Briginshaw, Dixon J pointed out that: '… reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. 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. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences ….[14]

Her Honour: But surely, as soon I give that sort of direction, I will be inviting the jury to engage in an analytic exercise dissecting such doubts as they may be experiencing? It will be creating a mare's nest.

Bullfry: That is no doubt something that the CCA can sort out in due course if your Honour goes astray. May I, with respect, hand up a suggested direction to the jury that deals with the balance of probabilities example in the context of *Briginshaw* – and your Honour will see that I have purposely refrained from introducing any hand gestures, or references to cricket.

ENDNOTES

1 [2017] HCA 36 at [41] per Kiefel CJ, Bell, Gageler, Keane, Nettle, and Edelman JJ.
2 (1960) 102 CLR 584.
3 (1938) 60 CLR 336. "In *Briginshaw* five judgments (those of Latham CJ, Rich, Starke, Dixon and McTiernan JJ) were delivered, each with substantial differences and nuances of meaning , and with Latham CJ indeed dissenting as to the result": per Peek J in *Stanberg Pty Ltd v Tabibi* [2012] SASC 187 at [99].
4 [1992] HCA 66; 67 ALJR 170 at 170 – 171 per Mason CJ, Brennan, Deane and Gaudron JJ.
5 [1965] HCA 46; (1965) 112 CLR 517 at 521 – 522 per Barwick CJ, Kitto, Taylor Menzies, and Windeyer JJ.
6 See the discussion by Peek J in *Stanberg Pty Ltd v Tabibi* [2012] SASC 187 at [112] and following.
7 "A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain": per Deane, Gaudron and McHugh JJ in *Malec v JC Hutton Pty Ltd* [1990] HCA 20; 169 CLR 638 at 642 – 643.
8 (1971) 126 CLR 28 citing Dixon CJ in *Dawson v The Queen* (1961) 106 CLR 1 at 18: "it is a mistake to depart from the time-honoured formula. ... The attempts to substitute other expressions … have never prospered." And see *Darkan v The Queen* (2006) 80 ALJR 1250 at 1265, [69].
9 (2002) 130 A Crim R 545 at 548, [15] per Bell J
10 [2013] NSWCCA 46 at [54] per McClelland CJ at CL (Latham and Adamson JJ agreeing) at [246], [247].
11 (1976) 136 CLR 62 at 71.
12 [2014] QCA 35 at [4].
13 (1971) 126 CLR 28 at 33.
14 (1938) 60 CLR at 361 – 362. And see *FTZK v MIMA* [2014] HCA 26 per French CJ and Gageler J at [12].

THE FURIES

Lifts. Every day I go to court I have to do the 'lift dance'. Men more senior than me insist on waiting for me to enter and leave first, while within male ranks juniors give way to seniors. Sometimes it takes an extra half a minute to do this dance. Should I say that I don't want to be marked out as different because of my gender?

Dear Escalating Advocate,

Civility, whether it is at the lift well or in a court room, is never a waste of time and a courtesy, provided it is motivated by respect, is always worthwhile. Taking your time to acknowledge another in the lift and, with eye contact and gesture, allowing them to precede you, may well be the beginning of many fruitful encounters whether ascending a building or transcending a timetabling issue. If the other person would, instead, prefer to extend to you that courtesy, then eye contact and a hand gesture (taking all of three seconds) should be sufficient to make that clear. However, an impatient insistence that you squeeze yourself between trolleys and the generous girths of older practitioners to exit on a floor (possibly not yours), just because you are wearing a skirt, is neither courteous nor respectful and should be treated with contempt. If you are extended the courtesy of entering a lift first, perhaps you can reciprocate by offering to press the button? Otherwise, have you ever offered to allow others to go before you at the lifts? If not, then you may well be in breach of the unwritten rules of lift precedence which we now set out for your edification:

1. All juniors (regardless of gender) should allow silk to take precedence, acknowledging, as they must, the respect owed to senior counsel for their fortitude in answering questions from judges.

2. All barristers (regardless of gender) should allow judges to take precedence, acknowledging, as they must, the respect owed to judges for their fortitude in deciphering responses from senior counsel.

3. Everyone should allow couriers to take precedence, acknowledging, as they must, that no one has the fortitude to come between a courier and an opening lift door.

Judges often say that advocates should only take their best points and avoid unnecessary evidence and cross-examination. But it is difficult or impossible to identify the best points until the end of the trial (or the end of the appeals); many cases are lost because such-and-such a question wasn't asked or such-and-such a point wasn't taken. How can I follow the instruction to be highly selective without running the risk that I will abandon a potentially winning point? Surely my duty to my client requires that I err on the side of caution and include those points which might win, not only those which appear to be the best points at the outset of a case?

Dear Unbridled Barrister,

Your two-paragraph question suggests you may lack some discipline in expressing yourself (as to which we refer to the Furies' first advice in the last edition of *Bar News*). Apparently, that also extends to points of argument and possibly claims.

To answer your question, the Furies invoke the words of none other than Chester Porter QC: 'The secret of winning cases, criminal or civil, is to pick out one or two points that you're really going to fight on, and fight on those. The scattergun defence never works.'

Chester Porter QC was, before his retirement in 2000, accorded Christ-like qualities which the Furies suspect was not just because his last name has the happy coincidence of rhyming with 'water', but because many people thought he knew a thing or two about advocacy. His words have been faithfully recorded on the oral histories section of the Bar Association website (Chester 14:10), but little else is given to explain them.

Without wanting to risk a theological rift with the more devout believers in Porter's divinity, the Furies interpolate that in 'picking one or two points that you are really going to fight on', Porter QC was suggesting that they ought to be your best points. We may even go further and suggest that, in more complex cases, more than two points may be required to win, in which case you must run your *necessary* or *winning* points. Running unnecessary and losing points is distracting, time wasting and may diminish the potency of your best points.

Of course, you are now asking the question: how does one decide which are the necessary or winning points? This requires judgment. Good barristers have it and we are reliably informed that, through experience, it may be developed.

Until you *have* judgment, may we suggest that you *give* judgment, or at least pretend to. If you were to judge the case before you, in a way that is both favourable to your client and intellectually honest, what points would you rely upon? If, in doing this, you develop judgment, you may find yourself being accorded a status that guarantees you precedence at the bar. Maybe even at the lifts. But perhaps not before couriers.