BEYOND REASONABLE DOUBT

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> "The function of a summing up is to furnish information which will help a particular jury to carry out its task in the concrete circumstances of the individual case before it and in the light of the trial judge's assessment of how well that jury is handling its task. It is undesirable for a summing up to assume the character of a collection of hallowed phrases mechanically assembled on a priori principles to be mouthed automatically in all circumstances, whether or not a particular jury understands them …
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> The stand which this Court has taken on the expression 'beyond reasonable doubt' – that it alone must be used, and nothing else – has not been shared elsewhere. Even in Australia it is an extreme and exceptional stand. The justification for it rests on several considerations. One is that 'beyond reasonable doubt' is an expression 'used by ordinary people and is understood well enough by the average man in the community'. That is not so of 'a probable consequence'. A second consideration is that departures from the formula 'have never prospered'. That has not been demonstrated to be the case in relation to 'a probable consequence'. A third consideration is that expressions other than 'beyond reasonable doubt' invite the jury 'to analyse their own mental processes', which is not the task of a jury. 'They are both unaccustomed and not required to submit their processes of mind to objective analysis'. Explanation of the expression 'a probable consequence' does not require this of juries. Finally, as Kitto J said in *Thomas v The Queen* [(1960) 102 CLR 584 at 595]:
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> > 'Whether a doubt is reasonable is for the jury to say; and the danger that invests an attempt to explain what "reasonable" means is that the attempt not only may prove unhelpful but may obscure the vital point that the accused must be given the benefit of any doubt which the jury considers reasonable."
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> There is not in that respect any analogy between 'beyond reasonable doubt' and 'a probable consequence'".[1]

1. What does "beyond reasonable doubt" mean? Why is it that Judges believe that "beyond reasonable doubt" is an expression "used by ordinary people and is understood well enough by the average [person] in the community"?[2] Why could it be confidently asserted in 1976 that "beyond reasonable doubt" was a

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[1] *Darkan v The Queen* (2006) 227 CLR 373 per Gleeson CJ, Gummow, Heydon and Crennan JJ at [67]-[69] (citations omitted).

[2] *Dawson v The Queen* (1961) 106 CLR 1 per Dixon CJ at 18.

"popularly understood formula"?[3] Why is it not the task of a jury to "analyse their own mental processes"?[4] Why are Judges well placed to assert confidently that jurors are "unaccustomed" to submitting their processes of thought to "objective analysis"?[5]

2. It is the experience of many trial Judges that notwithstanding obedience to the directive of the High Court and delivery of the classical direction as to "beyond reasonable doubt", not infrequently juries seek a further explanation as to the meaning of this standard of proof. Constrained by repeated admonitions not to embark upon explanations that depart from the standard direction in other than special circumstances, trial Judges frequently struggle to answer sensibly such enquiries about a fundamental aspect of the system of criminal justice. In this respect, as a consequence of the "extreme and exceptional stand" taken by the High Court, trial Judges are required to stick to a "hallowed phrase" and are severely limited in their ability "to furnish information which will help a particular jury carry out its task in the circumstances of the individual case".[6]

3. Recent research undertaken by the New South Wales Bureau of Crime Statistics and Research paints a disturbing picture of the understanding of jurors of this "popularly understood formula". One of the purposes of the research was to address a concern that jurors do not understand adequately judicial instructions.

[3] *La Fontaine v The Queen* (1976) 136 CLR 62 at 71.
[4] *Thomas v The Queen* (1960) 102 CLR 584 per Windeyer J at 606.
[5] *Green v The Queen* (1971) 126 CLR 28 per Barwick CJ, McTiernan and Owen JJ at 33.
[6] *Darkan v The Queen* (2006) 227 CLR 373 at [69] and [67].

The results suggest that a significant percentage of jurors believed that "beyond reasonable doubt" meant "almost sure" or either "pretty" or "very" likely.[7]

4. Is it time either to permit expanded explanations that provide genuine assistance within the current formula or to follow the lead of other jurisdictions and introduce a more modern and readily understood concept that requires the jury to be "sure" of guilt?

Origins

5. The development of the doctrine of beyond reasonable doubt occurred in the context of critical shifts in trial processes. Originally, jurors were expected to reach decisions primarily on the basis of their own personal knowledge of events and persons involved. In a paper delivered to the Second Australian Legal Convention held in Adelaide in 1936, Evatt J summarised the early developments:[8]

> "It is probably in the sworn inquests of Frankish origin employed by the Norman Kings in exercise of their prerogative in the interests both of the Crown and the Church, that the English system of trial by jury originates. The inquests recorded in the Doomsday Book well illustrated this prerogative procedure. Those sworn on these inquests were called recognitors and possessed special local knowledge of the facts to be inquired into.
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> In 1166 in the Assize of Clarendon an inquest was to be made through each county and through each hundred by twelve 'lawful' men of the hundred and by five 'lawful' men of each township. Having been sworn to speak the truth, the recognitors were bound to represent to the Justices all persons of evil fame who had then to submit to the test of the ordeal by fire or water. Later in the twelfth century in the Assize of Northampton the 'recognitors' are recognisable as a Grand Jury while the ordeal is still regarded as the only way of establishing guilt or innocence. But after the abolition of the ordeal early in the thirteenth century, the petty jury method of trial was adopted."

[7] See Lili Trimboli, 'Juror Understanding of Judicial Instructions in Criminal Trials' (2008) 119 *Crime and Justice Bulletin* 1 at 4 and 6.
[8] Justice Herbert Vere Evatt, 'The Jury System in Australia' (1936) 10 *Australian Law Journal Supplement* 49 at 54.

6. As populations grew, society became more complex and mobility increased resulting in jurors becoming less familiar with the facts of events and increasingly reliant upon testimony from other witnesses and on documents which had to be evaluated for truth and accuracy.[9] Evatt J describes the process leading to a separation of roles:[10]

> "A later development was that the jurors lost their character of witnesses. If the trial of a case presented difficulties the jury summoned was authorised to 'afforce,' that is, add to their number so as to obtain persons who could supply the necessary information. This practice of 'afforcing' at once brought into prominence a difference between jurors who knew the facts in dispute or knew them very well and those who did not know the facts at all or knew little of them. The afforced jurors gradually came to be separated from those who were uninformed. Accordingly the latter came to lose their original function as witnesses and came to assume the character of Judges of the facts [cd. 6817, pars 8 and 9]."

7. As jurors ceased to possess personal knowledge it became necessary for Judges to instruct jurors that they needed to reach some sort of firm assurance of guilt based on the evidence before them before they could convict.[11] It is the development of these formulations that are of interest.

8. Judges of the sixteenth, seventeenth and eighteenth century faced the difficult task of telling jurors what standard they needed to employ when reaching their verdicts. Professor Barbara Shapiro suggests that as the earlier common law offered no particular guidance, judges had little choice but to borrow from the "epistemology" that could be drawn from "religious doctrine and philosophy".[12] She advances the view that the formula of "beyond reasonable doubt" was the product of an "attempt to build an intermediate level of knowledge, short of absolute certainty but above the level of mere opinion … by an overlapping group of theologians and naturalists".[13]

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[9] Barbara Shapiro, *Beyond Reasonable Doubt and Probable Cause* (1991) at 6.
[10] Justice Herbert Vere Evatt, 'The Jury System in Australia' (1936) 10 *Australian Law Journal Supplement* 49 at 54.
[11] Barbara Shapiro, *Beyond Reasonable Doubt and Probable Cause* (1991) at 1.
[12] Barbara Shapiro, *Beyond Reasonable Doubt and Probable Cause* (1991) at 2.
[13] Barbara Shapiro, *Beyond Reasonable Doubt and Probable Cause* (1991) at 7.

9. Glazebrook J sitting on the New Zealand Court of Appeal, summarised this view of the origins of the reasonable doubt doctrine in the following terms:[14]

> **"[62]** The origins of the requirement of proof beyond reasonable doubt, as Hammond J notes, are somewhat obscure. Professor Barbara J Shapiro, in the leading text, *Beyond Reasonable Doubt and Probable Cause* (2003), pp 2 – 41, traces its development to the late seventeenth century and to the religious thinking and empirical philosophy of the time. Professor Shapiro also points to the parallel development by which juries moved from being largely self-informing bodies with firsthand knowledge of the matter to assessors of evidence gathered and presented by others.
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> **[63]** Professor Shapiro notes (at pp 7 – 8) the seventeenth century view that there are three categories of knowledge: physical, derived from immediate sense data; mathematical, established by logical demonstration; and moral, based on testimony and second-hand reports of sense data. In particular, she points to John Locke's influential *An Essay Concerning Human Understanding* (1690). In Professor Shapiro's view, the reasonable doubt standard equates to what Locke considered the highest degree of probability achievable in what Professor Shapiro terms the empirical realm of events where the absolute certainty of mathematical demonstration does not exist (see, in particular, p 41). For Locke, this highest degree of probability is such that it must attract the 'general consent of all men' (see p 8).
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> …
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> **[65]** Whatever its origins, it seems tolerably clear that the assumption was that there is a level of proof that is sufficient to produce in all reasonable persons as much certainty as it is possible to have when dealing with the reconstruction of past events. The standard should be no less stringent today and, if we are serious about this standard, then juries should be instructed accordingly."

10. In his text *The Origins of Reasonable Doubt*,[15] Professor James Whitman provides a different perspective. Noting that Judges and legal scholars in the United States had come to the conclusion that the phrase "reasonable doubt" could not be assigned a "definitive meaning", Professor Whitman suggests that the formula "seems mystifying today because we have lost sight of its original purpose".[16] He argues that the formula was "not primarily intended to protect the accused", rather, it "was originally concerned with protecting the souls of the jurors against damnation".[17] Professor Whitman explains:[18]

> "Convicting an innocent defendant was regarded, in the older Christian tradition, as a potential mortal sin. The reasonable doubt rule developed in response to

[14] *R v Wanhalla* [2007] 2 NZLR 573 at 591.
[15] James Q Whitman, *The Origins of Reasonable Doubt* (2008).
[16] James Q Whitman, *The Origins of Reasonable Doubt* (2008) at 2.
[17] James Q Whitman, *The Origins of Reasonable Doubt* (2008) at 2-3.
[18] James Q Whitman, 'What Are the Origins of "Reasonable Doubt"?' (25 February 2008).

this disquieting possibility. It was originally a theological doctrine, intended to reassure jurors that they could convict the defendant without risking their own salvation.

According to medieval doctrine, judging was a spiritually dangerous business. Any sinful misstep committed by a judge in the course of judging 'built him a mansion in Hell'. This was especially true any time a judge imposed 'blood punishments' – that is, execution and mutilation, the standard criminal punishments of pre-nineteenth-century law. To be a judge in a capital case was to participate in a killing, and that meant judging was full of spiritual peril.

… Doubt was the voice of an uncertain conscience, and it had to be obeyed. 'In cases of doubt', as the standard theological formula ran, 'the safer way is not to act at all' …

The story of the 'reasonable doubt' rule, which now seems so mysterious to us, is simply an English chapter in this long religious history. Common law jurors were Christians, and they were Christians who engaged in acts of judgment. This meant that to be a jury was potentially 'to pawn (your) Soul', as the most famous pamphlet of the revolutionary era declared. Or as another pamphlet put it, 'the Juryman who finds any other person guilty, is liable to the Vengeance of God upon his Family and Trade, Body and Soul, in this world and that to come.'

There is plenty of evidence that English jurors took these ominous threats quite seriously, especially at the end of the eighteenth century. Jurors experienced 'a general dread lest the charge of innocent blood should lie at their doors'. It was in response to such juror 'dread' that the reasonable doubt standard introduced itself into the common law, especially during the 1780s. The reasonable doubt rule arose in the face of religious fears. It is still with us today, a living fossil from an older moral world."

11. Professor Whitman opines that the standard was "originally designed to make conviction easier, by assuring jurors that their souls were safe if they voted to condemn the accused".[19] It has also been suggested that the standard of "beyond reasonable doubt" was "introduced by the prosecution, and that it actually was designed to provide less protection to the accused than the 'any doubt' test which did not require that doubts be reasonable".[20] Shapiro argues, however, that it was not a replacement for the any doubt test, but was added to "clarify the notions of moral certainty and satisfied belief".[21]

[19] James Q Whitman, 'What Are the Origins of "Reasonable Doubt"?' (25 February 2008).
[20] Anthony Morano, 'A Re-Examination of the Reasonable Doubt Rule' (1975) 55 *Boston University Law Review* at 507.
[21] Barbara Shapiro, *Beyond Reasonable Doubt and Probable Cause* (1991) at 21.

12. Sir Matthew Hale, a distinguished judge of the mid to late seventeenth century, wrote that in order to convict, the evidence should be of such "high credibility" that "no reasonable Man can without any just reason deny [it]".[22] Although not using the phrase "beyond reasonable doubt", the terminology encompasses that concept. In cases reported after 1668, a number of phrases appear repeatedly in judicial charges to the jury including, "if you believe", "if you are satisfied or not satisfied with the evidence" and "satisfied conscience". The "satisfied conscience" test was "the first vessel into which were poured the new criteria for evaluating facts and testimony … [it] became synonymous with rational belief, that is, belief beyond reasonable doubt".[23] Shapiro considered the "satisfied conscience test" as "central to the development of the beyond reasonable doubt standard".[24] This test was employed in cases between 1683 and 1700, but between 1700 and 1750 references to "conscience" became somewhat fewer. Other terms such as "mind" or "judgment" were preferred, a move that was designed to direct juries to reach their conclusion based on the evidence. However, the use of the term "satisfied" did not decline and the notions of satisfaction and belief by evaluating evidence were the most common features of jury charges during that period.[25] By the second half of the century, judges and counsel became concerned as to doubts jurors may have been experiencing. In a case in 1752 the prosecution suggested that the evidence was "so strong, so convincing … that that Presumption that will rise to a Conviction; there will not remain the least Doubt of it".[26]

13. It appears that the standard of beyond reasonable doubt was first employed in the Boston Massacre trials of 1770.[27] Interestingly, the Boston cases did not suggest that the standard was new or innovative and both the prosecution and the Judge emphasised that the accused was being tried according to traditional English law.

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[22] Sir Matthew Hale, *The Primitive Origination of Mankind* (1677) at 128.
[23] Barbara Shapiro, *Beyond Reasonable Doubt and Probable Cause* (1991) at 13.
[24] Barbara Shapiro, *Beyond Reasonable Doubt and Probable Cause* (1991) at 14.
[25] Barbara Shapiro, *Beyond Reasonable Doubt and Probable Cause* (1991) at 20.
[26] *The Genuine Trial of Swann* (London, 1752) at 4.
[27] Barbara Shapiro, *Beyond Reasonable Doubt and Probable Cause* (1991) at 22 referring to Anthony Morano, 'A Reexamination of the Reasonable Doubt Rule' (1975) 55 *Boston University Law Review* 507 at 516-519.

The prosecution indicated that if the evidence was "not sufficient to convince you beyond reasonable doubt"[28] then the jury should acquit. The judges employed the traditional "fully satisfied" and "satisfied belief" formulations as well stating:

> "if upon the whole, ye are in any reasonable doubt of their guilt, ye must then, agreeable to the rule of the law, declare them innocent."[29]

14. Professor Shapiro states that the introduction of the beyond reasonable doubt formula in the Boston massacre trials caused no comment because it was consistent with the notions of "belief", "satisfied conscience" and "moral certainty" employed in and outside the courtroom, noting that the standard had appeared in several editions of Sir Geoffrey Gilbert's authoritative *Law of Evidence* prior to 1770.[30]

15. The standard of beyond reasonable doubt was also applied in a 1796 Canadian case. The judge informed the jury that if they had any reasonable doubt they must acquit "for it is the invariable direction of our English Courts of Justice to lean on the side of mercy".[31]

16. In the nineteenth century, scholars began to distinguish between absolute and moral certainty as to matters of fact:[32]

> "Evidence which satisfied the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitute full proof of fact … Even the most direct evidence can produce nothing more than such a high degree of probability as amounts to moral certainty. From the highest it may decline, by an infinite number of graduations, until it produces in the mind nothing more than a preponderance of assent in favour of the particular fact."

17. The test became the "sufficiency of the evidence to satisfy the understanding and conscience of the jury", and it was sufficient when the evidence produced "moral certainty to the exclusion of every reasonable doubt". Moral certainty was the equivalent to the highest degree of probability and was inextricably linked to the

[28] Thomas Preston, *The Trial of the British Soldiers* (1824) at 118.
[29] Thomas Preston, *The Trial of the British Soldiers* (1824) at 142.
[30] Barbara Shapiro, *Beyond Reasonable Doubt and Probable Cause* (1991) at 22.
[31] Barbara Shapiro, *Beyond Reasonable Doubt and Probable Cause* (1991) at 22.
[32] Thomas Starkie, *Practical Treatise on the Law of Evidence* (1833) at 15.

standards of "satisfied conscience" and "satisfied belief" which had previously been employed. "To acquit upon light, trivial or fanciful suppositions, and remote conjecture, is a virtual violation of the juror's oath … On the other hand, a juror ought not to condemn unless the evidence excludes from his mind all reasonable doubt as to the guilt of the accused."[33]

Australia today

18. The starting point for a discussion as to the meaning of "beyond reasonable doubt" in Australia is the judgment of the High Court in *Green v The Queen*.[34] Seventeen years after that decision, in refusing special leave to appeal from a majority decision of the South Australian Court of Criminal Appeal *R v Pahuja*,[35] speaking for a court comprised of five justices Mason CJ said:[36]

> "The Court considers that there is no point in its seeking to expound what direction should be given to a jury on the standard of proof beyond what was said in *Green's* case. It is to *Green's* case that one should look to find the law on this topic, rather than to other cases in which glosses have been put upon what the Court said in that case."

19. In *Green*, the trial Judge had given a lengthy direction specifically inviting the jury to consider the quality of a doubt and whether it was rational or otherwise. In a joint judgment, Barwick CJ, McTiernan and Owen JJ described the direction as "fundamentally erroneous" and said:[37]

> "A reasonable doubt is *a doubt* which the particular jury entertain in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances … They are both unaccustomed and not required to submit their processes of mind to objective analysis of the kind proposed in the language of the judge in this case. 'It is not their task to analyse their own mental processes': Windeyer J, *Thomas v The Queen* [(1960) 102 CLR at 606]. A reasonable doubt which a jury may entertain is not to be confined to a 'rational doubt', or a 'doubt founded on reason' in the

[33] Thomas Starkie, *Practical Treatise on the Law of Evidence* (1833).
[34] (1971) 126 CLR 28.
[35] (1987) 49 SASR 191.
[36] [1988] 15 Leg Rep SL 4.
[37] *Green* (1971) 126 CLR 28 at 32–33.

analytical sense or by such detailed processes as those proposed by the passage we have quoted from the summing up." (my emphasis)

20. I commented upon this passage and the reference to a reasonable doubt being "a" doubt which the jury entertains in *Ladd v The Queen*:[38]

> "[**155**] It can be seen from this passage of the joint judgment that a reasonable doubt is 'a' doubt which the 'jury' entertain. If this passage means 'a' doubt in the sense that any doubt entertained by a 'juror' is necessarily a 'reasonable doubt', and I stress 'if', then, with the greatest of respect to those eminent judges who have opined that 'beyond reasonable doubt' is a well understood expression, in my opinion it is not. Further, if the expression means any doubt entertained by a juror, standing alone without explanation, it has the potential to mislead jurors. In itself the expression 'beyond reasonable doubt' invites jurors to analyse or assess the quality or strength of any doubt they, as individuals, might experience in order to determine whether the doubt is 'reasonable'. In my view this explains why juries regularly ask for an explanation as to the meaning of 'reasonable doubt. Jurors, not surprisingly, seek guidance as to the meaning of 'reasonable' in this context. From the perspective of a juror untrained in the law and unaided by further explanation, the expression 'beyond reasonable doubt' is likely to be perceived as having a significantly different meaning from 'a doubt' experienced by a reasonable person or juror."

21. It is interesting to compare the expression "a doubt" with the approval given in *Green* to the following passage from the judgment of Kitto J in *Thomas v The Queen*:[39]

> "Whether a doubt is reasonable is for the jury to say; and the danger that invests an attempt to explain what 'reasonable' means is that the attempt not only may prove unhelpful but may obscure the vital point that the accused must be given the benefit of any doubt *which the jury considers reasonable*." (my emphasis)

22. It is also interesting to compare the decision in *Green* with the views of Isaacs and Powers JJ in *Brown v The King*:[40]

> "Where a jury, with minds directed to the single object of performing their duty by arriving at a true verdict … investigate and weigh all the circumstances of the case truly and fairly, and, after doing so, find that notwithstanding any possible balance of their opinion against the accused *there nevertheless exists in their minds a residuum of doubt as to his guilt – not a mere conjectural, visionary doubt, or a doubt arising*

[38] (2009) 157 NTR 29 at [155].
[39] (1960) 102 CLR 584 at 595.
[40] (1913) 17 CLR 570 at 596.

> *from the bare possibility of his innocence, but a real doubt* created by the operation of the circumstances before them upon their reason and commonsense, - then their doubt is a reasonable doubt within the meaning of the rule. If such a doubt exists, they have not that moral certainty which is the correlative of the expression, and which the law requires to overcome the initial presumption of innocence …" (my emphasis)

23. The judgment in *Green* was delivered in 1971. A debate about equating "reasonable doubt" to "a doubt" experienced by the jury began in South Australia in 1986 with a decision of King CJ in *R v Wilson, Tchorz and Young*.[41] The trial Judge had given the following direction:

> "If you think there is a doubt but that it is merely a fanciful doubt, you will still convict because that is not a reasonable doubt: it is a doubt beyond reason."

24. King CJ regarded the direction as "radically defective". This view was shared by Johnston J, but not by Legoe J. King CJ said:[42]

> "This direction postulates a doubt about guilt which the jury thinks exists. It then invites them to subject their mental state to examination in order to determine whether the doubt about guilt which they think to exist, is to be characterized as fanciful or reasonable. That direction is a negation of the proposition for which *Green's* case [(1971) 126 CLR 28] is authority that the test of whether a doubt is reasonable is whether the jury entertains it in the circumstances.
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> I think that a direction in the terms given in the present case has a dangerous tendency to produce in the minds of the jurors an impression that a view held by them that there is a doubt about guilt is to be disregarded unless it passes some further test; that there must be some particular degree of doubt or even that a slight doubt is to be disregarded. When jurors are invited to consider whether a doubt which they actually think to exist is fanciful, they may well interpret the invitation as one, not merely to exclude aberrant mental processes, but to put aside real doubts unless those doubts possess in their minds a certain degree of strength. *Proof beyond reasonable doubt requires that doubts, irrespective of degree of strength which they attain, be given effect to if the jurors, as reasonable persons, are prepared to entertain them*". (my emphasis).

[41] (1986) 42 SASR 203.
[42] *Wilson* (1986) 42 SASR 203 at 207 (citations omitted).

25. King CJ distinguished a doubt from "fanciful, nervous or unreasonable misgivings about matters which are not in reality doubt".[43] His Honour emphasised that it is "not permissible to suggest that they should disregard *a doubt* which, at the end of their deliberations, they think to exist, *or that they are required to subject such a doubt to a process of analysis in order to determine its quality*" (my emphasis). In the view of King CJ, if the jury have "a doubt" at the end of their deliberations, "that doubt is *ipso facto*, as *Green's* case [(1971) 126 CLR 28] establishes, a reasonable doubt".

26. King CJ confirmed his view in *Pahuja*,[44] observing that as the jury sets the standard of what is reasonable, it follows that "a reasonable doubt is a doubt which the particular jury entertain in the circumstances".[45] His Honour again made the point that the adjective "reasonable" in the expression "does not denote any particular degree of strength of the doubt" as it is "qualitative, not quantitative, in meaning".[46]

27. Johnston J agreed with King J expressing the view that if a jury entertains a doubt, "by definition" such a doubt is a reasonable doubt "because it is entertained by the body of the jury which, in our constitutional concept and tradition, is the embodiment of the reasonableness of the members of the society whom the jury represent".[47]

[43] *Wilson* (1986) 42 SASR 203 at 206.
[44] *Pahuja* (1987) 49 SASR 191.
[45] *Pahuja* (1987) 49 SASR 191 at 194.
[46] *Pahuja* (1987) 49 SASR 191 at 195.
[47] *Pahuja* (1987) 49 SASR 191 at 220.

28. Cox J dissented and undertook a particularly helpful and insightful review of the authorities. In speaking of the philosophy underlying the standard of proof, his Honour said:[48]

> "The notion conveyed by the expression 'beyond reasonable doubt' is, of course, inexact. It is an acknowledgement of the impracticability, if not impossibility, of requiring that a charge be proved to the point of absolute certainty. All that society, acting through the courts, can do, if the system is to be workable, is to pitch the required degree of probability at a level that will ensure the conviction of a high proportion of the guilty and at the same time keep the risk of convicting the innocent acceptably low. The determinant that is used for this purpose is the state of mind – the belief or conviction – of the jury. There is no way of measuring degrees of conviction in any scientific fashion – one cannot apply to the jurors' minds a sort of Richter scale of belief – so recourse is had to a general formula that is intended to convey to the jury, simply and adequately, the law's standard of proof. The expression 'beyond reasonable doubt' is quantitatively and qualitatively imprecise, and there have been practical studies that suggest it can mean different things to different people …"

29. Cox J regarded it as "self-evident" that the word "reasonable" is a word of "limitation". His Honour observed that the word "reasonable" cannot be discarded as superfluous as it "must imply that there are some doubts that are reasonable and other doubts that are not …"[49]

30. As to analysis by the jury of a doubt, Cox J regarded a degree of analysis as inevitable:[50]

> "The criminal standard of proof implies that there may be in any given case an uncertainty, objectively speaking, called a doubt, about the guilt of the accused. The jury is required to find the accused not guilty if, but only if, it considers that doubt to be a reasonable doubt. A degree of analysis and evaluation in this respect – Is this a reasonable doubt? – is inseparable, to my mind, from the test. Of course, as the High Court pointed out, juries are not accustomed to the analysing of their mental processes in this deliberate and systematic fashion, and, understandably, it was held to be confusing, as well as unnecessary and undesirable, to invite them expressly to go through such an exercise, but that is another matter. Determining whether there is

[48] *Pahuja* (1987) 49 SASR 191 at 204.
[49] *Pahuja* (1987) 49 SASR 191 at 205.
[50] *Pahuja* (1987) 49 SASR 191 at 210.

> a reasonable doubt on the evidence requires the making of a judgment, and perhaps the discarding of perceived unreasonable doubts, even if it is all done unconsciously."

31. In a particularly helpful passage, Cox J addressed the distinction between the corporate state of mind of a jury and the mental processes of individual jurors in determining whether a doubt is reasonable or unreasonable:[51]

> "The High Court pointed out that 'a reasonable doubt is a doubt which the particular jury entertains in the circumstances', and that is the way the matter is looked at (any appeal aside) when the verdict has been returned. However, a judge's charge is directed not merely to the jury as a whole but to each individual member of it, for it is the votes of the individual members that will determine the verdict of the jury. It is obviously possible for an individual juror to perceive an unreasonable doubt, in the objective sense of that word, and I see no difficulty myself in conceiving of a juror having an unreasonable doubt. Jurors are selected at random and are no more immune from having unreasonable thoughts on occasions, or making unreasonable judgments, than judges or any other members of the community. To suppose otherwise, in the particular case of this class of persons, would be very strange indeed. At any rate, a person can have a doubt, in every sense of the word, but then, on further reflection and evaluation, discard it as unreasonable, so that it will no longer have any influence upon his decision. When the High Court in *Green* said that 'a reasonable doubt is a doubt which the particular jury entertains in the circumstances', it was, I apprehend, referring to the corporate state of mind that is implied in a finding of not guilty at the end of the jury's deliberations. It could not have been referring to the reasoning or evaluation processes, productive possibly of temporary as well as final states of mind, that are carried out, usually quite unconsciously, by individual jurors. Otherwise, it seems to me, the word 'reasonable', in the phrase 'beyond reasonable doubt', must be otiose."

32. The approach of King CJ has prevailed in South Australia.[52] However, notwithstanding the high regard in which his Honour's judgments in the criminal law are held,[53] and deservedly so, in *Ladd* I expressed my agreement with the view of Cox J. It is a view which has found support from the Victorian Court of Criminal Appeal in *Neilan v The Queen*[54] and *R v Chatzidimitriou*.[55] In *Neilan* the Court cited with approval the passage from the judgment of Cox J to which I have referred concerning the inevitability of a degree of analysis and evaluation

[51] *Pahuja* (1987) 49 SASR 191 at 210.
[52] *Gebert v The Queen* (1992) 60 SASR 110.
[53] *R v Southammavong* [2003] NSWCCA 312 per Spigelman CJ at [35].
[54] [1992] 1 VR 57.
[55] (2000) 1 VR 493.

by the jury. Of the passage in *Green* in which it is stated that a reasonable doubt "is a doubt which the particular jury entertain in the circumstances", the Court said:[56]

> "But this cannot mean that a reasonable doubt is anything other than a doubt, to use the language of Kitto J which had been approved a little earlier, 'which the jury considers reasonable'. The court is saying that the jurors set the standard of what is reasonable. To the references given by Cox J in *Pahuja* to judicial recognitions of the fact that juries may entertain doubts which they should not characterise as reasonable it will be sufficient to add a reference to what is said in the judgments in *Chamberlain v R (No 2)* (1984) 153 CLR 521."

33. If Cox J and the Victorian authorities are correct, and in particular if, as Cummins AJA said in *Chatzidimitriou*, "The adjective 'reasonable' qualifies the noun 'doubt'",[57] it appears inevitable that jurors must assess the nature and weight of any doubt that they experience. Evaluation of the doubt in order to determine whether it is reasonable is the very task with which the jurors are entrusted. This evaluation necessarily involves a degree of analysis of the mental processes or thoughts experienced by the jurors. If it was ever appropriate, why should Judges today assume that jurors are not accustomed to analysing their own thoughts in respect of any doubt that they might experience? Implicit in the assumption that jurors are not accustomed to analysing their mental processes is the further assumption that such a task would be beyond individual jurors and juries collectively. That further assumption is contrary to the experience of many trial Judges as to the capacities of jurors, individually and collectively, and such an assumption might reasonably be regarded as disclosing a somewhat patronising attitude. Whatever may have been the position when jurors were first engaged in the criminal trial process, the vast majority of today's jurors are well educated and

[56] *Neilan* [1992] 1 VR 57 at 71 (citations omitted).
[57] *Chatzidimitriou* (2000) 1 VR 493 at [46].

assumptions based on old stereotyping should play no role in determining how jurors should now be directed.

34. As to assisting jurors with an explanation concerning what is meant by "reasonable", trial Judges are provided with very little scope for expansion on the classical direction. In *Green,* allowance was made for excluding "fantastic and unreal possibilities" as a "source of reasonable doubt", but only in circumstances where it is necessary to restore the balance because "counsel for the accused has laboured the emphasis on the onus of proof to such a degree as to suggest to the minds of the jury that possibilities which are in truth fantastic or completely unreal ought by them to be regarded as affording a reason for doubt …"[58]

35. In *Wilson,*[59] King CJ observed that it is permissible to remind the jury "of the capacity of the human mind to conjure up fanciful, nervous or unreasonable misgivings about matters which are not in reality doubt" and, if thought necessary, "to warn a jury against unreasonable mental processes …"[60] His Honour emphasised, however, that "No attempt should be made to explain or define reasonable doubt" and:[61]

> "If amplification is desired it should go no further than to tell the jury that a reasonable doubt is one which they, as reasonable persons, are prepared to entertain".

This passage received specific approval in *Southammavong.*[62]

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[58] *Green* (1971) 126 CLR 28 at 33.
[59] (1986) 42 SASR 203.
[60] *Wilson* (1986) 42 SASR 203 at 206.
[61] *Wilson* (1986) 42 SASR 203 at 207.
[62] [2003] NSWCCA 312 per Spigelman CJ at [35].

36. In *R v Reeves,*[63] in a judgment with which Mahoney JA and Badgery-Parker J agreed, Hunt CJ at CL disapproved of a direction in which the trial Judge had informed the jury that the words "beyond reasonable doubt" were "perfectly everyday, well understood, English words" and that they meant exactly the same in court as they meant anywhere else. The direction also contained the following passage:

> "Each has a well understood meaning, 'beyond' means what it says, 'reasonable' means what it says and 'doubt' means what it says, and if you put the three words together in a phrase they retain their ordinary natural meaning."

37. Hunt CJ said:[64]

> "It appears to be an ineradicable misconception on the part of some trial judges that, simply because the High Court has on many occasion said that the phrase 'beyond reasonable doubt' is a well understood expression, and that whether a doubt is reasonable is for the jury to say by setting their own standards, it is necessary to tell the jury just that. It is not necessary; nor is it desirable to do so unless something is said by counsel during the course of the trial, or unless the jury asks a question, which warrants elaboration or explanation beyond the conventional direction … The phrase 'beyond reasonable doubt' needs neither embellishment nor explanation …"

38. The view that the jury should simply be told that the Crown must prove guilt beyond reasonable doubt, and that no further explanation should be given unless the jury asks a question, is supported by the model direction in the Queensland Supreme and District Courts Benchbook:[65]

> "For the prosecution to discharge its burden of proving the guilt of the defendant, it is required to prove beyond reasonable doubt that he is guilty."

39. A footnote to that direction is in the following terms:

> "A trial judge should not expand on the meaning of 'reasonable doubt' or attempt to define the concept any further, unless asked to do so by the jury."

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[63] (1992) 29 NSWLR 109.
[64] *Reeves* (1992) 29 NSWLR 109 at 117.
[65] *R v Clarke* (2005) 159 A Crim R 281 at [44].

40. Subsequently the Benchbook provides for explanation, but with the qualification that the "suggested direction should only be given where the jury indicates that it is struggling with the concept". The suggested direction is in the following terms:

> "A reasonable doubt is such a doubt as you, the jury, consider to be reasonable on a consideration of the evidence. It is therefore for you, and each of you, to say whether you have a doubt you consider reasonable. If at the end of your deliberations, you, as reasonable persons, are in doubt about the guilt of the defendant, the charge has not been proved beyond reasonable doubt."

41. In *Clarke*, the Court held that the trial Judge was entitled to reach the view that by reason of the addresses by counsel, "the jury would benefit from a more detailed direction even though not specifically requested".[66] McMurdo P, with whose judgment Helman and Chesterman JJ agreed, said that while the Benchbook was a valuable aid to Judges, it was "not intended to be an inflexible and all-encompassing code".[67]

42. I must confess to difficulty in understanding why, unless the jury asks a question, it is inappropriate to tell a jury that the phrase "beyond reasonable doubt" is a well understood expression and it is for the jury to determine what is "reasonable" in this context or that it is for the jury to decide whether a doubt is reasonable. Why should the initial direction be limited in the manner suggested in *Reeves* and the Queensland model direction? Why wait until the jury is experiencing difficulty to give an explanation which is simple, likely to be helpful and unlikely to confuse or detract from the fundamental concept that guilt must be proved beyond reasonable doubt?

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[66] *Clarke* (2005) 159 A Crim R 281 at [53].
[67] *Clarke* (2005) 159 A Crim R 281 at [53].

43. One of the authorities cited by Hunt CJ was the decision of the High Court in *Keil v The Queen.*[68] In refusing special leave to appeal from a decision of the Victorian Full Court, the bench of five justices made the following observation:

> "[T]he Court would like to reiterate what has been said in other cases that the traditional formula that all relevant matters are proved beyond reasonable doubt is adequate; it does not need embellishment or explanation. Of course, if in the course of a case, counsel for the accused attempts to put forward *doubts of a fanciful kind* and attempts to excite unreasonable attitudes on the part of the jury, one might expect a judge then to point out to a jury *that fanciful doubts are not reasonable doubts*." (my emphasis)

44. It is noteworthy that the Court spoke of "fanciful doubts" not amounting to "reasonable doubts". This is the type of direction of which King CJ disapproved in *Wilson*. A direction that "fanciful doubts are not reasonable doubts" might be thought to be different from the direction approved in *Green*, in appropriate circumstances, that the jury may exclude "fantastic and unreal possibilities" as a "source of reasonable doubt".

45. It is not difficult to imagine the frustration of both trial Judges and juries when questions by juries as to the meaning of "reasonable doubt" are met with a response that it is for the jury to determine what is reasonable and the Judge is unable to define it any further. *Southammavong* and *Chatzidimitriou* are good examples.

46. In *Southammavong*, the trial Judge directed the jury in the following terms:[69]

> "The words 'beyond reasonable doubt' are ordinary everyday words and that is how you should understand them."

47. The jury asked a question:[70]

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[68] (1979) 53 ALJR 525.
[69] [2003] NSWCCA 312 at [8].

> "… can you provide some more clarification around what a reasonable doubt means, ie is it our own individual view, or is there a more independent definition?"

48. The trial Judge gave the following further direction:[71]

> "In relation to your question about can you provide more clarification around what a reasonable doubt means – is it an individual view or is it a more independent definition? The answer is I am going to repeat to you what I said earlier. The words 'beyond reasonable doubt' are ordinary everyday words and that is how you should understand them."

49. In *Chatzidimitriou*, during deliberations the jury asked the trial Judge to define "doubt", "reasonable doubt" and "beyond reasonable doubt". The directions included a contrast between the criminal and civil standards of proof and the following direction:[72]

> "[T]he law has always taken the view that those are very plain English words and ought to be interpreted by the jury to mean exactly what they say, namely beyond reasonable doubt. It is impossible to put any other definition on them."

50. The caution of trial Judges is perfectly understandable. The frustration the juries must have experienced is equally understandable and well demonstrated by the fact that the jury in *Chatzidimitriou* subsequently requested a dictionary. It was provided without further direction.

51. Is it time for a modification of the "extreme and exceptional stand" taken in Australia? I venture to suggest that the concept of "beyond reasonable doubt" is not today a concept regularly used by "ordinary people". Nor is it "popularly understood", particularly in the way juries are supposed to understand it in a criminal trial. Further, if, as King CJ suggested, a "reasonable doubt" is "a doubt" experienced by a reasonable jury, the very expression "beyond reasonable doubt"

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[70] [2003] NSWCCA 312 at [10].
[71] [2003] NSWCCA 312 at [11].
[72] (2000) 1 VR 493 at [34].

is misleading to the average juror. Even if, as Cox J and the authorities to which I have referred demonstrate, it is a doubt which is "reasonable", experience has demonstrated that jurors need assistance in understanding what is meant by "reasonable" in these circumstances.

Juror comprehension

52. Historically, opinion has been divided about whether jurors properly understand instructions as to the standard of "beyond reasonable doubt". From at least the late 19th century in the United States, there has been a strongly held belief in some quarters that jurors readily understand the phrase and that there is no need for explanation.[73] For example, in 1886, the Michigan Supreme Court observed:[74]

> "We do not think that the phrase "reasonable doubt" is of such unknown or uncommon signification that an exposition by a trial judge is called for. Language that is within the comprehension of persons of ordinary intelligence can seldom be made plainer by further definition or refining. All persons who possess the qualifications of jurors know that a "doubt" is a fluctuation or uncertainty of mind arising from defect of knowledge, or of evidence, and that a doubt of the guilt of the accused, *honestly entertained*, is a 'reasonable doubt'".

53. The third edition of *Wigmore on Evidence* observed that:[75]

> "… when anything more than a simple caution and a brief definition is given, the matter tends to become one of mere words, and the actual effect upon the jury, instead of being enlightenment, is likely to be rather confusion, or, at the least, a continued incomprehension."

54. In Australia, Windeyer J picked up this line of opinion in 1960 noting that attempts to explain the phrase "are not always helpful" and suggesting that "it is not desirable that the time-honoured expression 'satisfied beyond reasonable doubt' should be omitted and some substitute adopted".[76] In 1961, Dixon CJ suggested that the expression is "used by ordinary people and is understood well

[73] See *Buel v State* 80 NW 78 (1899) at 85.
[74] *People v Steubenvoll* 28 NW 883 (1886) at 885.
[75] J Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1940) vol 9 at 319.
[76] *Thomas v The Queen* (1960) 102 CLR 584 at 604.

enough by the average man in the community".[77] The High Court has consistently followed this position.[78]

55. In recent times, however, the view has been expressed that the time-honoured expression lacks a "common usage and understanding". Courts in New Zealand,[79] Canada and the United States have made attempts to rectify this difficulty, but Australian Courts have consistently refused to expand upon the explanation of the formula. In the United States and Canada, "there is clear authority to the effect that a *failure* to elaborate on and explain the expression [beyond reasonable doubt] constitutes error" (my emphasis).[80] The Supreme Court of Canada has held that an explanation of the phrase is "an essential element of the instructions that a judge must give to a jury".[81] Ginsburg J of the United States Supreme Court noted:[82]

> "… the argument for defining the concept is strong. While judges and lawyers are familiar with the reasonable doubt standard, the words 'beyond a reasonable doubt' are not self-defining for jurors. Several studies of jury behavior have concluded that 'jurors are often confused about the meaning of reasonable doubt,' when that term is left undefined. … Thus, even if definitions of reasonable doubt are necessarily imperfect, the alternative – refusing to define the concept at all – is not obviously preferable."

56. Studies in both New South Wales and New Zealand have demonstrated that the use of the unadorned statement has led to disagreement among jurors as to the meaning of "reasonable doubt".[83]

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[77] *Dawson v The Queen* (1961) 106 CLR 1 at 18.
[78] See, eg, *Green* (1971) 126 CLR 28 at 32; *La Fontaine* (1976) 136 CLR 62 at 84; *Van Leeuwen v The Queen* (1981) 55 ALJR 726 at 728.
[79] See, eg, *R v Wanhalla* [2007] 2 NZLR 573 at [156].
[80] *Graham v The Queen* (2000) 116 A Crim R 108 at [51]. See also *Darkan v The Queen* (2006) 227 CLR 373 at [69] referring to the position adopted in the United Kingdom, New Zealand, Canada and the United States.
[81] *R v Lifchus* [1997] 3 SCR 320 at [22]. The Court did not give a precise formula for the explanation, suggesting amongst other things that, "It will suffice to instruct the jury that a reasonable doubt is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence". The Court also suggested that a jury should be instructed that a reasonable doubt cannot be "based on sympathy or prejudice" or be "imaginary or frivolous" and that "the Crown is not required to prove its case to an absolute certainty since such an unrealistically high standard could seldom be achieved" (at [30]-[31]).
[82] *Victor v Nebraska* 511 US 1 (1994) at 26.
[83] M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (2001) at [449]-[454]; J Robertson, 'The Jury Writes Back: Aspects of Jury Management' (Speech delivered at the Biennial Judges' Conference, Gold Coast, 22-26 June 2003) at 19-21; W Young, N Cameron and Y Tinsley, 'Juries in Criminal Trials: Part Two: A

57. The New South Wales study was conducted by that State's Bureau of Crime Statistics and Research (BOCSAR). A total of 1225 jurors from 112 juries completed a short, structured questionnaire at the end of criminal trials regarding their self-reported understanding of judicial instructions, judicial summing-up of trial evidence and other aspects of the trial process. These jurors heard District or Supreme Court trials held between mid-July 2007 and February 2008 in six courthouses in Sydney, Wollongong and Newcastle.

58. The precise terms of directions as to the standard of proof to which the jurors were subjected are unknown, but the New South Wales Criminal Trial Courts Benchbook provides the following standard direction:[84]

> "As this is a criminal trial the burden or obligation of proof of the guilt of the accused is placed squarely on the Crown. That burden rests upon the Crown in respect of every element or essential fact that makes up the offence with which the accused has been charged. That burden never shifts to the accused. There is no obligation whatsoever on the accused to prove any fact or issue that is in dispute before you. It is of course not for the accused to prove his/her innocence but for the Crown to establish his/her guilt.
>
> A critical part of the criminal justice system is the presumption of innocence. What it means is that a person charged with a criminal offence is presumed to be innocent unless and until the Crown persuades a jury that the person is guilty beyond reasonable doubt.
>
> …
>
> The Crown must prove the accused's guilt beyond reasonable doubt. That is the high standard of proof that the Crown must achieve before you can convict the accused. At the end of your consideration of the evidence in the trial and the submissions made to you by the parties you must ask yourself whether the Crown has established the accused's guilt beyond reasonable doubt. In other words, you should ask yourself, 'Is there any reasonable possibility that the accused is not guilty?'
>
> However, the Crown does not have the burden of proving beyond reasonable doubt every single fact that arises from the evidence and is in dispute. The obligation that rests upon the Crown is to prove the elements of the charge, that is the essential facts that go to make up the charge, and must prove those facts beyond reasonable doubt. I shall shortly outline for you what are the elements of the charge, or the essential facts, that the Crown must prove beyond reasonable doubt.

Summary of Research Findings' (Preliminary Paper No 37, New Zealand Law Commission, 1999) vol 2 at [7.16].

[84] Judicial Commission of New South Wales, *Criminal Trials Courts Benchbook* (2009).

> In a criminal trial there is only one ultimate issue that a jury has to decide. Has the Crown proved the guilt of the accused beyond reasonable doubt? If the answer is 'yes', the appropriate verdict is 'guilty'. If the answer is 'no', the verdict must be 'not guilty'".

59. The first survey question asked jurors about their understanding of the phrase "beyond reasonable doubt". The question asked:[85]

> "… people tried in court are presumed to be innocent, unless and until they are proved guilty 'beyond reasonable doubt'. In your view, does the phrase 'beyond reasonable doubt' mean (pretty likely the person is guilty/very likely the person is guilty/almost sure the person is guilty/sure the person is guilty)."

60. The table below shows the results recorded and depicts that more than half (55%) of the jurors surveyed believe that the phrase "beyond reasonable doubt" means "*sure* [that] the person is guilty". A further 23 per cent believe that the phrase means "almost sure [that] the person is guilty". In other words, almost four in five jurors (78%) understood the phrase to mean either "sure" or "almost sure" that the person is guilty. Cause for particular concern exists, however, when it is appreciated that a little over 20 percent understood the standard to equate to either "pretty" or "very" likely.[86]

Table: Jurors' understanding of 'beyond reasonable doubt'[87]

	N	***%***
Pretty likely person is guilty	119	10.1
Very likely person is guilty	137	11.6
Almost sure person is guilty	270	22.9
Sure person is guilty	652	55.4
TOTAL	**1178**[*]	**100.0**

[*] *47 jurors did not answer this question*

61. The comprehension of jurors was significantly influenced by their understanding of the judge's instructions on the law, whether the trial dealt with adult/child sexual offences or other offences and whether English was the juror's first language. Jurors who said they "understood completely" the judge's instructions

[85] Lily Trimboli, 'Juror Understanding of Judicial Instructions in Criminal Trials' (2008) 119 *Crime and Justice Bulletin* 1 at 4.
[86] Lily Trimboli, 'Juror Understanding of Judicial Instructions in Criminal Trials' (2008) 119 *Crime and Justice Bulletin* 1 at 4.
[87] Lily Trimboli, 'Juror Understanding of Judicial Instructions in Criminal Trials' (2008) 119 *Crime and Justice Bulletin* 1 at 6.

on the law were more likely than jurors who understood "most things/little/nothing" of the instructions (82% v 75%) to understand "beyond reasonable doubt" to mean "sure" or "almost sure" that the person was guilty. Equal proportions of jurors who reported that they understood "most things" (25%) as those who reported that they understood little or nothing (26%) of the instructions on the law, said that they understood the concept of beyond reasonable doubt to mean "pretty likely" or "very likely" that the person was guilty.[88]

62. There was no relationship between jurors' understanding of "beyond reasonable doubt" and whether they received written materials when considering their verdict, such as a transcript of the summing-up or trial evidence.[89]

63. There was a significant relationship between the type of offence before the court and jurors' self-reported understanding of beyond reasonable doubt. Jurors who heard trials concerning adult or child sexual assault offences were 1.4 times more likely than jurors hearing trials dealing with other types of offences (27% v 19%) to understand the concept to mean "pretty likely" or "very likely" that the person was guilty. Conversely, jurors who heard trials of offences other than sexual offences were 1.1 times more likely to understand the concept to mean "sure" or "almost sure" the person was guilty (81% v 73%).[90]

64. Jurors whose first language was English were more likely than those whose first language was not English to understand "beyond reasonable doubt" to mean "sure" or "almost sure" the person is guilty. However, jurors' understanding of this concept is not related to other socio-demographic characteristics of the jurors, including gender or employment status.[91]

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[88] Lily Trimboli, 'Juror Understanding of Judicial Instructions in Criminal Trials' (2008) 119 *Crime and Justice Bulletin* 1 at 6.
[89] Lily Trimboli, 'Juror Understanding of Judicial Instructions in Criminal Trials' (2008) 119 *Crime and Justice Bulletin* 1 at 6.
[90] Lily Trimboli, 'Juror Understanding of Judicial Instructions in Criminal Trials' (2008) 119 *Crime and Justice Bulletin* 1 at 6.
[91] Lily Trimboli, 'Juror Understanding of Judicial Instructions in Criminal Trials' (2008) 119 *Crime and Justice Bulletin* 1 at 6.

65. It should be noted that 47 jurors did not answer the question relating to "beyond reasonable doubt". This number is in stark contrast to questions 2 and 3, which concerned to the judge's summing-up of the evidence at trial and juror understanding of the judge's summing-up, where only five and four jurors respectively did not answer. Perhaps this disparity alone is an indication that a significant number of jurors had difficulty with the concept of "beyond reasonable doubt".

66. New Zealand research was conducted in 1999 in the context of standard directions which advised the jury that the standard of proof required is beyond reasonable doubt and that standard is satisfied if the jury "are sure" or "feel sure" of guilt. The result of the research was summarised in the joint judgment of William Young P, Chambers and Robertson JJ in *Wanhalla*:[92]

> "[41] The New Zealand approach (or approaches) created uncertainty in the minds of jurors in the cases which were studied for the Law Commission's jury research project, see New Zealand Law Commission *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, NZLC PP 37 vol 2 1999 at [7.16]:
>
> > [M]any jurors said that they, and the jury as a whole, were uncertain what 'beyond reasonable doubt' meant. They generally thought in terms of percentages, and debated and disagreed with each other about the percentage certainty required by 'beyond reasonable doubt', variously interpreting it as 100 per cent, 95 per cent, 75 per cent and even 50 per cent. Occasionally this produced profound misunderstandings about the standard of proof."

67. Not surprisingly, their Honours expressed "alarm" that jurors "could act on the basis that probabilities of guilt expressed in percentage terms as low as 75% or 50% are enough to warrant conviction".[93] Concern was also expressed that the standard direction could result in a conclusion by jurors that 100 percent certainty was required.

[92] *Wanhalla* [2007] 2 NZLR 573 at [41].
[93] *Wanhalla* [2007] 2 NZLR 573 at [42].

Other Jurisdictions

England and Wales

68. In England and Wales the standard direction concerning the standard of proof is found, with an accompanying note, in the specimen directions for use in England and Wales provided by the Judicial Studies Board. It is in the following terms:[94]

> "How does the prosecution succeed in proving the defendant's guilt? The answer is – by making you sure of it. Nothing less than that will do. If after considering all the evidence you are sure that the defendant is guilty, you must return a verdict of 'Guilty'. If you are not sure, your verdict must be 'Not Guilty'.
>
> **Note**
> Normally, when directing a jury on the standard of proof, it is not necessary to use the phrase 'beyond reasonable doubt'. But where it has been used in the trial, eg by counsel in their speeches, it is desirable to give the following direction: 'The prosecution must make you sure of guilt, which is the same as proving the case beyond reasonable doubt': see *R v Adey*, unreported (97/5306/W2), where the Court of Appeal cautioned against any attempt at a more elaborate definition of 'being sure' or 'beyond reasonable doubt'. Similarly in *R v Stephens* (2002) The Times, 27 June the CACD said that it was unhelpful to seek to distinguish between being 'sure' and 'certain'."

69. Judges in England and Wales now routinely instruct the members of the jury that they must be "sure" of the defendant's guilt,[95] although some Judges also continue to use the expression "beyond reasonable doubt".[96] The NSW Law Reform Commission notes that anecdotally it has been reported that juries rarely, if ever, seek clarification of a direction given in those terms, but footnotes a journalist's account of his jury service and the difficulties experienced with the word "sure".[97]

70. In England and Wales, there is longstanding support for a direction along the following lines:

> "a reasonable doubt is that quality and kind of doubt which, when you are dealing with matters of importance in your own affairs, you allow to influence you one way or another".[98]

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[94] England and Wales Judicial Studies Board, *Crown Court Bench Book: Specimen Directions* (2007) at s 2. See also *R v Bradbury* [1969] 2 QB 471 at 474; *R v Quinn* [1983] *Criminal Law Review* 475.
[95] *R v Kritz* [1950] 1 KB 82 at 89; *R v Summers* [1952] 1 All ER 1059 per Goodard LJ at 1060; *Walters v The Queen* [1969] 2 AC 26 at 30.
[96] C Heffer, 'Beyond "Reasonable Doubt": The Criminal Standard of Proof Instruction as Communicative Act' (2006) 13(2) *International Journal of Speech, Language and the Law* 159 at 176.
[97] NSW Law Reform Commission, 'Jury Directions' (Consultation Paper No 4, NSW Law Reform Commission, 2008) at 75-76.
[98] *Walters v The Queen* [1969] 2 AC 26 at 29. See also the list of alternative phrases in *Buel v State* 80 NW 78 (1899) at 84. *Walters v The Queen* [1969] 2 AC 26 at 30 suggests that judges, drawing on their knowledge of the jury before them, should exercise their discretion in the phraseology they employ.

71. This is known as the "important decision" analogy. The Privy Council has held that the use of this type of analogy is acceptable if the trial judge is of the opinion that there is a danger that the jury might consider their task "more esoteric than applying to the evidence … the common sense with which they approach matters of importance to them in their ordinary lives".[99] However, this approach has been criticised by both the New Zealand and Canadian Supreme Courts. In *Brown v The King*[100] a majority expressed the view that it was an error to direct that a reasonable doubt "means a doubt such as would influence you in the ordinary affairs of life".

Canada

72. In Canada, the Supreme Court has approved the following direction:[101]

> "The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.
>
> What does the expression 'beyond a reasonable doubt' mean?
>
> The term 'beyond a reasonable doubt' has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.
>
> A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
>
> Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
>
> On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
>
> In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt."

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[99] *Walters v The Queen* [1969] 2 AC 26 at 30.
[100] (1913) 17 CLR 570.
[101] *R v Lifchus* [1997] 3 SCR 320.

73. In disapproving the "important decision" analogy, the Supreme Court of Canada has observed that the standard by which people make everyday decisions is a "standard of probability" and often "at the low end of the scale", concluding that "to invite jurors to apply to a criminal trial the standard of proof used for even the important decisions in life runs the risk of significantly reducing the standard to which the prosecution must be held".[102]

74. Judges in Canada are not permitted to direct juries that the words 'beyond reasonable doubt' are ordinary everyday words and are to be applied in that way. Canadian judges may not qualify the word 'doubt' with adjectives other than 'reasonable', except to say that a reasonable doubt must not be frivolous or imaginary.[103]

75. Unlike practice in England and Wales, Canadian judges continue to use the phrase 'beyond reasonable doubt' prior to instructing that the jury must be 'sure' or 'certain' of the accused's guilt before convicting. The use of the words "sure" or "certain" comes "*after* proper instructions have been given as to the meaning of the expression 'beyond reasonable doubt'".[104]

New Zealand

76. In *Wanhalla,*[105] the Court of Appeal considered directions by a trial Judge which informed the jury that the Crown was required to prove the charge "to the standard of proof beyond reasonable doubt" and added the following:

- "In other words, you must be sure of guilt before you can find an accused guilty. If you are not sure of guilt, the verdict must not be guilty".
- "There are three further points regarding the burden of standard of proof which you should bear in mind.

[102] *R v Lifchus* [1997] 3 SCR 320 at [23]-[24].
[103] *R v Wanhalla* [2007] 2 NZLR 573 at [37].
[104] *R v Lifchus* [1997] 3 SCR 320 at [34].
[105] [2007] 2 NZLR 573.

Firstly, a reasonable doubt means just that. A doubt which has no basis whatsoever is not a reasonable doubt. The Crown does not have to prove a charge to the point of scientific or mathematical certainty, in other words, beyond all doubt. To return a guilty verdict you must therefore be sure, but not necessarily absolutely certain, of guilt".

77. The directions to which I have referred were provided to the jury in a preliminary memorandum. Similar directions were given orally, but the trial Judge added that "it is often said that members of a jury should be as sure about a conclusion of guilt as they would want to be about making an important decision in the context of their own personal lives".

78. The majority judgment observed that these directions were "far more elaborate than is customary in New Zealand trials". Their Honours said:[106]

> "Most Judges direct the juries on the basis that the standard of proof beyond reasonable doubt is met if they 'are sure', or 'feel sure', that the accused is guilty. … What is a reasonable doubt is sometimes explained as being more than a 'vague or fanciful doubt' … But, on the whole, … the use of adjectives to qualify what doubts are not reasonable is seen as best avoided."

79. After reviewing the authorities, the majority indicated that they were "inclined to the view that Judges should explain the concept of proof beyond reasonable doubt" in the following terms which the Court noted were in part borrowed from the decision of the Supreme Court of Canada in *Lifchus*:[107]

> "The starting point is the presumption of innocence. You must treat the accused as innocent until the Crown has proved his or her guilt. The presumption of innocence means that the accused does not have to give or call any evidence and does not have to establish his or her innocence.
>
> The Crown must prove that the accused is guilty beyond reasonable doubt. Proof beyond reasonable doubt is a very high standard of proof which the Crown will have met only if, at the end of the case, you are sure that the accused is guilty."

[106] *Wanhalla* [2007] 2 NZLR 573 at [22] (citations omitted).
[107] *Wanhalla* [2007] 2 NZLR 573 at [49].

80. The majority noted that no single formula is required and specifically stated that the formula cited above is not mandatory. Their Honours added:[108]

> "Further, we wish to discourage too close a focus on the precise nuances of judicial directions. It is sufficient to make it clear that the concept involves a high standard of proof which is discharged only if the jury is sure or feels sure of guilt."

81. The primary difference between the New Zealand and the English and Wales directions is that the English and Welsh judges tend to focus on what is required to justify conviction, whereas New Zealand judges focus on what warrants an acquittal.[109]

82. The New Zealand Court of Appeal has recently, on a number of occasions, criticised the "important decision" analogy. Reasons given for the criticism include: [110]

- personal decisions requiring serious deliberation are less common in today's society;
- important personal decisions may involve decisions about future action and do not often involve a reconstruction of past events based on conflicting accounts;
- in making such decisions, usually people will personally be aware of many of the relevant facts and will also be able to undertake their own fact-finding;
- important personal decisions may involve elements of risk-taking, speculation, emotion, hope, uncertainty and prejudice;
- different jurors may take differing levels of care and reflection in making important personal decisions; and
- people will often make important decisions on a standard falling short of proof beyond reasonable doubt.

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[108] *Wanhalla* [2007] 2 NZLR 573 at [52].
[109] *Wanhalla* [2007] 2 NZLR 573 at [34].
[110] *Wanhalla* [2007] 2 NZLR 573 at [26]-[32], [131]-[134] and [166]; *R v Adams* CA70/05, 5 September 2005 at [59]-[64]; *R v Jopson* CA24/05, 25 November 2005 at [28].

83. Although the Court of Appeal in *Wanhalla* concluded that in the context of all the directions provided by the trial judge the "important decision" analogy had not confused the jury, the majority judgment observed that "it is right to recognise that the analogy has the potential to puzzle jurors and for this reason is not helpful. It should not be used in the future".[111]

United States

84. In *Re Winship*[112] a Judge had found on a "preponderance of evidence" that a child had stolen money, rejecting the contention that "due process required proof beyond reasonable doubt". A majority of the Supreme Court of the United States held that the due process clause of the Constitution "protected an accused in a criminal prosecution against conviction except upon proof beyond reasonable doubt".

85. For Federal Courts, the recommended direction provided by the Federal Judicial Center is in the following terms:[113]

> "[T]he government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty."

86. Glazebrook J notes in *Wanhalla* that the main criticism of this direction has been aimed at the use of the word "real" rather than "reasonable" in the second to last

[111] *Wanhalla* [2007] 2 NZLR 573 at [56].
[112] 397 US 358 (1970).
[113] Federal Judicial Center, *Pattern Criminal Jury Instructions* (1988) at 21.

line.[114] Her Honour expressed the view that "firmly convinced" equates to the term "sure".

Conclusion

87. The current situation is unsatisfactory. The meaning of the expression "beyond reasonable doubt" remains open to debate. Jurors in the practical setting of criminal trials and in the context of research subsequent to trials have demonstrated difficulties with the concept. Faced with requests for explanation beyond the classical direction, the capacity of Judges to provide a helpful explanation is extremely limited and, with repeated admonitions by the High Court in mind, Judges feel constrained to repeat the standard formula in a way which provides little help to juries.

88. The NSW Law Reform Commission has identified a number of issues associated with the words "sure" and "certain".[115] The judgments in *Wanhalla* are particularly helpful. They contain reviews of research, practices in other jurisdictions and primary issues in the debate. The majority judgment recognised the "robustness" of the jury system which relies on the "collective strengths of juries",[116] but in the process of reaching a view as to the appropriate terms of a direction explained why there was "something to be said for the Canadian approach, at least in broad terms":[117]

[114] *Wanhalla* [2007] 2 NZLR 573 at [71].
[115] NSW Law Reform Commission, 'Jury Directions' (Consultation Paper No 4, NSW Law Reform Commission, 2008) at 75-78.
[116] *Wanhalla* [2007] 2 NZLR 573 at [47].
[117] *Wanhalla* [2007] 2 NZLR 573 at [48].

> "(a) At one end of the probability continuum, jurors should be told that absolute certainty is not required. Otherwise there is a substantial risk that jurors will mistakenly assume that it is. Common sense, supported by the Montgomery and Zander articles, shows that this is so.
>
> (b) Jurors should be told that more than proof on the balance of probabilities is required. The necessity for this is highlighted by the willingness of some jurors in New Zealand to equate proof beyond reasonable doubt with 50 per cent certainty.
>
> (c) For these reasons it seems sensible to ensure that juries at least exclude untenable concepts of proof beyond reasonable doubt (as equating it to more likely than not at one end of the continuum or absolute certainty at the other). This should at least make it likely that jurors will focus on the right area of the probability continuum.
>
> (d) When Judges do not give an explanation of proof beyond reasonable doubt, jurors are not assisted. A circular explanation of a reasonable doubt as one which the jury regards as reasonable can hardly provide much assistance, so some sort of explanation along the lines proposed in *Lifchus* has attractions."

89. Glazebrook J reviewed in more detail the research discussed in the majority judgment and concluded that "clear grounds" for a change in the existing New Zealand practice had not been established. Her Honour was of the view that the expanded direction identified in the majority judgment "should only be given when it appears to a Judge absolutely vital that the jury be given more assistance in the circumstances of the particular case".[118] Glazebrook J was concerned that the expanded explanation could "swamp the vital message that to convict jurors must be sure of guilt" and that "any direction that absolute certainty is not required risks weakening the effects of deliberation on those whose threshold percentages may be, despite direction to the contrary, too low". Her Honour added:[119]

> "The dynamic of deliberation is part of the strength of the jury system. A definition of reasonable doubt that is too prescriptive risks diluting that dynamic."

[118] *Wanhalla* [2007] 2 NZLR 573 at [118].
[119] *Wanhalla* [2007] 2 NZLR 573 at [113].

90. Later in her judgment, Glazebrook J expressed the view that "it is essential that any direction be aimed at the standard of proof itself and not the level of certainty required of jurors …".[120] Her Honour considered that if a jury is to be given a direction that there is no need for absolute certainty, "some explanation should be given as to why that is so" and, in her Honour's view, the expanded definition proposed by the majority provided a satisfactory explanation.[121]

91. Hammond J suggested that the arguments for and against a fuller explanation of the formula were "more evenly balanced than is commonly supposed". His Honour summarised his perception of those arguments in the following terms:[122]

> "[156] The arguments for requiring a fuller explanation of the concept are that reasonable doubt in fact lacks a common usage and understanding; that 'reasonable doubt' *is* capable of definition; that the formal requirements of 'due process' actively require a reasonable doubt definition; and that social science studies and judicial experience indicates that jurors are sometimes confused by the present concept.
>
> [157] The arguments against a fuller explanation are the flip side of the same coin: that empirical evidence does not support the provision of a fuller definition of reasonable doubt; that leaving the term largely undefined avoids the pitfalls of attempted definition of a concept that inherently defies precise definition; that a jury verdict harnesses the collective wisdom of the particular community as embodied in the jury to determine for itself the appropriate meaning of the term, through its own deliberations."

92. Hammond J was of the view that the jury should be told that absolute certainty is not required and that the direction proposed in the majority judgment would be appropriate in the vast majority of cases. His Honour emphasised, however, that the content of the direction is "best left to the discretion of the trial judge".[123]

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[120] *Wanhalla* [2007] 2 NZLR 573 at [123].
[121] *Wanhalla* [2007] 2 NZLR 573 at [126].
[122] *Wanhalla* [2007] 2 NZLR 573 at [156]-[157].
[123] *Wanhalla* [2007] 2 NZLR 573 at [170].

93. If it is recognised that an "extreme and exceptional stand"[124] has been taken in Australia, in the face of the uncertainties and problems discussed, particularly concerning juror comprehension of the standard of proof, I suggest a case for change has been made out. It is a change that should be made not only with the well documented difficulties in mind, but in the context of a recognition that, in the main, jurors are well educated and the patronising attitudes of the past have no place in formulating explanations of legal and other issues or in delivery of those explanations.

94. In the New South Wales survey to which I have referred, 32.9 percent of jurors surveyed had obtained either a post-graduate degree (12.7 percent) or a bachelor degree (20.2 percent) and a further 45.3 percent had achieved either secondary education (20.9 percent) or certificate level (24.4 percent). Ten percent of those surveyed were retired, while 83.2 percent were employed or self employed. In a survey conducted across three states in March and May 2007 involving 4765 empanelled and non-empanelled jurors in both metropolitan and regional areas, only four percent recorded their highest educational qualification as less than high school. The highest educational qualification of the other participants was as follows:

- High school 33.4 percent
- Trade certificate or equivalent 14.9 percent
- Diploma or equivalent 19.3 percent
- University degree 28.4 percent.

[124] *Darkan* (2006) 227 CLR 373 at [69].

95. Borrowing heavily on the approach formulated by the majority in *Wanhalla*, I tend to favour the following as a standard form of explanation to be adapted to the particular circumstances of each case:

> "The starting point is the presumption of innocence. Every person who pleads not guilty is presumed to be innocent of the crime(s) charged unless and until the Crown proves guilt to the satisfaction of the jury.
>
> You must treat the accused as innocent unless the Crown has proved his/her guilt. The presumption of innocence means that the accused does not have to establish his/her innocence or prove any explanation or defence. The Crown must do all the proving, including disproving any explanation or defence.
>
> Furthermore, nothing short of proof beyond reasonable doubt will do. The Crown must prove the guilt of the accused beyond reasonable doubt. Proof beyond reasonable doubt is a very high standard of proof which the Crown will have met only if you are sure that the accused is guilty.
>
> It is not enough for the Crown to persuade you that the accused is probably guilty or even that he/she is very likely guilty. On the other hand, when dealing with the reconstruction of past events, it is virtually impossible to prove anything with absolute certainty and the Crown does not have to do so. The Crown does not have to prove guilt beyond all doubt.
>
> What then is reasonable doubt? It is not appropriate to think of it in terms of percentages. A reasonable doubt is an honest and reasonable uncertainty left in your mind about the guilt of the accused. It is for you to decide what is reasonable.
>
> In summary, if, after careful and impartial consideration of the evidence, you are sure that the accused is guilty you must find him/her guilty. On the other hand, if you are not sure that the accused is guilty, you must find him/her not guilty."

96. As to an explanation should a jury seek clarification, if the current direction remains unchanged, I favour permitting trial Judges to provide an explanation which includes the following:

- It is for the jury to say whether a doubt is reasonable.
- Absolute certainty is not required. The Crown does not have to prove guilt beyond all doubt.
- Possibilities which are in truth fantastic or completely unreal ought not to be regarded by the jury as affording a basis for reasonable doubt.
- A fanciful doubt is not a reasonable doubt.

97. The burden of proof in a criminal trial is of fundamental importance. The law concerning such a critical feature of our system of criminal justice should not be left in a state of uncertainty in which both legal practitioners and Judges continue to debate the true meaning of “beyond reasonable doubt”. Nor should it be left in the current unsatisfactory state where it is well known through practical experience and juror surveys that jurors experience difficulty with the formula and it is commonly misunderstood. Further, Judges are unable to provide satisfactory explanations when jurors indicate that they are in difficulty understanding the formula. Certainty as to the meaning of “beyond reasonable doubt” is required and Judges need the flexibility to respond to juror uncertainty and to provide satisfactory explanations.

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