Clark v NZI Life Ltd* [1991] 2 Qd R 11, 16 (Thomas J); *G v H* (1994) 181 CLR 387, 399–40 [16] (Deane, Dawson and Gaudron JJ).

that the relevant racial discrimination legislation was remedial, not punitive,[247] which courts applying *Briginshaw* considered relevant to the gravity of the consequences. [248] True, Dixon J's inherent unlikelihood factor was not considered.[249] However, this does not mean inherent unlikelihood is irrelevant under section 140. Rather, the factor simply did not arise on the facts; racial discrimination in employment is not particularly uncommon.[250]

As Part III explained, *Briginshaw* created considerable ambiguity about what the law was. Subsequent consideration has resolved that ambiguity in favour of Dixon J's three-factor test and a fixed standard of proof, and the common law seems to be replicated in the *UEL*.

V *BRIGINSHAW* DIVERGES FROM INTUITIVE AND MATHEMATICAL MODELS OF DECISION-MAKING UNDER CONDITIONS OF UNCERTAINTY

This part compares *Briginshaw*'s application to Part II's models. I show applications of Dixon J's three-factor test deviate from those models because they wrongly assume serious allegations are inherently unlikely, disregard the consequences of 'false negatives', and exhibit contradictory attitudes towards economic consequences. Further, I show the rejection of the Variable Standard Interpretation means *Briginshaw* cannot properly account for improbable but grave consequences, such as those posed by the 'Russian roulette' class of cases.

A The Way Dixon J's Three-Factor Test Is Applied Deviates from the Models

Dixon J identified three factors for determining whether *Briginshaw* is enlivened. I consider each in turn.

1 'Inherent Unlikelihood': Courts' False Assumptions about Likelihood and Failure to Apply Briginshaw to Reduce the Evidence Required

In theory, this factor corresponds to Part II(A)'s Prior Probability Model, that we need stronger evidence to prove inherently unlikely claims. Thus, the factor has been applied to require stronger evidence of the unlikely claims that people

247 *Gama* (2008) 167 FCR 537, 576 [138] (Branson J).

248 *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission* (1998) 91 FCR 8, 29 (Weinberg J); *Victoria v Macedonian Teachers Association of Victoria Inc* (1999) 91 FCR 47, 50–1 (O'Connor, Sundberg and North JJ).

249 Anderson and Bayne, above n 26, 76.

250 See, eg, Lesleyanne Hawthorne, 'The Question of Discrimination: Skilled Migrants' Access to Australian Employment' (1997) 35(3) *International Migration* 395, 400–1; M Loosemore and D W Chau, 'Racial Discrimination towards Asian Operatives in the Australian Construction Industry' (2002) 20(1) *Construction Management and Economics* 91, 98; Farida Fodzar and Silvia Torezani, 'Discrimination and Well-Being: Perceptions of Refugees in Western Australia' (2008) 42 *International Migration Review* 30, 32; Farida Fodzar, 'Social Cohesion and Skilled Muslim Refugees in Australia: Employment, Social Capital and Discrimination' (2011) 48 *Journal of Sociology* 167, 173–5. See also *Department of Health v Arumugam* [1988] VR 319, 331 (Fullagar J); *Sharma v Legal Aid (Queensland)* [2002] FCAFC 196, [40] (Heerey, Mansfield and Hely JJ).

would commit perjury without any apparent motive;[251] that marriages have irretrievably broken down when the parties cohabit in apparent domestic harmony;[252] or that sufferers of serious mental illnesses have momentarily been lucid enough to write valid wills.[253] Conversely, courts decline to apply *Briginshaw* to apparently commonplace occurrences, such as breaches of workplace regulations.[254]

As the specificity of these examples indicates, consideration of the inherent unlikelihood factor is comparatively limited. As one of my anonymous reviewers has pointed out, the likelihood of a hypothesis greatly depends on the level of generality with which the hypothesis is phrased. Consider, for example, the likelihood of (a) murder generally, (b) Nicole Brown having been murdered, and (c) OJ Simpson murdering Nicole Brown on the evening of 12 June 1994, in light of their former relationship and his admitted history of domestic violence. *Briginshaw*'s starting point is the inherent unlikelihood of murder *generally*, without reference to the particular parties or their particular circumstances. But the inherent unlikelihood of allegations *in general* may be very quickly swamped by evidence of the *particular* allegation.[255] For example, the inherent likelihood of murder is *generally* miniscule, but readily apparent pieces of evidence (such as stab wounds) might make it almost certain *this particular person* was murdered.[256] Conversely, in cases with limited evidence of the *particular* allegation, courts are reluctant to rely on the frequency of such conduct *in general* because this fails Dixon J's additional requirement of subjective belief that allegations are true *in this particular case*.[257] However, even the limited consideration demonstrates the factor's application deviates from the Prior Probability Model.

First, *Briginshaw* is often applied due to the seriousness of the alleged conduct, without considering that such conduct may be relatively common. Sometimes, cases proceed under positive *misapprehensions* about the conduct's frequency. For example, the inherent unlikelihood factor has been applied to allegations of medical error,[258] even though medical error is relatively common and a leading cause of death in Western countries.[259] These misapprehensions

251 *Dunstan v Higham* [2016] ACTCA 20, [136] (Murrell CJ, Penfold and Rangiah JJ).
252 *In the Marriage of Pavey* (1976) 25 FLR 450, 457 (Evatt CJ, Demack and Watson JJ).
253 *Kantor v Vosahlo* [2004] VSCA 235, [20] (Ormiston JA).
254 *Granada Tavern v Smith* (2008) 173 IR 328, 344–5, [94] (Heerey J).
255 Hamer, 'The Civil Standard of Proof Uncertainty: Probability, Belief and Justice', above n 10, 512–13.
256 *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] 3 WLR 1, 22 [72] (Baroness Hale).
257 *Helton v Allen* (1940) 63 CLR 691, 711 (Dixon, Evatt, and McTiernan JJ); *Jones v Dunkel* (1959) 101 CLR 298, 304–5 (Dixon CJ); *Nesterczuk v Mortimore* (1965) 115 CLR 140, 149 (Kitto J); *Holloway v McFeeters* (1956) 94 CLR 470, 477 (Dixon CJ); *West v Government Insurance Office of New South Wales* (1981) 148 CLR 62, 65–6 (Stephen, Mason, Aickin and Wilson JJ). See also Simpson and Orlov, above n 36, 416; Cohen, 'Should a Jury Say What It Believes or What It Accepts?', above n 153, 469; Ricci and Gray, above n 153, 794–6. But see *Luxton v Vines* (1952) 85 CLR 352, 359 (Dixon, Fullagar and Kitto JJ); *TNT Management Pty Ltd v Brooks* (1979) 23 ALR 345, 351–4 (Murphy J); Eggleston, 'Focusing on the Defendant', above n 153, 62.
258 *Hocking v Bell* (1945) 71 CLR 430, 458 (Latham CJ), 465 (Rich J), 471 (Starke J), 503–4 (McTiernan J).
259 Martin A Makary and Michael Daniel, 'Medical Error: The Third Leading Cause of Death in the US' (2016) 353 *British Medical Journal* 2139, 2140.

about likelihood could be because courts wrongly assume allegations' seriousness means they are inherently unlikely,[260] or because the requirement of subjective belief makes them reluctant to consider general statistical evidence.[261]

On the other hand, sometimes cases *only* consider the seriousness factor without considering the *countervailing* factor of how common the occurrence is. Such cases include allegations of adultery,[262] sexual misconduct,[263] and racial discrimination in employment.[264] While statistical evidence on each is imperfect because of victims' reluctance to come forward[265] and selection bias in self-reporting,[266] the data we *do* have suggests all three are not uncommon occurrences,[267] but the cases do not consider this before applying *Briginshaw*.

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260 See, eg, *Neat* (1992) 110 ALR 449, 449–50 (Mason CJ, Brennan, Deane and Gaudron JJ); *Re H* [1996] AC 563, 586 (Lord Nicholls). See Bainham, above n 123, 211; Redmayne, above n 10, 184–5; *R (N) v Mental Health Review Tribunal* [2006] QB 468, 498 [64] (Richards LJ); Manning, above n 10, 396; *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] 3 WLR 1, 22–3 [72]–[73] (Baroness Hale); Hely, above n 70, 42; Keane and McKeown, above n 69, 116.

261 *State Government Insurance Commission v Laube* (1984) 37 SASR 31, 33 (King CJ), 36–7 (Millhouse J). See Williams, above n 9, 180; Goldring, above n 131, 262; Edward Christie, 'Toxic Mould Litigation: A New Sunrise Industry for Lawyers?' (2005) 16 *Insurance Law Journal* 281, 290–3.

262 *Briginshaw* (1938) 60 CLR 336, 347 (Latham CJ), 350 (Rich J), 353 (Starke J), 368 (Dixon J), 373–4 (McTiernan J); *Piggott v Piggott* (1938) 61 CLR 378, 415 (Dixon J), 428–9 (McTiernan J); *Wright v Wright* (1948) 77 CLR 191, 198–9 (Latham CJ), 205–6 (Rich J), 210 (Dixon J), 213–14 (McTiernan J); *Watts v Watts* (1953) 89 CLR 200, 203 (Fullagar J), 207–10 (Kitto and Taylor JJ); *Paterson v Paterson* (1953) 89 CLR 212, 218 (Dixon CJ and Kitto J); *Locke v Locke* (1956) 95 CLR 165, 167–8 [8]–[11] (Dixon CJ, Williams and Fullagar JJ); *Mann v Mann* (1957) 97 CLR 433, 439–40 (Dixon CJ and Williams J).

263 *Clark v Stingel* [2007] VSCA 292, [37]–[39] (Warren CJ, Chernov and Kellam JJA); *Fortnum & Fortnum [No 3]* [2008] FamCAFC 133, [121]–[122] (Faulks DCJ, Coleman and Cronin JJ); *Leeks v XY* (2008) 21 VR 118, 122 [11]–[12] (Redlich JA; Buchanan JA agreeing at 119 [1]; Vincent JA agreeing at 119 [2]); *Varmedja v Varmedja* [2008] NSWCA 177, [149] (Tobias JA; Hodgson JA agreeing at [1]; McColl JA agreeing at [172]); *Amador & Amador* [2009] FamCAFC 196, [90]–[93] (May, Coleman and Le Poer Trench JJ); *Dye v Commonwealth Securities Ltd [No 2]* [2010] FCAFC 118, [55] (Marshall, Rares and Flick JJ); *Vergara v Ewin* (2014) 223 FCR 151, 156–8 [21]–[26] (White J; North and Pagone JJ agreeing at 177 [123]); *Council of the New South Wales Bar Association v Franklin [No 2]* [2014] NSWCA 428, [21] (Meagher JA; Beazley P agreeing at [1]; Leeming JA agreeing at [48]); *Fleming v Advertiser-News Weekend Publishing Company Pty Ltd* [2016] SASCFC 109, [100]–[101] (Vanstone, Nicholson and Bampton JJ); *NU v Secretary, New South Wales Department of Family and Community Services* (2017) 95 NSWLR 577, 589 [54] (Beazley P; McColl JA agreeing at 596 [85]; Schmidt J agreeing at 596 [86]).

264 *Department of Health v Arumugam* [1988] VR 319, 331 (Fullagar J); *Sharma v Legal Aid (Queensland)* [2002] FCAFC 196, [40] (Heerey, Mansfield and Hely JJ).

265 Bonnie Fisher et al, 'Reporting Sexual Victimisation to the Police and Others: Results from a National-Level Study of College Women' (2003) 30 *Criminal Justice and Behaviour* 6, 26.

266 Lars Fatnes, Adam Taube and Thorkild Tylleskar, 'How to Identify Information Bias Due to Self-Reporting in Epidemiological Research' (2009) 7 *Internet Journal of Epidemiology* 3, 5.

267 David C Atkins, Donald H Baucom, and Neil S Jacobson, 'Understanding Infidelity: Correlates in a National Random Sample' (2001) 15(4) *Journal of Family Psychology* 735, 735; Mark A Whisman and Douglas K Snyder, 'Sexual Infidelity in a National Survey of American Women: Differences in Prevalence and Correlates as a Function of Method of Assessment' (2007) 21(2) *Journal of Family Psychology* 147, 147; Frank D Fincham and Ross W May, 'Infidelity in Romantic Relationships' (2017) 13 *Current Opinion in Psychology* 70, 70; Rape, Abuse & Incest National Network, *Victims of Sexual Violence: Statistics* (2015) <https://www.rainn.org/statistics/victims-sexual-violence>; Hawthorne, above n 250, 400–1; Loosemore and Chau, above n 250, 98; Fodzar and Torezani, above n 250, 32; Fodzar, above n 250, 173–5.

Second, *Briginshaw* has never been explicitly applied to *reduce* rather than *increase* the evidence required. Part II(A)'s Prior Probability Model requires stronger evidence for unlikely claims, but conversely indicates the more inherently likely the claim, the *less* evidence we need to be satisfied of its truth. Similar reasoning informs the allocation of *burdens* of proof to each side. For example, in negligence claims, plaintiffs bear the burden of proving negligence, and defendants the burden of proving contributory negligence, partly because both kinds of negligence are generally less likely than competent performance: therefore the side asserting the negligence must prove it.[268]

However, in relation to *standards* of proof, allegations' inherent likelihood does not seem to reduce the *strength of evidence* required for a party to meet their burden. For example, because sexual assault is not uncommon[269] and false allegations quite rare,[270] the Prior Probability Model suggests we should accept a lesser amount of corroborating evidence to find that defendants committed sexual assault on the civil standard than we would require for other serious allegations. However, courts have never *explicitly* adopted this reasoning in relation to the *standard* of proof, to lower the amount of evidence required to meet a party's burden; although perhaps, within judges' minds or the 'black box' of the jury room, similar reasoning is applied.[271]

2 *'The Gravity of the Consequences': Disregarding 'False Negatives' and Contradictory Attitudes to Economic Consequences*

In theory, this factor corresponds to Part II(B)'s Consequences of Error Model, that we need stronger evidence to make findings where the consequences of *incorrect* findings are particularly grave. Thus, *Briginshaw* requires stronger evidence for findings resulting in losses of liberty, such as findings of dangerous psychiatric illness;[272] irreversible health effects, such as decisions to involuntarily

268 Hamer, 'Presumptions, Standards and Burdens: Managing the Cost of Error', above n 70, 223–4.

269 Rape, Abuse & Incest National Network, above n 267; New South Wales Bureau of Crime Statistics and Research, above n 122, 16; Office for National Statistics, above n 122, [9].

270 Deborah L Rhode, *Speaking of Sex: The Denial of Gender Inequality* (Harvard University Press, 1997) 125; Philip N S Rumney, 'False Allegations of Rape' (2006) 65(1) *Cambridge Law Journal* 128, 136; David Lisak et al, 'False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases' (2010) 16(2) *Violence Against Women* 1318, 1331.

271 See Shari Seidman Diamond and Neil Vidmar, 'Jury Room Ruminations on Forbidden Topics' (2001) 87(8) *Virginia Law Review* 1857, 1858; Louise Ellison and Vanessa E Munro, 'Of "Normal Sex" and "Real Rape": Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18 *Social and Legal Studies* 291, 292.

272 *R v Schafferius* [1987] 1 Qd R 381, 383 (Thomas J; Andrews CJ agreeing at 381; Ryan J agreeing at 384); *A-G (Qld) v Kamali* [1999] QCA 219, [9] (de Jersey CJ, Thomas JA and Demack J); *McGarry v The Queen* [1999] WASCA 276, [24] (Kennedy J); *Pendleton v The Queen* [2002] WASCA 4, [24] (Kenny J; Wallwork J agreeing at [48]; Pidgeon AJ agreeing at [49]); *Thompson v The Queen* [2002] WASCA 230, [42] (Templeman J; Murray J agreeing at [51]; McKechnie JJ agreeing at [64]); *Yarran v The Queen* (2003) 27 WAR 427, 430–2 [11]–[12] (McKechnie J; Malcolm CJ agreeing at 428 [1]; Anderson J agreeing at 428 [2]); *DAR v DPP (Qld)* [2008] QCA 309, [82]–[83] (Keane JA; Holmes JA agreeing at [95]; Fraser JA agreeing at [98]); *Harvey v A-G (Qld)* [2011] QCA 256, [10] (McMurdo P); *NOM v DPP (Vic)* (2012) 38 VR 618, 647 [91] (Redlich and Harper JJA and Curtain AJA); *SCN v DPP (Qld)* [2016] QCA 237, [4] (McMurdo P; Gotterson JA agreeing at [37]; Morrison JA agreeing at [38]).

sterilise severely mentally disabled women;[273] reputational damage, such as findings that children are illegitimate,[274] that parties contributed to another's death,[275] or that doctors acted negligently;[276] damage to livelihood, such as adverse licensing,[277] directors' disqualification,[278] and professional disciplinary decisions;[279] and losses of community connections, such as deportation decisions.[280] Conversely, authorities differ on *Briginshaw*'s application to different kinds of control and apprehended violence orders, perhaps reflecting their different degrees of restriction of liberty.[281] However, this factor's application also deviates from the Consequences of Error Model.

First, courts applying the factor consider the consequences of wrongly making the orders plaintiffs seek (*false positives*), but often disregard the consequences of wrongly *declining* to make those orders (*false negatives*).[282] By contrast, our intuitions tell us to consider *both* types of error.

See also *Nigro v Secretary, Department of Justice* (2013) 41 VR 359, 403–4 [161]–[163] (Redlich, Osborn and Priest JJA); McSherry, above n 19, 217.

273 *Re Jane* (1988) 94 FLR 1, 27 (Nicholson CJ); *Re L and M* (1993) 17 Fam LR 357, 373 (Warnick J).

274 *Piggott v Piggott* (1938) 61 CLR 378, 428–9 (McTiernan J); *Watts v Watts* (1953) 89 CLR 200, 207 (Kitto and Taylor JJ).

275 *Anderson v Blashki* [1993] 2 VR 89, 96 (Gobbo J); *Secretary, Department of Health and Community Services v Gurvich* [1995] 2 VR 69, 74 (Southwell J); *Chief Commissioner of Police v Hallenstein* [1996] 2 VR 1, 19 (Hedigan J); *Hurley v Clements* [2010] 1 Qd R 215, 232–4 [25]–[27] (McMurdo P, Keane and Fraser JJA). See also Harcourt, above n 4, 56.

276 *Willcox v Sing* [1985] 2 Qd R 66, 72 (Connolly J; Campbell CJ agreeing at 67; Thomas J agreeing at 87).

277 *Barten v Williams* (1978) 20 ACTR 10, 12 (Blackburn CJ).

278 *Australian Securities and Investments Commission v Reid* (2005) 55 ACSR 152, 156 [23] (Lander J); *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1, 29 [146] (Giles JA; Mason P agreeing at 5 [1]; Beazley JA agreeing at 5 [2]); *Australian Securities and Investments Commission v Plymin* (2003) 175 FLR 124, 206–7, [366]–[367] (Mandie J); *Morley v Australian Securities and Investments Commission* (2010) 247 FLR 140, 175 [742] (Spigelman CJ, Beazley and Giles JJA); *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345, 435–6 [241] (Heydon J). See also Rees, above n 5, 143–5.

279 *Willcox v Sing* [1985] 2 Qd R 66, 72 (Connolly J; Campbell CJ agreeing at 67; Thomas J agreeing at 87); *Council of the Queensland Law Society Inc v Roche* [2004] 2 Qd R 574, 577 [9] (de Jersey CJ; McMurdo P agreeing at 589 [48]; Williams JA agreeing at 592 [59]); *Alroe v Medical Board of Queensland* [2004] QCA 364, [7] (McMurdo P; Dutney J agreeing at [63]), [54] (Williams JA); *Mustac v Medical Board of Western Australia* [2004] WASCA 156, [73] (Simmonds J); *Lindsay v Health Care Complaints Commission* [2005] NSWCA 356, [7] (Hunt AJA; Mason P agreeing at [1]; Hodgson JA agreeing at [2]); *Puryer v Legal Services Commissioner* [2012] QCA 300, [23] (Holmes JA; Gotterson JA agreeing at [43]; North J agreeing at [44]); *Legal Profession Conduct Commissioner v Morcom* (2016) 126 SASR 331, 347 [96] (Kourakis CJ, Blue and Doyle JJ). But see *Polglaze v The Veterinary Practitioners Board of New South Wales* [2010] NSWCA 4, [5] (Beazley JA), [18]–[19] (Handley AJA). See also Mendelson, above n 5, 150; de Plevitz, above n 5, 318.

280 *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 255 (Brennan J); *Horne v Minister for Immigration and Citizenship* [2008] FCA 581, [54] (Sackville J).

281 *Porteous v McNamara* [1999] WASCA 123, [10] (Wheeler J); *Myles v Carroll* [2003] WASCA 160, [12] (Heenan J); *RJE v Secretary, Department of Justice* (2008) 21 VR 526, 534 [25] (Maxwell P and Weinberg JA; Nettle JA agreeing at 552 [96]); *Thomas v Mowbray* (2007) 233 CLR 307, 355–6 [113] (Gummow and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1, 101 [257] (Heydon J); *R v Draoui* (2015) 122 SASR 360, 384 [120] (Blue J; Kelly J agreeing at 361 [1]; Bampton J agreeing at 390 [160]).

282 Hunyor, above n 9, 540; Manning, above n 10, 400; Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act', above n 76, 156; Daryl Higgins and Rae Kaspiew, '"Mind the Gap": Protecting Children in Family Law Cases' (2008) 22 *Australian Journal of Family Law* 235, 248–9;

Consider *Morrison*,[283] the 'swapped baby case'. The High Court required exceptionally strong evidence from the plaintiff that the child was hers, because a 'false positive' where the court ordered the wrong child's return would have grave consequences.[284] But none of the judges appreciated that a 'false negative', failing to return the *right* child to the *right* family, would be almost as bad. In either case, the children would grow up with the wrong families. (Indeed, in *Morrison*, some sources suggest that the failure to return the *right* child caused unhappiness for all involved as the children grew up to resemble their biological parents and the court's mistake became increasingly clear.)[285] Admittedly, a 'false positive' would be *somewhat* worse because of the additional disruption to both children's lives.[286] But because *either* error would have grave consequences, the Consequences of Error Model would not require proof excluding 'every other reasonable hypothesis',[287] 'all real doubt and risk of error',[288] and 'all reasonable doubt'.[289] That would increase the likelihood of false negatives with their associated consequences. Instead, the model would require us to make whichever finding was *somewhat* more likely, perhaps leaning *somewhat* towards the negative to account for false positives' *somewhat* worse consequences.

Similarly, many cases where *Briginshaw* was applied because of the grave consequences of 'false positives' also have significant consequences for 'false negatives'.[290] Patients with dangerous psychiatric illnesses who are wrongly *not* detained may harm themselves or others (though it may be difficult to determine exactly how likely these outcomes are).[291] Severely mentally disabled women who are wrongly *not* sterilised may suffer the anxiety of pregnancies they cannot

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Ronald J Allen and Larry Laudan, 'Deadly Dilemmas' (2008) 41 *Texas Tech Law Review* 65, 85–6; Chisholm, 'Child Abuse Allegations in Family Law Cases: A Review of the Law', above n 9, 12; Young, Dhillon and Groves, above n 231, 254.

283 (1949) 80 CLR 626.

284 Ibid 636–7 (Latham CJ), 640 (Rich J), 642 (Dixon J), 648 (McTiernan J), 654 (Webb J).

285 See Colin Duck, 'Hospital Error Has Echoes of Heartbreaking Story: Gut-Wrenching Switch', *Geelong Advertiser* (Geelong), 21 July 2011, 44; *Whose Baby?* (Directed by Ian Barry, Crawford Productions, 1986).

286 *Morrison* (1949) 80 CLR 626, 637 (Latham CJ), 640 (Rich J), 642 (Dixon J).

287 Ibid 640 (Rich J).

288 Ibid 642 (Dixon J).

289 Ibid 648 (McTiernan J).

290 Redmayne, above n 10, 190–1.

291 See, eg, *R v Schafferius* [1987] 1 Qd R 381, 383 (Thomas J; Andrews CJ agreeing at 381; Ryan J agreeing at 384); *A-G (Qld) v Kamali* [1999] QCA 219, [9] (de Jersey CJ, Thomas JA and Demack J); *McGarry v The Queen* [1999] WASCA 276, [24] (Kennedy J); *Pendleton v The Queen* [2002] WASCA 4, [24] (Kenny J; Wallwork J agreeing at [48]; Pidgeon AJ agreeing at [49]); *Thompson v The Queen* [2002] WASCA 230, [42] (Templeman J; Murray J agreeing at [51]; McKechnie J agreeing at [64]); *Yarran v The Queen* (2003) 27 WAR 427, 430–2 [11]–[12] (McKechnie J; Malcolm CJ agreeing at 428 [1]; Anderson J agreeing at 428 [2]); *DAR v DPP (Qld)* [2008] QCA 309, [82]–[83] (Keane JA; Holmes JA agreeing at [95]; Fraser JA agreeing at [98]); *Harvey v A-G (Qld)* [2011] QCA 256, [10] (McMurdo P); *NOM v DPP (Vic)* (2012) 38 VR 618, 647 [91] (Redlich and Harper JJA and Curtain AJA); *SCN v DPP (Qld)* [2016] QCA 237, [4] (McMurdo P; Gotterson JA agreeing at [37]; Morrison JA agreeing at [38]). See also *Nigro v Secretary, Department of Justice* (2013) 41 VR 359, 403–4 [161]–[163] (Redlich, Osborn and Priest JJA); McSherry, above n 19, 217.

understand, resulting in children they cannot raise.[292] Yet in each case, only 'false positive' consequences were considered. True, in particular cases 'false negatives' may be less serious, and arguably it is *somewhat* worse for courts to actively perpetrate injustices through 'false positives' than to passively allow them through 'false negatives'.[293] But this does not justify *disregarding* false negatives' consequences, rather than weighing them against those of false positives.

The High Court has implicitly acknowledged the problem by creating an exception in removal of custody cases. There, applying *Briginshaw* makes it difficult to prove children have been abused because of the allegation's seriousness and false positives' grave reputational harm.[294] By construing legislative references to 'the best interests of the child'[295] to include avoiding unacceptable *risks* of abuse, the Court has allowed the grave consequences of a 'false negative' to justify the removal of children.[296] But the exception illustrates the difficulties with the general rule, and cannot be generalised to other cases because it depends on the interpretation of particular family law legislation.[297]

Second, courts' attitudes to whether *Briginshaw* is enlivened by serious *economic* consequences are contradictory. On the one hand, *Briginshaw* applies to decisions affecting livelihoods[298] or (more controversially)[299] government entitlements.[300] Similarly, it applies to awards of civil penalties[301] and exemplary

292 See, eg, *Re Jane* (1988) 94 FLR 1, 27 (Nicholson CJ); *Re L and M* (1993) 17 Fam LR 357, 373 (Warnick J).

293 Leo Katz, 'Form and Substance in Law and Morality' (1999) 66 *University of Chicago Law Review* 566, 569–70; but see John C Hall, 'Acts and Omissions' (1989) 39 *The Philosophical Quarterly* 399, 407–8.

294 *M v M* (1988) 166 CLR 69, 76–7 [22] (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ); *Murphy & Murphy* [2007] FamCA 795, [143] (Carmody J); *Amador & Amador* [2009] FamCAFC 196, [47] (May, Coleman and Le Poer Trench JJ).

295 *Family Law Act 1975* (Cth) s 60CC.

296 *M v M* (1988) 166 CLR 69, 78 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ). See Frank Bates, 'Access where Allegations of Sexual Abuse Are Made: Who Are We Protecting and from What?' (1994) 13 *University of Tasmania Law Review* 237, 240; Parkinson, above n 1, 353; Files, above n 131, 249; Fogarty, above n 23, 265–6; Manning, above n 10, 400; Higgins and Kaspiew, above n 282, 248; Richard Chisholm, 'How to Treat Allegations of Violence and Abuse: *Amador v Amador*' (2010) 24 *Australian Journal of Family Law* 276, 281.

297 See also *Chief Executive Officer, Department for Child Protection v Grindrod [No 2]* (2008) 36 WAR 39, 59–60 [83]–[85] (Buss JA; Wheeler JA agreeing at 41 [1]), 71 [142] (Murray AJA); *Folett & Langley* [2016] FamCAFC 191, [118]–[121] (Strickland, Kent and Austin JJ).

298 *Willcox v Sing* [1985] 2 Qd R 66, 72 (Connolly J; Campbell CJ agreeing at 67; Thomas J agreeing at 87); *Barten v Williams* (1978) 20 ACTR 10, 12 (Blackburn CJ); *Australian Securities and Investments Commission v Reid* (2005) 55 ACSR 152, 156 [23] (Lander J); *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1, 29 [146] (Giles JA; Mason P agreeing at 5 [1]; Beazley JA agreeing at 5 [2]); *Australian Securities and Investments Commission v Plymin* (2003) 175 FLR 124, 206–7, [366]–[367] (Mandie J). See also Mendelson, above n 5, 150; de Plevitz, above n 5, 318; Rees, above n 5, 143–5.

299 *Crook v Consumer, Trader & Tenancy Tribunal of New South Wales* (2003) 59 NSWLR 300, 306 [20], 307–8 [25] (Sheller JA; Mason P agreeing at 301 [1]; Ipp JA agreeing at 311 [42]).

300 *Shaw v Wolf* (1998) 83 FCR 113, 123–4 (Merkel J).

damages [302] because of their severe financial consequences. [303] However, *Briginshaw* is not usually enlivened by large *compensatory* awards [304] or dispositions of property.[305] This cannot be because such awards are not serious financial consequences, since punitive awards could be for smaller amounts. Instead, it is justified on the basis that the consequences of error in either direction are equally grave.[306] When plaintiffs and defendants are considered as a class, 'false positives' wrongly depriving defendants of property are exactly as serious as 'false negatives' wrongly depriving plaintiffs of the same property.

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301 *Trade Practices Commission v Ansett Transport Industries (Operations) Pty Ltd* (1978) 32 FLR 305, 328–9 (Northrop J); *Trade Practices Commission v Nicholas Enterprises Pty Ltd [No 2]* (1979) 26 ALR 609, 642 (Fisher J); *Australian Securities and Investments Commission v Vines* [2002] NSWSC 1223, [1] (Austin J); *Adler v Australian Securities and Investments Commission* [2003] NSWCA 131, [146] (Giles JA; Mason P agreeing at 5 [1]; Beazley JA agreeing at 5 [2]); *Australian Securities and Investments Commission v Plymin* (2003) 175 FLR 124, 206–7, [366]–[367] (Mandie J); *Australian Securities and Investments Commission v Loiterton* [2004] NSWSC 172, [10] (Bergin J); *Construction, Forestry, Mining and Energy Union v Clarke* (2007) 164 IR 299, 309 [32] (Tamberlin, Gyles and Gilmour JJ); *Australian Building and Construction Commissioner v McConnell Dowell Constructors (Aust) Pty Ltd* (2012) 203 FCR 345, 370 [119] (Katzmann J); *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2015] FCAFC 25, [63] (Logan, Bromberg and Katzmann JJ); *Reardon v Magistrates' Court of Victoria* (2018) 331 FLR 291, 319 [136] (Weinberg, Beach and Kyrou JJA). See also Robert Baxt, 'Commercial Law Note' (1978) 52 *Australian Law Journal* 458, 459; Tom Middleton, 'The Difficulties of Applying Civil Evidence and Procedure Rules in ASIC's Civil Penalty Proceedings under the *Corporations Act*' (2003) 8 *Companies and Securities Law Journal* 507, 518; Michelle Welsh, 'Adler, Whitlam, Elliott and Others: Judicial Interpretation of the Civil Penalty Provisions of the *Corporations Act 2001* (Cth)' (2005) 18 *Australian Journal of Corporate Law* 243, 252; Rees, above n 5, 144–5; Michelle Welsh, 'Civil Penalty Orders: Assessing the Appropriate Length and Quantum of Disqualification and Pecuniary Penalty Orders' (2008) 31 *Australian Bar Review* 96, 98; Thomas Middleton, 'The Privilege against Self-Incrimination, the Penalty Privilege and Legal Professional Privilege under the Laws Governing ASIC, APRA, the ACCC and the ATO: Suggested Reforms' (2008) 30 *Australian Bar Review* 282, 312; Janet Austin, 'Does the Westpoint Litigation Signal a Revival of the ASIC s 50 Class Action?' (2008) 22 *Australian Journal of Corporate Law* 8, 19–20; Neil Andrews, 'Editorial Note' (2010) 24 *Australian Journal of Corporate Law* 103, 104; Neil Andrews, 'Editorial Note' (2011) 26 *Australian Journal of Corporate Law* 1, 5.

302 *Backwell v AAA* [1997] 1 VR 182, 211 (Ormiston JA; Brooking and Tadgell JJA agreeing at 184); *Allam v Aristocrat Technologies Australia Pty Ltd* [2012] FCAFC 34, [173] (Bennett, Middleton and Yates JJ); see also Tilbury, above n 217, 171.

303 See also Sebastian de Brennan, 'Freezing Notices and Confiscation Powers: New Punitive Roles for Police?' (2011) 35 *Criminal Law Journal* 345, 351.

304 *Clark v NZI Life Ltd* [1991] 2 Qd R 11, 17 (Thomas J); *G v H* (1994) 181 CLR 387, 399–401 [16]–[18] (Deane, Dawson and Gaudron JJ); *Sinclair & Whittaker* [2013] FamCAFC 129, [86]–[91] (Bryant CJ, Thackray and Aldridge JJ); *Owens & Benson* [2014] FamCAFC 243, [1] (Finn and Strickland JJ). But see *Goodlen Pty Ltd v BP Australia Pty Ltd* [2004] FCAFC 331, [33], [83] (Moore, Tamberlin and Allsop JJ); *Bartlett v Australia & New Zealand Banking Group Ltd* (2016) 92 NSWLR 639, 653 [58]–[60] (Macfarlan JA; Meagher JA agreeing at 662 [98]; Simpson JA agreeing at 664 [108]).

305 *Damberg v Damberg* [2001] NSWCA 87, [44] (Heydon JA; Spigelman CJ agreeing at [1]; Sheller JA agreeing at [2]); *Mischel Holdings Pty Ltd (in liq) v Mischel* [2013] VSCA 375, [67] (Ashley, Priest and Santamaria JJA); *Giarrusso v Veca* (2015) 13 ASTLR 132, 138 [25]–[27] (Garde AJA; Beach JA agreeing at 133 [1]); *Re Tang* (2017) 52 VR 786, 807 [85] (Kyrou and McLeish JJA). But see *Dore v Billinghurst* [2006] QCA 494, [41] (Jerrard JA; Holmes JA agreeing at [51]; McMurdo J agreeing at [58]); *Hadjigeorgiou v New South Wales Crimes Commission* [2007] NSWCA 197, [20] (Giles JA; Santow JA agreeing at [33]); *Veall v Veall* [2015] VSCA 60, [180] (Santamaria JA; Beach JA agreeing at [232]; Kyrou JA agreeing at [233]).

306 Redmayne, above n 10, 171; Dennis, above n 69, 487; Hamer, 'Presumptions, Standards and Burdens: Managing the Cost of Error', above n 70, 222.

But this *general* evaluation of consequences is not always accurate for *particular* causes of action.[307] Consider a bank seeking to enforce a mortgage against a residential mortgagor. Suppose the mortgagor raises defences, such as that their signature was forged. 'False positives' wrongly allowing recovery have particularly serious consequences for mortgagors: the loss of a home can be as psychologically serious as[308] and sometimes lead to[309] family breakdown. Conversely, 'false negatives' wrongly preventing recovery have less serious consequences for banks. To them, the property is valuable only as security, rather than as a home; in any case, if they are in the business of lending, the loss can be written off as tax-deductible.[310] Therefore the consequences of 'false positives' outweigh those of 'false negatives'.

The Consequences of Error Model would require stronger evidence from the bank, and when in doubt, err in the mortgagor's favour. Perhaps within judges' minds or in the jury room, that very reasoning might be applied.[311] But although banks seeking to enforce mortgages against residential mortgagors is a common fact pattern, *Briginshaw* has never been explicitly applied in this way. Instead, the mortgagor's potential defences, such as forgery,[312] fraud[313] and undue influence,[314] are subject to *Briginshaw* in the *opposite direction*, requiring stronger evidence from the *mortgagor*. Thus, the 'gravity of the consequences' factor's application deviates from the model.

3 'Seriousness': Double-Counting Consequences?

The inherent unlikelihood and grave consequences factors are relatively self-explanatory. The concept of 'seriousness' is more nebulous; unhelpfully, courts

307 David Hamer, 'Probabilistic Standards of Proof, Their Complements and the Errors That Are Expected to Flow from Them', above n 56, 74; David Hamer, 'Presumptions, Standards and Burdens: Managing the Cost of Error', above n 70, 228–31.

308 Rand D Conger et al, 'Husband and Wife Differences in Response to Undesirable Life Events' (1993) 34(1) *Journal of Health and Social Behaviour* 71, 79–81; Vivian Kraaij, Ella Arensman, and Philip Spinhoven, 'Negative Life Events and Depression in Elderly Persons: A Meta-Analysis' (2002) 57(1) *The Journals of Gerontology* 87, 91.

309 Rand D Conger et al, 'Linking Economic Hardship to Marital Quality and Instability' (1990) 52(3) *Journal of Marriage and Family* 643, 644; Julie Aniol and Douglas Snyder, 'Differential Assessment of Financial and Relationship Distress: Implications for Couples Therapy' (1997) 23(3) *Journal of Marital and Family Therapy* 347, 349.

310 See *Income Tax Assessment Act 1997* (Cth) s 25-35(1); Australian Taxation Office, *Income Tax: Bad Debts*, TR 1992/18, 24 April 1992.

311 See Diamond and Vidmar, above n 271, 1858; Ellison and Munro, above n 271, 292.

312 *State Trustees Ltd v Whitehead* [2012] VSCA 274, [124] (Neave JA; Tate JA agreeing at [160]; Davies AJA agreeing at [161]); *Lam v Lam* [2017] VSCA 173, [115] (Wheelan, Santamaria and Kaye JJA).

313 *Rejfek* (1965) 112 CLR 517, 521 (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ); *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219, 226 (Mahoney JA); *Neat* (1992) 110 ALR 449, 449–50 (Mason CJ, Brennan, Deane and Gaudron JJ); *Volanne Pty Ltd v International Consulting and Business Management (ICBM) Pty Ltd* [2016] ACTCA 49, [86] (Refshauge ACJ, Perry J and Walmsley AJ).

314 *Giarrusso v Veca* (2015) 13 ASTLR 132, 138 [25]–[27] (Garde AJA; Beach JA agreeing at 133 [1]); *Re Tang* (2017) 52 VR 786, 807 [85] (Kyrou and McLeish JJA).

frequently assert allegations are 'serious' without elaboration.[315] To understand where 'seriousness' fits into the models, I first consider what it means for allegations to be 'serious'.

The better view is that allegations are 'serious' if they involve criminality or moral wrongdoing,[316] assessed by reference to community standards at the time of the conduct.[317] For example, in *Clark v NZI Life Ltd*,[318] an insurer alleged the insured had committed suicide, voiding his life insurance policy. Thomas J observed that suicide had previously been considered a crime and serious moral wrong. However, by the time of the alleged suicide, it had been decriminalised and lost most (but not all) of its moral stigma.[319] His Honour therefore found suicide should not be inferred lightly, but neither was it 'at the top of the range' of *Briginshaw* seriousness.[320] Similarly, modern discussions of *Briginshaw* note adultery is considered less morally serious today, perhaps implying such allegations no longer enliven *Briginshaw*.[321]

Applying that approach, allegations are frequently 'serious' because they involve both criminality and immorality. Examples include allegations of dishonesty (such as fraud,[322] forgery,[323] corruption,[324] perjury,[325] and fabricating[326]

315 *New South Wales v Beck* [2013] NSWCA 437, [73] (Ward JA; Beazley P agreeing at [1]; Barrett JA agreeing at [8]). See, eg, *Kervan Trading Pty Ltd v MMI* [2000] NSWCA 356, [47] (Davies AJA); *Council of the Law Society of New South Wales v A Solicitor* [2002] NSWCA 62, [80] (Sheller JA; Mason P agreeing at [1]; Giles JA agreeing at [117]); *Kirwan v Cresvale Far East Ltd (in liq)* [2002] NSWCA 395, [405] (Giles JA; Meagher JA agreeing at [3]); *Lewis v Shimokawa* [2012] NSWCA 300, [92] (Hoeben JA).

316 *Department of Health v Arumugam* [1988] VR 319, 331 (Fullagar J); *Clark v NZI Life Ltd* [1991] 2 Qd R 11, 16 (Thomas J); *G v H* (1994) 181 CLR 387, 399–400 (Deane, Dawson and Gaudron JJ).

317 *Clark v NZI Life Ltd* [1991] 2 Qd R 11, 16 (Thomas J).

318 [1991] 2 Qd R 11.

319 Ibid 16 (Thomas J).

320 Ibid 17 (Thomas J); see also *Australian Associated Motor Insurers Ltd v Elmore Haulage Pty Ltd* (2013) 39 VR 465, 476 [55] (Kaye AJA; Wheelan JA agreeing at 466 [1]; Vickery AJA agreeing at 466 [2]).

321 *G v H* (1994) 181 CLR 387, 399–400 (Deane, Dawson and Gaudron JJ); *Kantor v Vosahlo* [2004] VSCA 235, [2] (Ormiston JA); Peter Young, 'Current Issues' (2007) 81 *Australian Law Journal* 847, 848; de Plevitz, above n 5, 319; *QAAH v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 145 FCR 363, 390 [103]–[104] (Madgwick J); Bennett and Broe, above n 117, 262; Harry Glasbeek, 'The James Hardie Directors: A Case of Missing Directors and Misdirections by Law' (2013) 28 *Australian Journal of Corporate Law* 107, 114.

322 *Rejfek* (1965) 112 CLR 517, 521 (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ); *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219, 226 (Mahoney JA); *Neat* (1992) 110 ALR 449, 449–50 (Mason CJ, Brennan, Deane and Gaudron JJ); *Williams v Commonwealth Bank of Australia* [1999] NSWCA 345, [133] (Mason P, Priestley JA and Sheppard AJA); *Sharples v O'Shea* [2000] QCA 23, [19] (de Jersey CJ; McMurdo P agreeing at [38]; Helman J agreeing at [47]); *Johns v Cosgrove* [2002] 1 Qd R 57, 70 [22] (Thomas JA; de Jersey CJ agreeing at 65 [1]; McMurdo P agreeing at 65 [2]); *Igloo Homes Pty Ltd v Sammut Constructions Pty Ltd* (2005) 61 ATR 593, 614 [167] (Ipp JA; Santow JA agreeing at 594 [1]); *Palios Meegan & Nicholson Holdings Pty Ltd v Shore* (2010) 108 SASR 31, 37 [61] (Gray J; Nyland J agreeing at 33 [1]), [136] (Vanstone J); *Bale v Mills* (2011) 81 NSWLR 498, 505 [23] (Allsop P, Giles JA and Tobias AJA); *Rasch Nominees Pty Ltd v Bartholomaeus* [2013] SASCFC 23, [17] (Gray J; Sulan J agreeing at [83]; Stanley J agreeing at [94]); *Vu v New South Wales Crime Commission* [2013] NSWCA 282, [75] (McColl JA; Meagher JA agreeing at [105]; Emmett JA agreeing at [112]); *White v Johnston* (2015) 87 NSWLR 779, 798 [86] (Leeming JA; Barrett JA agreeing at 782 [3]; Emmett JA agreeing at 785–6 [18]); *Sgro v Australian Associated Motor Insurers Ltd* (2015) 91 NSWLR 325, 336–7 [54] (Beazley P; Meagher JA agreeing at 338 [67]; McDougall J agreeing at 340 [78]); *Young v King* [2016] NSWCA 282, [95] (Emmett AJA; Basten JA agreeing at [25]; and Gleeson

or destroying[327] evidence) and violence (such as assault,[328] sexual assault,[329] and murder).[330] Further, allegations are serious if they involve serious immorality but

JA agreeing at [26]); *Westpac Life Insurance Services Ltd v Guirgis* [2015] VSCA 239, [52] (Hansen, Beach and Kaye JJA); *Volanne Pty Ltd v International Consulting and Business Management (ICBM) Pty Ltd* [2016] ACTCA 49, [86] (Refshauge ACJ, Perry J and Walmsley AJ); *Clone Pty Ltd v Players Pty Ltd (in liq)* (2016) 127 SASR 1, 66–7 [304] (Blue J; Stanley J agreeing at 102 [420]); *Nadinic v Drinkwater* (2017) 94 NSWLR 518, 529–30 [47] (Leeming JA; Beazley P agreeing at 520 [1]; Sackville AJA agreeing at 553 [159]); *Anderson v Anderson* (2017) 94 NSWLR 591, 600 [44] (Leeming JA; Basten JA agreeing at 593 [1]; Sackville AJA agreeing at 605 [70]); *Saba v Plumb* [2018] NSWCA 60, [83] (Macfarlan JA; Sackville AJA agreeing at [111]; Emmett AJA agreeing at [130]).

323 *Eggins v Robinson* [2000] NSWCA 61, [28] (Sheller JA; Powell JA agreeing at [71]); *Damjanovic v York Agencies Pty Ltd* [2003] NSWCA 222, [81] (James J; Meagher JA agreeing at [1]; Beazley JA agreeing at [2]); *Creswick v Creswick* [2011] QCA 66, [25] (Fraser JA); *Tabtill Pty Ltd v Creswick* [2011] QCA 381, [30] (Fraser and White JJA, Boddice J); *State Trustees Ltd v Whitehead* [2012] VSCA 274, [124] (Neave JA; Tate JA agreeing at [160]; Davies AJA agreeing at [161]); *LTH Pty Ltd v Tong* [2013] VSCA 268, [28]–[31] (Tate JA; Hansen JA agreeing at [1]); *Telfer v Telfer* (2014) 87 NSWLR 176, 194 [100] (Sackville AJA; McFarlan agreeing at 177 [1]; Gleeson JA agreeing at 177 [2]); *Perpetual Trustees Victoria Ltd v Cox* [2014] NSWCA 328, [105] (Leeming JA; Macfarlan JA agreeing at [1]; Emmett JA agreeing at [8]).

324 *Cox v Corruption and Crime Commission* [2008] WASCA 199, [135]–[139] (Steytler P); *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187, [6] (Beazley P; Bathurst CJ agreeing at [1]).

325 *Clay v Clay* [1999] WASCA 8, [55] (Wallwork, Owen and Parker JJ); *Whitlam v Australian Securities and Investments Commission* (2003) 57 NSWLR 559, 592 [117]–[118] (Hodgson, Ipp and Tobias JJA); *Legal Services Commissioner v Voll* [2008] QCA 293, [41] (Wilson J; Keane JA agreeing at [1]; Dutney J agreeing at [70]); *Carlisle Homes Pty Ltd v Barrett Property Group Pty Ltd* [2009] FCAFC 31, [63] (Tamberlin, Sundberg and Besanko JJ); *Legal Services Commissioner v Dempsey* [2010] QCA 197, [45] (Muir JA; McMurdo P agreeing at [1]; Holmes JA agreeing at [2]); *Shaeffer & Jacobs* [2011] FamCAFC 119, [56] (Bryant CJ and Benjamin J; May J agreeing at [180]); *Viscariello v Legal Practitioners Conduct Board* [2012] SASCFC 147, [69] (Gray, Sulan and Blue JJ); *Kaufman v Kozak* [2013] ACTCA 30, [111] (Penfold, Burns and Cowdroy JJ); *Legal Practitioner v Council of the Law Society of the Australian Capital Territory* [2015] ACTCA 20, [43] (Murrell CJ, Burns and Perry JJ); *Martin v The Queen* [2015] ACTCA 38, [64] (Refshauge, Burns and Ross JJ); *Saad v Fares* [2015] NSWCA 385, [33] (Leeming JA; Beazley P agreeing at [1]); *Dunstan v Higham* [2016] ACTCA 20, [136] (Murrell CJ, Penfold and Rangiah JJ); *Smith v Pangallo* [2017] ACTCA 61, [59] (Burns and Perry JJ; Penfold J agreeing at [1]); *Gann v Hosny* [2017] VSCA 303, [87] (Ashley JA; Santamaria JA agreeing at [1]; Kaye JA agreeing at [2]).

326 *Shekhani v Ardino* [2009] NSWCA 361, [37] (Ipp JA; Bergin CJ in Eq agreeing at [110]; Handley AJA agreeing at [111]); *New South Wales v Beck* [2013] NSWCA 437, [71]–[73] (Ward JA; Beazley P agreeing at [1]; Barrett JA agreeing at [8]).

327 *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524, 586 [173] (Phillips, Batt, and Buchanan JJA).

328 *Bhattacharya v Director-General of Department of Education & Training* [2000] NSWCA 74, [21]–[22] (Mason P, Beazley JA, and Bryson AJA); *Weir v Tomkinson* [2001] WASCA 77, [40] (Kennedy J; Wallwork J agreeing at [122]; Murray J agreeing at [123]); *Ainsworth v Ainsworth* [2002] NSWCA 130, [63] (Sheller JA; Meagher JA agreeing at [1]; Santow JA agreeing at [82]); *Peakhurst v Fox* [2004] NSWCA 74, [50]–[51] (Tobias JA; Sheller JA agreeing at [1]; Pearlman AJA agreeing at [67]); *New South Wales v Koumdjiev* (2005) 63 NSWLR 353, 367–8 [61]–[63] (Hodgson JA; Beazley P agreeing at 355 [1]; Hislop J agreeing at 369 [70]); *Harvey v A-G (Qld)* [2014] QCA 146, [23]–[26] (Holmes JA; Fraser JA agreeing at [47]; Lyons J agreeing at [48]); *Brunoro v Nebelung* [2017] ACTCA 26, [24] (Murrell CJ, Burns and Collier JJ).

329 *Clark v Stingel* [2007] VSCA 292, [37]–[39] (Warren CJ, Chernov and Kellam JJA); *Fortnum & Fortnum [No 3]* [2008] FamCAFC 133, [121]–[122] (Faulks DCJ, Coleman and Cronin JJ); *Leeks v XY* (2008) 21 VR 118, 122 [11]–[12] (Redlich JA; Buchanan JA agreeing at 119 [1]; Vincent JA agreeing at 119 [2]); *Varmedja v Varmedja* [2008] NSWCA 177, [149] (Tobias JA; Hodgson JA agreeing at [1]; McColl JA agreeing at [172]); *Amador & Amador* [2009] FamCAFC 196, [90]–[93] (May, Coleman and

not criminality. While arguably moral boundaries have since shifted,[331] that category was held to include suicide,[332] illegitimacy,[333] and adultery.[334] More recently, it has been held to include officials deliberately acting unlawfully,[335] maliciously,[336] or with actual bias;[337] relatives exercising undue influence over wills;[338] and parties engaging in negotiations in bad faith.[339] Finally, allegations are 'serious' if they involve crimes, even if the underlying conduct is not

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Le Poer Trench JJ); *Dye v Commonwealth Securities Ltd [No 2]* [2010] FCAFC 118, [55] (Marshall, Rares and Flick JJ); *Vergara v Ewin* (2014) 223 FCR 151, 156–8 [21]–[26] (White J; North and Pagone JJ agreeing at 177 [123]); *Council of the New South Wales Bar Association v Franklin [No 2]* [2014] NSWCA 428, [21] (Meagher JA; Beazley P agreeing at [1]; Leeming JA agreeing at [48]); *Fleming v Advertiser-News Weekend Publishing Company Pty Ltd* [2016] SASCFC 109, [100]–[101] (Vanstone, Nicholson and Bampton JJ); *NU v New South Wales Secretary, New South Wales Department of Family and Community Services* (2017) 95 NSWLR 577, 589 [54] (Beazley P; McColl JA agreeing at 596 [85]; Schmidt J agreeing at 596 [86]). See also Hely, above n 70, 40.

330 *Helton v Allen* (1940) 63 CLR 691, 696 (Rich J), 701 (Starke J), 711–2 (Dixon, Evatt, and McTiernan JJ); *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533, 595 [170] (Callinan J); *Hurley v Clements* [2010] 1 Qd R 215, 232–4 [25]–[27] (McMurdo P, Keane and Fraser JJA); *Sands v South Australia* (2015) 122 SASR 195, 256–7 [253] (Blue, Stanley and Nicholson JJ).

331 Young, above n 321, 848; Bennett and Broe, above n 117, 262.

332 *Clark v NZI Life Ltd* [1991] 2 Qd R 11, 16 (Thomas J); *American Home Assurance Company v King* [2001] NSWCA 201, [8]–[12] (Stein JA; Handley JA agreeing at [1]; Beazley JA agreeing at [2]); *Australian Associated Motor Insurers Ltd v Elmore Haulage Pty Ltd* (2013) 39 VR 465, 476 [55] (Kaye AJA; Wheelan JA agreeing at 466 [1]; Vickery AJA agreeing at 466 [2]).

333 *Piggott v Piggott* (1938) 61 CLR 378, 415 (Dixon J), 428–9 (McTiernan J); *Watts v Watts* (1953) 89 CLR 200, 207–10 (Kitto and Taylor JJ); see also *The Ampthill Peerage* [1977] AC 547, 568 (Lord Wilberforce). But see *Family Law Act 1975* (Cth) s 69U(1); *Status of Children Act 1996* (NSW) s 15(1).

334 *Briginshaw* (1938) 60 CLR 336, 347 (Latham CJ), 350 (Rich J), 353 (Starke J), 368 (Dixon J), 373–4 (McTiernan J); see also *Wright v Wright* (1948) 77 CLR 191, 198–9 (Latham CJ), 205–6 (Rich J), 210 (Dixon J), 213–4 (McTiernan J); *Watts v Watts* (1953) 89 CLR 200, 203 (Fullagar J); *Paterson v Paterson* (1953) 89 CLR 212, 218 (Dixon CJ and Kitto J); *Mann v Mann* (1957) 97 CLR 433, 439–40 (Dixon CJ and Williams J); *Locke v Locke* (1956) 95 CLR 165, 167–8 [8]–[11] (Dixon CJ, Williams and Fullagar JJ).

335 *DPP (Vic) v Marijancevic* (2011) 33 VR 440, 461 [80] (Warren CJ, Buchanan and Redlich JJA); *Commonwealth v Fernando* (2012) 200 FCR 1, 28–9 [128]–[130] (Gray, Rares and Tracey JJ); *New South Wales v Roberson* [2016] NSWCA 151, [85] (Basten JA; Beazley P agreeing at [1]; Macfarlan JA agreeing at [91]); *Gould v Deputy Commissioner of Taxation* (2017) 104 ATR 608, 613–4 [21] (Logan J).

336 *New South Wales v Hathaway* [2010] NSWCA 184, [263]–[266] (Tobias, McColl and Macfarlan JJA); *El-Wasfi v New South Wales* [2017] NSWCA 332, [113] (Leeming JA; Simpson agreeing at [230]; Payne JA agreeing at [231]).

337 *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71, 122 (Burchett J), 123 (Wilcox J); *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 531 [69] (Gleeson CJ and Gummow J), 546 [127] (Kirby J); *Crewdson v Industrial Relations Commission of New South Wales* [2007] NSWCA 178, [36], [43]–[45] (Hodgson JA; Mason P agreeing at [1]; Handley AJA agreeing at [49]); *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, 524–5 [104] (Basten JA; Spigelman CJ agreeing at 506–7 [1]; Campbell JA agreeing at 553 [234]); *SZQMZ v Minister for Immigration and Citizenship* [2012] FCA 1005, [34] (Cowdroy J); *Spirits International BV v Federal Treasury Enterprise (FKP) Sojuzplodoimport* [2013] FCAFC 106, [20] (Jacobson and Jessup JJ); *SZSMD v Minister for Immigration and Border Protection* [2015] FCA 202, [41] (Rares J); *Cleret v Sunshine Coast Regional Council* [2017] QCA 163, [79] (Morrison JA; Mullins J agreeing at [91]; Flanagan J agreeing at [92]).

338 *Giarrusso v Veca* (2015) 13 ASTLR 132, 138 [25]–[27] (Garde AJA; Beach JA agreeing at 133 [1]); *Re Tang* (2017) 52 VR 786, 807 [85] (Kyrou and McLeish JJA).

339 *Masters Home Improvement Australia Pty Ltd v North East Solution Pty Ltd* [2017] VSCA 88, [281] (Santamaria, Ferguson and Kaye JJA).

obviously immoral. Inadvertent failures to comply with time limits in takeover legislation[340] and tax accountants inadvertently overstepping into giving legal advice[341] could fall into that category.

Consequently, conduct that is unlawful *but not criminal* will only be 'serious' if it is also considered morally wrong. Thus, *deliberate* discrimination is serious,[342] but *unintentional* discrimination is not.[343] *Dishonest* breaches of the *Corporations Act*[344] or fiduciary duties[345] are serious, but *good faith* breaches are not.[346] Medical practitioners *abusing their position* is serious, but ordinary medical negligence is not.[347]

Does *Briginshaw* 'seriousness' fit into either model? The Prior Probability Model only considers unlikelihood, and as Part III(C)(1) explained, allegations can be 'serious' without being unlikely. Some argue seriousness fits into the Consequences of Error Model, because serious allegations have serious

340 *Cuming Smith & Co Ltd v Westralian Farmers Co-operative Ltd* [1979] VR 129, 147 (Kaye J).

341 *Orrong Strategies Pty Ltd v Village Roadshow Ltd* (2007) 207 FLR 245, 436 [821] (Habersberger J); *Defteros v Scott* [2014] VSCA 154, [16] (Santamaria JA; Neave JA agreeing at [1]).

342 *Department of Health v Arumugam* [1988] VR 319, 331 (Fullagar J); *Sharma v Legal Aid (Qld)* [2002] FCAFC 196, [40] (Heerey, Mansfield and Hely JJ).

343 *Victoria v Macedonian Teachers Association of Victoria Inc* (1999) 91 FCR 47, 50–1 (O'Connor, Sundberg and North JJ); *Gama* (2008) 167 FCR 537, 576 [137] (Branson J). See also Natalie Blok, 'It Is (Not) OK to Offer "Black Babies" to Indigenous Employees in the Commonwealth Public Service' (2016) 23 *Australian Journal of Administrative Law* 119, 123; de Plevitz, above n 5, 324.

344 *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253, 364 [454] (Santow J); *Whitlam v Australian Securities and Investments Commission* (2003) 57 NSWLR 559, 596 [138], 602 [157] (Hodgson, Ipp and Tobias JJA); *Australian Securities and Investments Commission v Loiterton* [2004] NSWSC 172, [258] (Bergin J); *Macks v Viscariello* (2017) 130 SASR 1, 121–2 [599] (Lovell J, Corboy and Slattery AJJ).

345 *Barwick v Law Society of New South Wales* (2000) 169 ALR 236, 270–1 [159] (Callinan J); *Cureton v Blackshaw Services Pty Ltd* [2002] NSWCA 187, [110] (Sheller JA; Meagher JA agreeing at [1]; Beazley JA agreeing at [121]); *White Constructions (ACT) Pty Ltd (in liq) v White* [2005] NSWCA 173, [231] (Ipp JA; Santow JA agreeing at [1]; McColl JA agreeing at [327]); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 162 [170] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *King Network Group Pty Ltd v Club of the Clubs Pty Ltd* [2008] NSWCA 344, [56] (Hodgson JA; Campbell JA agreeing at [73]); *Westpac Banking Corporation v The Bell Group (in liq) [No 3]* (2012) 270 FLR 1, 562–3 [2916] (Carr AJA); *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609, 613 [8] (Gleeson JA), 619 [38] (Leeming JA); *Jones v Invion Ltd* [2015] QCA 100, [49] (Philippides JA; McMurdo P agreeing at [1]; Lyons J agreeing at [85]). But see *Fensford Pty Ltd v Nour Pty Ltd* [2006] VSCA 118, [68]–[69] (Nettle JA; Chernov JA agreeing at [1]; Ashley JA agreeing at [76]). See also *Council of the Queensland Law Society Inc v Lowes* [2003] QCA 201, [7], [14] (de Jersey CJ; Jerrard JA agreeing at [28]; Helman J agreeing at [29]); *Marriner v Australian Super Developments Pty Ltd* (2012) 46 VR 213, 237 [95] (Neave and Mandie JJA and Judd AJA); *Kumar v Legal Services Commissioner* [2015] NSWCA 161, [60] (Leeming JA; Basten JA agreeing at [1]; Sackville AJA agreeing at [117]); Patricia Cahill, 'Commercial Equity: The Unsettled Second Limb of *Barnes v Addy*' (2016) 42 *Australian Bar Review* 1, 10.

346 *Dimos v Skaftouros* (2004) 9 VR 584, 611 [127] (Dodds-Streeton AJA; Winneke P agreeing at 586 [1]; Batt JA agreeing at 593 [15]). See also *Australian Securities and Investments Commission v Loiterton* [2004] NSWSC 172, [258], [453] (Bergin J); Rees, above n 5, 143–5. But see *Prescott-Smith v Sandhu* [2001] NSWCA 43, [47]–[48] (Sheller JA; Fitzgerald JA agreeing at [88]; Ipp JA agreeing at [92]); *Gad v Health Care Complaints Commission* [2002] NSWCA 111, [32]–[40] (Stein JA; Meagher JA agreeing at [1]; Sheller JA agreeing at [2]).

347 *T v Medical Board of South Australia* (1992) 58 SASR 382, 391 (Matheson J), 404 (Olsson J), 423 (Debelle J). See also *Morley v Australian Securities and Investments Commission* (2010) 247 FLR 140, 174–5 [741] (Spigelman CJ, Beazley and Giles JJA).

consequences and vice versa.[348] This view is supported by the test for seriousness. By definition, criminal conduct has the grave consequence of risking criminal punishment, and conduct judged immoral by the community has the grave consequence of risking reputational damage and defendants feeling shame at the court's censure of their wrongdoing. However, if this view is correct, courts applying Dixon J's three-factor test to decide whether *Briginshaw* is enlivened 'double-count' consequences: once because of their gravity, and a second time because they render allegations serious.

However, the better view is that 'seriousness' does not *entirely* overlap with the gravity of the consequences.[349]

First, as Part III(C)(1) explained, there are *some* situations in which allegations involve criminality or immorality without any serious consequences (such as fraud claims heard in closed court), or serious consequences but no criminality or immorality (such as *Morrison*'s accidentally swapped babies). Asking whether allegations are serious or findings have grave consequences are two different sorts of inquiry.[350] The former concerns whether conduct is *right or wrong*, a legal and moral question not dependent on whether the court finds the conduct occurred. The latter concerns the practical outcome of proceedings, an empirical question dependent on the findings.

Second, *Briginshaw*'s much quoted[351] language supports this distinction. Dixon J refers to *three* factors separated by the word 'or'.[352] McTiernan J similarly distinguishes 'the nature of the issue and its consequences'.[353] This suggests the factors should be considered *separately*, particularly because the consequences consideration is *in addition to* the seriousness consideration identified by the other judges.[354]

However, if *Briginshaw* seriousness is distinct from the gravity of the consequences, *Briginshaw* further diverges from the models. The *inherent* moral and legal aspects of 'seriousness' do not find expression in the Prior Probability Model's calculation of probability, nor the Consequences of Error Model's evaluation of consequences (of course, the Consequences of Error Model could consider any *consequences* of 'serious' conduct, such as punishment, reputational damage, or shame at the court's censure). We might be able to justify seriousness as an independent consideration by appealing to some value *outside* the models' values of reaching the correct outcome and consequentially

348 de Plevitz, above n 5, 328. See also Dennis, above n 69, 484.

349 Redmayne, above n 10, 193–4.

350 Ligertwood, 'The Uncertainty of Proof', above n 10, 374.

351 See, eg, *Helton v Allen* (1940) 63 CLR 691, 711–2 (Dixon, Evatt, and McTiernan JJ); *Locke v Locke* (1956) 95 CLR 165, 168–8 [8]–[11] (Dixon CJ, Williams and Fullagar JJ); *M v M* (1988) 166 CLR 69, 76–7 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ); *Neat* (1992) 110 ALR 449, 449–50 (Mason CJ, Brennan, Deane and Gaudron JJ); *G v H* (1994) 181 CLR 387, 399 (Deane, Dawson and Gaudron JJ); *Commissioner of the Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 576 [219] (Gummow J); *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, 84–5 [201] (Hayne J); *Re Day* (2017) 91 ALJR 262, 268 [15] (Gordon J).

352 *Briginshaw* (1938) 60 CLR 336, 362 (Dixon J).

353 Ibid 372 (McTiernan J).

354 Ibid 343–4 (Latham CJ), 350 (Rich J), 353 (Starke J), 372 (McTiernan J).

minimising the costs of error. For example, perhaps there is *inherent* value in treating people with dignity, such that we do not lightly find them guilty of serious allegations, *even if* those findings have no particular consequences. Whether such 'inherent' values exist, or can be easily divorced from purely consequentialist considerations, is a contested proposition that is beyond the scope of this article. The important point for our purposes is that, whether or not we consider *Briginshaw* seriousness distinct from the gravity of the consequences, the way Dixon J's three-factor test is applied deviates from our models.

B The Rejection of the Variable Standard Interpretation Deviates from the Consequences of Error Model, and Contradicts Dixon J's Three-Factor Test

The Evidentiary Requirement Interpretation requires *particularly strong* evidence to show certain allegations are more likely than not, but does *not* require proof to a higher degree of probabilistic certainty. In this part, I show that this interpretation diverges from the Consequences of Error Model and cannot account for improbable but grave consequences. Further, it contradicts Dixon J's three-factor test, because *Briginshaw* also applies to serious but not unlikely allegations that require no additional evidence under the Prior Probability Model.

1 The Rejection of the Variable Standard Interpretation Means Briginshaw Deviates from the Consequences of Error Model and Cannot Account for Improbable but Grave Consequences

Part II(B)'s Russian roulette example illustrated the importance of considering improbable but grave consequences. The Consequences of Error Model deals with such consequences by considering *all* possible outcomes, irrespective of whether they are more likely than not, weighted by their likelihood. Because of the rejection of the Variable Standard Interpretation, *Briginshaw* is unable to take that step, with deeply counterintuitive results.

Suppose we apply *Briginshaw* to the decision to play Russian roulette as an example of such cases. On Dixon J's three-factor test,[355] *Briginshaw* is enlivened because of the gravity of the consequences. However, on the Evidentiary Requirement Interpretation, *Briginshaw* is satisfied. We know that, five times out of six, Russian roulette is perfectly safe, and on the Evidentiary Requirement Interpretation, 'if the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain'.[356] Seeking stronger evidence according to the Evidentiary Requirement Interpretation, or examining the evidence more closely according to the Evidentiary Treatment Interpretation, will only confirm the $\frac{5}{6}$ likelihood of winning. The reasoning that

355 Ibid 362 (Dixon J).

356 *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638, 642–3 (Deane, Gaudron and McHugh JJ). See also Eggleston, 'Probabilities and Proof', above n 10, 209; Hodgson, 'The Scales of Justice: Probability and Proof in Legal Fact-Finding', above n 152, 732.

prevented us from playing Russian roulette in Part II(B) is that we required a *higher standard* of probabilistic certainty than 'more likely than not': on our approximate calculations, at least 99.99 per cent certainty. Yet rejecting the Variable Standard Interpretation means we cannot adopt this reasoning. Because five times out of six we will win, we are forced to treat Russian roulette as perfectly safe, and in the Russian roulette class of cases, disregard improbable but grave consequences. This is deeply counterintuitive and contrary to the Consequences of Error Model.

The Evidentiary Requirement Interpretation's defenders might seek to avoid this conclusion by appealing to Dixon J's additional requirement that trial judges *subjectively believe* allegations are true.[357] By definition, 'subjective belief' varies between people, but few would feel a 'comfortable satisfaction'[358] of winning Russian roulette. However, as a purely factual matter, you *should* subjectively believe the chamber is empty. The *reason* we would not feel 'satisfied' is that the odds of winning may be more likely than not, but to feel 'comfortable' we would like them to be much higher. But this reintroduces the Variable Standard by stealth, [359] which is again the very reasoning forbidden by the accepted Evidentiary Requirement Interpretation.[360]

This deviation from the Consequences of Error Model means that *Briginshaw* cannot account for improbable but grave consequences. The difficulty arises not just in our hypothetical, but in any situation where there are unlikely but grave consequences if the wrong decision is made: for example, to deport people who are *probably not* genuine refugees (but would face severe persecution upon returning if they were);[361] to make findings of fraud against defendants who are *probably* fraudsters (but whose livelihoods and reputations would be unjustly ruined if they were not);[362] or to grant custody to parents who are *probably not* child abusers. In the first two examples, even the *tiniest* preponderance of probability is legally sufficient.[363] As Part V(A)(2) explained, the High Court has

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357 *Briginshaw* (1938) 60 CLR 336, 363 (Dixon J). See *Helton v Allen* (1940) 63 CLR 691, 711 (Dixon, Evatt, and McTiernan JJ); *Jones v Dunkel* (1959) 101 CLR 298, 304–5 (Dixon CJ); *Holloway v McFeeters* (1956) 94 CLR 470, 477 (Dixon CJ); *Nesterczuk v Mortimore* (1965) 115 CLR 140, 149 (Kitto J); *West v Government Insurance Office of New South Wales* (1981) 148 CLR 62, 65–6 (Stephen, Mason, Aickin and Wilson JJ). *Contra TNT Management Pty Ltd v Brooks* (1979) 23 ALR 345, 351–4 (Murphy J). See also Simpson and Orlov, above n 36, 416; Cohen, 'Should a Jury Say What It Believes or What It Accepts?', above n 153, 469; Hodgson, 'The Scales of Justice: Probability and Proof in Legal Fact-Finding', above n 152, 732; Rahman, above n 152, 198–9.

358 *Briginshaw* (1938) 60 CLR 336, 350 (Rich J).

359 Eggleston, 'Probabilities and Proof', above n 10, 189; Ligertwood, 'The Uncertainty of Proof', above n 10, 389; Martin Davies, 'Proximate Cause in Insurance Law' (1996) 7 *Insurance Law Journal* 135, 143.

360 Hamer, 'The Civil Standard of Proof Uncertainty: Probability, Belief and Justice', above n 10, 509–10.

361 See, eg, *Ngaronoa v Minister for Immigration and Citizenship* (2007) 244 ALR 119, 122 [12] (Bennett and Buchanan JJ; Moore J agreeing at 119 [1]).

362 See, eg, *Rejfek* (1965) 112 CLR 517, 521 (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ); *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219, 226 (Mahoney JA); *Neat* (1992) 110 ALR 449, 449–50 (Mason CJ, Brennan, Deane and Gaudron JJ); *Volanne Pty Ltd v International Consulting and Business Management (ICBM) Pty Ltd* [2016] ACTCA 49, [86] (Refshauge ACJ, Perry J and Walmsley AJ).

363 See *Ngaronoa v Minister for Immigration and Citizenship* (2007) 244 ALR 119, 122 [12] (Bennett and Buchanan JJ; Moore J agreeing at 119 [1]).

developed an exception in relation to the last example, requiring only a *real risk* of abuse to deny custody.[364] However, that exception illustrates the difficulties with the general rule, and cannot be generalised to other civil cases as it depends on family law legislation's particular language.[365]

2 The Rejection of the Variable Standard Interpretation Contradicts Dixon J's Three-Factor Test

The Evidentiary Requirement Interpretation seems to accord with the Prior Probability Model. Each provides that, for certain allegations, stronger evidence is required to satisfy the court the allegations are more likely than not. However, Part IV showed that the High Court has endorsed *both* Dixon J's three-factor test for when *Briginshaw* is enlivened, *and* the Evidentiary Requirement Interpretation. The *combination* of these principles results in contradictions.

Consider allegations which are serious and have grave consequences, but which are not *inherently* unlikely. Their seriousness and grave consequences mean that, on Dixon J's three-factor test, *Briginshaw* is enlivened.[366] Therefore, on the Evidentiary Requirement Interpretation, stronger evidence is required to establish the allegations are more likely than not. But in terms of the Prior Probability Model, this makes no sense. The model says that allegations' inherent unlikelihood, not their seriousness or consequences, determines how likely they are given certain evidence. Because the allegation is not inherently unlikely, we should not need such strong evidence to establish it is more likely than not. Dixon J's three-factor test tells us *Briginshaw* applies, but on the Evidentiary Requirement Interpretation, there is nothing for *Briginshaw* to do.

Part of the difficulty is that the current understanding of *Briginshaw* combines the intuitions behind the Prior Probability and Consequences of Error Models into a single step. Dixon J's three-factor test assesses whether *Briginshaw* is enlivened by reference to the considerations behind *both* models,

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364 *M v M* (1988) 166 CLR 69, 78 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ). See Bates, 'Access where Allegations of Sexual Abuse Are Made: Who Are We Protecting and from What?', above n 296, 240; Parkinson, above n 1, 353; Files, above n 131, 249; Fogarty, above n 23, 265–6; Manning, above n 10, 400; Higgins and Kaspiew, above n 282, 248; Chisholm, 'How to Treat Allegations of Violence and Abuse: *Amador v Amador*', above n 296, 281.

365 See also *Chief Executive Officer, Department for Child Protection v Grindrod [No 2]* (2008) 36 WAR 39, 59–60 [83]–[85] (Buss JA; Wheeler JA agreeing at 41 [1]), 71 [142] (Murray AJA); *Folett & Langley* [2016] FamCAFC 191, [118]–[121] (Strickland, Kent and Austin JJ).

366 *Clark v Stingel* [2007] VSCA 292, [37]–[39] (Warren CJ, Chernov and Kellam JJA); *Fortnum & Fortnum [No 3]* [2008] FamCAFC 133, [121]–[122] (Faulks DCJ, Coleman and Cronin JJ); *Leeks v XY* (2008) 21 VR 118, 122 [11]–[12] (Redlich JA; Buchanan JA agreeing at 119 [1]; Vincent JA agreeing at 119 [2]); *Varmedja v Varmedja* [2008] NSWCA 177, [149] (Tobias JA; Hodgson JA agreeing at [1]; McColl JA agreeing at [172]); *Amador & Amador* [2009] FamCAFC 196, [90]–[93] (May, Coleman and Le Poer Trench JJ); *Dye v Commonwealth Securities Ltd [No 2]* [2010] FCAFC 118, [55] (Marshall, Rares and Flick JJ); *Vergara v Ewin* (2014) 223 FCR 151, 156–8 [21]–[26] (White J; North and Pagone JJ agreeing at 177 [123]); *Council of the New South Wales Bar Association v Franklin [No 2]* [2014] NSWCA 428, [21] (Meagher JA; Beazley P agreeing at [1]; Leeming JA agreeing at [48]); *Fleming v Advertiser-News Weekend Publishing Company Pty Ltd* [2016] SASCFC 109, [100]–[101] (Vanstone, Nicholson and Bampton JJ); *NU v Secretary, New South Wales Department of Family and Community Services* (2017) 95 NSWLR 577, 589 [54] (Beazley P; McColl JA agreeing at 596 [85]; Schmidt J agreeing at 596 [86]).

but then the Evidentiary Requirement Interpretation only has the *consequences* of the Prior Probability Model, not the Consequences of Error Model.

3 *The Variable Standard is a Preferable Way of Giving Effect to Our Intuitions, but is Inconsistent with Current Authorities*

A better way of giving effect to our intuitions would be for the law to separate the thought process into two steps. First, we could ask whether the grave consequences of error enliven the Consequences of Error Model, including the consequences of false negatives and economic consequences. If so, we could apply the Variable Standard Interpretation to select a standard of proof (such as proof of a 'real risk' short of 50 per cent likelihood, or beyond reasonable doubt) that errs on the side of caution.[367] Indeed, the High Court adopted a similar approach in setting the standard of an 'unacceptable risk' of child abuse.[368] Second, we could ask whether the Prior Probability Model is enlivened because the allegation is particularly likely or unlikely. If so, we apply something like the Evidentiary Requirement Interpretation and require more or less evidence to reach the standard of proof selected in the first step.

This way of giving effect to our intuitions has considerable advantages. It properly accounts for improbable but grave consequences in accordance with the Consequences of Error Model. It avoids the difficulty that serious but not inherently unlikely allegations should require stronger evidence to establish on the balance of probabilities, contrary to the Prior Probability Model. It also makes the different roles of inherent unlikelihood and grave consequences clear, without necessarily requiring either to be quantified; instead, *qualitative* standards of proof such as proof of a real risk or beyond reasonable doubt could be applied.

Opponents argue that this approach depends on judges evaluating consequences' desirability. This, they say, is highly subjective and will cause inconsistencies between cases.[369] But this difficulty is overstated. In applying *Briginshaw* as currently understood, judges *already* consider whether findings' consequences are grave, and the *much more* subjective notion of whether allegations involve immorality.[370] Further, there is at least *some* community and judicial consensus about certain consequences being *obviously* undesirable (such as wrongful imprisonment[371] or reputational damage).[372] Adopting the above

367 Hamer, 'Presumptions, Standards and Burdens: Managing the Cost of Error', above n 70, 227.

368 *M v M* (1988) 166 CLR 69, 76–7 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ). See also *In the Marriage of S and R* (1999) 149 FLR 149, 173–4 [108]–[110] (Kay, Holden and Mullane JJ); *Amador & Amador* [2009] FamCAFC 196, [47] (May, Coleman and Le Poer Trench JJ).

369 Redmayne, above n 10, 182–3; Kaplan, above n 71, 352.

370 *Department of Health v Arumugam* [1988] VR 319, 331 (Fullagar J); *Clark v NZI Life Ltd* [1991] 2 Qd R 11, 16 (Thomas J); *G v H* (1994) 181 CLR 387, 399–40 (Deane, Dawson and Gaudron JJ).

371 See, eg, *Jendell Australia Pty Ltd v Kesby* [1983] 1 NSWLR 127, 136–7 (McLelland J); *R v Schafferius* [1987] 1 Qd R 381, 383 (Thomas J; Andrews CJ agreeing at 381; Ryan J agreeing at 384); *McGarry v The Queen* [1999] WASCA 276, [24] (Kennedy J); *Pendleton v The Queen* [2002] WASCA 4, [24] (Kenny J; Wallwork J agreeing at [48]; Pidgeon AJ agreeing at [49]); *Thompson v The Queen* [2002] WASCA 230, [42] (Templeman J; Murray J agreeing at [51]; McKechnie J agreeing at [64]); *Yarran v*

approach would likely lead to more appellate guidance about which consequences are 'grave', further reducing any inconsistency.[373] Finally, while the *most accurate* way to assess consequences is assessing them for each case's particular parties, subjectivity could be reduced and the value of appellate guidance increased by assessing consequences at the level of the *cause of action* or *allegation* instead (for example, the reputational damage caused by allegations of murder *generally*, rather than for each case's particular defendant).

A more fundamental objection is that evaluating consequences' undesirability is the type of policy decision better left to the legislature than judges,[374] because the legislature is elected and better able to evaluate consequences by balancing competing interests.[375] But while *general* legislative guidance about *how* to evaluate consequences would clarify some of *Briginshaw*'s ambiguities, *Briginshaw* covers a multitude of sins. It is unrealistic to expect the legislature to define precise standards of proof for every allegation to which *Briginshaw* applies, particularly since the three-factor test's broad language and the variable nature of community moral standards means the category of such allegations is not closed. Rather, applying *general* principles to determine the correct outcome on *particular cases*' facts is precisely the task to which courts are best suited.[376]

However, while Dixon J's three-factor formulation combines consideration of unlikelihood and grave consequences, and the Evidentiary Requirement Interpretation prevents us from adopting a variable standard of proof, this approach cannot be adopted. Instead, the Evidentiary Requirement Interpretation means *Briginshaw* deviates from our intuitions, and leads to the counterintuitive result that we should disregard improbable but grave consequences such as those in Russian roulette.

VI CONCLUSION

When a method of risk assessment endorses playing Russian roulette, something has gone badly wrong with its logic. Yet this hypothetical illustrates just what is wrong with the current interpretation of *Briginshaw*.

Contrary to the conventional account, *Briginshaw* left the High Court divided about where the principle was enlivened and its consequences. Subsequent

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The Queen (2003) 27 WAR 427, 430–2 [11]–[12] (McKechnie J; Malcolm CJ agreeing at 428 [1]; Anderson J agreeing at 428 [2]). See also McSherry, above n 19, 217.

372 See, eg, *Piggott v Piggott* (1938) 61 CLR 378, 428–9 (McTiernan J); *Watts v Watts* (1953) 89 CLR 200, 207 (Kitto and Taylor JJ); *Anderson v Blashki* [1993] 2 VR 89, 96 (Gobbo J); *Secretary,Department of Health and Community Services v Gurvich* [1995] 2 VR 69, 74 (Southwell J); *Chief Commissioner of Police v Hallenstein* [1996] 2 VR 1, 19 (Hedigan J); *Hurley v Clements* [2010] 1 Qd R 215, 232–4 [25]–[27] (McMurdo P, Keane and Fraser JJA); *Ashby v Slipper* (2014) 219 FCR 322, 345–6 [68]–[71] (Mansfield and Gilmour JJ). See also Harcourt, above n 4, 56.

373 Redmayne, above n 10, 183.

374 Ibid; Alex Stein, 'Against "Free Proof"' (1997) 31 *Israel Law Review* 573, 582–3.

375 See *Abbott v The Queen* [1977] AC 755, 767 (Lord Salmon); *Airedale NHS Trust v Bland* [1993] AC 789, 879 (Lord Browne-Wilkinson); *Cattanach v Melchior* (2003) 215 CLR 1, 53 (Kirby J).

376 John Rawls, 'Two Concepts of Rules' (1955) 64 *The Philosophical Review* 3, 6–7; Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 *University of Chicago Law Review* 1175, 1177.

consideration and legislative replication partly resolved *Briginshaw*'s ambiguities in favour of Dixon J's three-factor test and the Evidentiary Requirement Interpretation. However, this subsequent consideration deviates from Part II's intuitive and mathematically supported models, and means *Briginshaw* cannot properly account for improbable but extremely grave consequences. We could better give effect to our intuitions by using a variable standard of proof to reflect the consequences of error, and prior probabilities to determine the evidence required to reach that standard, but current authority is inconsistent with this approach.