

Beyond Reasonable Doubt

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Introduction

The standard of proof lies at the core of litigation. It forms the framework against which the evidence is tested and is the fulcrum of persuasion. In criminal cases, that standard is proof beyond reasonable doubt. The well-known words come trippingly off the tongue, but they contain a deceptive simplicity. Of course, the words are plain English words and, at least in this country, the authorities generally proscribe giving the phrase further explication.¹ The onus is also “an essential condition precedent to conviction” which “gives effect” to the presumption of innocence.²

Recently, in *Dookheea*, the High Court considered an appeal where the trial judge, during the course of directions, compared “any doubt” with “reasonable doubt”. Kiefel CJ, Bell, Gageler, Keane, Nettle and Edelman JJ explained that, although it is generally speaking undesirable to contrast them, “in point of principle it is not wrong to notice the distinction” and a reasonable doubt is what a reasonable jury considers to be so.³

The US Supreme Court in *Apprendi v New Jersey*, 530 U.S. 466, 478 (2000) observed that the phrase did not emerge until as late as 1798, and Professor Whitman has observed that our “difficulties in understanding the “reasonable

¹ *The Queen v Dookheea* (2017) 91 ALJR 960; [2017] HCA 36 (*Dookheea*) at [41]; *Green v The Queen* (1971) 126 CLR 28 at 32-33; *La Fontaine v R* (1976) 136 CLR 62 at 71.

² *Momcilovic v The Queen* (2011) 245 CLR 1 at [53] (French CJ) referring to *Howe v The Queen* (1980) 55 ALJR 5 at 7.

³ *Dookheea* [37],[39].

*doubt” rule are the result of a failure of historical memory”.*⁴ It begs the question, what existed before the formulation emerged some 220 years ago? How did the phrase come to form a part of the common law? Does its genesis support the exclusion of “unreasonable doubts”?

As appears from the below analysis, the origins of the formulation are somewhat obscure. It remains to attempt to trace its development. Further, the overseas approaches to explaining the phrase are briefly considered.

Historical development

Trial by jury appears to have been substituted for trial by ordeal by Pope Innocent III’s 1215 Fourth Lateran Council prohibition on clergy performing religious ceremonies in connection with ordeals.⁵ Prior to this, ordeals were in widespread use in western Europe and went by the name “judicium dei” or “the judgment of God”.⁶ The most important of them were the ordeal of hot iron and the ordeal of cold water. The ordeal of hot iron required the accused to grasp a red hot iron and after three days, bandages were removed from the accused’s hand to see whether the burn wound was healing (which was a sign of innocence) or not (which was a sign of guilt). As cruel as this may seem today, the ordeal of cold water may have been even more so. It involved the accused being thrown into a body of water. Innocence however was demonstrated if the accused sank.⁷ These were different times.

⁴ *Whitman, The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*, (2008) at 9 (*Whitman*’).

⁵ Plucknett, *A Concise History of the Common Law*, 3rd ed (1940) at 112-113; *Whitman, The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*, (2008) at 53, 126-127; *Dookheea* [31].

⁶ *Whitman* at 31.

⁷ *Whitman* 31-32.

Ordeals were replaced by trial by jury⁸ in England, whereas on the European continent, they were replaced by a “romano-canonical” procedure which was an inquisitorial procedure governed by elaborate canon law rules.⁹ It has been observed ordeals were abolished in part because they exposed the clergy who presided over them to the moral danger associated with joining in a collective killing.¹⁰ Indeed, as early as the ninth century, Agobard of Lyon had denounced them because they involved the spilling of blood in ways that made everyone involved a “murderer”.¹¹

Although these dangers should have, by analogy, applied to judges imposing blood punishments, it had been earlier explained by the Latin Church Fathers of Late Antiquity, including Saint Augustine, that “when a man is killed justly, it is the law that kills him, not you” and it was recognised by canon lawyers in the middle ages, including Gratian.¹² However, clergy, who presided over ordeals, could not claim this privilege, and it led in part to their abolition.¹³

Jurors at that time (similar to now - see s 72A of the Jury Act 1977 (NSW))¹⁴ were required to swear by God that they would determine the truth of the

⁸ Although this paper does not trace the origins of trial by jury, it should be noted that Evatt J (extra-judicially) observed it probably arose in the sworn inquests of “Frankish origin employed by the Norman Kings in exercise of their prerogative in the interests of both the Crown and the Church... Those sworn on these inquests were called recognitors and possessed special local knowledge of the facts to be inquired into”: H V Evatt, ‘The Jury System in Australia’ (1936) 10 *Australian Law Journal Supplement* 49 at 54.

⁹ *Whitman* at 33.

¹⁰ *Whitman* at 31.

¹¹ *Whitman* at 34.

¹² *Whitman* at 30.

¹³ *Whitman* at 34.

¹⁴ This section prescribes the form of oath or affirmation to be that “the person will give a true verdict according to the evidence.”

matters presented to them. They were not initially directed as to the standard of proof which was left to each juror's own conscience.¹⁵ Indeed, it has been observed that in the early history, juries decided cases on their personal knowledge of events.¹⁶ But "in an age of strong Christian belief and adherence, it was understood that to convict an accused despite lingering doubts was a violation of the juror's oath, and that to convict an innocent man was a mortal sin that would result in damnation."¹⁷

This concept of doubt has been traced to Pope Gregory the Great who stated "[i]t is a serious and unseemly business to go giving certain judgments in doubtful cases". This was picked up by lawyer-popes in the twelfth and thirteenth centuries, including Innocent III who stated, "[w]hen there are doubts, one must choose the safer path." Ivo of Chartres, in the late eleventh century explained "God...was the only judge who could always judge with certainty. For humans it was different. When humans confronted "incerta" – uncertain allegations – they could not condemn an accused person unless it was by "indiciis certis", evidence sufficient to create certainty."¹⁸ Britton observed in the 13th Century that:¹⁹

"... if the jurors are in doubt of the matter and not certain, the judgment ought always in such case to be for the defendant."

The idea of convicting an innocent person being morally more serious than acquitting a guilty one is noted in the oft quoted passage of Blackstone that,

¹⁵ *Dookheea* [31].

¹⁶ *R v Wanhalla* [2007] 2 NZLR 573 (Hammond J).

¹⁷ *Dookheea* [31].

¹⁸ *Whitman* at 66.

¹⁹ Nichols, Britton – The French Text Carefully Revised with an English Translation Introduction and Notes, (1865), vol 1 at 32-33; *Dookheea* [31].

“better that ten guilty persons escape, than that one innocent suffer”.²⁰ It has been observed that Blackstone was merely quoting Sir Matthew Hale who had earlier stated, “it is better five guilty persons should escape unpunished, than one innocent person should die”.²¹ Hale had also used the maxim to argue caution in the use of circumstantial evidence - pointing to two cases where defendants were convicted of murder and executed but it was later discovered the “victims” were alive.²²

However, even earlier references are found in the twelfth century. Maimonides interpreted Exodus²³ to state “it is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent man to death once in a way”²⁴. Earlier still, the maxim may have roots in Roman Law where it was “deemed better to absolve the guilty than to risk sentencing an innocent to death.”²⁵ Though not speaking with the voice of the onus, it

²⁰ *Blackstone: Commentaries on the Laws of England* (1765-1769), Vol IV, 352.

²¹ Harvard Law Review: Volume 128, Number 4 – February 2015, fn58. Indeed, John Adams, appearing for the British soldiers in the Boston Massacre cases of 1770 quoted Hale to the jury as follows: “The rules I shall produce to you from Lord Chief Justice Hale, whose character as a lawyer, a man of learning and philosophy, and as a christian, will be disputed by nobody living; one of the greatest and best characters, the English nation ever produced: his words are these...it is always safer to err in acquitting, than punishing, on the part of mercy, than the part of justice. The next is from the same authority...it is always safer to err on the milder side, the side of mercy...the best rule in doubtful cases, is, rather to incline to acquittal than conviction: and in page 300...Where you are doubtful never act; that is, if you doubt of the prisoners guilt, never declare him guilty, though there is no express proof of the fact, to be committed by him; but then it must be very warily pressed, for it is better, five guilty persons should escape unpunished, than one innocent person should die.”: *Whitman* at 149.

²² Harvard Law Review: Volume 128, Number 4 – February 2015.

²³ In a passage that commands, “*the innocent and righteous slay thou not.*”

²⁴ Moses Maimonides, *The Commandments* (Charles B. Chavel trans., Soncino Press 1967). For a review of the different ratios presented in the legal literature see Alexander Volokh, *n Guilty Men*, 146 U. PA L. REV. 173 (1997); Harvard Law Review: Volume 128, Number 4 – February 2015, fn46.

²⁵ See various sources cited in the Harvard Law Review: Volume 128, Number 4 – February 2015, fn48 referring to the Digest of Justinian 48.19.5.

revealed the need to have “some tradeoff between freeing many guilty and saving fewer innocents”²⁶. Whatever its source, the principle has been observed by scholars to be seen as “a fundamental premise of Anglo-American criminal justice”²⁷ and a go-to justification for the onus.²⁸

Three schools of thought have emerged theorising the adoption of the onus of proof beyond reasonable doubt.²⁹ In a sense, it is difficult to reconcile them. First, Chief Justice May of the Boston Municipal Court propounded that the onus was introduced to “ameliorate the harshness of the criminal justice system” and “make conviction more difficult”.³⁰ Second, it is suggested that the standard of proof was introduced “to compensate the prosecution for the advantage obtained by an accused upon being permitted to adduce evidence.”³¹ And third, that it was to make conviction “easier” having regard to the age of anxious Christians fearing damnation for erring.³² In similar vein, the moralist and priest William Paley, writing in 1785, explained that juries were not wanting to convict “lest the charge of innocent blood should lie at their doors”.³³ He explained:

“...I apprehend much harm to have been done to the community, by the over-strained scrupulousness, or weak timidity, of juries, which demands often such proof of a prisoner’s guilt, as the nature and

²⁶ Harvard Law Review: Volume 128, Number 4 – February 2015.

²⁷ Harvard Law Review: Volume 128, Number 4 – February 2015, fn70.

²⁸ Ibid.

²⁹ *Dookheea* [30].

³⁰ May, “Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases”, (1876) 10 *American Law Review* 642 at 656-659; Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1981), vol 9 at 405 §2497; Broun, *McCormick on Evidence*, 7th ed (2013), vol 2 at 670 §341; *Dookheea* [30].

³¹ Morano, “A Reexamination of the Development of the Reasonable Doubt Rule”, (1975) 55 *Boston University Law Review* 507 at 515; *Dookheea* [30].

³² *Whitman* at 5; *Dookheea* [30].

³³ William Paley, *The Principles of Moral and Political Philosophy* (1785), 446.

secrecy of his crime scarce possibly admit of; and which holds it the part of a safe conscience not to condemn any man, whilst there exists the minutest possibility of his innocence...”

At some stage, the English law came to reject the “idea that facts, or trial proof, could be established with absolute certainty”.³⁴ In this context, it is apposite to note:

“Society's regard for the 17th century jury system's approach to fact finding appears to have informed some aspects of the thinking of English Enlightenment philosophers. Reciprocally, Enlightenment philosophy – particularly John Wilkins' epistemology of three categories of knowledge (physical, mathematical and moral), each involving a different type of certainty and of which the last was based on testimony and reports without requiring absolute proof, and John Locke's consideration of probability bordering so near upon certainty as to form the basis of human conduct – influenced 18th century Anglo-American jurisprudential thought on the processes of proof and the rules of evidence...”³⁵

From the mid 18th Century, three expressions began to be given to juries conveying similar meaning - “satisfied in conscience”, “moral certainty” and

³⁴ Franklin, *The Science of Conjecture: Evidence and Probability before Pascal*, (2001) at 62-63; Jonakait, "Finding the Original Meaning of American Criminal Procedure Rights: Lessons from Reasonable Doubt's Development", (2012) 10 *University of New Hampshire Law Review* 97 at 140-141; *Dookheea* [32].

³⁵ *Dookheea* at [33].

“beyond reasonable doubt”.³⁶ Wigmore has argued the rule first applied only to capital cases and developed out of, earlier, weaker, statements such as “clear impression”, “upon clear grounds” and “satisfied” from where the negative forms “rational doubt”, “rational and well grounded doubt”, “beyond probability of doubt” and “reasonable doubt” emerged.³⁷

Though there is no particular date from which point the onus of proof beyond reasonable doubt was universally accepted and applied, Professor Franklin concluded ultimately “the previous common understanding that the standard of proof in criminal trials should be somewhere between probable suspicion and complete certainty came to be expressed solely in the formulation “beyond reasonable doubt””³⁸.

The first use of the formulation has been noted to be in America, during the Boston Massacre trials of 1770, however it was not the only one used. Among references to being “fully satisfied” and “satisfied belief”, the jury were directed:

“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.”³⁹

One of the first examples in England appears in a trial at the Old Bailey of a Mr Richard Corbett for Arson in 1784. In that case, the judge directed the jury:⁴⁰

³⁶ *Dookheea* [33].

³⁷ *Wigmore on Evidence*, 9 Wigmore, Evidence 2497 (Chadbourn rev. 1981); *R v Compton* (2013) 237 A Crim R 177 at [5] (Kourakis CJ).

³⁸ Franklin, *The Science of Conjecture: Evidence and Probability before Pascal*, (2001) at 62-63. See also Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence*, (1991) at 21; *Dookheea* [33].

³⁹ Thomas Preston, *The Trial of the British Soldiers* (1824) at 142.

⁴⁰ *Whitman* at 158.

“But you gentlemen will weigh all these circumstances in your minds, in such a case you certainly will not convict the prisoner on a mere suspicion; but if you think his conduct such as can by no possibility be accounted for consistent with his innocence, you will be obliged to find him guilty; I do not mean to say that you are to strain against all evidence, or that if you are clearly and truly convinced of his guilt in your own minds you ought to acquit him, but I say if there is a reasonable doubt, in that case that doubt ought to decide in favour of the prisoner.”

Almost a hundred years later, in 1876, Thomas Starkie in “A Practical Treatise of the Law of Evidence” observed:⁴¹

“What circumstances will amount to proof can never be matter of general definition; ... On the one hand, *absolute, metaphysical and demonstrative certainty* is not essential to proof by circumstances. It is sufficient if they produce *moral certainty to the exclusion of every reasonable doubt*; ... On the other hand, a juror ought not to condemn unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused, and, as has been well observed, unless he be so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest...”

⁴¹ As quoted to in *R v Compton* (2013) 237 A Crim R 177 at [36] (Peek J).

In *Brown v The King* (1913) 17 CLR 570 at 585, Isaacs and Powers JJ explained that proof beyond reasonable doubt is “the same conception from the negative standpoint” of the idea of satisfaction to a degree of “moral certainty”. Barton ACJ stated “the persuasion of guilt ought to amount to a moral certainty; or, as an eminent Judge expressed it, ‘such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt’”.

In his concurring opinion in *In re Winship* 397 U.S 358 (1970), 369-373, Harlan J, with respect succinctly, summarised as follows:⁴²

“First, in a judicial proceeding in which there is a dispute about the facts of some earlier event, the fact finder cannot acquire unassailably accurate knowledge of what happened. Instead, all the fact finder can acquire is a belief of what probably happened. The intensity of this belief – the degree to which a fact finder is convinced that a given act actually occurred – can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases “preponderance of the evidence” and “proof beyond a reasonable doubt” are quantitatively imprecise they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusion...the standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial where a preponderance of the

⁴² As quoted to in *R v Compton* (2013) 237 A Crim R 177 at [9] (Kourakis CJ).

evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

...

In a criminal case...we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. ... In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."

The Current Approach

As observed above, the development of the English law demonstrated a rejection of the idea of absolute certainty. In this sense, the High Court in *Dookheea* at [34]-[35] rejected the notion that, "whenever a reasonable jury recognises the existence of a doubt, no matter how slight the doubt may be, the jury ipso facto has a reasonable doubt", but that, a "reasonable doubt is a doubt which the jury as a reasonable jury considers to be reasonable". In practical reality it is for each individual juror to consider whether they have a doubt which, "upon reflection and evaluation...is disposed to [be] discard[ed] as an unreasonable doubt.". In the words of Phillips JA in *R v Chatzidimitriou* (2000) 1 VR 493 at 498:

"the test remains one of reasonable doubt, not of any doubt at all; and ... the jury's function includes determining what is reasonable doubt – or to put that in more concrete fashion, whether the doubt which is left (if any) is reasonable doubt or not."

It is in this sense, the High Court noted in *Dookheea* that "a fanciful doubt would not require a juror to vote for an acquittal; and to reason...that a fanciful doubt is distinguishable as not a doubt at all is not at all convincing. Not all jurors would regard a fanciful doubt as no doubt and nor logically should they do so."⁴³ However, despite noting this distinction, the Court affirmed its previous authority that "it is generally speaking unwise for a trial judge to attempt any explication of the concept of reasonable doubt beyond observing the expression means what it says..."⁴⁴.

It is beyond present purpose to consider whether the Australian approach is apposite. However, the approach appears to be principally rooted in the following:

- (1) That the onus is an expression used and understood by the average person in the community.⁴⁵ In the words of Barwick CJ in *La Fontaine v The Queen* (1976) 136 CLR 62 at 71, "...it is both unnecessary and unwise for a trial judge to attempt explanatory glosses on the classical, and, as I think, popularly understood formula..."

⁴³ *Dookheea* [36].

⁴⁴ *Dookheea* [41].

⁴⁵ *Dawson v The Queen* (1961) 106 CLR 1 at 18 (Dixon CJ); *Green v The Queen* (1971) 126 CLR 28 at 31 (Barwick CJ, McTiernan and Owen JJ).

- (2) To attempt to define with precision the ordinary phrase is to “embark on a dangerous sea”.⁴⁶
- (3) That an explanation is more likely to exacerbate a jury’s uncertainties than alleviate their concerns.⁴⁷
- (4) An explanation may invite the jury to analyse their own mental processes, and may obscure the vital point that the accused be given the benefit of any doubt which the jury regards as reasonable.⁴⁸
- (5) A reasonable doubt is not confined to a “rational doubt”.⁴⁹ Jurors may have a reasonable doubt about the guilt of the accused although they cannot articulate a reason for it other than they are not satisfied beyond reasonable doubt that the Crown has proved its case.⁵⁰

It must be noted that the Court in *Dookheea* observed the practice of contrasting the standard of proof to the civil onus should be encouraged as it is an effective means of conveying that the criminal onus requires a much higher standard of satisfaction than the accused *may* have committed the offence, or that it is *more likely than not* they did so.⁵¹

Overseas Approaches

England and Wales

⁴⁶ *Brown v The King* (1913) 17 CLR 570 at 584 (Barton ACJ).

⁴⁷ *Darkan v R* (2006) 227 CLR 373 at [69] (Gleeson CJ, Gummow, Heydon and Crennan J).

⁴⁸ *Thomas v R* (1960) 102 CLR 584 at 595 (Kitto J).

⁴⁹ *Green v R* (1971) 126 CLR 28 at 33 (Barwick CJ, McTiernan and Owen JJ).

⁵⁰ *Stevens v R* (2005) 227 CLR 319 at [30] (McHugh J).

⁵¹ *Dookheea* [41].

Denning J (as his Honour then was), explained in *Miller v Minister of Pensions* (1947) 2 All ER 372 that proof beyond reasonable doubt:

“...need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail the community if it admitted fanciful possibilities to deflect the courts of justice.”

The model directions provided by the Judicial College are cast in the following terms:

“The prosecution will only succeed in proving that D is guilty if you have been made sure of his guilt. If, after considering all of the evidence, you are sure that D is guilty, your verdict must be ‘Guilty’. If you are not sure that he is guilty, or sure that he is innocent, your verdict must be ‘Not Guilty’.

If reference has been made to “beyond reasonable doubt” by any advocate, the following may be added:

You have heard reference to the phrase ‘beyond reasonable doubt’. This means the same as being sure.”⁵²

New Zealand

In *R v Wanhalla* [2007] 2 NZLR 573, William Young P, Chambers and Robertson JJ explained trial judges should explain the concept of proof beyond reasonable doubt as follows:

“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.

⁵² “The Crown Court Compendium”, Judicial College, November 2017, 5-1

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.

It is not enough for the Crown to persuade you that the accused is probably guilty or even that he or she is very likely guilty. On the other hand, it is virtually impossible to prove anything to an absolute certainty when dealing with the reconstruction of past events and the Crown does not have to do so.

What then is reasonable doubt? A reasonable doubt is an honest and reasonable uncertainty left in your mind about the guilt of the accused after you have given careful and impartial consideration to all of the evidence.

In summary, if, after careful and impartial consideration of the evidence, you are sure that the accused is guilty you must find him or her guilty. On the other hand, if you are not sure that the accused is guilty, you must find him or her not guilty.

Canada

In Canada, an expanded direction has been suggested. In the case of *R v Lifchus* [1997] 3 SCR 320, Cory J at [19] referred to an earlier decision⁵³ in which it was held:

“While it is tempting to conclude that the jury must have understood what reasonable doubt means because those words were used so frequently, it must not be forgotten that the principle of reasonable doubt in criminal law imports a great deal more than a lay person might attribute to them. This is demonstrated by the fact that juries are always given a special definition of what reasonable doubt means. It would clearly be legal error to fail to give a jury such a definition just because the words are commonly used.”

⁵³ *R. v. Tyhurst* (1992), 79 C.C.C. (3d) 238 at 250, unanimously approved by a five-member panel of the Ontario Court of Appeal: *R. v. Jenkins* (1996), 107 C.C.C. (3d) 440, at pp. 459-60.

Indeed, his Honour went further to state at that “a reasonable doubt should not be described as an “ordinary” concept” ([23]) and “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” ([24]). His Honour provided the following suggested direction at [39]:

“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.

The Supreme Court of Canada also held in *R v Starr* [2000] 2 SCR 144 at 267-268 that an effective way to explain the expression is to say that proof beyond reasonable doubt “falls much closer to absolute certainty than to proof on a balance of probabilities”.

The United States

Approaches appear to vary from state to state.⁵⁴ However, in *Victor v Nebraska*, 511 US 1 (1994), Ginsburg J thought the following direction, suggested by the Federal Judicial Center, was “clear, straightforward, and accurate” (26). It was set out at 27 as follows:

“[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.

⁵⁴ *R v Wanhalla* [2007] 2 NZLR 573 per judgment of Glazebrook J.

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."

Conclusion

Although the Australian approach stands apart from the overseas authorities, at the very least, there is commonality in that juries should be directed that the onus of proof required to sustain a criminal conviction is much higher than the accused *may* have committed the offence, or that they did so *more likely than not*. However, the reasons for the lack of universal consensus on the onus of proof in criminal litigation may, like its somewhat obscure origins, be explained by the inherent difficulty in calculating the gravity of human belief. Indeed, as Wigmore observed:⁵⁵

"The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be yet no successful method of communicating intelligibly to a jury a sound method of self analysis for one's belief. If this truth be appreciated, courts will cease to treat any particular form of words as necessary or decisive in the law for that purpose; for the law cannot expect to do what logic and psychology have not yet done."

⁵⁵ As referred to in *R v Compton* (2013) 237 A Crim R 177 at [8] (Kourakis CJ); *Wigmore on Evidence*, Wigmore, Evidence 2497 (Chadbourn rev. 1981).