

# THE CIVIL STANDARD OF PROOF



BY CRISTEN GLEESON  
*civil litigation and family law*

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The standard of proof in all civil cases has traditionally been the balance of probabilities. If you are the plaintiff in a civil action (the person who started the action) this means you have to prove that it is more likely than not that the particular act or 'tort' caused your loss or damage. Put into a specific example, if you are suing for personal injury as the result of being struck by a car, you will need to prove that it is 51% more likely than not that your injuries were caused by the defendant.

In criminal cases, the standard of proof is higher. The Crown must prove beyond a reasonable doubt that the alleged crime was committed by the accused person.

The British Columbia Courts, relying on legal principles originating from the House of Lords in England, created a higher standard of proof for civil wrongs of a higher moral blameworthiness such as sexual assault, fraud and professional misconduct. The higher standard required "clear and cogent evidence" in order for a plaintiff to be successful in suing civilly in such actions.

This higher standard meant that plaintiffs seeking to recover damages for actions involving torts of higher moral blameworthiness such as sexual assault, fraud or professional misconduct had a tougher burden to meet.

With respect to civil sexual assault in particular, some B.C. cases even require independent corroborating evidence where the evidence consists of only the plaintiff's word against the defendant's word.

Why would the standard of proof be more onerous for some civil cases than it is for others?

The Supreme Court of Canada took a close look at the trend towards creating higher standards for these types of civil cases recently in the case of *F.H. v. McDougall* 2008 S.C.C. 53 and released its decision on October 2, 2008.

Mr. Justice Rothstein, writing for the majority of the Court, appears to have effectively put an end to the more onerous civil standard for cases of higher moral blameworthiness.

*F.H. v. McDougall* involved incidents of sexual assault by a supervisor at a residential school when the plaintiff was a child. The Defendant testified at trial and denied the assaults. The trial judge took note of the more onerous standard for civil sexual assault and nevertheless found that the Plaintiff had been sexually assaulted and that the Plaintiff's loss had resulted from the Defendant's sexual assaults. As the assaults had occurred in private, there was no independent corroborating evidence – it was the Plaintiff's word against the Defendant's.

The Defendants appealed the case and went before the British Columbia Court of Appeal. The Court of Appeal was of the opinion that independent corroborating evidence was required given the higher standard of scrutiny required in cases of higher moral blameworthiness such as sexual assault. In addition, the Court of Appeal held that the trial judge had failed to correctly apply the higher standard.

The Plaintiff appealed the Court of Appeal's decision to the Supreme Court of Canada. The following summarizes some of the significant points made by Mr. Justice Rothstein in his reasons for judgment:

1. There is only one standard of proof in civil cases – the balance of probabilities – and there is no higher standard for torts of higher moral blameworthiness.
2. The requirement that there be independent corroborating evidence in cases of civil sexual assault where the evidence consists of only the plaintiff's word against the defendant's word is unsuited to sexual based offences which normally occur in private.
3. A trial judge's factual findings, particularly with respect to the credibility of the parties, ought to be accorded a high level of deference by the appeal court.
4. It is inappropriate to say that the evidence should be scrutinized more carefully depending on the seriousness of the case. In all cases evidence must be scrutinized with care by the trial judge.

The Supreme Court of Canada's decision means a less onerous burden of proof for plaintiffs in cases involving serious or morally blameworthy torts. It also marks a shift toward applying an equal standard in all civil cases, no matter how serious.

*To learn more about Cristen Gleeson, his areas of practice and view other articles written by lawyers at our firm, visit us online at [www.bakernewby.com](http://www.bakernewby.com).*