

**The civil standard of proof confirmed: Always proof on a balance of probabilities but now mindful of the mysterious "inherent" probabilities or improbabilities**  
by Brett Code\*

*F.H. v. McDougall*, 2008 SCC 53

<http://scc.lexum.umontreal.ca/en/2008/2008scc53/2008scc53.html>

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In *F.H. v. McDougall*, released October 2, 2008, the Supreme Court of Canada has confirmed that there is only one standard of proof in a civil case: proof on a balance of probabilities. A mixed series of cases over the last 50 years had caused uncertainty as to the applicable standard of proof when trying allegations of morally blameworthy conduct, for example, of fraud, of sexual assault in the civil context or of dishonesty in the context of professional conduct by lawyers (see for example *Bater v. Bater*, [1950] 2 All E.R. 458 at 459 (C.A., Lord Denning); *H.F. v. Canada (Attorney General)*, [2002] B.C.J. No. 436, 2002 BCSC 325 at para 154; *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138; *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164 at 169-171). What had evolved was an apparently sliding scale, sometimes requiring plaintiffs to meet a higher standard of proof, a standard often said to be commensurate with the occasion. That uncertainty is now resolved, perhaps finally.

Unfortunately, in its statement of the law, the Supreme Court of Canada has introduced a new, unwelcome concept that will create a different kind of confusion and may open the door to reliance by triers of fact upon unproven facts, possibly of their own creation or derived from their own personal views or biases. For the Court, Rothstein J. said (at para. 40):

[40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of *inherent* probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow. [*emphasis added*. In the French version of the judgment, Rothstein J. used the word “intrinsèque”].

The trouble is that there is nothing inherent about probability or improbability. “Inherent” probability and “inherent” improbability are not subject to proof. A judicial conclusion based upon such notions is more likely than not akin to an inference derived from the taking of judicial notice. Depending on the issue and the trier of fact making the determination of inherency, such a conclusion could be more akin to a pre-judgment, a prejudice.

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*McDougall* was a case in which, put at its simplest, the trial judge had to decide whether the plaintiff had been sexually assaulted by the defendant forty years earlier. As is so often the case, no one saw the assaults, and there was no direct third party testimony. The trial judge had to choose.

In cases of that kind, to permit inherent probability to assist in making that choice is to permit the trier to conclude, for example, that it is inherently improbable that a man of the cloth would commit such an act, or vice versa.

In *McDougall*, the appellant plaintiff was a former resident student of the Sechelt Indian Residential School in British Columbia, an institution operated by the Oblates of Mary Immaculate and funded by the Canadian government. The respondent, Ian Hugh McDougall, described himself an Oblate Brother and a supervisor of junior and intermediate boys at the school from 1965 to 1969. The B.C. Supreme Court found that McDougall had sexually assaulted the appellant in the supervisors' washroom when the latter was approximately ten years of age. A majority of the B.C. Court of Appeal allowed McDougall's appeal in part and reversed the decision of the trial judge. Neither court made any reference of any kind to inherent probability. In a 7-0 decision written by Justice Rothstein, the Supreme Court of Canada allowed the appeal and restored the judgment of the trial judge.

The Supreme Court of Canada did not define the concept of inherent improbability but discussed it in light of two decisions of the House of Lords. Lord Nicholls is quoted, in *In Re H (Minors) (Sexual Abuse: Standard of Proof)*, [1996] A.C. 563 (H.L.) at 563, as follows in para 33:

. . . the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on balance of probability, its occurrence will be established.

What that could be read to mean is nothing other than the prejudice described above: it being inherently improbable that a man of the cloth, a natural fiduciary, would sexually assault a child under his care and supervision, the plaintiff must, to make out his case on a balance of probabilities, tender proof strong enough to defeat what is, being inherent, a presumption.

The case that changed that position in the United Kingdom, *In re B*, [2008] 3 W.L.R. 1, [2008] UKHL 35, was brought to the attention of the Supreme Court of Canada after the hearing of McDougall's appeal, by consent of counsel (and therefore without benefit of written or oral argument). In *In re B*, Lord Hoffman said the following regarding inherent probability (at para. 15):

15. . . . There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.

Baroness Hale said (at paras. 70, 72, 73):

70. . . . Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.

. . .

72. As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.

73. In the context of care proceedings, this point applies with particular force to the identification of the perpetrator. It may be unlikely that any person looking after a baby would take him by the wrist and swing him against the wall, causing multiple fractures and other injuries. But once the evidence is clear that that is indeed what has happened to the child, it ceases to be improbable. *Some-one looking after the child at the relevant time must have done it.* The inherent improbability of the event has no relevance to deciding who that was. The simple balance of probabilities test should be applied. [*emphasis added*]

Baroness Hale's speech is confusing, for she does not appear to be talking about inherent probability. Instead, she appears to use the word "inherent" as an adjective, like "very".

Her conclusion, in paragraph 73, that, once the violent act is proved to have occurred, the perpetrator *must have been* a person looking after the harmed child, is troubling. She appears to say: an unlikely event having been proved, the most likely explanation will now suffice. It follows, on that logic, that:

- a) It having been proved that a gate was open at the zoo, a lion walked the park; or
- b) It having been proved that a child was sexually assaulted at Sechelt Indian Residential School, the supervisor did it.

For Baroness Hale, therefore, proof of facts that are inherently improbable permit the trier of fact to jump to the easiest conclusion available, the latter having now been rendered inherently probable. That could not be what she meant. It is a possible interpretation of what she said. It is a direct consequence of the use of the concept of inherent probability.

Inherent probability and inherent improbability, being concepts with no rational explanatory force, should not be considered or discussed and should form no part of the reasoning of a trier of fact when it comes to proof and the standard of proof.

Something is inherent if it is intrinsic or innate, if it is permanently part or an inseparable element, quality, or attribute of the thing in question. When it comes to legal actors, one such trait used frequently for proof, at least in the popular mind if not in modern courts of law, is skin colour. Others frequently employed for proof, all other facts being equal, are facets of character, heritage, race, gender, religion, or sexual orientation, among others.

There is nothing about “probability” that permits it to be characterized as inherent. While “probability” has a legal meaning, its origin is mathematical. The probability of an event occurring is measured by taking the ratio of the favourable cases to the whole number of cases possible, which can be expressed in a fraction. The probability of tossing a coin and having heads come up is 1 in 2, or 50%. The probability of tossing a coin twice and having heads coming up both times is 1 in 4 or 25%. It is equally probable on a single toss that heads or tails will come up. It is less probable that heads will come up twice in a row. It is improbable that heads will come up 5 times in a row. It is highly improbable that heads will come up 10 times in a row. Adding the word inherent adds nothing to the coin toss problem, because the only thing inherent in a coin is that it has only two sides and can therefore only produce results of exactly equal probability.

If the issue at trial is whether the Plaintiff tossed heads or tails on any particular toss, say, on the 10<sup>th</sup> toss, it does not assist the trier of fact to know that the prior 9 tosses were all heads. That fact does not, even if proved beyond a reasonable doubt, render it any more likely that the next toss will be either heads or tails. The probability on the 10<sup>th</sup> toss is the same as on the first: 50-50. That is so even though the overall improbability of tossing 10 in a row may be thought by the trier of fact to be impossibly high. If the only evidence tendered is of the prior 9 tosses, the judge simply has to guess, there being no rational means of actually knowing whether the plaintiff tossed heads or tails on the 10<sup>th</sup> toss.

In such a civil case, the plaintiff loses, because he or she has not demonstrated on a balance of probabilities that heads was tossed, or vice versa.

The difficulty with sexual assault is similar: it either did or did not occur.

Properly introduce evidence of good character or of high moral reputation of the defendant, and the likelihood of success for the plaintiff is diminished. Properly introduce evidence of the defendant's bad character, and the plaintiff has an increased chance of winning. Introduce similar fact evidence or of prior convictions for sexual assault and the likelihood that the judge will find for the plaintiff increases. On properly admitted similar fact evidence, which is fundamentally different in nature from evidence of 9 prior coin tosses and actually bears persuasive relevance, the likelihood increases that the defendant committed the assault in question.

No number of such prior convictions or of similar acts render that probability inherent. There is no evidence that could be tendered, in a modern court, that would result in a conclusion that the sexual assault was inherently probable. Such a concept does not apply to the acts of sentient

beings capable of choice and free to choose. Therefore it has no place in a statement of law setting out the standard of proof, since, with regard to the conduct of humans, there are no inherent probabilities.

As a test for the propriety of appellate review or interference, the concept is useful. The Supreme Court of Canada dismissed the appeal in *R. v. B. (J.N.)*, [1991] 1 S.C.R. 66, [1991] S.C.J. No. 9, as follows (para. 3):

3 The trial judgment was based substantially on an express finding of credibility with respect to the evidence of the complainant. There is nothing in the record to indicate that there was any inherent improbability in her evidence or any other basis which would justify interference by an appellate court with the findings of the trial judge. Moreover there was some support for her testimony in other evidence which was accepted by the trial judge.

The appellate court, unable to view the witness, reads the evidence as a whole and comes to a conclusion similar in effect to the conclusion that the trial judge has made no palpable or overriding error – nothing that should have been perfectly obvious, nothing inherent, nothing innate.

Permitting triers of fact, rather than courts of appeal, to utilize the inherent probability concept permits the former to employ their own biases or beliefs.

For example, in *Marina Pawlett v. Dominion Protection Services Ltd. and Ihsan Ismail*, 2007 ABQB 415, it was urged upon McDonald J. that he should find in favour of the defendant Ismail in a sexual assault case because “he would never have acted in the manner alleged because he is a devout Muslim” (para. 13). His Lordship correctly rejected that attempt at introducing evidence of inherent improbability based upon religion (para 15).

It is worth revisiting here one of many historical examples where the personal traits of an individual were used by the trial judge as though they created some inherent likelihood. In 1982, in a criminal sexual assault case, *R. v. Taylor*, the trial judge admitted evidence, as being probative of guilt, that the accused was a homosexual, a practicing homosexual, and that he had been such “even while he was married.” The trial judge might well have said: the accused is a homosexual, rendering it inherently probable that he committed the criminal act of which he is accused.

As part of its reasons for overturning the trial judge's finding of guilt, the Court of Appeal highlighted the specious reasoning of a trier of fact unable to separate his or her own biases from evidence. The Court stated the following:

11. . . . However, the matter did not end there and it appears to us that the trial judge, in the course of very careful reasons, considered that the fact that the appellant was a homosexual had probative value on the issue of guilt. He said as follows:

The accused admitted being a practicing homosexual, although this is not in my view evidence that he therefore committed the act with

which he is charged. It is a circumstance which together in my view with all the other circumstances may be considered in looking at all the evidence to determine the facts here on all of the evidence when applying the cautions and considerations that I have indicated.

We regard that passage as indicating that the learned trial judge considered the appellant's homosexuality was probative of guilt. We are, with deference, of the view that this was an error. [*R. v. Taylor*, [1982] O.J. No. 3177, 35 O.R. (2d) 738, 135 D.L.R. (3d) 291 at 294 (C.A.)].

The British Columbia Court of Appeal, in a criminal sexual assault case, said the following in allowing an appeal in which the trial judge had rejected the explanation given by the accused as not having an “inherent probability of innocence”, a conclusion which the Court of Appeal found resulted in shifting the burden of proof to the accused. Justice Wood, for a unanimous court, said further:

I have already alluded to the danger, in a case where the evidence consists primarily of the allegations of a complainant and the denial of the accused, that the trier of fact will see the issue as one of deciding whom to believe. Earlier in the judgment I noted the gender related stereotypical thinking that led to assumptions about the credibility of complainants in sexual cases which we have at long last discarded as totally inappropriate. It is important to ensure that they are not replaced by an equally pernicious set of assumptions about the believability of complainants which would have the effect of shifting the burden of proof to those accused of such crimes. [*R. v. V.K.*, [1991] B.C.J. No. 3913, 68 C.C.C. (3d) 18 at 35 (C.A.)].

There, the Court quite rightly associated the notion of inherent probabilities with a shift of the burden of proof. If something is thought to be inherently probable, it is being used by the trier of fact as a presumption. If it is a presumption, it must be overcome, whether by plaintiff or defendant. If unstated, because it is only in the trier's mind, it is patently unjust, since it becomes a part of the case to be met that does not form part of the pleadings. If stated, it inevitably either shifts the onus of proof, which is unjust, or it raises the standard of proof, which is exactly what the Supreme Court of Canada purports to correct in its statement of law on the burden of proof in *McDougall*.

The Supreme Court of Canada rightly concluded that there is only one standard of proof in a civil case. Reference to inherent probability and improbability was a mistake that permits the inclusion of the kind of pernicious thinking rejected by the above-cited courts.

The proper approach for an assessment on a balance of probabilities, in the circumstance presented in *McDougall* where the decision comes down to credibility and oath against oath, is still best set out by O'Halloran J.A. in *Faryna v. Chorny*, [1951] B.C.J. No. 128, [1952] 2 D.L.R. 354 (C.A.):

9 If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding, and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and *cf.* *Raymond v. Bosanquet* (1919) 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

10 The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. ***The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*** Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind. [*emphasis added*]

11 The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of the credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

That remains the proper test. Permitting a trier of fact to employ something as mysterious and illogical as inherent probability to assist in the determination does not satisfy the requirements of the B.C. Court of Appeal, and it is never appropriate. The standard of proof, being proof on a balance of probabilities, has now been confirmed by the Supreme Court of Canada. Its implementation has long been understood and completely explained by Justice O'Halloran.