Understanding “Standard of Proof”: Is it a Moving Target?

The U.S. Perspective

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Washington State Department of Health

Balancing Public Interest against Private Rights

- Regulatory authorities have a public safety mission.
- Licenseholders have the right to due process before their credential may be restricted or removed.
What Is a Standard of Proof?
A standard of proof helps instruct the factfinder concerning the degree of confidence society thinks he should have in the correctness of factual conclusions for a particular type of case.  

*Addington v. Texas*, 441 U.S. 418 (1979)

Standards of Proof in the United States

- **Preponderance of the Evidence**
- Clear, Cogent and Convincing Evidence
- Evidence Beyond a Reasonable Doubt

- The elements of the case are shown with evidence that indicates that the information is more likely to be true than not.

- The elements of the case are shown with evidence that indicates that the information is “highly probable.”
Standards of Proof in the United States

- Preponderance of the Evidence
- Clear, Cogent and Convincing Evidence
- Evidence Beyond a Reasonable Doubt

- The elements of the case are shown with evidence that leaves little room for doubt. This standard has been equated to near a moral certainty.

Most states use the preponderance of the evidence standard in professional discipline.

- Of those that use the clear and convincing standard, most view professional regulation and the loss of a license as “quasi-criminal”.

The Washington Experience

- In 2001, the Washington Supreme Court determined that medical physicians could not have their licenses revoked unless unprofessional conduct was proven by clear, cogent and convincing evidence. *Nguyen v. Department of Health*, 144 Wn.2d 516, 534, cert. denied, 535 U.S. 904 (2002).
“The individual's interest in a professional license is profound.”

The response to *Nguyen*

- The Washington appellate courts, when faced with different types of licenses, reached different conclusions:
  - Engineer discipline was subject to the clear, cogent and convincing standard
  - Real estate appraiser discipline was subject to preponderance of the evidence standard

The response to *Nguyen*

- The Department of Health, and associated boards and commissions had to make a policy choice.
  - Option 1: limit *Nguyen* to medical physician cases only
  - Option 2: limit *Nguyen* to all physician cases, including osteopathic and podiatric
  - Option 3: use the standard in all cases, but also evaluate by the preponderance standard
Applying the standard in all health professions

- In a registered nursing assistant case, the health law judge concluded:
  - The Department met the preponderance standard regarding the abuse charge.
  - The Department’s proof, due to the written statement and conflicting evidence, did not meet the clear, cogent, and convincing evidence standard.

Extending the standard

- Five years after Nguyen, the state Supreme Court determined the standard applies to all licensing cases. *Ongom v. Department of Health*, 159 Wn.2d 132 (2006), cert. denied 127 S.Ct. 2115 (2006).
- An individual’s interest in a professional license is profound.
  - More than money is at stake.
  - Discipline is not civil and has some criminal attributes because it is for public protection and may have punitive results.
  - Procedural safeguards are not a substitute for the standard of proof.

Other states’ experience

- Some states have used the U.S. Constitution as the basis for using the higher standard, looking at the “investment” in the license:
  - California (medical)
  - Oklahoma (medical)
  - Wyoming (medical)
  - Oregon (dental)
  - Nebraska (legal)
- Still others looked at the nature of the action:
  - Mississippi (allegations of fraud or quasi-criminal activity)
Many states have adopted the higher standard by choice:
- North Dakota (medical and dental summary suspensions)
- West Virginia (when there is conflicting expert testimony in standard of care cases)
- Florida (when a malpractice award used a standard less than clear and convincing, it is reviewed under that standard)

Others extended the standard to other professions once it was adopted in another:
- Oklahoma (veterinary, podiatric, chiropractic, and dental boards)
- Wyoming (massage board)

The implications of clear and convincing standard

- Decision-makers must:
  - Weigh the importance of an individual’s interest in her professional license.
  - Emphasize public protection (priority cases and sanction guidelines).
  - Emphasize credibility determinations in well-drafted orders.

- The balance has shifted slightly to the due process side.

Moving north...
Understanding “Standard of Proof”:
Is it a Moving Target?

The Canadian Perspective

Bonni Ellis, MA, JD
Steinecke Maciura LeBlanc

Onus vs Standard of Proof

- **Onus** of proof refers to which party has the responsibility of proving a case.

- **Standard** of proof refers to the degree to which the trier of fact must be persuaded of the truth of the allegations or facts to be proven.

  *“Burden of proof“ is often used interchangeably with both concepts.*

<table>
<thead>
<tr>
<th>The Canadian Standards (Historically)</th>
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<tbody>
<tr>
<td>Area of Law</td>
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<tr>
<td>------------</td>
</tr>
<tr>
<td>Criminal Law</td>
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<tr>
<td>Civil Law</td>
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<tr>
<td>• Divorce</td>
</tr>
<tr>
<td>• Professional Misconduct</td>
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<tr>
<td>• Criminal/Immoral Conduct</td>
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Some differences...

<table>
<thead>
<tr>
<th>Civil</th>
<th>Professional Misconduct</th>
<th>Criminal</th>
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</thead>
<tbody>
<tr>
<td>No presumption</td>
<td>No presumption</td>
<td>Presumption of innocence and burden of proof</td>
</tr>
<tr>
<td>Goal: usually financial compensation</td>
<td>Goal: remediation, deterrence, public protection and denunciation</td>
<td>Goal: rehabilitation, deterrence, public safety and public condemnation</td>
</tr>
<tr>
<td>Stigma not really an issue</td>
<td>Professional stigma</td>
<td>Social stigma</td>
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</tbody>
</table>

Some more differences...

<table>
<thead>
<tr>
<th>Civil</th>
<th>Professional Misconduct</th>
<th>Criminal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Actors choose whether to enter relationships/legal arena</td>
<td>Professionals choose whether to join self-regulated profession</td>
<td>Law applies to everybody</td>
</tr>
<tr>
<td>Individual against individual</td>
<td>Individual against the regulatory body</td>
<td>Individual against &quot;the state&quot;</td>
</tr>
<tr>
<td>Loss of $</td>
<td>Loss of ability to earn $</td>
<td>Loss of freedom</td>
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“Bernstein”

Bernstein and College of Physicians and Surgeons of Ontario (Re) [1977], 76 D.L.R. (3d) 38 (Div. Ct.)

In my view discipline committees whose powers are such that their decisions can destroy a man’s or woman’s professional life are entitled to more guidance from the Courts than the simple expression that "they are entitled to act on the balance of probabilities"...

The important thing to remember is that in civil cases there is no precise formula as to the standard of proof required to establish a fact...
“Bernstein” (cont.)

In all cases, before reaching a conclusion, the trier of fact must be reasonably satisfied that the fact occurred, and whether the trier is so satisfied will depend on the totality of the circumstances, including the nature and consequences of the facts to be proved, the seriousness of an allegation made, and the gravity of the consequences that will flow from a particular finding...

[The] degree of proof required in disciplinary matters of this kind is that the proof must be clear and convincing and based on cogent evidence which is accepted by the tribunal.

“Jory”


[The] standard of proof required in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt. But it is something more than a mere balance of probabilities. The authorities establish that the case against a professional person on a disciplinary hearing must be proved by a fair and reasonable preponderance of credible evidence. The evidence must be sufficiently cogent to make it safe to uphold the findings with all the consequences for the professional person’s career and status in the community.

-Justice Beverly McLachlin of the BCSC (as she then was)

“McDougall”


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.

-Justice Rothstein, writing for unanimous Court
McDougall (cont.)

...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.

McDougall (cont.)

To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending on the seriousness of the case.

Huh?!?

- What has changed?
- Where are we now?
- How can we make sense of this?
Three key points regarding the standard of proof

1. There is a difference between the process of assessing the weight that should be attributed to the evidence and the job of assessing its persuasiveness.

2. In cases involving serious allegations /consequences, the trier of fact may be more inclined to reduce the weight that s/he will give to various pieces of evidence that are questionable in terms of their reliability, credibility and/or probative value.

3. In terms of assessing the persuasiveness of the evidence, there is one standard for civil cases, a balance /preponderance of probabilities, which means that the trier of fact, when looking at all of the evidence in its totality, must be satisfied that it is more likely than not that what is alleged to have occurred, did occur.
Is this a good approach and why do we care?

- Appeals
- Public confidence and accountability
- The integrity of the law
- Fairness to the registrant

Is this the right approach or even the best approach?

Understanding “Standard of Proof”: Is it a Moving Target?

Communication & Training Issues

Bruce G. Matthews, P.Eng.
Professional Engineers Ontario
Why It’s Important...

• Risk of Misunderstanding the Standard
  – Misapplication of the standard can lead to appeals of decisions
  – Inconsistent decisions
  – Damage to the image and reputation of the regulator

• Better to get it right the first time, everytime

Training is Key!

• Most Discipline Committee members are not lawyers and have limited training as jurists
• Question is how to best explain the concepts and principles involved
  – One size does not fit all
  – Know your audience – objective is to find something the discipline committee can wrap its head around

Quantitative vs. Qualitative Models

• “Preponderance of the evidence”

• “Balance of Probabilities”

• Balance of the Evidence
Balance of the Evidence

- “Balance” implies weight and comparison
- “More likely than not…”
- 51%
- 50.1%
- 50.0000000001%?

Weighing the Evidence

- “Size” versus “Density”
- Size
  - Importance / Relevance
- Density
  - Believability / Credibility / Corroboration
- What if evidence is agreed?
  - Relevance may still be an issue
  - How much does that evidence weigh?

Panel Member Self-Assurance

- I’m not persuaded...
- I’m not convinced...
- It’s possible / probable...
- I’m inclined to believe...
Seriousness of the Allegations

• Doesn't change the standard of proof

• Potential consequences of a finding of misconduct are always the same

• Seriousness of the allegations and the extent of the proof can go to the issue of penalty

Can't Eliminate Subjectivity

• No training model will ensure identical outcomes across discipline panel members

• Subjectivity cannot be eliminated, only minimized
  – Discipline panels are made up of multiple individuals for a reason

In Summary...

• Train, Train, Train

• Know your audience and select a training model accordingly (use more than one if appropriate)

• Qualitative explanations are often easier to grasp

• Separate the issue of the finding versus the penalty
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