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The Crown Court Compendium and the criminal standard of proof: suggestions to aid juror comprehension and help judges

Paul McKeown

Associate Professor of Law, City, University of London

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The ultimate decision that a jury makes in a criminal trial is whether the prosecution has proved that the accused is guilty of the crime alleged. To make this decision jurors need to have a sound grasp of the very high standard of proof that the prosecution must meet. For this reason, the judge's direction on the standard of proof is one of the most important directions that the jury will receive. This article identifies issues in the Crown Court Compendium's model direction and associated legal guidance and suggests some simple changes which might aid juror comprehension, reduce the need for juries to ask questions and, when they do ask questions, make it easier for judges to answer them.

Introduction

Over the course of six editions of the Crown Court Compendium going back to 2016, and before that, in the Compendium's predecessor, the Crown Court Bench Book,¹ the advice to judges on how to direct juries on the criminal standard of proof has relied primarily on the concept of the prosecution making the jury "sure". The model direction (or "Example") in the most recent edition of the Compendium is little different from those in previous editions² and states:

"... The prosecution will only succeed in proving that D is guilty if you [the jury] have been made sure of D's guilt'. If, after considering all... the evidence, you are sure that D is guilty, your verdict must be 'Guilty'. If you are not sure that D is guilty, your verdict must be 'Not Guilty'".³

The direction draws on a formula suggested by Goddard CJ in *R v Kritz*,⁴ which was that the jury "must feel fully satisfied of the guilt of the accused person and should not find a verdict

*I am grateful to Adrian Keane and Keir Monteith QC for their helpful comments. This article draws on work undertaken for a previous article in this journal: A. Keane and P. McKeown, "Time to Abandon "Beyond Reasonable Doubt" and "Sure": The Case for A New Direction on the Criminal Standard and how it should be used." [2019] Crim LR 505.

¹ Introduced in 2010. Accessible at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/eLetters/CCBB_first_supplement_071211.pdf. [Accessed 27 June 2022].

² Except that in the 2016 edition, the words '... or sure that he is innocent...' were included. See the *Crown Court Compendium* (May 2016), Part 1, 5, Legal Summary, Directions, Example 1. Accessible at: <https://www.judiciary.uk/wp-content/uploads/2016/05/crown-court-compedium-part-i-jury-and-trial-management-and-summing-up.pdf>. [Accessed 29 June 2022]. It is submitted that these words might have affected comprehension of both the burden and standard of proof. The words were removed in the subsequent edition.

³ *The Crown Court Compendium* (June 2022), Part 1, 5, Legal Summary, Directions, Example 1. Accessible at: <https://www.judiciary.uk/wp-content/uploads/2022/07/Crown-Court-Compendium-Part-I.pdf>. [Accessed 5 July 2022].

⁴ [1950] 1 KB 82.

against him unless they feel sure.”⁵ The other well-known formula, “proof beyond reasonable doubt”, is time-honoured and appears in many authorities including *Woolmington v DPP*,⁶ when the House of Lords famously laid down the principle that the burden of proof is on the prosecution.⁷ When the Crown Court Bench Book was introduced, it recommended using “sure”, because of problems juries experienced when trying to understand the concept of “reasonable doubt”, problems which Goddard CJ had referred to in a general way in *R v Kritz*.⁸

However, using “sure” replaces one type of problem (what is a reasonable doubt?) with another (how sure do we have to be?) and there does not appear to be any clear basis upon which it can be safely said that “sure” is easier to comprehend.⁹ The current model direction contains no reference points to help juries understand what this difficult concept means. They are simply told that the prosecution must make them “sure”, and with little more to go on, they may be perplexed as to how high or low the standard is meant to be as they begin to make their most critical decision. Since “sure” is likely to be used for the foreseeable future,¹⁰ it is important to acknowledge that there is a problem of comprehension and to consider whether any adjustments could be made to the model direction and legal guidance, to help juries better understand what “sure” means in a legal sense and to help judges answer jury questions. It is essential to stress though, that it is not the role of the Judicial College and the authors of the Compendium to change the law. The Compendium’s role is to provide “...guidance and draft directions in relation to points of law and practice that may arise in trials and in relation to which juries may need to be directed.”¹¹ When making suggestions in this article, the role of the Compendium needed to be kept very much in mind.

In the article, it will be suggested that the issue of “doubt” should be addressed upfront in the direction on the standard of proof, because it is impossible for the jury to apply “sure” without considering doubt.¹² Juries could be told that when deciding whether the prosecution have

⁵ *R v Kritz* [1950] 1 KB 82, at 88-90. See also *R v Summers* (1952) 36 Cr App R 14 at 15, and *R v Hepworth* [1955] 2 QB 600.

⁶ [1935] AC 462, HL, at 481-482. See also, *Mancini v DPP* [1942] AC 1 at 13; and *R v Appleby* (1940) 28 Cr App R 1

⁷ Whether *Woolmington v DPP* [1935] AC 462 also lays down the principle that the correct description of the standard is “beyond reasonable doubt”, is unclear, and is outside the scope of this article.

⁸ [1950] 1 KB 82 at 88-90, per Goddard CJ. Although in *R v Hepworth* [1955] 2 QB 600, he said that it was safe to use ‘satisfied beyond reasonable doubt’ albeit that he still thought ‘feeling sure’ was better. See also *R v Majid* [2009] EWCA Crim 2563. For a “Critique of beyond reasonable doubt”, see, A. Keane and P. McKeown, “Time to Abandon “Beyond Reasonable Doubt” and “Sure”: The Case for A New Direction on the Criminal Standard and how it should be used.” [2019] Crim LR 505 at 510-512. See also I. Dennis, *The Law of Evidence*, 7th edn (Oxford University Press, 2020), pp. 482-483.

⁹ See A. Keane, “Not so sure about the criminal standard of proof”, 170 NLJ 7890, p 15.

¹⁰ “Sure” is well entrenched, although it has been strongly argued elsewhere that it is not fit for purpose. See the articles mentioned in nn. 8 and 9.

¹¹ See *R v A* [2018] EWCA Crim 1393 cited in *The Crown Court Compendium* (June 2022), Introduction, (ii). Accessible at: <https://www.judiciary.uk/wp-content/uploads/2022/07/Crown-Court-Compendium-Part-I.pdf>. [Accessed 13 July 2022]. However, it is obviously a very important and influential resource which is regularly updated to help judges frame comprehensible and legally correct directions, and it is cited with approval by the Court of Appeal.

¹² Whether there should be an amendment to the part of model direction which deals with the *burden* of proof is outside the scope of this article. However, it is submitted that the jury should be told in express terms that the reason why the prosecution must prove its case and the defendant does not have to prove his innocence is because people are presumed innocent until proven guilty. See the model direction on the burden and standard

made them “sure”, they are entitled to ignore doubts which relate to extremely remote possibilities and trivial details, but that doubts relating to real possibilities cannot be ignored and that such doubts would mean that they cannot be “sure” and must return a verdict of “Not guilty”.¹³ This would help to narrow the spectrum of “sure” and enable the jury to have a clearer idea of what being sure means when deciding guilt in the context of a criminal trial. It might also reduce the number of “dreaded questions”¹⁴ which, in reality, are mostly about whether the jury can have a degree of doubt about the prosecution case and still be sure. If such questions are asked, judges would be able to refer juries back to what was said in the initial direction in relation to doubt, making their task easier (although more might need to be said, depending on the particular question asked). None of this would involve changing the law.

The article will also address the fact that where an advocate uses the formula of “beyond reasonable doubt” in speeches to the jury, or the jury ask about “beyond reasonable doubt” because the formula is so well known, the Compendium continues to recommend that they should be told that it means the same as “sure”.¹⁵ It will be suggested that a rule of practice should be introduced to prevent the use of “beyond reasonable doubt” by advocates in their speeches. Where the jury do ask questions about “beyond reasonable doubt” based on their general knowledge, it will be suggested that, instead of being told that it means the same as “sure”, they should be told in clear terms to put “beyond reasonable doubt” out of their minds and to focus on what the judge said about “sure”, which, if the initial direction were to be adjusted, would be fuller and would cover doubts that can and cannot be ignored.

Two issues contained in the Compendium’s Legal Summary will also be considered. First, it will be suggested that the guidance that “... no particular form of words is essential provided that...”,¹⁶ should be dropped and that instead judges should be strongly encouraged to use the same direction with the same words in order to promote clarity and consistency across criminal trials. It is submitted that it is within the remit of the Compendium to provide this guidance.¹⁷ As it stands, the direction to be used would be the “Example”, even though it will be suggested that the Example should be developed to aid comprehension. Second, it will be suggested that judges should be strongly discouraged from answering a jury question by drawing an analogy between being sure of guilt and being sure about an important decision in life, because such an analogy is likely to confuse the jury and risks reducing the standard. In suggesting this, the law

of proof proposed in *R v Wanhalla* [2002], 2 NZLR 573 at [49], where “the presumption of innocence” is explicitly stated as “the starting point”.

¹³ See *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373. See also *R v Majid* [2009] EWCA Crim 2563.

¹⁴ The term draws on the vignette in *R v Majid* [2009] EWCA Crim 2563 at [1] – [2] and [12], of judges’ experiences of directing the jury and being asked questions.

¹⁵ *The Crown Court Compendium* (June 2022), Part 1, 5, Legal Summary, Directions, Example 1. Accessible at: <https://www.judiciary.uk/wp-content/uploads/2022/07/Crown-Court-Compendium-Part-I.pdf>. [Accessed 5 July 2022]. A suggestion in the media that judges had been advised to stop using ‘beyond reasonable doubt’ was criticised as incorrect by the Judicial College: M. Zander, “The criminal standard of proof: how sure is sure? Pt 2” (2020) 170 NLJ, 7888, p 18.

¹⁶ *The Crown Court Compendium* (June 2022), Part 1, 5, Legal Summary, para 2. Accessible at: <https://www.judiciary.uk/wp-content/uploads/2022/07/Crown-Court-Compendium-Part-I.pdf> [Accessed 5 July 2022].

¹⁷ See *R v Majid* [2009] EWCA Crim 2563 at [1] – [2] and [11] – [12]. See also *R v A* [2018] EWCA Crim 1393.

on the use of the analogy will be explained. Guidance highlighting problems with the analogy and discouraging its use would, it is submitted, also be within the Compendium's remit.

However, before all of this, it is useful to consider briefly both the attraction of using "sure" and the problem with using it.

The attraction of using "sure" and the problem with using it

On the surface, telling a jury that they must be sure of the defendant's guilt might seem simple and clear, and capable of being grasped intuitively by most people as a very high standard of proof, just "one notch short" of certain."¹⁸ In this respect, the concept of "certain" is absolute in nature, and means having no doubts at all about any detail or aspect of prosecution case not matter how trivial or far-fetched. The word "sure" is repeated three times in the Compendium's model direction, which, it might be thought, gives it additional force. Being made "sure" has an overarching quality, which seems appropriate for the ultimate decision that the jury must make, having heard all the evidence, what has been said by advocates in speeches, what has been said by the judge in other oral directions, and having received written directions and a written route to verdict. However, "sure" is a vague concept and is likely to be difficult for jurors to grasp once they actually start to consider what it means and begin to apply it. Further, "sure" is not confined to the ultimate decision on guilt where its overarching nature might seem more appropriate. It must also be applied by the jury in discrete ways to specific types of evidence before they can use it against the defendant, for example, in relation to disputed evidence of bad character¹⁹ and evidence of adverse inferences.²⁰

Upon hearing a direction which simply tells them that the prosecution must make them "sure of the defendant's guilt", different jurors may settle for different degrees of sure and the differences may well be significant. Some jurors when deliberating with fellow jurors, might insist on a standard which is impossible to meet (absolute certainty), while some might argue for a standard which is too low, for example, where the evidence is strong and it seems highly likely that the defendant is guilty, but there are still some realistic doubts. This raises the possibility of a jury being unable to reach a verdict (higher and lower standards may divide them too deeply) or acquitting a guilty person (they apply too high a standard) or convicting an innocent one (they apply too low a standard).

The problem of different standards of "sure" is borne out by research, albeit that the research suffers from the limitations of the researchers not having been able to question real jurors during a real trial. The findings of researchers and the limitations of research methods have been considered in a previous article in this journal²¹ but to provide an example here, in a study by Michael Zander, members of the public and magistrates were asked to estimate in

¹⁸ See *R v Starr* [2000] 2 SCR 144 at [96].

¹⁹ See *R v Mitchell* [2016] UKSC 65. See *The Crown Court Compendium* (June 2022), Part 1, 12-6, Legal Summary, Directions, para 16 and Example 2. Accessible at: <https://www.judiciary.uk/wp-content/uploads/2022/07/Crown-Court-Compendium-Part-I.pdf> [Accessed 5 July 2022].

²⁰ *The Crown Court Compendium* (June 2022), Part 1, 17-1, Legal Summary, Directions, paras 28 and 30, and 17-2, Legal Summary, Directions, para 13. Accessible at: <https://www.judiciary.uk/wp-content/uploads/2022/07/Crown-Court-Compendium-Part-I.pdf>. [Accessed 5 July 2022].

²¹ A. Keane and P. McKeown, "Time to Abandon "Beyond Reasonable Doubt" and "Sure": The Case for A New Direction on the Criminal Standard and how it should be used." [2019] Crim LR 505 at 512-515.

percentage terms the degree of probability that would be required to make them sure.²² This was a convenient and accessible approach to take, given that percentages are a useful shorthand for degrees of probability and are often used in this way in ordinary speech.²³ The probability varied among participants and the variation was not insignificant. Three quarters of participants who were members of the public said that they would require a probability of at least 90%, but one quarter said that they required less than 90% and a very small minority (5%) stated that they would require less than 70% probability. Although a juror who might be in the very small minority may well be put right by other jury members, what if those who were be prepared to convict on less than 90% were two or three members of a jury and were stubborn, robust, and persuasive?²⁴

The point has been made about this study and other studies which uncovered significant variations,²⁵ that participants did not give responses as real jurors involved in the process of deciding the guilt of a real person in a real trial.²⁶ They had not heard witnesses being examined or the speeches of advocates, had not been exposed to the views of other jurors and had not had the opportunity to ask a judge for advice on the meaning of “sure”.²⁷ Nor, in the Zander study, were participants giving responses which were tied to a case study.²⁸ However, findings such as those in the Zander study should not simply be brushed aside. They do provide some indication of the understanding that ordinary individuals bring when called to serve as jurors in a real trial, during which they will receive no explanation from the judge of what “sure” means unless they ask.²⁹

Furthermore, while research revealing problems with “sure” will always be open to the criticism that real jurors are not used, it is an undeniable fact that real jurors do ask judges “dreaded” questions about how sure they must be. This is obviously because they don’t know. If it is to be acknowledged that there is a problem of juries understanding and applying “sure”,³⁰ how might the direction be changed in order to help them?

²² M. Zander, “The criminal standard of proof: how sure is sure” (2000) 150 NLJ 1517. The research was revisited by Michael Zander in 2020: M. Zander, “The criminal standard of proof: how sure is sure? Pt 2” (2020) 170 NLJ, 7888, p 18. See a response to that article: A. Keane, “Not so sure about the criminal standard”, (2020) 170 NLJ 7890, p 15.

²³ They can be another way of saying, ‘absolutely sure’, ‘pretty sure’, ‘nearly sure’ and so on. We will all be familiar with informal exchanges, such as, ‘Are you sure about that?’, ‘No, not a hundred percent’, or ‘yes, a hundred percent’, or ‘Yes, pretty sure, about 90% sure’.

²⁴ See A. Keane, “Not so sure about the criminal standard of proof”, 170 NLJ 7890, p 15.

²⁵ See for example, J. W. Montgomery, “The criminal standard of proof” (1998) 148 NLJ 582. For an overview of the findings in various studies, see the judgment of Glazebrook J in *R v Wanhalla* [2007] NZLR 573 at [73] – [95].

²⁶ See Glazebrook J’s critique in *R v Wanhalla* [2007] NZLR 573 at [86]: the studies by Zander and Montgomery “... provided no opportunity for deliberation.”

²⁷ The use of percentages in relation to the criminal standard of proof has been deprecated by the courts. See for example, *R v Boughton* [2020] EWCA Crim 1093, where an expert gave evidence on the crucial issue of causation using a percentage.

²⁸ *R v Wanhalla* [2007] NZLR 573 at [86].

²⁹ Any elaboration and definition is unwise: *The Crown Court Compendium* (June 2022), Part 1, 5, Legal Summary, paras 3 and 6. Accessible at: <https://www.judiciary.uk/wp-content/uploads/2022/07/Crown-Court-Compendium-Part-1.pdf>. [Accessed 5 July 2022].

³⁰ The problem of comprehension was pointed out by Moses LJ in *R v Majid* [2009] EWCA Crim 2563 at [9], in the context of judges answering jury questions: “To have to define what is meant by ‘reasonable doubt’ or what is meant by ‘being sure’ requires an answer difficult to articulate and likely to confuse.” The Compendium alerts judges to problems of definition by citing this passage: see *The Crown Court Compendium* (June 2022), Part 1,

The direction should address “doubt”

Questions from juries about the standard of proof are generally about how sure they need to be. Such questions are likely to be asked because jurors express doubts to each other about aspects of the prosecution case and they want to resolve whether the doubts are of such a degree that they cannot be legally sure.³¹ The problem is reflected in the types of questions which juries ask and which have been mentioned in authorities down the years: “how certain do you have to be?”,³² “do we have to be “100% sure/certain of guilty/not guilty, or can we decide beyond reasonable doubt?”³³ or “How sure do we have to be? Do we have to be 100% sure with no doubt?”³⁴

“Doubt” is intrinsic to the criminal standard of proof. A decision about whether you have been made “sure” necessarily involves considering whether you have doubts, and, if so, how serious those doubts are. This is inescapable. For this reason, “doubt” needs to be addressed in the initial direction. The judge could tell the jury that when they are deciding whether the prosecution have made them “sure”, they will naturally consider whether they have any doubts about the prosecution case. The judge could then tell the jury about the kind of doubts that can and cannot be ignored when deciding whether they are “sure”. The judge could explain that they are entitled to ignore doubts that are related to fanciful possibilities and doubts about peripheral details that are extremely marginal and of no significance in the case. This would avoid jurors thinking that the prosecution must make them absolutely certain of every possibility no matter how far-fetched and every fact no matter how trivial, a standard which is impossible to meet.

Equally, to avoid the jury taking too tolerant an approach to doubt and dropping the standard too far once they have been told about doubts which they are entitled to ignore, the judge could explain that doubts related to real possibilities must not be ignored and that the effect of such doubts is that they cannot be “sure” and that this would mean that they must find the defendant “Not guilty”.³⁵ These simple reference points could mean fewer dreaded questions for judges and when such questions are asked, judges may find it easier to deal with them by referring the jury back to what has already been said in the initial direction.

Currently, it is possible for the judge to address the issue of “doubt” where it is specifically raised in a question by the jury,³⁶ for example, a question about “reasonable doubt,” or “sure”

5, Legal Summary, para 6. Accessible at: <https://www.judiciary.uk/wp-content/uploads/2022/07/Crown-Court-Compendium-Part-I.pdf>. [Accessed 12 July 2022].

³¹ See for example, *R v Yap Chuan Ching* (1976) 63 Cr App R 7, at 8.

³² *R v Stephens* [2002] EWCA Crim 15.

³³ *R v JL* [2017] EWCA Crim 621.

³⁴ *R v Mohammad* [2022] EWCA Crim 380.

³⁵ See along similar lines, but in relation to “beyond reasonable doubt”, the specimen direction in the Northern Ireland Crown Court Bench Book and Specimen Directions, 3rd edition 2010, 2.1, p 29. Accessible at <https://www.judiciaryni.uk/sites/judiciary-ni.gov.uk/files/media-files/BenchBook.pdf>. [Accessed 28 June 2022]. (See also p 30, note 3: the direction is taken from a Federal Judicial Centre proposal which was approved by Ginsberg J in the US Supreme Court in *Victor v Nebraska*, 611 USI (1994) at 27).

³⁶ See *R v JL* [2017] EWCA Crim 621, cited in the *Crown Court Compendium* (June 2022), Part 1, 5, Legal Summary, para 7. Accessible at <https://www.judiciary.uk/wp-content/uploads/2022/07/Crown-Court->

with “no doubt”.³⁷ However, it seems odd that the jury should not be given help unless they ask, especially when the issue that they mostly need help with (how “sure”?) is so predictable. Furthermore, juries in need of help may often feel inhibited about asking for it. Research shows that the general inhibition against asking questions can be a strong one.³⁸ The inhibition against asking questions about the standard of proof might be particularly strong. The jury might consider that being “sure” is something very basic that they just are expected to understand. The shortness and apparent simplicity of the direction they receive may send this signal. As a result, a live issue of doubt might be left unresolved in deliberations or be resolved in error, and this will never come to light.³⁹ The jury might be unable to reach a verdict because divergent views on the significance of particular doubts divide them too deeply, or they might acquit based on fanciful or remote possibilities or convict based on a strong prosecution case, even though there are real possibilities pointing away from guilt.

Any changes to the direction on the criminal standard of proof would obviously have to be consistent with domestic law.⁴⁰ Addressing “doubt” in jury directions on the criminal standard of proof has a long history in the authorities. Prior to the Crown Court Bench Book, the formula “beyond reasonable doubt” was used for decades. It was endorsed by Goddard CJ even after his judgment in *Kritz*⁴¹ when he introduced the concept of feeling “sure”. In respect of doubts that can be put to one side, the descriptions of “fanciful possibilities” and “remote possibilities” appear in a formula for the criminal standard of proof provided by Denning J in *Miller v Minister of Pensions*.⁴² This formula has been endorsed by academics and judges.⁴³ The use of “fanciful possibilities” and “realistic possibilities” was also approved by the Court of Appeal in *Majid*,⁴⁴ where the jury had been directed that they should be “satisfied beyond reasonable doubt”.

An obvious concern is that referring to doubts about “fanciful possibilities” and “real possibilities” could introduce the kind of problems of comprehension which arose in respect of “reasonable doubt”. These terms do carry their own problems of precision and definition.⁴⁵ Nevertheless, they are narrower than “reasonable doubt” (and “sure”) and have a different purpose. “Beyond reasonable doubt” constituted the standard of proof itself, whereas “fanciful

Compendium-Part-I.pdf. [Accessed 5 July 2022]. Of course, doubt will be addressed in the initial direction if advocates have mentioned “beyond reasonable doubt”.

³⁷ See *R v Mohammed* [2022] EWCA Crim 380 at [9].

³⁸ See M. Zander and P. Henderson, “Crown Court Study for the Royal Commission on Criminal Justice” (HMSO, 1993), 213, which identified an issue of juries feeling overwhelmingly inhibited from asking questions. See also, P. Darbyshire, “What can we learn from published jury research? Findings for the Criminal Courts Review 2001” [2001] Crim LR 970, 974.

³⁹ Juries Act 1974, s 20D. Accessible at <https://www.legislation.gov.uk/ukpga/1974/23/section/20D>. [Accessed 28 June 2022].

⁴⁰ The point has already been made that it is not the job of the Compendium to change the law. See the text accompanying n.11.

⁴¹ See *R v Hepworth* [1955] 2 QB 600, at 603.

⁴² [1947] 2 All ER 372 at 373.

⁴³ See A. Keane and P. McKeown, “Time to Abandon “Beyond Reasonable Doubt” and “Sure”: The Case for a New Direction on the Criminal Standard and how it should be used” [2019] Crim LR 505, p 507; See also *R v Scott Smith* [2012] EWCA 702 at [15] – [17]; and I. Dennis, *The Law of Evidence*, 7th edn (Oxford University Press, 2020), pp. 482-483.

⁴⁴ [2009] EWCA Crim 2563 at [12].

⁴⁵ The meaning of ‘fanciful possibilities’ might be more clearly conveyed by using “extremely remote possibilities”. Assistance as to the clearest and most comprehensible forms of expression might be offered by experts from disciplines such as forensic psycholinguistics.

possibilities” and “real possibilities” would operate differently, as reference points to narrow down “sure” and help the jury better understand what it means in the context of a criminal trial. It must be acknowledged that there are no scientific studies as to how jurors might comprehend “sure” were it to be used in conjunction with doubts relating to “fanciful possibilities” or “real possibilities”. However, the case for covering doubt in the initial direction is logical: “sure” on its own is a relative and vague concept; it is obvious that part of the process for deciding whether you are sure requires you to consider whether you have doubts; jury questions about the standard of proof concern the relationship between being “sure” and having “doubt”; and there is domestic legal authority for describing doubts in terms of doubts that relate to possibilities that can and cannot be ignored.

The direction should not accommodate “beyond reasonable doubt”

An odd part of the Compendium’s suggested direction is triggered where an advocate uses “beyond reasonable doubt”. The direction, after covering “sure”, goes on to say: “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.”⁴⁶ This (conditional) part of the direction involves telling jurors that “sure” and “beyond reasonable doubt” are different ways of describing the same thing. The effect is to present jurors with two different concepts, each of which has its own internal problems of definition. “Beyond reasonable doubt” was abandoned as a formula when it was used on its own because of difficulties juries experienced with “reasonable doubt”.⁴⁷ When used alongside “sure” problems of comprehension become even more difficult.

Aside from difficulties jurors may experience understanding what the different formulae mean, they may be confused as to which formula they should apply, with some jurors applying “sure” and others, “beyond reasonable doubt”, or they may even engage in a messy attempt to apply both.⁴⁸ Different juries in different trials may end up using different formulae depending on whether “beyond reasonable doubt” has come into play, with some applying only “sure”, and some applying both while struggling with the idea that they mean the same thing. In addition, if they were to apply only “beyond reasonable doubt”, having opted for it when they are told it means the same as “sure”, research shows that this formula may suggest too low a standard to jurors⁴⁹ and for this reason it has been said that “... advocates and not just judges should be banned from using beyond reasonable doubt.”⁵⁰

⁴⁶ The *Crown Court Compendium* (June 2022), Part 1, 5, Legal Summary, Directions, Example 1. Accessible at <https://www.judiciary.uk/wp-content/uploads/2022/07/Crown-Court-Compendium-Part-1.pdf>. [Accessed 5 July 2022].

⁴⁷ See A. Keane and P. McKeown, “Time to Abandon “Beyond Reasonable Doubt” and “Sure”: The Case for A New Direction on the Criminal Standard and how it should be used.” [2019] Crim LR 505 at 510-512.

⁴⁸ A direction involving both formulae was said to be ‘safe ground’ in *Ferguson v R* [1979] 1 WLR 94, PC, at 99.

⁴⁹ For an overview, see A. Keane and P. McKeown, “Time to Abandon “Beyond Reasonable Doubt” and “Sure”: The Case for A New Direction on the Criminal Standard and how it should be used.” [2019] Crim LR 505 at 510-512.

⁵⁰ See the problems that arose when both formulas were used: *R v Stephenson* [2002] EWCA Crim 1529; *R v Majid* [2009] EWCA Crim 2563; and *R v JL* [2017] EWCA Crim 621.

Why is this anomaly permitted? The use of “beyond reasonable doubt” is available to advocates as a matter of law. The formula was used by the House of Lords in *Woolmington v DPP*⁵¹ and endorsed in many subsequent authorities, and it has never been overruled. More precisely, authority for saying that “beyond reasonable doubt” means the same as “sure” may be found in an unreported case,⁵² and in *R v JL*⁵³ which is cited in the Compendium’s Legal Summary.⁵⁴ Yet, it is illogical to make a break with the practice of using “beyond reasonable doubt” in the service of clarity, and at the same time allow scope for advocates to bring it back into play alongside “sure”, which makes this time-honoured formula even more difficult to understand than when it was used on its own.

Could a rule of practice prohibiting the use of beyond reasonable doubt be legally justified even though the description is endorsed in appellate authority?⁵⁵ A justification might be found in the overriding objective of the Criminal Procedure Rules,⁵⁶ which is set out in Rule 1.1. Rule 1.1(1) states that the overriding objective is to deal with cases justly, and 1.1(2) states that this includes acquitting the innocent and convicting the guilty. Avoiding unnecessary complications in a critical direction on the criminal standard of proof – a direction which enables the jury to measure whether the standard is reached – goes directly to acquitting the innocent and convicting the guilty, and so it is consistent with the overriding objective in a fundamental way.⁵⁷

A rule of practice which prevents advocates from using “beyond reasonable doubt” does not guarantee that questions about “beyond reasonable doubt” will cease, because the formula is so well known. However, such questions are less likely if the initial direction addresses doubt, and if the jury do ask about “beyond reasonable doubt”, they might simply be told: it is an out-of-date formula which must not be used; that they should put it out of their minds and focus on “sure”; and they should recall what was said about “sure” in the initial direction (a reminder could be provided). This is far more logical and comprehensible than telling the jury that beyond reasonable doubt means the same as being sure. Taking this one step further, it might be said to the jury upfront in the initial direction, that “beyond reasonable doubt” is out of date and must not be used by them when deciding whether the prosecution has proved that accused

⁵¹ [1935] AC 462.

⁵² *R v Adey*, unreported (97/5306/W2).

⁵³ *R v JL* [2017] EWCA Crim 621.

⁵⁴ The *Crown Court Compendium* (June 2022), Part 1, 5, Legal Summary, Para 7(2). Accessible at: <https://www.judiciary.uk/wp-content/uploads/2022/07/Crown-Court-Compendium-Part-I.pdf>. [Accessed 13 July 2022].

⁵⁵ *Woolmington v DPP* [1935] AC 462, HL, at 481-482. See also *Mancini v DPP* [1942] AC 1 at 13; *Appleby* (1940) 28 Cr App R 1; *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373; *R v Hepworth* [1955] 2 QB 600 at 603.

⁵⁶ The Criminal Procedure Rules 2020, SI 2020/759, R 1.1, accessible at <https://www.legislation.gov.uk/uksi/2020/759/contents/made>. [Accessed 28 June 2022].

⁵⁷ Concerning the functions of the Criminal Procedure Rules Committee, see s 72 of the Courts Act 2003. In addition, the Lord Chief Justice is empowered under s. 74 of the Act to give directions as to the practice and procedure of the criminal courts, which supplement the Criminal Procedure Rules. See Criminal Practice Directions 2015, 1, para, A1. Accessible at <https://www.judiciary.uk/wp-content/uploads/2019/03/crim-pd-amendment-no-8-consolidated-mar2019.pdf>. [Accessed 28 June 2022]. See also Part 1, Schedule 2 of the Constitutional Reform Act 2005.

is guilty.⁵⁸ This could pre-empt its use during deliberations and make it much less likely to come up in jury questions.

All judges should use the same words in the initial direction and “satisfied so that you are sure” or “you must feel sure” should not be used

Drawing on *R v Miah*,⁵⁹ the guidance in the Compendium’s Legal Summary is that ‘no particular form of words is essential ... [what] is required is a clear instruction to the jury that they have to be satisfied so that they are sure before they can convict’.⁶⁰ The Compendium’s own “Example” prefers to avoid the use of the word ‘satisfied’, to make the direction clearer.⁶¹ However, judges may use “satisfied so that you are sure” and, under the guidance, may use other words to convey what is required.⁶² The justification for allowing judges to come up with their own form of words to capture the instruction “satisfied so that you are sure” may be partly based on what was said by Goddard CJ in *R v Kritz*.⁶³

“It is not the particular formula that matters: it is the effect of the summing up. If the jury are made to understand that they have to be satisfied and must not return a guilty verdict unless they feel sure... then whether the judge uses one form of language, or another is neither here nor there.”

However, the suggestion that it is the effect and not the form of language that matters is a false dichotomy. The words chosen to describe the standard of proof matter very much precisely because of their effect. It is safe to assume that the Compendium’s “Example” was selected by the Judicial College because it was thought to be clearer than other examples considered.⁶⁴ It is strange then, at the same time, to advise judges that a particular form of words is not essential. It raises an obvious risk that some juries could be directed in a way that is less clear than the Compendium’s Example, albeit that a judge’s own individual formulation may meet the general requirement.

Another justification for allowing judges to use their own form of words may be to do with the principle that judges should have the freedom and flexibility to tailor their directions to the

⁵⁸ See for example in A. Keane and P. McKeown, “Time to Abandon “Beyond Reasonable Doubt” and “Sure”: The Case for A New Direction on the Criminal Standard and how it should be used.” [2019] Crim LR 505 at 526.

⁵⁹ [2018] EWCA Crim 563 at [33].

⁶⁰ The *Crown Court Compendium* (June 2022), Part 1, 5, Legal Summary, para 2. Accessible at <https://www.judiciary.uk/wp-content/uploads/2022/07/Crown-Court-Compendium-Part-I.pdf>. [Accessed 5 July 2022].

⁶¹ M. Zander, “The criminal standard of proof: how sure is sure? Pt 2” (2020) 170 NLJ, 7888, 18, 19, citing a passage from H. Malek, J. Auburn, R. Bagshaw et al, *Phillips on Evidence*, 17th edn (London: Sweet & Maxwell, 2017). See also n. 64.

⁶² For example, in *R v Abdi* [2022] EWCA Crim 315 at [27], the judge’s directions on circumstantial evidence included the phrase, ‘[whether the evidence] ...will assist you to reach a sure conclusion...’

⁶³ [1950] 1 KB 82 at 89.

⁶⁴ The Judicial College consults experienced judges of the Crown Court and draws on research into juries’ understanding of criminal proceedings. The Plain English Campaign provides help with the Examples. See Thomas LJ, *Crown Court Compendium* (August 2021), Part 1, 1-2, Forward. Accessible at <https://www.judiciary.uk/wp-content/uploads/2016/05/crown-court-compedium-part-i-jury-and-trial-management-and-summing-up.pdf>. [Accessed 2 July 2020].

particular facts of the case being tried.⁶⁵ However, it is submitted that the direction on the criminal standard of proof is an exception and that there should be a prescribed formula to be adhered to in every criminal trial.⁶⁶ This is because of the importance of the direction; the difficulties juries have comprehending the standard, which have a long history; and because the direction is relatively short, overarching and independent of the facts of the case, so that ‘tailoring’ is not an imperative.

As to the guidance that what is necessary is an instruction to the jury that they should be “satisfied so that they are sure”, there are good reasons for avoiding a formula that uses both “satisfied” and “sure”. These are very different concepts and combining them in a direction on the standard of proof is unhelpful. This is not mere pedantry. In the process of trying to understand and apply a nebulous concept like “sure”, the jury are very likely to look for reference points in the direction, and in the process will scrutinise every key word that the judge has used. On its own, the word “satisfied” suggests much too low a standard of proof,⁶⁷ almost the civil standard. When combined with “sure”, there is a risk of conflation, and that the standard could be pulled downwards in the minds of some jurors. If a juror said to other jury members in deliberations, ‘How many of us are satisfied so that we are sure that he is guilty?’, it is not inconceivable that a juror might decide that the accused was guilty, being more satisfied about his guilt than sure.⁶⁸

The necessary instruction in the Compendium does not use exactly the same words as the words used by Goddard CJ in his formula which was, “... they [the jury] must not return a guilty verdict unless they *feel* sure” (emphasis added).⁶⁹ However, since no particular form of words is essential, it would be seen as unexceptional if a judge were to tell the jury they must *feel* sure. The problem with telling the jury that they must *feel* sure, however, is that it invites an emotional response, when the defendant must be tried only on the evidence.⁷⁰

Drawing all of this together then, it would be desirable in terms of both consistency and clarity, if the Compendium were to strongly encourage all judges to use the same formula with same words, and to strongly recommend that the words ‘satisfied’ and ‘feel’ should not be used.

⁶⁵ Use of specimen directions led to difficulties in the past, including judges giving directions to the jury even though the directions may not have been a good fit for the facts of the cases they were trying. See the *Crown Court Compendium* (May 2016), Part 1, 1-2, Forward. Accessible at: <https://www.judiciary.uk/wp-content/uploads/2016/05/crown-court-compendium-part-i-jury-and-trial-management-and-summing-up.pdf>. [Accessed 30 June 2020].

⁶⁶ See *R v Majid* [2009] EWCA Crim 2563: in spite of flexibility, which was to be encouraged, there are certain golden rules and words that should be adhered to, in particular in relation to the burden and standard of proof. (Per Moses LJ at [1]- [2]).

⁶⁷ See a direction which lowered the standard in *R v Bentley* [2001] 1 Cr. App. R. 21 at [34]: “...that they should be convicted, and if you find good ground for convicting them, it is your duty to do it if you are satisfied with the evidence for the prosecution.” See also *R v Miah* [2018] EWCA Crim 563.

⁶⁸ In *R v Abdi* [2022] EWCA Crim 315 telling the jury that they needed to be satisfied that the accused’s bad character showed his propensity did not reduce the standard of proof in the overall context of directions where the jury would have understood that sure was the standard from the overall structure of the directions. Yet might there have been a risk of conflation, the word ‘satisfied’ having been in the judges written directions? It is not inconceivable that jurors might have referred to the word when applying the standard of proof.

⁶⁹ *R v Kritz* [1950] 1 KB 82 at 89.

⁷⁰ See the *Crown Court Compendium* (June 2022), Part 1, 3.1, Legal Summary, para 2(ii), and The Start of the Trial, 26G.3(i). Accessible at: <https://www.judiciary.uk/wp-content/uploads/2022/07/Crown-Court-Compendium-Part-I.pdf>. [Accessed 5 July 2022].

An analogy with making important decisions in life should be strongly discouraged

Where juries ask questions about “reasonable doubt”, they can be told that it is “...the sort of doubt that might affect [their] minds if they were making decisions in matters of importance in their own affairs, their own lives.”⁷¹ A jump has been made though, so that the analogy can be used in relation to “sure”.⁷² Thus in *R v Bogdanovic*, it was “substantively unobjectionable” to tell the jury that, “You use sure as you would in your ordinary lives, an ordinary English word.”⁷³ Similarly, in *R v Mohammed*, it was unexceptional for the judge to tell the jury to “... use ‘sure’ in your deliberations as you would in your day-to-day lives, when making decisions in matters of importance in your own affairs, in your own lives or those of your loved ones.”⁷⁴

In respect of the law relating to the analogy, there is consistent line of authorities which state that it should not be used in relation to “reasonable doubt”.⁷⁵ These authorities were endorsed in *R v Chuan Ching*,⁷⁶ where it was said that “... the use of any analogy was to be avoided whenever possible.”⁷⁷ However, *Ching* also endorsed, as an exception, what was said in *Walters v The Queen*,⁷⁸ which was that:

*“...where the jury are in danger of thinking that they are engaged in some task [which is] more esoteric than applying to the evidence ... common sense with which they approach matters of importance to them in their ordinary lives, then the use of such analogies... may be helpful... and unexceptional.”*⁷⁹

In *Walters*, the judge had given an unusually long and elaborate direction on the burden and standard of proof, during which he used the analogy. It was held that the judge, having observed the jury during the trial, had been entitled in his discretion to use the analogy if he took the view that it would help *that* particular jury. However, it is respectfully submitted that the judge’s direction in *Walters*, which ran to four paragraphs and over 600 words, risked overwhelming the jury, and, in terms of helping the jury avoid abstruse analysis, the solution was not to include a problematic analogy, but to reduce the length of the direction.

These days, jury questions on the standard of proof follow a short direction and the questions themselves are usually predictable and straightforward and are asked as a matter of common-sense. Juries who ask how sure they need to be, or if they need to be certain, or 100% sure, are not taking an esoteric approach in place of common sense, and they are unlikely to be in the position of needing this analogy to help get them back on track. Further, understanding and applying the analogy could itself become an esoteric task. ‘Important decisions in day-to day

⁷¹ The Crown Court Compendium (June 2022), Part 1, 5, Legal Summary, Para 7(3), citing *R v JL* [2017] EWCA Crim 621. Accessible at: <https://www.judiciary.uk/wp-content/uploads/2022/07/Crown-Court-Compendium-Part-I.pdf>. [Accessed 5 July 2022].

⁷² See *R v Stephens* [2002] EWCA Crim 1529; *R v JL* [2017] EWCA Crim 621, *R v Bogdanovic* [2020] EWCA Crim 1229 and *R v Mohammad* [2022] EWCA Crim 380.

⁷³ [2020] EWCA Crim 1229

⁷⁴ [2022] EWCA Crim 380 at [10].

⁷⁵ *R v Gray*, *R v Knott* and *R v Newton*

⁷⁶ (1976) 63 Cr App R 7.

⁷⁷ *Ibid* at 10.

⁷⁸ [1969] 2 AC 26.

⁷⁹ *Ibid* at 30.

life’ are highly relative and so the analogy could be contentious for jurors, who will be from different walks of life, will have different views of what constitutes an important decision and will have different attitudes to risk-taking. Even more seriously, the analogy risks diluting the criminal standard. This a familiar and valid argument that has often been made against it. People take risks when they make important decisions in day-to-day life that are simply not appropriate when deciding whether a person is guilty of a criminal offence, where so much is at stake.⁸⁰

For these and other reasons, the analogy has been deprecated by appellate authority in England and Wales in relation to “reasonable doubt” (subject to the *Walters* exception), and by appellate authority in commonwealth jurisdictions in relation to both “reasonable doubt” and “sure”. In *R v Wanhalla* for example, the New Zealand Court of Appeal was clear that what it called “the domestic analogy” created a real risk of confusing the jury and diluting the standard.⁸¹ Appellate authorities in other jurisdictions are to similar effect.⁸²

The difficulty with dropping the analogy though is that the Court of Appeal has held that its use in relation to “sure” is not unobjectionable⁸³ and is “... compatible with the authorities in this jurisdiction, which are themselves clear and consistent.”⁸⁴ However, it is respectfully suggested that it would be within the Compendium’s remit to discourage use of the analogy by pointing out: the fact that domestic authorities concerning “reasonable doubt” deprecated its use save where a particular jury appeared to the judge to be in danger of thinking that they were engaged in an esoteric task; most questions about “sure” are predictable and straightforward and asked as a matter of common sense; and, generally, there is a significant risk of confusing the jury and diluting the standard where it is used in respect of “sure” (which has been convincingly explained in appellate authority in other jurisdictions).

Conclusion

Legal formulae for the criminal standard of proof have chopped and changed down the years. The courts have come up with formulae ranging from, “satisfied beyond a reasonable doubt”,⁸⁵ to “you must *feel* sure”,⁸⁶ “you must be completely satisfied”,⁸⁷ “you must be satisfied so that you are sure”,⁸⁸ and even, “[you must be] satisfied so that [you] are sure beyond reasonable doubt.”⁸⁹ Three of these formulae were endorsed as ‘safe’ in a single authority,⁹⁰ and two

⁸⁰ *Victor v Nebraska* 611 US (1994) at p 24.

⁸¹ *R v Wanhalla* [2007] NZLR 573 at [61] and [131] – [132].

⁸² *Ibid* at [133].

⁸³ *R v Bogdanovic* [2020] EWCA Crim 1229.

⁸⁴ See *R v Mohammed* [2022] EWCA Crim 380 at [33], referring to the use of the analogy when responding to the jury’s question.

⁸⁵ *Woolmington v DPP* [1935] AC 462, HL, at 481-482; *Mancini v DPP* [1924] AC 1 at 13; and *R v Appleby* (1940) 28 Cr App R 1. See also *R v Majid* [2009] EWCA Crim 2563, where the trial judge used this formula.

⁸⁶ *R v Kritz* [1950] 1 KB 82 at 88-90; *R v Summers* (1952) 36 Cr App R 14 at 15.

⁸⁷ *R v Hepworth* [1955] 2 QB 600 at 603, CA

⁸⁸ *R v Miah* [2018] EWCA Crim 563. See also the Crown Court Compendium (June 2022), Part 1, 5, Legal Summary, para 2. Accessible at: <https://www.judiciary.uk/wp-content/uploads/2022/07/Crown-Court-Compendium-Part-I-June-2022.pdf>

⁸⁹ *Ferguson v R* [1979] 1 WLR 94, PC at 99

⁹⁰ *R v Hepworth* [1955] 2 QB 600 at 603, CA

others were endorsed as safe in another authority.⁹¹ The precise status of all the different formulae in law and practice is not entirely clear. Some have not been adopted in practice for reasons that hardly need to be explained (for example, “satisfied beyond reasonable doubt so that [you] are sure”). Obviously, “beyond reasonable doubt” is time-honoured and has been used for decades, and although it has fallen out of favour,⁹² it remains legally valid and may still find its way into a modern criminal trial. It is not apparent that any of the formulae mentioned above have been expressly overruled in authority, except “satisfied” when used on its own.⁹³

Although the Compendium recommends one formula for the standard of “sure”,⁹⁴ it leaves the door open for judges to convey the standard using different forms of words.⁹⁵ In practice, the prosecution making the jury “sure” or the jury being “satisfied so that [they] are sure” are most likely to be used, with the possibility that “beyond reasonable doubt” could come into play alongside. Answers to jury questions will obviously depend on the questions asked, but one recommended answer, based on case law involves an analogy which is seriously flawed and has been disavowed in appellate authority in other jurisdictions.⁹⁶ Overall, the law and practice relating to the criminal standard of proof and its development could be fairly described as difficult and anomalous. It seems to call out for a thorough review.

Such a review was sought in *R v Mohammed*,⁹⁷ where there was an application to introduce reports from two experts eminent in the field of forensic linguistics, who had identified problems inherent in the use of “sure” and had concluded that the law and practice in relation to the standard of proof was “wrong or unsatisfactory” and in need of change.⁹⁸ However, the court did not admit the evidence, nor did it

*“... regard [Mohammed] as a suitable case, if ever there might be such a case, for a wholesale and fundamental review of the authorities or the established practice in England and Wales in relation to the standard of proof.”*⁹⁹

The court’s use of the phrase “if ever there might be such a case” suggests that the road is not completely blocked and there is a slender possibility of review in the future by a court hearing the right case. However, it is difficult to contemplate a case that could raise new points capable of triggering a review. Some very confusing directions have featured in appellate authorities over time and most, if not all, of the significant issues around ‘sure’ seem to have been

⁹¹ *Ferguson v R* [1979] 1 WLR 94, PC at 99

⁹² In England and Wales.

⁹³ *R v Bentley* [2001] 1 Cr. App. R. 21 at [34].

⁹⁴ The *Crown Court Compendium* (June 2022), Part 1, 5, Legal Summary, Directions, Example 1. Accessible at <https://www.judiciary.uk/wp-content/uploads/2022/07/Crown-Court-Compendium-Part-I-June-2022.pdf>. [Accessed 6 July 2022].

⁹⁵ The *Crown Court Compendium* (June 2022), Part 1, 5, Legal Summary, para 2, citing *R v Miah* [2018] EWCA Crim 563. Accessible at: <https://www.judiciary.uk/wp-content/uploads/2022/07/Crown-Court-Compendium-Part-I-June-2022.pdf>. [Accessed 6 July 2022].

⁹⁶ It is submitted that the answer to the question, “do we need to be 100% certain/sure”, suggested in *R v JL* [2017] EWCA Crim 380 amounts to little more than a “No” and without more could be seen by the jury as, to put it colloquially, a green light to convict. See The *Crown Court Compendium* (June 2022), Part 1, 5, Legal Summary, para 7(1), citing *R v JL* [2017] EWCA Crim 621. Accessible at <https://www.judiciary.uk/wp-content/uploads/2022/07/Crown-Court-Compendium-Part-I.pdf>. [Accessed 5 July 2022].

⁹⁷ [2022] EWCA Crim 380.

⁹⁸ *Ibid* at [19].

⁹⁹ At [34].

considered. The overwhelming majority of appeals concerning directions on the standard of proof fail to render a conviction unsafe, let alone provide the slightest hint that the courts are up for a review of law and practice.

Might a review be undertaken in other contexts?¹⁰⁰ The Judicial College frequently revises and prepares new editions of the Compendium, but its role in this respect is limited to providing accurate up-to-date guidance and draft directions. The College could not undertake the kind of review that may be called for, one which would contemplate changes to law. This type of review might be within the remit of the Law Commission, whose aims include:

*“... to ensure that the law is fair, modern, and simple and as cost effective as possible; to conduct research and consultations in order to make systematic recommendations for consideration by Parliament; and to codify the law, eliminate anomalies...”*¹⁰¹

The importance of the direction on the criminal standard of proof, its inherent difficulties, and the long-standing issues and anomalies in law and practice, could provide grounds for a review by the Commission. Such a review could engage with approaches taken in other jurisdictions and with scientific knowledge and findings in other disciplines such as forensic linguistics.¹⁰² In the meantime, some adjustments to practice could be possible, perhaps similar to those suggested in this article, which are relatively modest and seek to stay within legal parameters in this jurisdiction.

¹⁰⁰ In *R v Mohammed* [2022] EWCA Crim 380 at [22] the court stated that the expert reports might be relevant in other contexts.

¹⁰¹ Accessible at: <https://www.lawcom.gov.uk/about/>. [Accessed 23 June 2022].

¹⁰² See P. Darbyshire, “What can we learn from published jury research? Findings for the Criminal Courts Review 2001” [2001] Crim LR 970, 973, where it is suggested that psycholinguistic experts could be involved in writing directions, as happens in the United States. The extent to which this already happens is unclear, although the Judicial College does draw on research into jurors’ understanding of criminal proceedings and the Plain English Campaign has helped with Examples. See Note 55.