ROUTE(S) TO VERDICT – THE CLEAR PATH FORWARD IN CRIMINAL JURY TRIALS

Abstract: Juries are selected at random by design but how they are instructed is a more carefully designed process. How the jury is charged by the judge plays a crucial role in dictating how the jury will deliberate. In this way, it is a cornerstone of equipping a jury to reach a legally justified verdict. Jurors as laypersons in many instances will lack an understanding of many legal terms, tests and standards. This article addresses a novel measure introduced in the United Kingdom called a route to verdict and advocates for its introduction in this jurisdiction when the empirical research is considered.

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Introduction

As O'Malley writes, 'few legal institutions have had so many passionate defenders and so many detractors as the jury'.[2] To illustrate his point, he makes reference to Lord Devlin, Blackstone and Mark Twain. Devlin describes the jury as 'the lamp that shows that freedom lives'.[3] To Blackstone, a 'palladium' and 'the sacred bulwark of our nation'.[4] Twain providing the anthesis condemns it as '[putting] a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury'.[5] One columnist from The Times goes as far to say that the 'Jury trial has outlived its usefulness. To pretend that it delivers justice is absurd. This archaic theme park democracy is expensive, a waste of time and adds nothing to fair trial'.[6] Having observed the jury process first hand working as a judicial assistant, the author's own view has seen a shift from Devlin more towards the view of Twain.

Whatever your own opinion on the jury model, there is a consensus that it is optimal so as to instil public confidence in the criminal process.[7] Colloquially, and for similar reasons, there is disdain amongst many for what can be viewed as the closed-shop nature of the Special Criminal Court.[8] If we assume that the jury model is something which will not be displaced, then it is worth evaluating the current way in which they are given information and to examine if the current model is the most effective way to do so.[9] While the selection of potential jurors is a random process by design, the way in which they are informed and the efficacy of same is something which should be regularly under review. For legal practitioners, it can be easy to underestimate how convoluted and incomprehensible legal concepts and the law itself can be to laypersons. This is a question of degree, and some will have more of an understanding than others, but notwithstanding such, there are a large number of those

[1] The author would like to thank Judge Sean Enright of Peterborough Crown Court who provided helpful information in regards how the practice operates in the U.K while sharing his own experience in utilising RTV's.
[2] Tom O'Malley, 'A Representative and Impartial Jury' (2003) 8 The Bar Review 1.
[3] ibid quoting Patrick Devlin, *Trial by Jury* (rev. edn, London, Stevens & Sons Limited 1966) 164.
[4] ibid quoting William Blackstone, *Commentaries on the Law of England* (Oxford 1765-1769), Book IV, ch 27.
[5] ibid quoting Trevor Gove, *The Juryman's Tale* (London, Bloomsbury 1998) 3.
[6] Simon Jenkins, 'Ladies and Gentlemen of The Jury, You Have Had Your Day' *The Times* (17 February 2006) <https://www.thetimes.co.uk/article/ladies-and-gentlemen-of-the-jury-you-have-had-your-day-5kczmnbqdd5> accessed 22 July 2022.
[7] Julian Roberts and Mike Hough, 'Public Attitudes to The Criminal Jury: A Review of Recent Findings' (2011) 50 The Howard Journal of Criminal Justice.
[8] Mary Carolan, 'Special Criminal Court Should Be Abolished, Rights Watchdog Says' *The Irish Times* (18 November 2021) <https://www.irishtimes.com/news/crime-and-law/courts/special-criminal-court-should-be-abolished-rights-watchdog-says-1.4732757> accessed 12 May 2022.
[9] The Constitution requires that the most serious offences are tried by a jury per Article 38.5.

who will find such terminology difficult to understand. This is only heightened when we consider the huge variety of criminal trials in terms of length and complexity.

The jury trial process is one based on the rationale that twelve people brought from diverse backgrounds and dispositions can come together bringing with them their common sense, knowledge and life experiences to look at the evidence in a particular case and decide on the facts. This expectation is underpinned by an expectation that each juror and the jury collectively fully understand what is being asked of them. Imagine 12 lay people being orally briefed by a consultant oncologist on potential courses of complex treatment for someone with an aggressive form of cancer, and those people then being sent away to the lobby to decide what was the best treatment for this patient. Wouldn't they be better off with some written guidance they could refer to? Should the written guidance be tailored for the people making the decision? This article evaluates the current method of charging the jury and looks at a somewhat recent measure introduced in the United Kingdom (UK) called a route or routes to verdict (RTV hereafter). This article examines what it is, and why its introduction in this jurisdiction may well be warranted when the empirical research from other common law jurisdictions is considered. It also recommends that written directions (i.e., a copy of the judge's charge) should be provided *as standard*.

What is it and where does it come from?

The basic premise of an RTV is that the presiding judge will, after charging the jury on the relevant facts and law, provide the jurors with a written aid which would contain a series of primarily factual questions that gradually lead the jury to a legally justified verdict. Each question should be tailored to the law, issues and evidence in the case. The idea being that they are clear enough that the defendant (and the public) may understand the basis for the verdict that has been reached.[10] It is, in some ways, a road map jurors should follow when deliberating.

The origin of their use relates to proactive members of the English judiciary who started using them organically to assist them in directing the jury. Their use was not automatic and they were only recently incorporated into guidance on how the judiciary should direct juries. May 1991 saw the publication, of the Crown Court Benchbook which contained what was coined 'Specimen Directions'.[11] It was primarily focused on assisting judges to get the law right and was in part a training manual.[12] In March 2010, a change in approach was embarked on focusing on maximising juror comprehension and these Specimen Directions were replaced by a Judicial Studies Board Crown Court Benchbook named: Directing the Jury.[13] The change was in response to what was seen as a ritualistic incantation of the directions which were being recited mechanistically by judges who were not engaging properly with the facts and issues in individual cases.[14] In 2016, the latest iteration of jury direction guides was created in what is known as The Crown Court Compendium, something which is updated regularly.[15] The use of RTVs is addressed in this guide and their use is now mandated by the

[10] Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings* (London, Judiciary of England and Wales 2015), paras 307 and 308.
[11] The Judicial Studies Board was the forerunner to the Judicial College. It was established following publication of the Report of Lord Justice Bridge's working party in 1978.
[12] David Ormerod, 'The Evolution of Jury Direction Manuals – Where next?' (Reading at Middle Temple November 15 2022).
[13] ibid.
[14] Successive Lords Chief Justice have variously underlined that the directions are not to be used 'mechanistically' (*per* Lord Taylor of Gosforth) and 'must be a servant, not a master', requiring always to be 'adapted to the circumstances of the individual case'. Roderick Munday, 'Exemplum habemus: reflections on the Judicial Studies Board's specimen directions' (2006) 70 (1) Journal of Criminal Law (2006) 27.
[15] Lord Chief Justice, 'Criminal Practice Directions [2020] EWCA Crim 1567' (UK Ministry of Justice 2022).

by the Criminal Practice Directions.[16] The following are two examples of RTVs, the first of which was received from a member of the English judiciary in the context of a murder case where self-defence was at play.[17]

Example 1

Q1. Are we sure that at that time of the incident, he did not have an honest belief that he was under threat?
If not sure, go to Q2.
If sure, self-defence fails, and you will ignore Q2 and go *straight* to Q3.

Q2 Are we sure the force he used was not reasonable and proportionate?
If not sure, self-defence is made out and your verdict against him is 'not guilty'. *Go no further***.**
If sure, then self-defence fails and go to Q3.

Q3 Are we sure that when the defendant unlawfully stabbed X they intended to cause death or really serious harm?
If sure, he is guilty of murder (but go straight Q5 and consider manslaughter route 2).
If not sure, consider Q4.

Q4 Are you sure that he intentionally stabbed X?
If yes, he is guilty of manslaughter only. *That is your verdict and go no further.*

Q 5 Has the defence proved on the balance of probability all of the following:
(a) did his abnormality of mental functioning give rise to a *substantial* impairment of his ability to exercise self-control?
If no, he is guilty of murder. Go no further.
If yes go to (b).

(b) Was this substantial impairment the cause, or a significant contributary cause for the killing?
If no, he is guilty of murder. *Go no further.*
If yes, he is not guilty of murder but guilty of manslaughter.

Example 2

This second example is also from the UK and was widely circulated online after a notorious cricket player was found not guilty of affray.[18] For context, an affray is statutorily defined in the following terms: 'A person is guilty of affray if he uses or threatens unlawful violence towards another and his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety'.[19] The route to verdict provided to the jury was as follows:

[16] The latest version was published in June 2022: *The Crown Court Compendium, Part 1: Jury and Trial Management and Summing Up* (Judicial College 2022) <https://www.judiciary.uk/guidance-and-resources/crown-court-compendium/>
[17] Judge Sean Enright of Peterborough Crown Court.
[18] Caroline Davies, 'Ben Stokes Cleared of Affray After Brawl Outside Bristol Club' *The Guardian* (2018) <https://www.theguardian.com/uk-news/2018/aug/14/ben-stokes-trial-cleared-affray-brawl-outside-bristol-nightclub-england-cricketer> accessed 6 July 2022.
[19] S.3 Public Order Act 1986 <https://www.legislation.gov.uk/ukpga/1986/64/contents>

> Q1 Did he use, or threaten violence towards another?
> If no, not guilty, if yes move to Q2.
>
> Q2 Did he genuinely believe that it was necessary to use or threaten that violence so as to defend himself and/or another?
> If yes, was the force reasonable in the circumstances he perceived them to be? If it was, then the verdict is not guilty. If no, move to Q3.
>
> Q3 Was the conduct of all of them, taken together, such as would cause a person of reasonable firmness present at the scene to fear for his personal safety?
>
> If yes, the verdict is guilty, if no or it may not have been, the verdict is not guilty.[20]

There is no prescriptive format an RTV should take. Judicial discretion is retained in how it is produced and ultimately in the final form of the document. Judges adopt different styles; some judges present numbered questions while others prefer flowcharts.[21]

Is it Necessary?

The next logical question is whether employing such a tool is necessary? The appropriate response warrants answering two related questions. The first being what is the overarching purpose of the judges' charge with respect to explaining the legal rules the jury must apply? The second being whether the current format is the most optimal method of delivery when the empirical research is considered? These shall both be examined in detail.

The role of the judge's summing up/charge is seen as an impartial overview of the facts,[22] and a clear delineation of the legal rule(s) the jury must apply.[23] It is the second part of this which is most relevant here and something which could be improved on if you consider the purpose of summing up. Coonan in her book explains this purpose: 'The foundational principle for any summing up is that it must be sufficient to achieve its purpose (…) it should aim at precision and conciseness over prolixity'.[24] The need for clarity in summing up is something which has been affirmed in case-law.[25] The more complicated and long the case, the harder it is to for judges to adhere to this principle. This point was eloquently made in *R v Landy*:[26]

> A summing-up should be clear, concise and intelligible (…) This summing-up suffered from the fact that the judge was over conscientious, he seems to have decided that the jury should be reminded of nearly all the details of the evidence and directed as to every facet of the law which applied. 'He must

[20] Jon Ross, 'Ben Stokes-The Route to Verdict' (EBR Attridge LLP 2018) <https://www.ebrattridge.com/articles/ben-stokes-the-route-to-verdict> accessed 6 July 2022.
[21] David Ormerod and Cheryl Thomas, 'Routes to Verdict - What We Know and What We Need to Know' (2021) 8 Criminal Law Review 615-619, 616.
[22] *R. v Vincent Joseph Wood* [1996] 1 Cr. App. R. 207 'We do not doubt that the degree of adverse comment allowed today is substantially less than it was 50 years ago'.
[23] At common law there is no absolute requirement for summing up to be given in all cases. In practice judges do provide summations particularly the more complicated or serious the case. However, these vary widely in terms of length and detail.
[24] Brian Foley and Genevieve Coonan, 'The Judge's Charge in Criminal Trials' (Round Hall 2008) 15.
[25] *R v Woolin* [1999] 1 AC 82, 97. 'I attach great importance to the search for a direction which is both clear and simple'.
[26] *R v Landy* [1981] 1 WLR. 355, the judge gave a summing up which lasted for six days.

> have spent hours preparing his summing-up but in the end he got lost in the trees and missed the wood'.[27]

Now it should be stated that an overly protracted summation will not yield a successful ground for appeal if the content of the charge does not err in law or fact. *DPP v Hickey* is a case where a six-day charge was a feature but did not yield the same result.[28] It was held that: 'the charge while overlong was not such as would confuse the jury either as to the law, the evidence or the inferences to be drawn from the evidence'.[29] It is not necessary to dispute the learned judge's ruling in this regard. The charge may not have been so confusing as to warrant overturning the decision. However, this in no way precludes the idea that the charge could have been clearer, perhaps with a written aid in the form of an RTV; an RTV should be seen as a complement to the judge's charge, not a means to replace it.

The argued deficiencies in the current format of the judge's charge are eloquently put by Lord Justice Moses who addressed the issue of summing up in a speech delivered to the Inner Temple in 2010:

> The oral tradition proves hard to shift but we must surely have grown out of the belief that any good can be achieved by the ritual incantation of obscure utterance, expecting the jury to sit there saying nothing but absorbing all they are told like a sponge.
>
> And when they go out and wrack their brains trying to remember what they have been told, and come back to ask to be reminded, the judge re-reads his instruction, sometimes more carefully, possibly more slowly, or even in a louder voice. [Sometimes he is merely hurt, and responds in a tone of injured affront, rather as the Prime Minister of Italy might if you ask him the rules of 'Bunga-Bunga'].[30]

Humour aside, his point is rather persuasive. Repetition of a direction which has already garnered confusion will not always (even frequently) be the correct remedy. Of course, if jurors have failed to take an adequate note or were not listening to the charge, then this method will fill in the gaps so to speak. It is important that jurors are not relying on memory alone and therefore a written copy should be provided. The judge's charge can be long and drawn out over multiple days and while the jury are told they can come back to court for matters to be repeated or clarified it should not be underestimated how intimidating or reluctant jurors might be to ask for this. An issue arises where the confusion is more pronounced, as then repetition will do little to clarify matters to the jury and this is where an RTV would be of assistance.

Another consideration is the structure of jury deliberations. The general rule in European countries is that jury deliberations are conducted in private.[31] Anything else would run contrary to the well-established principle in this jurisdiction that the nature of the jury

[27] ibid [8].
[28] *DPP v Hickey* [2007] IECCA 98.
[29] ibid [17].
[30] Lord Justice Moses, 'Summing Down the Summing-Up' (Annual Law Reform Lecture, The Hall, Inner Temple, 23 November 2010).
[31] In some countries, this is not the case. For example, in Belgium a judge may be invited to the deliberation room to provide the jury with clarifications on a specific question, without being able to express a view or to vote on the issue of guilt per *Taxquet v Belgium* (2012) 54 EHRR 26 [54].

deliberation in a criminal case should not be revealed or inquired into.[32] This applies even if there is a legitimate doubt over whether the conviction of the accused is fully in accordance with what the jury agreed.[33] The argument being that the confidentiality requirement of jury deliberations is intertwined with the absence of reasons.[34] The issue of whether juries should have to give reasons for their verdict is for another article and is the subject to much debate.[35] However, it is clear that in this jurisdiction, the rationale is that the judge's directions to the jury are delivered in open court so as to compensate for the jury's lack of any reasoned judgment when returning the verdict. In this context, any way in which these directions can be refined must be thus refined. They are essentially the only safeguard to a legally justified verdict.

Empirical Research

Thus far the arguments advanced rest on the rather shaky ground of anecdotal experience. However, there are data and studies which have been conducted on the subject of jury comprehension which lend some weight to my assertions. Jury research is not a novel undertaking and yet considering the importance of jury decision making it is an underdeveloped area of research. In the US, it stems back as far as the 1950's where University of Chicago carried out its well-known jury project.[36]

Mock jury studies have been conducted in other jurisdictions with varying design processes dictated by convenience and cost. Common criticisms of some mock jury studies have been that they rely on unrepresentative student samples of jurors, rely on written stimuli rather than live re-enactments or videos, and have not always included deliberation as part of the research design.[37] Notwithstanding such limitations, valuable research has been done in the area of jury comprehension and that of particular utility conducted in other common law jurisdictions such as Australia, New Zealand and the United Kingdom. Before delving into this research, an important point to note is the difference between objective and subjective comprehension. Many studies which focus on subjective and self-reported comprehension yield extremely positive results. One study conducted in Australia found that 94.9% of 'actual' jurors stated that they understood the instructions 'mostly' or 'completely'.[38] A different study conducted in New Zealand found similarly positive results with 85% of 'actual' jurors believing that the instructions were clear.[39] This is to be expected. As Shakespeare said, 'the fool doth think he is wise, but the wiseman knows himself to be a fool'. Jurors who are not familiar with legal terminology and do not understand exactly what is being asked of them are not likely to admit such. As such, studies which focus on objective comprehension are of more utility.

An example of a study which looks to objective understanding was conducted by Cheryl Thomas in 2010 on the behest of the UK Ministry of Justice.[40] This study looked at *inter alia* 'an initial exploration of how well jurors actually understand judges' oral instructions on the

[32] Dermot Walsh, *Walsh on Criminal Procedure* (2nd edn, Round Hall 2016) ch 22, para 22-27.
[33] *People (Attorney General) v Longe* [1967] IR 369
[34] *Taxquet v Belgium* (2012) 54 EHRR 26 [79].
[35] For instance, see Tom Daly, 'An endangered species? The future of the Irish criminal jury system in light of Taxquet v Belgium' (2010) 20(2) Irish Criminal Law Journal 34-43.
[36] William Young, 'Summing Up to Juries in Criminal Cases - What Jury Research Says About Current Rules and Practice' [2003] Criminal Law Review 665-689.
[37] James Chalmers and others, 'Three distinctive features, but what is the difference? Key findings from the Scottish Jury Project' (2020) 11 Criminal Law Review 1012-1033.
[38] Blake M. McKimmie, Emma Antrobus and Chantelle Baguley, 'Objective and Subjective Comprehension of Jury Instructions in Criminal Trials' (2014) 17 (2) New Criminal Law Review 163–183, 167.
[39] ibid.
[40] Cheryl. Thomas, 'Are Juries Fair?' (Ministry of Justice Research Series February 2010).

law and whether certain tools may improve comprehension'.[41]A key finding from this study was that:

> When given a written summary during oral directions, there was also a closer relationship between jurors' perception of their understanding of the legal directions and their actual understanding[42](…) Most jurors believed they understood the judge's direction on the law. However, a substantial proportion of these jurors in fact did not fully understand the directions in the legal terms used by the judge.[43]

In numeric terms, when jurors had written directions, 60% of those who said the directions were extremely easy to understand correctly identified both legal questions. When jurors only received oral directions, 34% of those who said the directions were extremely easy to understand correctly identified both legal questions.[44]

The current Irish approach mirrors that in Scotland, which is distinct and separate to England and Wales, with a reliance on oral delivery of the charge exclusively. Thus, it is an interesting comparator. A key difference between Scotland and this jurisdiction is that the Scottish have been proactive in commissioning a review of empirical work which explores jury comprehension.[45] This comprehensive review which looked at studies conducted in a multitude of jurisdictions found that the most effective ways of enhancing juror memory and understanding was a combination of methods which included juror note-taking, pre-instruction, plain language directions and the use of written directions and structured decision aids (RTVs). It found that each of the methods benefitted different aspects with some improving memory and recall, with others improving understanding and assisting with the application of legal tests. In terms of the use of RTVs it found:

> There is a developing evidence base relating to structured decision aids (routes to verdict), which are a more recent innovation. The evidence that does exist (particularly from the better designed studies) suggests *that these are more effective than written directions* in improving applied comprehension – jurors' ability to correctly apply legal tests to the evidence. Oral directions should be tailored to the route to verdict provided, otherwise there is a danger that jurors ignore the route to verdict.[46]

Other Potential Advantages

The chief advantage of RTVs is aiding jury comprehension. This is particularly true for complex cases with multiple co-accused and multiple counts which would benefit greatly from reducing the information down to the most pertinent questions in reaching a verdict. Beyond this the drafting of an RTV has other advantages. As Ormerod and Taylor write, 'they cause counsel, judges and, crucially, juries to address more logically and systematically the legal bases for reaching their verdict'.[47] In the UK, Counsel make submissions and

[41] ibid 4.
[42] ibid 38.
[43] ibid 48.
[44] ibid 39.
[45] Fiona Leverick and James Chalmers, 'Methods of Conveying Information to Jurors: An Evidence Review' (Justice Directorate 2018) 6.
[46] ibid.
[47] David Ormerod and Richard Taylor, 'Agreement and Disagreement in Murder and Manslaughter Verdicts Practical Implications of The Above Analysis and Identifying Routes to Verdict' (2022) 3 Criminal Law Review 188-209, 188.

participate in the drafting of RTVs.[48] This is provided for in the Criminal Practice Directions: 'Such written materials may be prepared by the judge or the parties at the direction of the judge. Where prepared by the parties at the direction of the judge, they will be subject to the judge's approval'.[49] This benefit of active participation in drafting has been described by the English Court of Appeal: 'apart from the assistance which the end product will provide to the jury, the mental discipline of drafting a route to verdict in itself assists the court to identify the essential ingredients of the offences charged and the issues on which the jury must focus.'[50] If a similar method were introduced here, it could potentially prevent a number of requisitions and recharges of the jury. Counsel do of course address the judge about aspects of the charge, but the author suggests this is not done in such a proactive and detailed way as RTVs. Another advantage is that they enable appellate courts to readily and easily identify issues and appeal points.[51]

Interestingly, it appears that Court of Appeal Guidance can actually hinder juries being charged more succinctly. Madge argues that this coupled with the ever-increasing number of criminal statutes has added to the length and intricacy of directions on the law.[52] In Australia, before legislative intervention, surveys of judges consistently showed that judges felt they had to 'appeal proof' their charges, with many judges feeling their charges were 'drafted for the appellate courts rather than for the comprehension of jurors'.[53] This of course would be different if appellate courts prescribed the use of RTVs – something we will return to later in this article.

Other perceived advantages of RTVs are their potential to improve transparency, with accused persons, and indeed the wider public being able to see more clearly why a particular verdict was reached.[54] This may lead to greater confidence in the criminal justice process, although this perspective may be sanguine. A more tangible advantage of RTVs is that they may lead to cost savings through shorter deliberation times, as jurors spend less time attempting to understand their task.[55] This is borne out by one UK judges' perspective: 'Handing out written directions seems to have almost eliminated requests from juries for reminders or further guidance on the law. Juries also seem to be reaching verdicts more quickly'.[56] Clearly these potential advantages, while desirable, are subordinate to the ultimate advantage: aiding jury comprehension.

Disadvantages/Concerns

One concern expressed with respect to introducing RTVs is that by reducing everything to a series of questions presented concisely and simply, the subtleties of legal definitions might be lost or the law 'glossed' for convenience.[57] This danger is something which has been recognised by the English Court of Appeal in a judgment last year which while affirming the benefits of RTVs gave a word of caution also: [58]

[48] *R v Christopher Alexander* [2018] EWCA Crim 239: 'That had been approved by counsel before being given to the jury(…)it is not wise for a route to verdict document ever to go to a jury when counsel thinks there is something within it which is misleading or wrong'.
[49] Lord Chief Justice (n 15) para 26K.15 137.
[50] *R. v Atta-Dankwa (Abena)* [2018] EWCA Crim 320 [31].
[51] Ormerod and Taylor (n 47) 188.
[52] Nic Madge, 'Summing Up - A Judge's Perspective' (2006) 2 Criminal Law Review 817-827, 819.
[53] Chris Maxwell and Greg Byrne, 'Making Trials Work for Juries: Pathways to Simplification' (2020) 11 Criminal Law Review 1034-1056, 1041.
[54] Leverick (n 45) 38.
[55] ibid.
[56] Madge (n 52) 821.
[57] Ormerod and Thomas (n 21) 618 provides an example in the case of multi-handed murders.
[58] *R v Rowe* [2022] EWCA Crim 27.

> There is no doubt that routes to verdict (and written directions of law) have proved to be invaluable in assisting jurors to arrive at a true verdict according to the evidence. There is no doubt either that the questions that are formulated should be phrased in as straightforward language as possible and put in a way that is straightforward for the jury to understand. But there is a risk, and in our view this case is illustrative of it, of oversimplifying the questions to such an extent that they distort the issues the jury has to consider.[59]

This case is fact specific and more a criticism of that particular RTV which was created rather than on the concept more generally.[60] However, the simplifying of legal concepts in standardised instructions is not straightforward and care must be taken not to alter legal concepts in ways which would change their legal meaning.[61] Something to be mindful of is that one Australian study suggests that reducing the complexity of information, to make it more comprehensible, reduces people's reliance on heuristic cues because they are better able to engage in effortful processing.[62] Thus, there is a danger that providing a simplified instruction would mean that jurors would not engage with the information and the legal issues. This is certainly a possibility which should not be discounted, although equally it is true that one cannot engage with something correctly if they fail to understand it fundamentally. A correct balance between the two needs to be achieved.

One limitation to some of the studies conducted in jury comprehension is that they do not address objective understanding. There is a difference between feeling more confident that you understand something and actually having understood something. The most recent research has emphasised the importance of whether jurors can apply the instructions.[63] Jurors may think they have understood the instructions, but the litmus test is in their application.[64] This is a salient point in terms of aiding juror comprehension and should be considered when designing studies into the utility of simplifying jury instructions. However, what should not be discounted in terms of the benefit of RTVs is providing a more tangible link to a legally justified verdict in that it provides an easier guide to jurors for them to use in their deliberations. Moreover, while an empirical limitation, it does not preclude the possibility that their objective understanding has improved and other, better designed studies which have been referenced have yielded positive results.

Another potential disadvantage is the time and effort that would have to be expended by the trial judge. However, if sufficient guidance and training is provided this should not be an issue. Their use does pose some difficult questions such as, does the RTV's binary approach (i.e., 'if yes then guilty, if no then not guilty') make juries more likely to convict?[65] It is clear more research should be conducted into the consequences of their use in this regard. There

[59] ibid [73].
[60] ibid [76] 'care should be taken to ensure that the natural desire to pose a series of simple questions does not override the imperative that the questions should where necessary, be tailored to the individual circumstances of each defendant. In this case for example, there was no evidence whatever that Rowe was the shooter, yet the jury were invited to consider whether he was'
[61] Chantelle Baguley, Blake McKimmie, and Barbara Masser, 'Deconstructing the Simplification of Jury Instructions: How Simplifying the Features of Complexity Affects Jurors' Application of Instructions' (2017) 41(3) Law and Human Behavior Journal 284-304, 285.
[62] ibid.
[63] Chantelle Baguley, Blake McKimmie, and Barbara Masser, 'Re-evaluating how to measure jurors' comprehension and application of jury instructions' (2019) 26 (1) Psychology, Crime & Law 53-66.
[64] Ormerod (n 12).
[65] Ormerod and Thomas (n 21) 617.

has also been a lack of research looking into the impact of written directions distinct from RTVs and the effectiveness of different types in different scenarios.[66] The experience in England and Wales shows that their advantages significantly outweigh any disadvantage. Indeed, most judges in England and Wales have gone from being initially sceptical to very enthusiastic about their use.[67]

Other Jurisdictions

Much of the discussion thus far has referenced the situation in the UK as it provides a clear blueprint for how adoption of RTVs or something similar could be introduced here. Australia has also made a number of changes to how juries are directed but has opted for legislative reform.[68] Despite the differences in how the changes were implemented, there is cross-jurisdictional consensus that the objective in change is to ensure that jury directions are clear and comprehensible and are presented in a form which elucidates the issues to be decided.[69] The empirical work in jury comprehension laid the foundations, and wholesale change began in 2015 after Sir Brian Leveson published a *Review of Efficiency in Criminal Proceedings*.[70] One of his general recommendations was for: 'A change of culture so as to use the Criminal Procedure Rules to ensure that trials proceed expeditiously and commensurately with the issues in the case'.[71] In terms of assisting the jury, he recommended that judges should be ready to provide directions before evidence is given, where this would assist the jury to evaluate the evidence. Interestingly, research conducted in New Zealand identifies many complaints by jurors about the absence of clear guidance at the start of the trial as to the real issues in the case.[72] This is something that would be of great benefit if introduced in this jurisdiction. Juries are given general directions on the criminal process but are not armed with any explanation of the law which will dictate their ultimate decision. It seems logical that they would be given a roadmap by the judge of the particular legal issues at play before they hear from counsel.

England and Wales

In England and Wales, Leveson also renewed Auld LJ's recommendation that instead of summarising the evidence, the judge should devise and put to the jury a series of written factual questions (RTV).[73] These were subsequently implemented in the Criminal Procedure Rules and the first Crown Court Compendium.[74] While their use is strictly speaking discretionary,[75] 'a strong expectation has developed that an RTV will be provided to the jury in almost every case'.[76] An interesting development in UK jurisprudence is the consequences when an RTV is not utilised. Numerous Court of Appeal decisions have emphasised the importance and desirability of written directions and RTVs.[77]

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[66] ibid 619

[67] Douglas Thomson, 'Should Scotland Adopt The "Route to Verdict" In Criminal Jury Trials?' (2018) 31 Scots Law Times 131.

[68] Recommended by the in Victorian Law Reform Commission, Jury Directions, in its Report No 17 (2009).

[69] Maxwell and Byrne (n 53) 1055-1056.

[70] Leveson (n 10).

[71] ibid 74, para 281.

[72] Young (n 36) 682.

[73] Leveson (n 10) 79, para 307. Auld LJ recommended that there be a single instrument setting out, concisely and simply, all of the rules of criminal procedure, in a form which could be readily amended "*without constant recourse to primary legislation*": Lord Justice Auld, 'Review of The Criminal Courts of England and Wales' (Judiciary of England and Wales 2001).

[74] Published in May 2016.

[75] Only not to be used 'where the case is so straightforward that it would be superfluous', Lord Chief Justice, 'Criminal Practice Directions [2015] EWCA CRIM 1567' (UK Ministry of Justice 2022) 127, para 26K.12.

[76] Ormerod and Thomas (n 21) 616.

[77] For example, *R. v K* [2017] EWCA Crim 2214 and *R v N* [2019] EWCA Crim 2280.

A prime example is *R. v Atta-Dankwa (Abena)*.[78] The case concerned an alleged altercation whereby the appellant had knocked down the victim with their car. The jury had to consider three separate counts on indictment: assault by beating (count 1); whether the victim's injuries from being hit by the car amounted to wounding with intent (count 2), or in the alternative, whether it was unlawful and malicious wounding (count 3).[79] The trial judge opted to not utilise any written directions including an RTV. The jury requested clarification on whether the accused was guilty on count 2 if her intention had been to scare the victim rather than injure her. The trial judge mistook the enquiry as relating to count 3, and wrongly directed the jury that recklessness on the accused's part was sufficient to convict on count 2. The jury found the accused guilty on counts 1 and 2. This case illustrates how written directions can prevent mistakes of this nature –the grounds for appeal would not have arisen if an RTV had been provided to the jury. As Hungerford observes, the jury would have had a clear record, to which they could, if necessary, refer during their deliberations, of the approach they should have taken in deciding their verdicts.[80] Holroyde LJ made it abundantly clear that a written RTV should be seen as the norm and criticised the fact that it was not used in that case: 'There is a lesson to be learned from this case. It is that one should never be too quick to assume that a case is so straightforward that a route to verdict would be superfluous. Experience shows that problems can arise even in cases which seem straightforward'.[81]

The Irish Perspective

In this jurisdiction, the matter of RTVs has not been properly considered. The Law Reform Commission in a 2013 report looked at the issue of jury comprehension and noted research which suggested that juror comprehension of legal directions was aided by written directions.[82] However, instead of opting to make specific and detailed recommendations, it instead advocated for legislative intervention and for the provision of empirical research into the topic.[83] This appears to have fallen on deaf ears and no such legislative or empirical work has been embarked on thus far. One encouraging development has been the commencement of the Criminal Procedure Act 2021, which makes provision for written documents used in the trial to be provided to the jury.[84] The section is broad in scope in terms of what may be provided. However, while written copies of the judges' directions may be provided, they are not provided as standard. Furthermore, this does not resolve the problem discussed earlier whereby mere repetition is not a sufficient antidote.

The idea of utilising an RTV document to assist jury comprehension is something which has not been given proper judicial scrutiny or consideration by the appellate courts. There is only one case where it is mentioned,[85] and this was to provide context to an English decision where such a document was used: 'the concept of a "route to verdict" document is not one that has been adopted in Irish criminal procedure to date'.[86] No examination of why such a

[78] [2018] EWCA Crim 320.
[79] ibid [6].
[80] Peter Hungerford-Welch, 'Written Directions to The Jury: R. v Atta-Dankwa (Abena) Court of Appeal (Criminal Division): Holroyde LJ, Elisabeth Laing J And Judge Aubrey QC: 13 February 2018; [2018] EWCA Crim 320' (2018) 8 Criminal law Review 685-688, 685.
[81] *R. v Atta-Dankwa (Abena)* [2018] EWCA Crim 320 [31].
[82] Law Reform Commission, *Jury Service* (LRC 107-2013).
[83] ibid: 'The Commission recommends that (…) provision should be made in legislation for empirical research into matters such as jury representativeness, juror comprehension, juror management and juror capacity and competence'.
[84] The Criminal Procedure Act 2021 s. 2.
[85] *The Director of Public Prosecutions v Jose Lacerna Pena* [2022] IECA 15 which references the UK case of *R v. Shehu* [2001] EWCA Crim 1381.
[86] ibid.

document was used nor any evaluation as to the utility of same was made – a missed opportunity.

Conclusion

Juries are here to stay. In that context, it would be wrong to assume that the current way in which they are addressed on the law and how it should apply is beyond reproach. Surely where the stakes are so high, and a person's liberty is at stake, the utmost must be done to try and prevent perverse outcomes or indeed disagreements which stem from confusion. Beyond that, jurors are conscripted to perform what can be an onerous role, and thus is it not the case that the criminal justice system is obliged to provide as much assistance as is practicable so they can adequately discharge their function.[87]

Juries should be provided with a written copy of the judge's directions as standard to curtail any confusion about what is said. Moreover, and more critically, adopting the use of RTVs needs to be introduced to address more fundamental confusion that juries can experience, particularly in complex cases with a number of alternate verdicts and counts. At a bare minimum, more research into the topic needs to be conducted and any barriers to such lifted.[88] Notwithstanding the absence of such research in this jurisdiction, the Irish judiciary should take a more proactive approach in improving and refining the ways in which juries are charged.

[87] Ormerod (n 12).

[88] 'Unclear contours of the common law and constitutional restrictions on conducting empirical research with jurors have undoubtedly contributed to this research deficit' Mark Coen and others, 'Respect, Reform and Research: An Empirical Insight into Judge-Jury Relations (2020) 4(2) Irish Judicial Studies Journal 166-133.