The Presumption of Innocence, the Burden of Proof and the Assessment of Risk[1]

It is a great honour to be able to be asked to deliver the Peter Nygh Memorial Lecture and to do so in Hobart.

Like most lawyers, my first exposure to Peter Nygh's work was through his seminal text, '*Conflict of Laws in Australia*' which has been through many editions. As a law student and barrister, I recall being confronted by questions such as whether a French national struck by a German-manufactured car, driven by a Canadian holidaying at a resort in Thailand, operated by an American multinational, could sue in South Australia. I turned to Nygh's masterpiece for comfort in those stressful times. Unlike many other texts, including those not confined to the law, Peter Nygh's book would invariably provide concrete answers to the problem at hand.

But the research undertaken for this lecture yielded an image of Peter Nygh as much more than just the author of a very good book. Instead, what emerged was a picture of someone who, having lost both parents by the age of 16 and arriving in Australia at 18,[2] lived a very rich life in the law and beyond. We barristers who become judges like to describe legal careers as a linear progression: student, lawyer, silk, judge etc. Peter Nygh's life in the law defies that framework; instead it was Everything Everywhere All at Once. He was everything: academic, teacher, advocate, law reformer, international lawyer, judge, appeal judge, Tribunal member, Principal Member, author. He did it all at once: many of those roles overlapped. And he was everywhere: he ranged across state and international borders. The academic component of his kaleidoscope of careers began its life in this city in 1960 when, only nine years after arriving in Australia, he took up a position at the University of Tasmania.[3]

The occasion of this lecture reflects just one of those roles that Peter Nygh fulfilled with distinction, namely his service as a Judge of the Family Court of Australia from

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[1] This is the revised version of the Peter Nygh Memorial Lecture delivered on 23 October 2026 in Hobart for the 21st National Family Law Conference.
[2] Bennett, "Peter Edward Nygh" (2002) 76 *Australian Law Journal* 595 at 595 ("Bennett").
[3] Justice Paul Brereton, 'Aspects of Domestic and International Law and Practice in Adoptions' (Peter Nygh Memorial Lecture, National Family Law Conference, 8 October 2014) at 2.

1979 to 1993, having been designated as a judge of the appeal division of that court in 1983.[4] Of course, he discharged the duties of a judge with distinction and erudition and, just as importantly, with fairness, empathy and an exemplary courtroom manner.[5] However, one of the many things that stands out about Peter Nygh is the breadth of his interest in the law, spanning family law, private international law, police powers,[6] tort and damages,[7] constitutional interpretation,[8] refugee law,[9] comparative law[10] and procedure.[11] And that breadth is reflected in the topic of many of these lectures. The lectures, like Peter Nygh himself, serve as a reminder not to let ourselves get locked in our own legal silo. I hope that this lecture fits within that paradigm.

Introduction

As we climb out of our silos can I start with an introduction.

The story may be apocryphal but it is said that a former Chief Justice of the High Court once commenced a speech to a medical conference by saying that when lawyers and doctors meet for professional purposes, it usually turns out badly for one of them.

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[4] Justice Paul Brereton, 'Aspects of Domestic and International Law and Practice in Adoptions' (Peter Nygh Memorial Lecture, National Family Law Conference, 8 October 2014) at 2.
[5] Bennett (2002) 76 *Australian Law Journal* 595 at 595.
[6] See, eg, Nygh, "The Police Power of the States in the United States and Australia" (1967) 2(2) Federal Law Review 183.
[7] See, eg, Nygh, "The Liability of Multi-national Corporations for the Torts of Their Subsidiaries" (2002) 3 *European Business Organization Law Review* 51 at 51-81; Nygh, *Autonomy in International Contracts* (1999); Nygh, "The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort" (1995) 251 *Recueil des Cours* 269 at 269-400; Nygh, "Damages for Trespass" (1963) *Australian Lawyer* 105.
[8] See, eg, Nygh, "An Analysis of Judicial Approaches to the Interpretation of the Commerce Clause in Australia and the United States" (1967) 5 *Sydney Law Review* 353 at 353-397; Nygh, "Doctrine of Political Questions within a Federal System" (1963) 5 *Malaya Law Review* 132; Nygh, "Full Faith and Credit: A Constitutional Rule for Conflict Resolution" (1991) 13 *Sydney Law Review* 415 at 415-434.
[9] See, eg, Nygh, "Recent Developments in Refugee Law" (2000) *Australian Institute of Administrative Law Forum* 1 at 1-25; Nygh, "The Future of the United Nations 1951 Refugees Convention" (2000) *Australian International Law Journal* 1 at 1-24.
[10] See, eg, Nygh, "The Consequences for Australia of the New Netherlands Law Permitting Same Gender Marriages" (2002) 16 *Australian Journal of Family Law* 139 at 139-145; Nygh, "Homosexual Partnerships in Sweden" (1997) 11 *Australian Journal of Family Law* 11 at 11-12; Nygh, "Malaysia, Singapore, Australia and Papua New Guinea: The Common Law Approach to Interpersonal Law in Marriage Relations" (1972) 3 *Lawasia* 137 at 137-157.
[11] See, eg, Nygh, "Choice of Law in Federal and Cross-vested Jurisdiction", in Opeskin and Wheeler (eds), *The Australian Federal Judicial System* (2000) 335 at 335-362; Nygh, "Gould v Brown: Is Cross-vesting Barely Alive?" (1998) 12 *Australian Journal of Family Law* 95 at 95-98.

There is, I think, an equivalent principle for meetings between family lawyers and other types of lawyers. Apart from one exceptional period, I have not had the pleasure of dealing with family lawyers in their professional capacity until today and today undoubtedly provides the nicest circumstances in which that could happen. To be blunt, and please do not take this the wrong way, but I am very happy to be meeting you for the first time at a conference.

That exceptional period in which I dealt with a family lawyer did not involve me as a client. In the early 1990s I worked in a small inner-city firm the size of which Dennis Denuto would have been proud. I occupied a room in which all manner of clientele would enter but they had one thing in common; namely, they were charged with a crime. In the room next to me was a hardworking and far more stressed solicitor whose clientele all faced family breakdown. You might think that clients charged with crimes would usually react badly to the sometimes blunt advice they received as to their prospects. Well, all I can say is that the reactions of my clients to the advice I gave were far quieter and more sanguine than what I heard coming from next door.

Today, I want to again indulge my tendency to eavesdrop on family lawyers, but not by presumptuously telling you how to do your jobs. Instead, in my attempt to live up to Peter Nygh's example, I propose to compare and contrast the approach of the criminal law, the civil law and family law to the resolution of serious allegations of misconduct, especially those concerning family violence or abuse.

***Woolmington*: Burden of Proof**

Reginald Woolmington married Violet Smith in August 1934.[12] Reginald, a farm labourer, was 21 and Violet was 17.[13] Their son was born in October of that year.[14] Reginald and Violet lived together only briefly. According to one report Reginald threatened Violet whenever she left the home.[15] They separated in November and

[12] Glover, "Woolmington in Context: The Excavation of a Case" (2023) 44 *Journal of Legal History* 1 at 4 ("Glover").
[13] Glover (2023) 44 *Journal of Legal History* 1 at 4.
[14] Glover (2023) 44 *Journal of Legal History* 1 at 4.
[15] Crosby, "Well, the Burden Never Shifts, but It Does: Celebrity, Property Offences and Judicial Innovation in Woolmington v DPP" (2023) 43 Legal Studies 104 at 104 ("Crosby").

Violet went to live with her mother. The bare facts of the famous case in legal history that became *The King v Woolmington*[16] record that on 10 December 1934 Reginald visited Violet at her mother's home and she was shot through the heart by a bullet from a sawn-off shotgun. At his trial, Reginald testified that it was an accident and he had not intended to kill or injure her.

To expand, Reginald's "defence" was that he showed the gun to Violet in order to demonstrate that he was prepared to commit suicide if she would not return home.[17] Reginald said he decided to do that the night before and on the morning of the shooting he took a gun from the barn, loaded it with two cartridges, cycled to his parents' house and then to his mother-in-law's home to see Violet. He went around the back into the kitchen, confronted Violet and twice asked her to come back.[18] She eventually said she would not return and, in language drawn from Downton Abbey, said she was "going into service".[19] According to the law reports, Reginald threatened that he would shoot himself if she would not return home: "…and, to explain how he meant to do this, and to show her the gun with which he meant to do it, he unbuttoned his overcoat, and brought the gun across his waist. The gun went off; [he said] he did not know it was pointing at his wife. She fell to the ground."[20]

Reginald then cycled to his parents' house. He put the gun in their shed and told them what happened. He seems to have neglected to tell them that the shooting had been an accident. He had also left Violet in that kitchen without alerting the family next door or seeking medical assistance. When questioned about this Reginald said he was 'confused'.[21]

We have some extra details. Violet's mother testified to Reginald's violent, controlling and possessive behaviour.[22] For her sins in saying this, she was castigated as an

[16] *Woolmington v Director of Public Prosecutions* [1935] AC 462.
[17] Glover (2023) 44 *Journal of Legal History* 1 at 4.
[18] Glover (2023) 44 *Journal of Legal History* 1 at 5.
[19] Glover (2023) 44 *Journal of Legal History* 1 at 19.
[20] Glover (2023) 44 *Journal of Legal History* 1 at 5.
[21] Glover (2023) 44 *Journal of Legal History* 1 at 6.
[22] Glover (2023) 44 *Journal of Legal History* 1 at 13.

interfering mother-in-law[23] and for not encouraging her daughter to comply with what was then understood to be her lawful duty to return to her husband.[24]

There was evidence, only touched upon at Reginald's trials, suggesting that he was upset because Violet's brother had told him that Violet had been seen with another man at the cinema. There was also a note recovered from Reginald's coat written in red ink which stated, "no more cartridges, only two, one for her and one for me."[25]

Violet was shot at close range and died instantaneously.[26] Of the various articles I have read, her story appears to still be untold. We know nothing about her other than she was 17, had a 3-month-old baby and was confronted by a controlling husband with a loaded gun. That story has repeated itself over the ensuing century across the world. Variations on that story were the basis for the first three murder trials I presided over while I was a judge of the Supreme Court of New South Wales.

The Trials and the Appeal

Reginald faced two trials for murder.[27] Even though women could sit on juries in England in the 1930s, both juries were all male and that was possibly because there was a requirement to own property to sit on a jury[28] or perhaps because of the exercise of the rights to challenge jurors, or both.[29] Anyway, at the first trial the jury could not agree on a verdict.[30] It was at that trial that the suggestion of accident first came out in Reginald's evidence, catching the prosecution by surprise.[31] The trial judge at that trial (Finlay J) directed the jury to "[c]onsider whether you entertain the slightest doubt that this was a deliberate killing", and that if they "have no doubt, it is [their] duty to convict", but if the jury were left with a reasonable doubt they had to acquit.[32] That

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[23] Glover (2023) 44 *Journal of Legal History* 1 at 13-14.
[24] Glover (2023) 44 *Journal of Legal History* 1 at 15-16. The 1937 edition of *Eversley's Law of Domestic Relationships*, stated that it was permissible for a husband to "detain his wife within the walls of the matrimonial domicil... when apprehensive of her doing some injury to his property or his honour": Cairns, *Eversley's Law of Domestic Relationships*, 5th ed (1937) at 154.
[25] Glover (2023) 44 *Journal of Legal History* 1 at 6.
[26] Glover (2023) 44 *Journal of Legal History* 1 at 5.
[27] The first at Taunton and the second at Bristol: Crosby (2023) 43 Legal Studies 104 at 107.
[28] Under the *Juries Act 1825* (6 Geo. IV, c. 50).
[29] Glover (2023) 44 *Journal of Legal History* 1 at 16.
[30] Crosby (2023) 43 Legal Studies 104 at 108.
[31] Crosby (2023) 43 Legal Studies 104 at 107.
[32] Crosby (2023) 43 Legal Studies 104 at 108.

direction reflects a burden of proof to the criminal standard resting on the prosecution. However, at the second trial, a different trial judge (Swift J) told the jury that:

> "Once it is shown to the jury that somebody has died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy a jury that what happened was something less, something which might be alleviated, something which might be reduced to a charge of manslaughter, or was something which was accidental, or was something which could be justified."[33]

The jury duly convicted Reginald and the trial judge duly imposed the death sentence as he was obliged to do.[34] Much of the notoriety of this case as well as the history of the law of homicide is explicable by the fact that, for a long period, death was the penalty for murder and it was mandatory.

Reginald's appeal to the Court of Criminal Appeal was dismissed. That Court concluded that the trial judge's direction applied the law of murder "in the way in which it is to be found in the old authorities".[35]

Ordinarily that would have been the end for Reginald. However, for only the third time in history and the first time ever in a murder case, the Attorney-General certified Reginald's case as suitable for appeal on a point of law to the House of Lords.[36] These were days long before there existed a Supreme Court of the United Kingdom.

No one really knows why the Attorney-General certified the case, although there was speculation that it was because the government was generally opposed to the death penalty and there was a sustained campaign underway to save Reginald.[37] The Attorney-General's advisors told him the trial judge's direction was correct.[38]

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[33] *Woolmington v DPP* [1935] AC 462 at 465.
[34] *Offences Against the Person Act 1861* (UK), ss 1 and 2.
[35] *Woolmington v DPP* [1935] AC 462 at 473.
[36] *Criminal Appeal Act 1907* (UK), s 1(6); Glover (2023) 44 *Journal of Legal History* 1 at 27-28.
[37] Glover (2023) 44 *Journal of Legal History* 1 at 20; Crosby (2023) 43 Legal Studies 104 at 115-116.
[38] Crosby (2023) 43 Legal Studies 104 at 115.

And so on went the case to the House of Lords sitting in its judicial capacity. Things moved quickly in those days. As I said, Reginald and Violet were married in August 1934. He shot her on 10 December 1934. Reginald was convicted at his second trial on 14 February 1935.[39] He lost his appeal on 8 March but by April the House of Lords had announced that he had won his appeal with reasons for judgment to be delivered later.[40]

The reasons for judgment handed down in *The King v Woolmington* on 23 May 1935 proved to be a biggy. They were delivered by the Lord Chancellor, Viscount Sankey. The judgment confirmed that the prosecution must prove the prisoner's guilt and "no such burden [is] laid on the prisoner to prove his innocence."[41] Lord Sankey uttered what became a famous passage as follows: [42]

> "Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt. ... If, at the end of and on the whole of the case, there is a reasonable doubt... the prosecution has not made out the case and the prisoner is entitled to an acquittal. ... [T]he principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

The fame of this passage in the popular mind is both direct and indirect. If, like me, you have watched too many episodes of Law and Order, you can hear the echoes of it when Assistant District Attorney Jack McCoy delivers those moralistic closing addresses to the jury. If you are old, and I am old, you may have also heard the quintessential English barrister Horace Rumpole go on about the 'golden thread' in the drama series 'Rumpole of the Bailey'.[43]

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[39] Crosby (2023) 43 Legal Studies 104 at 112.
[40] Block and Hostettler, *Famous Cases: Nine Trials That Changed the Law* (2002) at 40.
[41] *Woolmington v Director of Public Prosecutions* [1935] AC 462 at 481.
[42] *Woolmington v Director of Public Prosecutions* [1935] AC 462 at 481-482.
[43] Mortimer, *Rumpole and the Golden Thread* (1983).

Aftermath

Well the appeal was upheld but what did that mean for Reginald? The unusual procedure of having the Attorney-General certify an appeal to the House of Lords did not make any provision for the House of Lords to order a retrial, so Reginald walked free and headed off into the sunset or, as it was England, headed off into the drizzle. One book reported that he "disappeared into obscurity".[44] There are various records describing the death of a Reginald Woolmington, one suggesting he died during World War II[45] and another in 1962.[46]

In England a debate was touched off as to whether the decision in *Woolmington* represented a change in the law or an affirmation of orthodox principle from which trial judges had strayed.

The trial judge's direction reflected the leading practitioner's text of the day,[47] but a passage invoking a 'golden thread' sounds like it's talking about the law as it always has been. On the other hand, Professor Glanville Williams later described *Woolmington* as a "revolution in the criminal law".[48] The debate about whether *Woolmington* stood for something new or was orthodox became murkier when three days after the judgment was published, one of the law lords who joined in the decision (Lord Hewart) published an article in the Sunday Times about the judgment under the headline "Innocent until Proved Guilty"[49]. Lord Hewart told the readers that the judgment *did* effect a change in the law and quoted a legal academic[50] in saying "we slide ... into a new language and a new train of thought. We now admit that the new decision *has* modified the law".[51]

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[44] Block and Hostettler, *Famous Cases: Nine Trials That Changed the Law* (2002) at 48.
[45] Search for "Reginald Woolmington" on Ancestry.com, available at <https://www.ancestry.com/genealogy/records/results?firstName=reginald&lastName=woolmington&geo_a=r&geo_s=us&geo_t=us&geo_v=2.0.0&o_xid=62916&o_lid=62916&o_sch=Partners>.
[46] Record of "Reginald Woolmington" on Ancestry.com, available at <https://www.ancestry.com/genealogy/records/reginald-woolmington-24-21v1grg?geo_a=r&geo_s=us&geo_t=us&geo_v=2.0.0&o_xid=62916&o_lid=62916&o_sch=Partners>.
[47] *Archbold's Pleadings, Evidence and Practice in Criminal Cases*, referred to in Glover (2023) 44 *Journal of Legal History* 1 at 8.
[48] Williams, 'The Logic of Exceptions' (1988) 47(2) *Cambridge Law Journal* 261 at 264, cited in Glover (2023) 44 *Journal of Legal History* 1 at fn 70.
[49] Lord Hewart CJ, 'Innocent Until Proved Guilty' in the *Sunday Times*, 26 May 1935.
[50] Sir Henry James Sumner Maine.
[51] Crosby (2023) 43 Legal Studies 104 at 119, fn 121.

Whatever the position in England, *Woolmington* was treated in Australia as confirming the orthodox position, with the only real debate being whether, unlike accident, the accused bore an onus of proof with respect to such defences as insanity, self-defence or provocation.[52]

Briginshaw: Standard of Proof and Satisfaction

One thing to be clear about is that *Woolmington* was not concerned with the standard of proof for a criminal charge. Instead, *Woolmington* was concerned with the burden of proof; who has to prove what. In *Woolmington*, it was beyond reasonable doubt that the standard of proof was beyond reasonable doubt. As we know, the criminal standard is to be contrasted with the civil standard, the balance of probabilities.

This difference in standards of proof brings us to our next stop, which is Devonport in 1937. Devonport, Tasmania, that is. Fred and Clarice Briginshaw were married in Victoria in 1932.[53] They stopped living together in 1935.[54] We do not know why, but relations could not have been that bad at that time because Clarice took up a job in a business that Fred ran with his father. However, her time in that job only lasted for about six months and things appear to have deteriorated from there.

In April 1937 Clarice took a job as a hairdresser in Devonport.[55] The population of the Devonport municipality is around 27,000 today and it appears to have around 20 hairdressers.[56] In the 1933 census its population was around 6,500 with females outnumbering males, possibly an ongoing effect of the war.[57] I suspect Devonport had

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[52] *Sodeman v The King* (1936) 55 CLR 192 at 229; *Packett v The King* (1937) 58 CLR 190 at 198; *R v Mullen* (1938) 59 CLR 124 at 128-129, 134 and 138-139.
[53] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 354 ("*Briginshaw*").
[54] *Briginshaw* (1938) 60 CLR 336 at 354.
[55] *Briginshaw* (1938) 60 CLR 336 at 354.
[56] Australian Bureau of Statistics, 'Devonport - 2021 Census All persons QuickStats', available at <https://abs.gov.au/census/find-census-data/quickstats/2021/LGA61610>; Yellow Pages, *Hairdressers in Devonport* (Web Page) available at <https://www.yellowpages.com.au/search-map/devonport-tas-7310/hairdressers?search_lat=-41.227583&search_lon=146.319730&radius=24>.
[57] Commonwealth Bureau of Census and Statistics, 'Census 1933, Vol I, Part VI - Tasmania Population', at 518-521, available at <https://archive.org/details/cbcs-census-1933-vol-i-part-vi-tasmania-population/page/n1/mode/2up>.

very few hairdressers then[58] given the depression and the desire to stay warm. Anyway, on 19 June 1937 Clarice went to a dance at a Devonport hotel.[59] At the dance Clarice met the mystery man referred to in the Commonwealth Law Reports as the "co-respondent", a 21-year-old bank clerk.[60] According to Fred, after the dance they committed "adultery". According to Clarice and the bank clerk, they were introduced at the dance but the person who introduced them became drunk and she helped the bank clerk drive the drunk home and then was driven back to her hotel. They denied anything that amounted to adultery.[61] They said they did not meet up again until the bank clerk took her to another dance a month later when, again, they both denied anything constituting adultery occurred.[62]

As was often the case in family law proceedings in those days, in the meantime Fred's private investigators had rolled into town, as did a friend of his operating 'undercover'. Through various underhanded means they claimed that both the bank clerk and Clarice admitted committing adultery after the dance in June but refused to sign statements to that effect.[63] Clarice and the bank clerk denied making admissions.[64]

Fred filed proceedings in the Supreme Court of Victoria seeking a dissolution of the marriage on the basis that Clarice was guilty of adultery.[65] He joined the bank clerk to the proceedings as a defendant because if adultery was proved the clerk was liable to pay damages.[66] To be satisfied that there were grounds for the dissolution of the marriage, the Supreme Court had to satisfy itself that adultery had been committed,[67] and that was interpreted to mean satisfied on the balance of probabilities.

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[58] Only about 15% of females over 14 were even in paid work: Commonwealth Bureau of Census and Statistics, 'Census 1933, Vol I, Part VI - Tasmania Population' at 520-521, 545, available at <https://archive.org/details/cbcs-census-1933-vol-i-part-vi-tasmania-population/page/n1/mode/2up>.
[59] *Briginshaw* (1938) 60 CLR 336 at 355.
[60] *Briginshaw* (1938) 60 CLR 336 at 355.
[61] *Briginshaw* (1938) 60 CLR 336 at 355.
[62] *Briginshaw* (1938) 60 CLR 336 at 356, 358.
[63] *Briginshaw* (1938) 60 CLR 336 at 356-358.
[64] *Briginshaw* (1938) 60 CLR 336 at 357. Fred also claimed that, after he commenced proceedings, the co-respondent admitted adultery to another independent witness, but this was denied by both the co-respondent and another person present. The drunk was also present at that meeting but no one called him to give evidence: *Briginshaw* (1938) 60 CLR 336 at 358-359.
[65] *Marriage Act 1928* (Vic), s 76.
[66] *Marriage Act 1928* (Vic), s 101.
[67] *Marriage Act 1928* (Vic), s 80.

The trial judge refused to dissolve the marriage. His Honour said that "if this were a civil case I might well consider that the probabilities were in favour of [Fred], but I am certainly not satisfied beyond reasonable doubt that the evidence called by [Fred] should be accepted".[68] Not surprisingly, Fred appealed on the basis that this reasoning involved the application of the wrong standard of proof.

For reasons I will not detain you with, this appeal came directly to the High Court. Dixon J (as he then was) noted the difference between the criminal standard of proof and the civil standard and said that, even with the civil standard, the tribunal of fact "must [still] feel an actual persuasion of [the] occurrence [of the fact] or [its] existence before it can be found" and that it is not enough to engage in a "mere mechanical comparison of probabilities independently of any belief in [the fact's] reality".[69] Dixon J then enunciated the *Briginshaw* principle, which is that, even with proof to the civil standard, "[t]he 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" means that "reasonable satisfaction" should not be produced by reference to "inexact proofs, indefinite testimony, or indirect inferences".[70]

According to Dixon J this principle did not mean that there was a new standard of proof existing somewhere between beyond reasonable doubt and the balance of probabilities.[71] Even so, Fred still failed because Dixon J and the other judges in the majority, perhaps generously, interpreted the trial judge as having stated that he was unable to arrive at a satisfactory or firm and definite conclusion that adultery had been committed, adultery being a serious allegation.[72]

And so Fred did not get his divorce. I would like to be able to tell you what happened to Fred and Clarice next, but the record appears to run cold. Presumably they joined a long list of people in the days before the *Family Law Act 1975* (Cth) of being stuck in marriages neither really wanted, but that is another story.

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[68] *Briginshaw* (1938) 60 CLR 336 at 337, 348.
[69] *Briginshaw* (1938) 60 CLR 336 at 361; cf *Strong v Woolworths Ltd* (2012) 246 CLR 182 at 196-198 [34]-[37].
[70] *Briginshaw* (1938) 60 CLR 336 at 362.
[71] *Briginshaw* (1938) 60 CLR 336 at 362-363.
[72] *Briginshaw* (1938) 60 CLR 336 at 369.

In the end the *Briginshaw* principle appears to have had a longer and happier life than Fred and Clarice's relationship but, like their marriage, it has had some rough patches. To start with, what did the principle really mean? Despite what Dixon J said, is it positing a standard of proof hovering somewhere between the balance of probabilities and beyond reasonable doubt depending on how serious the allegation is or its consequences? Or is the principle just a reminder to trial judges and juries to take extra or particular care in looking at the evidence in certain civil proceedings? Or is the principle saying something about the quality of the evidence that was to be relied on to base a finding in a civil case that someone had done something naughty, or which might cause bad things to happen to them, like a solicitor being struck off?[73]

Subsequent decisions clarified that it is not a new standard of proof but is an approach to that standard of proof directed to the cogency and clarity of the evidence relied on,[74] or, according to some, the strength of the evidence relied on.[75] I think that the former at least is made clear by Dixon J's description of the principle itself because his Honour refers to not relying on "inexact proofs, indefinite testimony, or indirect inferences". If you are in a civil case or a professional standards tribunal and something serious is being alleged, like fraud, your allegation needs to be precise, and your evidence needs to be (relatively) exact, not fuzzy.

What end does the *Briginshaw* principle ultimately serve? Some cases have emphasised one or other of the justifications for its application; ie, a serious allegation, an inherently unlikely occurrence, or the gravity of consequences flowing from a particular finding.[76] The reference to the seriousness of the allegation and the gravity of the consequences can easily be rationalised as protecting the rights and reputation of a person facing grave accusations when they are a party to, or even only a witness in, civil proceedings.

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[73] See Stratton, 'Perfectly Safe, Five Times Out of Six: The *Briginshaw* Principle and its Paradoxes' (2019) 42(2) *UNSW Law Journal* 376 at 397-398.
[74] *Rejfek v McElroy* (1965) 112 CLR 517 at 521.
[75] *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171; 110 ALR 449 at 450.
[76] See, eg, *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171; 110 ALR 449 at 450: “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”.

The Presumption of Innocence

Having meandered around the burden of proof, the standard of proof and *Briginshaw* and, before I come to the far more difficult waters that many of you swim in, I will mention the other concept referred to in the title of this speech, the presumption of innocence.

The presumption of innocence is often misunderstood, but that misunderstanding is understandable. Sometimes even the mighty get confused. In *Coffin v United States*[77] the United States Supreme Court set aside a jury verdict even though the trial judge correctly told the jury that they should acquit the accused unless satisfied of his guilt beyond reasonable doubt. The Supreme Court said the trial judge nevertheless erred in failing to refer to the presumption of innocence as some piece of evidence or factor favouring the accused's acquittal. The Court was solidly panned for the decision,[78] including in one of our own well-known evidence texts.[79]

Two of Scott Turow's highly successful legal thrillers were the novel "Presumed Innocent", later made into a blockbuster movie with Harrison Ford and Australia's very own Greta Scacchi, and a sequel novel called "The Burden of Proof", later turned into a TV series. Brian Dennehy was the only actor in both productions although strangely he played different roles. And a bit like Brian Dennehy, those books really should have been a two-for-one deal, because the presumption of innocence and the burden of proof are really just the same thing or, to be more accurate, the mirror image of each other.

In law, or at least in litigation, all truth is relative and all truth is contextual. To say someone has the benefit of the presumption of innocence is a meaningless statement unless it is located in a relevant legal context. If we refer to the presumption of innocence in the context of someone charged with a crime and facing trial, it means

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[77] (1895) 156 US 432.
[78] Wigmore, *Evidence*, 3rd ed (1940) vol 5 at §2511; see *Taylor v Kentucky* (1978) 436 US 478 at 483.
[79] *Cross on Evidence,* 14th Aust ed (2024) at [7085]. The Supreme Court however has retained an instruction about the presumption of innocence: *Taylor v Kentucky* (1978) 436 US 478 at 484-486.

no more and no less than, unless and until the prosecution has proven the charge beyond reasonable doubt, they are not guilty of a crime. If we refer to the presumption of innocence in the context of a civil case, it means that the party making a serious allegation must prove it to the civil standard bearing in mind *Briginshaw*,[80] and if they do not, then in those proceedings the alleged fact is treated as not having happened. And so on it goes depending on context.

However, as Bret Walker SC explained some years ago, the presumption of innocence is not some free-standing idea to the effect that, because an allegation has not yet been proved beyond reasonable doubt before a jury, or even on the balance of probabilities before a judge, then for any and all purposes everyone must act as though the asserted conduct did not happen.[81] Instead the question comes down to that infuriating response we lawyers always give to questions posed in the abstract, namely "why do you ask?" If you're working in the criminal justice system you get one answer. If you're asking in a workplace context you might get another. So if you're working in a shop and the boss saw you nick a Mars Bar, I don't think saying "I am presumed innocent until a jury finds I stole it" will cut much ice if you want to keep your job.

***M v M*: Future Risk**

So we have the burden of proof, criminal and civil standards of proof, *Briginshaw* and the presumption of innocence. All settled. Well, not quite. All that I have talked about to this point concerns legal proceedings that involve inquiries about what happened in the past. Who did what and to whom? There are other types of inquiries where things can be more complicated. For example, there are counterfactual inquiries, that is, what would have happened in the alternative past or the hypothetical future had something happened or not happened.[82] Again, the approach to those inquiries is context-dependent. For example, does it concern a cause of action in tort or contract or does

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[80] See *Gonzales v Claridades* (2003) 58 NSWLR 188 at 197-198 and the cases there cited.
[81] Bret Walker, 'The Presumption of Guilt' (Speech, Rule of Law Education Centre, 15 June 2021), available at <https://www.ruleoflaw.org.au/lecture-2021-walker-hoenig-cunneen-stewart-merritt-presumption-of-guilt-conference>
[82] See, eg, *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64; *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332.

it arise within an administrative law challenge?[83] Are we looking at causation of loss or damage or the quantification of damages? I will pass over these questions and come to a more pressing concern, the assessment of future risk.

There is an accelerating trend in legislation requiring judges to make relatively complex forward-looking assessments about future risk, ie, to make assessments about what may happen in the future and then balance the risk of that happening or not happening against the cost or risk of taking action or not taking action. A similar type of function has been undertaken by family courts for a long time, specifically in deciding whether the making of a particular custody or parenting order is in the best interests of the child.[84] What happens when an allegation of conduct amounting to a serious crime such as violence or sexual abuse arises in the context of making that assessment?

That very issue arose in *M v M,*[85] which came before the High Court in 1988. In custody proceedings concerning an estranged couple's daughter, the ex-wife resisted her ex-husband being granted access. She contended that her ex-husband had sexually abused their daughter. The trial judge in the Family Court appears to have undertaken a very careful fact-finding exercise. The judge was not satisfied on the balance of probabilities that the ex-husband had sexually abused his daughter.[86] In making that finding the judge relied on the ex-husband's denials, the absence of medical evidence suggesting abuse, the conflicting evidence of the ex-wife about when she first suspected abuse and the initial refusal of the child to disclose abuse.[87] The judge added, however, "I am not sure that he did not do so".[88] That uncertainty arose from evidence of statements made by the daughter to the ex-wife, a police officer and a child psychologist.[89] The judge accepted that there was a possibility that the child had been sexually abused and denied the ex-husband access to eliminate the risk of

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[83] See, eg, *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 524 [38]; *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at 328-329 [14]-[15].
[84] *M v M* (1988) 166 CLR 69 at 76; *Family Law Act 1975* (Cth), s 60CA.
[85] (1988) 166 CLR 69.
[86] *M v M* (1988) 166 CLR 69 at 74.
[87] *M v M* (1988) 166 CLR 69 at 74-75.
[88] *M v M* (1988) 166 CLR 69 at 75.
[89] *M v M* (1988) 166 CLR 69 at 74-75.

abuse.[90] The ex-husband's appeal to the Full Court of the Family Court was dismissed by a majority. His appeal to the High Court also failed.

In the High Court, the husband accepted that the test to be applied was whether there was a real or substantial risk of the child being sexually abused if he had custody of her. However, he argued that, before determining that question, the court had to first make a finding on the balance of probabilities as to whether he had abused his daughter, and if his ex-wife failed on that issue, that was the end of the matter as there was no basis for determining that his having custody or access produced a future risk.[91]

The High Court rejected this argument because it did not accept that custody proceedings, in which the paramount consideration is the best interests of the child, are like normal civil litigation between parties. The High Court observed that a court hearing an application for custody is not resolving a competition between the legal rights of parents to custody of or access to their children. Instead, the significance of parental custody or access to the Court's function in determining custody is that, prima facie, parental access is in the best interests of the child.[92]

The significance of that framing of the inquiry by the High Court in *M v M* is that family courts are not required to resolve allegations of sexual abuse, but may do so in a particular case. If they do, they should not make a positive finding that an allegation of sexual abuse is true “unless the court is so satisfied according to the civil standard of proof, with due regard to the factors mentioned in *Briginshaw*”.[93] If a positive finding that abuse occurred is made then in most cases that would resolve the question of custody. However, if such a finding is not made, that does not conclude the inquiry. What the Court must determine is whether there is a risk of sexual abuse occurring if custody or access is granted and assess the magnitude of that risk. Access to a child by a parent will be denied if there exists “an unacceptable risk that the child would be exposed to sexual abuse" if the parent is awarded custody or access.[94]

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[90] *M v M* (1988) 166 CLR 69 at 75.
[91] *M v M* (1988) 166 CLR 69 at 70.
[92] *M v M* (1988) 166 CLR 69 at 76.
[93] *M v M* (1988) 166 CLR 69 at 76.
[94] *M v M (1988)* 166 CLR 69 at 78.

A lot of water has passed under the *M v M* bridge since it was decided, including various statutory changes yielding the current regime, but even so *M v M* still largely governs the current position. One issue that yielded different answers and was said not to be resolved by *M v M* concerned how a court is to perform the obligation of "determin[ing] whether ... there is a risk of sexual abuse occurring".[95] According to some decisions, that question was itself to be decided according to the balance of probabilities bearing in mind *Briginshaw*. Within the Federal Circuit and Family Court of Australia that controversy was resolved by a five-member decision of the Full Court in *Isles v Nelissen*,[96] where it was held that such conjecture about the unacceptable risk of future sexual abuse is not to be determined on the balance of probabilities.[97]

Leaving aside that question, *Isles v Nelissen* also provides a useful example of how the form of risk assessment yielding an unacceptable risk envisaged by *M v M* operates:[98]

> "Imagine a child will be minded by one of three randomly allocated carers. Assume one of the carers would sexually abuse the child, but the other two would not, meaning the child stands a 33.33 per cent chance of being sexually abused if left in care. No sensible adult would take the risk of leaving the child in care because, even though the prospect of sexual abuse is only possible but not probable, the risk is still too high to tolerate. In other words, it is unacceptable."

I will come back to this example but for now I note that it does not involve any positive finding being made against any particular carer that they sexually abused a child.

Wrapping Up

As I said, these types of forward-looking assessments are no longer largely confined to Family Court proceedings. For example, they are now to be found in statutory

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[95] *M v M (1988)* 166 CLR 69 at 77.
[96] (2022) 65 Fam LR 288.
[97] For a statutory standard of proof relating to future risk, see *Crimes (High Risk Offenders) Act 2006* (NSW), s 5B.
[98] *Isles v Nelissen* (2022) 65 Fam LR 288 at 310 [86].

regimes governing those working with children,[99] and also detention and supervision regimes for offenders who have finished serving their sentences.[100]

When we look at a case like *M v M* it highlights that the presumption of innocence had no meaningful content in that case beyond being the counterpart to the relevant burden of proof of a serious allegation of past misconduct. In *M v M* the making of the allegation of sexual abuse by the ex-wife imposed a form of burden on her to adduce evidence to support that allegation. If she sought a positive finding that the ex-husband abused his daughter then, as *M v M* states, she bore a further burden to establish that on the balance of probabilities bearing in mind the protections of *Briginshaw*. In *M v M* the ex-wife did not discharge *that* burden of proof. However, in the context of child custody proceedings, her failure to prove that the ex-husband had abused their daughter did not mean that the alleged abuse was treated as not having happened in those proceedings. On the contrary, the evidence adduced was still sufficient to establish the possibility of abuse and that possibility had significance because of its capacity to bear on an assessment of future risk. Thus, to refer to the husband as having the benefit of the presumption of innocence in this context means no more than saying that the ex-wife failed to establish the positive finding for which she contended. The presumption had no sensible role to play in the court's assessment of the risk of him committing abuse in the future.

However even if all or any of the burden of proof, *Briginshaw* and the presumption of innocence are not engaged in relation to the assessment of future risk, there is still an obvious potential for grave reputational, professional or other damage to be occasioned to litigants, and possibly witnesses, arising from the evidence produced or the findings in such cases. To return to that example from *Isles v Nelissen,* I do not think anyone would like to be told that there is a one in three chance that if a child is

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[99] See, eg, *Working with Children Check Act 2000* (Qld), s 230; *Child Protection (Working with Children) Act 2012* (NSW), s 15; *Child Safety (Prohibited Persons) Act 2016* (SA), ss 3, 26; *BKE v Office of Children's Guardian* [2015] NSWSC 523.

[100] See, eg, *Crimes (High Risk Offenders) Act 2006* (NSW), ss 5B-5C, 5I; *Criminal Code* (Cth), s 105A.7; *Serious Offenders Act 2018* (Vic), s 14; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), s 13; *High Risk Serious Offenders Act 2020* (WA), ss 35, 48; *Criminal Law (High Risk Offenders) Act 2015* (SA), ss 5, 7; *Dangerous Criminals and High Risk Offenders Act 2021* (Tas), ss 7, 9; *Serious Sex Offenders Act 2013* (NT), ss 8, 9.

placed in their care in the future, the child will be abused. Judges should be, and I think generally are, mindful of that.

However, any such sense of injustice or grievance is no justification for levelling a concern about this approach at the feet of the Federal Circuit and Family Court. The task of assessing the best interests of the child in such cases is imposed on judges of that Court by legislation. To say that they often have to display the wisdom of Solomon is not a metaphor; it is a literal description of much of their jurisdiction. Like other public institutions, including the High Court, decisions of the Federal Circuit and Family Court are legitimate subjects of scrutiny and criticism. But criticism of a judge for simply performing a difficult task required by statute is unjustified. And as with other courts and tribunals, if the statute demands an assessment of future risk, then criticising a judge simply because their identification of a risk of something happening in the future proves to be incorrect is a cheap shot. At some point in the future risks either materialise or they do not.

Woolmington **Revisited**

I referred earlier to the absence of much evidence about the life of Reginald Woolmington after his somewhat miraculous acquittal in the House of Lords. What about Reginald and Violet's son? Well one source states that he was given up for adoption but when his parents' history became known he was rejected and spent many years in a Dr Barnardo's home before being adopted at a later age. According to that source the son only learned of what happened to his parents much later in his life. When he was in his sixties he returned to the village where his parents had lived.[101]

If there were a custodial dispute concerning this boy today, then Viscount Sankey's 'golden thread' would not and should not play too much of a part. I am not the presiding judge or a member of the jury at the Court of Assize at Bristol that tried Reginald. Speaking here today, it makes no sense to speak of Reginald's presumption of innocence in speculating about the outcome of a hypothetical custody application concerning his son. Reginald took a loaded shotgun to confront Violet, while he is said

[101] Block and Hostettler, *Famous Cases: Nine Trials That Changed the Law* (2002) at 48.

to have been carrying a note suggesting there was one bullet for each of them. I do not think most judges exercising jurisdiction under the *Family Law Act 1975* (Cth) would have much difficulty in using those facts to assess future risk.

Thank you for listening.