CHARGING JURIES: WRITTEN DIRECTIONS, ROUTES TO VERDICT AND THE SUPREME COURT

Abstract: The judge's charge in criminal trials is firmly rooted in the oral tradition of the common law. The convention is that the judge addresses the jury about the task before them, but does not provide anything in writing. The jurors may take notes if they wish and may also request the judge to repeat any element of the charge. In the last twenty years common law jurisdictions across the world have accepted the value of supplementing the oral charge with written directions and other written materials. However, Ireland has stood aloof from these developments. That may be about to change. In July 2024 in The People (DPP) v Lane the Supreme Court indicated that it wished to see the adoption of written directions, particularly in complicated trials. This article considers the likely impact of that decision.

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Introduction

Jury trial in Ireland makes for an interesting comparative case study. Political inertia and a conservative judicial culture have stymied reform so that '[i]n the space of twenty years, Ireland's law and practice in relation to juries has drifted away from the law and practice in the common law mainstream.'[1] One of the developments in jury procedure that has occurred in other jurisdictions with a similar legal heritage but which has not yet been adopted in Ireland is the provision of written directions to jurors. Reliance on a solely oral charge unaccompanied by written aids is now at odds with judicial practice in England and Wales, New Zealand, Canada and several Australian states.[2] Research we conducted (published in 2020) showed that there was a lack of awareness among Irish trial judges of developments in other common law jurisdictions relating to the provision of written directions to jurors.[3] At that time it appeared unlikely that trial judges would consider supplementing the oral summing up with written materials. In July 2024 the Supreme Court, in *The People (DPP) v Lane*,[4] urged trial judges to do just that.

This article begins by outlining the written materials provided to jurors in a number of other common law countries. The decision of the Supreme Court in *Lane* as it relates to written materials will then be considered. The focus of the article will then shift to the question of how likely it is that trial judges will start providing written materials post-*Lane* and what issues may arise if they do so. Our research, conducted in 2017-18, revealed that judges and barristers had considerable misgivings about the provision of written materials to jurors. Some insights from those we interviewed help to demonstrate how difficult it may be to implement what the Supreme Court has decreed in *Lane*.

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[1] Mark Coen, 'Another case of Hibernian exceptionalism? Jury trial in Ireland' in Nicola Monaghan (ed), *Contemporary Challenges in the Jury System: A Comparative Perspective* (Routledge 2025) 82, 97.

[2] A useful overview is provided in James Chalmers and Fiona Leverick, *Methods of Conveying Information to Jurors: An Evidence Review* (April 2018) 43-61<Methods of Conveying Information to Jurors: An Evidence Review (www.gov.scot)> accessed 4 November 2024 The oral charge still dominates in Scotland: see Douglas Thomson, 'Should Scotland Adopt The "Route to Verdict" in Criminal Jury Trials?' (2018) 31 Scots Law Times 131.

[3] Mark Coen, Niamh Howlin, Colette Barry and John Lynch, *Judges and Juries in Ireland: An Empirical Study* (UCD 2020) 66. Twenty-two judges with Circuit Criminal Court and/or Central Criminal Court experience were interviewed, as well as eleven barristers with criminal law practices.

[4] [2024] IESC 30.

Before delving into the specific issue of providing jurors with written materials, we will briefly explain our original research project and its methodology.

Our Research

In this article, we draw upon the findings of our qualitative study on judge-jury interactions in Ireland. Our broader focus in this research was the examination of judicial and legal practitioner perspectives on how judges conduct criminal jury trials and interact with jurors. This included consideration of judicial and practitioner perspectives on the provision of written materials to jurors, and some relevant findings on this topic are outlined further below.

The data presented later in this article was generated from semi-structured interviews with 33 participants: 22 judges and 11 barristers. Judges were drawn from the Central and Circuit Criminal Courts, and had experience of presiding over criminal jury trials. All barristers had criminal practices and experience of criminal jury trials. Ethical approval was granted by University College Dublin Human Research Ethics Committee in early 2017. Interviews took place between June 2017 and December 2018.

We recruited these participants by sending letters to 47 serving and retired Central and Circuit Criminal Court judges and 22 barristers throughout Ireland inviting them to participate in the research. Responses were received from 26 judges and 13 barristers, and 22 judges and 11 barristers participated in interviews. The judge cohort consisted of 16 men and six women. Four participants were retired at the time of data collection. Length of service ranged from one year to 31 years. Experience of presiding over criminal jury trials varied across the sample; five participants reported less than 20 jury trials, while ten participants estimated they had presided over more than 100 criminal jury trials at the time of interview. All participants had experience of working in courtrooms as legal practitioners prior to their appointment to the bench. While most had practitioner experience in criminal trials, many participants highlighted the difference between the judicial role and that of the advocate.

The practitioner cohort included seven men and four women. The sample included six junior counsel and five senior counsel. There were no retired participants in this cohort. Seven participants practised in criminal and other areas, while four listed criminal work as their only area of practice at the time of the interview. The majority of practitioners (9) reported a combination of urban and rural experience, with two participants indicating that they participated in criminal jury trials in urban settings only. All participants had at least 10 years of experience at the time of the interviews. Eight participants reported that the majority of their criminal practice took place in the Circuit Criminal Court. One participant mainly practised in the Central Criminal Court, while another had only done criminal jury trials in the Circuit Criminal Court. The final practitioner of the 11 indicated that their practice was evenly split between the Central and Circuit Criminal Courts.

Thirty-two interviews were audio-recorded and transcribed. One participant requested not to be recorded and detailed notes were taken by the interviewer and typed up immediately following the interview. All data were fully anonymised and each transcript was audited by one of the authors. Interviews were analysed using the thematic analysis framework proposed by Braun and Clarke.[5] Thematic analysis is a method of identifying, analysing and

[5] Virginia Braun and Victoria Clarke, 'Reflecting on Reflexive Thematic Analysis' (2019) 11(4) Qualitative Research in Sport, Exercise and Health 589.

reporting patterns or themes found within data. An inductive, data-guided approach was adopted throughout this process. Each transcript was reviewed by the authors, with patterns in the data identified and sorted into categories or 'codes'. Codes were then clustered together as possible themes, and later reviewed and refined by the authors. One of the themes identified in our research related to judicial and practitioner perspectives on the provision of written materials to jurors. Some of this data is presented later in this article.

Juries and Written Materials

At the turn of this century, Tinsley identified four problems experienced by jurors when evidence is presented orally.[6] First, they have difficulty attending to, absorbing, and recalling orally presented information. Second, the slow pace of witness examinations creates a cumbersome and inefficient presentation of evidence, affecting their capacity to make reliable credibility assessments of witnesses. Third, evidence presented in a fragmented, illogical sequence is more difficult to follow; and fourth, the presentation of technical or specialised evidence is hard to understand, often because it is ponderous and complicated.[7] Since the early 2000s, jurors in the common law world have increasingly been provided with written documents to assist them in their decision-making. For example, empirical research on behalf of the New Zealand Law Commission examined juror comprehension, judicial directions and the provision of written material to jurors.[8] By the late 1990s it was common in New Zealand for the prosecution give jurors copies of the indictment, relevant legislation, interview transcripts."[9] New Zealand jurors are now given copies of the indictment, a question trail (a variation of the 'route to verdict' as described below) and a transcript of the evidence.[10]

In England, the Royal Commission on Criminal Justice recommended in 1993 that in all complex cases jurors should be provided with written materials including summaries of the agreed evidence and lists of witnesses.[11] It further recommended that in lengthy trials, with counsel's agreement, weekly summaries of the evidence, parts of the judge's summing up and guidance on applicable points of law should be given in written form to the jury for the purpose of their deliberations.[12] In his 2001 *Review of the Criminal Courts of England and Wales* Auld LJ recommended the provision of 'a written case and issues summary'[13] to juries. A shift in favour of the provision of written directions to juries in England is clearly discernible over the past thirty years. Zander and Henderson's 1993 survey of judges for the Royal

[6] Yvette Tinsley, 'Juror Decision-Making: A Look Inside the Jury Room' in Roger Tarling (ed), *Papers from the British Society of Criminology Conference, Leicester* (2000) <www.britsoccrim.org/volume4/004.pdf> accessed 6 September 2024.
[7] ibid.
[8] New Zealand Law Commission, *Juries in Criminal Trials, Part Two: A Discussion Paper* (Preliminary Paper 37, vol 1, 1999) and the final report: New Zealand Law Commission, *Juries in Criminal Trials* (Report 69, 2001). This research was then cited in a number of cases, including *R v Rongonui* [2000] 2 NZLR 385, 445; *R v H* [2000] 2 NZLR 581, 589; *R v McLean (Colin)* [2001] 3 NZLR 794, 802; *R v Burns (Travis) (No.2)* [2002] 1 NZLR 410, 413; *R v Haines* [2002] 3 NZLR 13, 20; *R v Zoneff* (2000) 200 CLR 234, 261; *Ex p The Telegraph Group plc* [2001] 1 WLR 1983, 1992 and *Montgomery v HM Advocate* [2001] 2 WLR 779, 809–10.
[9] New Zealand Law Commission, *Juries in Criminal Trials* 20.
[10] David Harvey, 'The Googling Juror: The Fate of the Jury Trial in the Digital Paradigm' (2014) New Zealand Law Review 203, 214.
[11] The Royal Commission on Criminal Justice, *Report* (Cmnd 2263, HMSO, 1993) 134–5.
[12] ibid.
[13] Robin Auld, *Review of the Criminal Courts of England and Wales* (HMSO 2001) 522.

Commission found that judges gave written directions in only 2% of cases,[14] but by 2011, Darbyshire found that the figure was closer to 85%.[15]

The Route to Verdict

One specific type of written material which is frequently supplied to jurors in other jurisdictions is the 'route to verdict' (RTV) document. As Ormerod and Thomas explain, '[a]ll RTVs are written directions but not all written directions are RTVs'.[16] While some written directions are essentially extracts from or summaries of relevant information, RTVs are written aids tailored to the facts of individual cases that guide jurors through the sequential decisions they should make when deciding on their verdict.[17] Different terms are employed for such aids—'route to verdict documents' in England and Wales,[18] 'question trails' in New Zealand[19] and 'decision trees' in Canada, for example.

Horan describes a written 'verdict guide' as a document which

> provides jurors with a logical series of questions to address during deliberations. These questions address the essential legal issues the jury needs to answer in order to reach a verdict. Legal content is embedded within the questions so a lecture on the law is not needed.[20]

She describes a 'question trail' as:

> a visual representation of an integrated summing up which restructures the summing up into a series of steps that logically follow on from each other. Each step presents a question of fact, tailored to the legal concepts involved. Instead of an explicit explanation of the law, the legal issues are incorporated into the questions of fact that arise in the trial. They are usually presented as a diagram or flow chart to present the sequential list of questions.[21]

Comiskey defines a 'decision tree' as 'a document that summarises the elements of an offence or a defence with a step-by-step series of questions, which require a "yes" or "no" answer.'[22] She uses the term to encompass a variety of such documents, variously referred to as RTVs, question trails, flow charts, etc.

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[14] Michael Zander and Paul Henderson, *The Crown Court Study* (The Royal Commission on Criminal Justice, Research Study No 19, HMSO 1993) 216.
[15] Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Hart, 2011) 216. Twenty-three English circuit judges out of 27 said that they had provided juries with written directions at least once.
[16] David Ormerod and Cheryl Thomas, 'Routes to Verdict - What We Know and What We Need to Know' (2021) 8 Criminal Law Review 615, 615.
[17] Examples of Routes to Verdict are given in Jack Healy, 'Route(s) to Verdict – The Clear Path Forward in Criminal Jury Trials'
(2023) 7(1) Irish Judicial Studies Journal 40, 42–3.
[18] Extracts from English route to verdict documents are reproduced in *Grant, McCalla and Kolawole v* R [2014] EWCA Crim 143.
[19] See, for example, *R v Dixon* [2007] NZCA 398.
[20] Jacqueline Horan, *Juries in the 21st Century* (The Federation Press 2012) 80.
[21] New South Wales Law Reform Commission, *Jury Directions* (Report No. 136, 2012) xvii.
[22] Marie Comiskey, 'Tempest in a Teapot – The Role of the Decision Tree in Enhancing Juror Comprehension and Whether It Interferes with the Jury's Right to Deliberate Freely?' (2016) 6(2) Oñati Socio-Legal Series 255. 58.

From 2010 onwards the Court of Appeal of England and Wales referred approvingly to 'steps to verdict' documents in a number of judgments[23] and in 2015 the provision of RTVs was recommended by the Leveson Review.[24] In more recent times the Court of Appeal has emphasised their value in complex cases and has been critical of trial judges who have omitted them.[25] Ormerod and Thomas pointed out in 2021 that 'although not mandatory, a strong expectation has developed that an RTV will be provided to the jury in almost every case.'[26] In *R v Cox*[27] Singh LJ noted that 'in accordance with good modern practice' the judge had given the jury 'both written legal directions and a Route to Verdict.'[28]

Improved understandings of how jurors consume, synthesise and process information have informed some of these changes in judicial practice.[29] Research on question trails in Australia examined the extent to which question trails improved juror comprehension and suggests a positive impact.[30] Empirical work by Baguely et al further supports the use of decision aids.[31] Recent scholarship has sought to measure the effectiveness of RTVs and question trails. For example, Spivak et al have found that 'fact-based instructions' may enhance the jury's ability to resolve questions of fact in accordance with the law.[32] Goldsmith demonstrates that structured decision aids can have significant effects on decision-making.[33] Moving away from an entirely oral tradition can be justified, in the words of Comiskey, as follows:

> Without some sort of aid such as a decision tree to simplify and distil the complex principles of criminal law into a page or two, our expectations of jurors are unrealistic. How can they remember all of the elements of an offense (or multiple offenses) and any applicable defense(s) if all they receive is a lengthy oral summation of the law?[34]

Similar sentiments were expressed in the Supreme Court by Donnelly J in the case of *The People (DPP) v Lane*.[35]

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[23] See, for example, *R v Thompson* [2011] 2 All ER 83, *R v Hindhaugh* [2011] EWCA Crim 1102and *R v F* [2011] EWCA Crim 1669.

[24] Brian Leveson, *Review of Efficiency in Criminal Proceedings* (Judiciary of England and Wales 2015).

[25] In *R v Atta-Dankwa (Abena)* [2018] EWCA 320 (Crim) no written directions or route to verdict document was given to the jury and it was held that the circumstances which gave rise to the appeal would not have arisen had the judge provided such materials. Holroyde LJ stated (at para [31]): '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.'

[26] Ormerod and Thomas (n 16) 615.

[27] [2024] EWCA Crim 892.

[28] ibid, [40].

[29] See for example William Young, 'Summing-up to Juries in Criminal Cases – What Jury Research says about Current Rules and Practice' (2003) Criminal Law Review 665; New Zealand Law Commission, *Juries in Criminal Trials, Part II: A Discussion Paper* (Preliminary Paper 37, vol 1, 1999); Nic Madge 'Summing up – A Judge's Perspective' [2006] Criminal Law Review 817.

[30] This includes Tamsin Ede and Jane Goodman-Delahunty, 'Question Trails in Trials: Structured Versus Unstructured Juror Decision-Making' (2013) 37(2) Criminal Law Journal, 114 and Ryan Essex and Jane Goodman-Delahunty, 'Judicial Directions and the Criminal Standard of Proof: Improving Juror Comprehension' (2014) 24(2) Journal of Judicial Administration 75.

[31] Chantelle M Baguley, Blake M McKimmie and Barbara M 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 284.

[32] Benjamin Spivak and others, 'The Impact of Fact-Based Instructions on Juror Application of the Law: Results from a Trans-Tasman Field Study' (2020) 101(1) Social Science Quarterly 346.

[33] Tessa Kathleen Gillies Goldsmith, *Question Trails: Do Structured Decision Aids Help Jurors to Make Legally Sound Decisions in Sexual Assault Cases?* (PhD, University of Otago 2022).

[34] Comiskey (n 22) 261.

[35] [2024] IESC 30.

The People (DPP) v Lane

Lane involved the prosecution of two men for involvement in an incident that caused permanent brain damage to the victim. The case did not contain elements obviously calling for appellate discussion of the provision of written directions to jurors. No such directions were provided by the trial judge and no argument was made by counsel that they should be provided. The case did not require jurors to decide unusually complex matters of fact, engage with particularly intricate offences or consider multiple alternative defences. Two individuals, Lane and Broderick, were tried together but charged with different offences under the Non-Fatal Offences Against the Person Act 1997 and the Firearms and Offensive Weapons Act 1997. In other words, complicating factors that might suggest the usefulness of providing written materials were absent.[36]

The central issue which Lane appealed to the Court of Appeal[37] and subsequently the Supreme Court was whether there should have been separate trials, on the basis that Broderick's pre-trial statements implicating Lane, and comments made by Broderick's counsel in his closing speech, rendered Lane's trial unfair.

The issue of written directions was incorporated into the *Lane* judgment as follows. Donnelly J stated that where an accused implicates a co-accused in a pre-trial statement the jury must be told that that statement is evidence against the accused only and not the co-accused.[38] Donnelly J placed this instruction in the broader context of juror comprehension, stating:

> That is the type of standard direction that judges in this jurisdiction have given to juries for generations. Jurors' ability to understand legal directions is a fundamental aspect in the proper functioning of the jury decision-making process. Furthermore, contemporary judges are aware of the necessity to give charges in simple language that gives clarity to what the jury must do.[39]

This echoes the statement of Mahon J in *The People (DPP) v Herda*[40] that in summing up to a jury a judge must ensure that 'complex legal terminology and principles are explained in ordinary language to the greatest possible extent.'[41] Trial judges also see this as a key part of their role; most judges who were interviewed for the *Judges and Juries in Ireland* study demonstrated a commitment to explaining the law to juries using 'readily-digestible language and relatable scenarios.'[42]

Donnelly J referred with approval to the English Crown Court Compendium,[43] stating that she had 'borrowed' the direction on pre-trial statements of accused persons in joint trials from that publication.[44] She then stated that the *Compendium* discusses the 'value to jurors of

[36] See the comments of Lord Judge CJ in *R v Thompson* [2011] 2 All ER 83. However, those comments have been overtaken in England and Wales by subsequent caselaw stating that written directions should be provided in most cases.
[37] [2022] IECA 263.
[38] [2024] IESC 30, paras [65]–[66].
[39] ibid, para [66].
[40] [2017] IECA 260.
[41] ibid, para [35].
[42] Coen (n 3) 48–9.
[43] Specifically *The Crown Court Compendium: Part I: Jury and Trial Management and Summing Up* (2023), Crown Court Compendium Part One https://www.judiciary.uk/wp-content/uploads/2024/09/Crown-Court-Compendium-Part-I-July-2024.pdf.> accessed 4 November 2024.
[44] [2024] IESC 30, para [67].

having written directions of law'[45] and outlined how such directions had come to be the norm in England and Wales. Turning to the situation in this jurisdiction, she observed:

> To the best of my knowledge, some judges in the Central Criminal Court and in the Circuit Criminal Court give written directions to juries in addition to oral directions. Most often these are agreed in advance with counsel.[46]

When we interviewed 22 judges with criminal trial experience in 2017/2018, none of them had provided written directions.[47] One judge stated that they attempted to do so in one trial but counsel 'thought it was a very interesting suggestion but they weren't having any of it.'[48] The 11 criminal barristers in our study had never experienced the provision of written directions to juries. We discuss the views of our interviewees on the desirability and usefulness of written directions further below.

Donnelly J addressed the fact that provision had been made in legislation for the giving of written materials to juries in particular types of trials.[49] She stated that the fact that the Oireachtas had legislated for this in relation to certain offences did not preclude it occurring in trials for other offences. This overlooks a provision in the Criminal Procedure Act 2021, which deals with the giving of written materials to jurors in criminal trials beyond those previously included in distinct statutes. This permits, inter alia, the giving of 'any … document that in the opinion of the trial judge would be of assistance to the jury in its deliberations.'[50] That provision renders the judgment's discussion of the previous statutory position unnecessary.

One of the most compelling criticisms levelled at the traditional judge's charge is that it is not reasonable to expect jurors fully to absorb the technical details of legal issues presented to them in an exclusively oral format.[51] Donnelly J is a proponent of this view. She observed that judges and lawyers would not be able to do this, and continued:

> [I]t is difficult to see why we expect jurors, who are not lawyers, to retain particularly complex details of certain offences, defences or shifting burdens as may arise, having only heard them delivered orally… Naturally, the more complex or more numerous the legal directions given in a charge, the more difficult it will be for all jurors to understand and retain them for the entirety of their deliberations.[52]

It is difficult to argue with the logic of this. The standard oral charge without written aids places unrealistic demands on people, given that research from the educational field shows 'that an average learner's attention span is measured in minutes, not hours.'[53] Donnelly J continued by stating that written directions 'may be very helpful and are to be encouraged in

[45] ibid, para [68].
[46] ibid, para [71].
[47] Coen and others (n 3) 62.
[48] ibid.
[49] She referred to the Criminal Justice (Theft and Fraud Offences) Act 2001, s 57. Other examples include the Competition Act 2002, s 10 (commenced in 2011) and the Companies Act 2014, s 882.
[50] Criminal Procedure Act 2021, s 12(2)(d). The entire Act was commenced by SI 79/2022, Criminal Procedure Act 2021 (Commencement) Order 2022.
[51] This criticism has been made by judges in other jurisdictions. See, for example, Auld (n 13) 534; Alan Moses, 'Summing Down the Summing Up', Annual Law Reform Lecture, Inner Temple, 23 November 2010; Mark Weinberg, 'Jury Directions on Trial – A Pathway Through the Labyrinth?', Supreme and Federal Court Judges' Conference, Darwin, July 2014.
[52] [2024] IESC 30, [72].
[53] Max Rogers, 'Laypeople as Learners: Applying Educational Principles to Improve Juror Comprehension of Instructions' (2021) 115(4) Northwestern University Law Review 1185, 1218.

appropriate cases',[54] and that they should be discussed with counsel in advance. Noting that a transcript of the legal directions would be one form of written aid that could be given to jurors, Donnelly J expressed a preference for 'bullet points summaries of the law or a longer narrative summary of the law.'[55] She also cited the recent work by Leverick and Chalmers which demonstrates that path or route to verdict aids using questions to guide the jury were the most helpful form of written direction.[56]

Implementing *Lane*: insights from Irish empirical research

We asked judges if they had ever provided written materials to a jury. No judge interviewed had done this, and half said that they would not contemplate doing so.[57] When we showed them examples of RTVs from England and Wales, almost half of the judges interviewed expressed generally negative views about these documents. Among the other half of the sample there were some muted positive responses. Several judges told us they were unaware of the use of RTVs in other jurisdictions. They said they had 'never heard of it' (Judge 16), or 'never come across them before' (Judge 19). An explanation by the interviewer that written directions were now the norm in England and Wales, and common in other jurisdictions, provoked negative reactions from some judges. For example, one interviewee observed: '[T]he English have made too much of a meal of all of that' (Judge 06). Another stated: 'Not everything the UK does is right.' (Judge 03). We also asked the criminal barristers we interviewed about their views on written directions and RTVs.

One of our key findings was that judges had enormous respect for jurors and sought to manifest this respect in various ways.[58] The provision of written directions was perceived by some as running counter to this convention and perhaps even having the potential to antagonise jurors. A range of views, mostly negative, were expressed by both judges and barristers, and these can be grouped as follows:

(i) Written directions are unnecessary

When discussing the RTV examples we showed them, some of the judges in our study did not see that such documents or flowcharts added anything to the traditional oral charge:

> I suppose you could do that, but would you? That would be explained to them in the charge. But would you give them a flowchart? (Judge 03)

Some of the judges who expressed negativity about the use of these aids emphasised the intelligence and capabilities of juries, and saw route to verdict aids as unnecessary, with one telling us they felt it resembled an 'Idiot's Guide' (Judge 04):

> [M]y experience of juries is that they would not need something like this. They are well capable of navigating their way through the questions that they have to answer in order to get to a verdict. (Judge 11)

> I don't see the need for explanations of that kind just looking at this document for example…[Juries] should be trusted actually [laughs]. We should actually proceed on

[54] [2024] IESC 30, [72].
[55] ibid, [73].
[56] ibid, [75], citing Fiona Leverick and James Chalmers, *Methods of Conveying Information to Jurors: An Evidence Review* (Social Research, Scottish Government 2018).
[57] Coen and others (n 3) ch 4.
[58] See further Mark Coen and others, 'Respect, Reform and Research: An Empirical Insight into Judge-Jury Relations' (2020) 4(2) IJSJ 116.

> the basis that they are not stupid [laughs]. We should proceed on the basis that they are intelligent. (Judge 06)

One judge similarly reasoned that RTVs were unnecessary as their understanding was that juries create their own materials in the jury room as part of their deliberations:

> They do have flipcharts in the jury room and they can work it out … but that's their job to work it out. I wouldn't see, I personally wouldn't see any function for the court … My feeling is that juries work this out for themselves. (Judge 15)

Some barristers also questioned the need for written directions:

> Nobody is saying juries are finding it confusing and need written instructions. I'm not aware of that and maybe it is happening I don't know and until, I suppose, we hear from the juries themselves, how do we know? (Practitioner 04)

Although this practitioner mentions hearing from 'the juries themselves', there is currently no official forum in which jurors can make their views about their experiences heard. While they sometimes communicate comments or questions to the judge obliquely through jury minders, jurors are not actually asked for feedback.[59]

It can thus be seen that many interviewees did not see a compelling reason for written directions and felt that introducing them would cause rather than solve problems. The additional negative consequences they foresaw are outlined below.

(ii) Potential adverse effect on fair trial rights

Two judges expressed concern that the use of RTVs could have an adverse effect on fair trial rights. One judge emphasised the potential detriment to accused persons:

> [The route to verdict] could be an oversimplification and it could actually lose some of the nuances in the case and of course it's the nuances that give rise to the doubt, which would lead to the acquittal and which the defence is entitled to raise and try to raise and of course the state has to prove guilt ... These are core basic principles and … I don't think we should move away from them, and I think there'd be a danger in … this type of arrangement that you might be shifting off course. (Judge 15)

Another judge suggested that route to verdict materials could be seen as reductivist:

> [Y]ou are asking the jury to apply legal principles that you have told them are at the core of everything that we do, the presumption of innocence and the burden of proof, and then you are reducing it all down to four or five questions. (Judge 04)

A similar perspective was shared by some barristers, who highlighted risks including the minimisation of the burden and standard of proof, or the distraction of juries:

> I just wonder then if people lose sight of the threshold that they actually are supposed to be satisfied beyond reasonable doubt if they are going to convict somebody. (Practitioner 01)

[59] The authors have argued elsewhere that empirical research involving jurors would greatly enhance our understanding of jury trials. We asked our interviewees if post-verdict interviews with jurors would be legal and/or desirable; see Coen and others (n 3) ch 13.

> [W]hen you give something like that to a jury everyone is going to focus on that …They are meant to focus on the facts and have a thorough debate about it. (Practitioner 03)

One of the examples participants were shown, taken from the Crown Court Compendium, was a flowchart or decision tree containing information in boxes, with arrows linking the boxes sequentially. Some judges likened this to a children's board game:

> I wouldn't be happy with it, it's a bit like a board game that you'd play with the kids at Christmas … I think to set that as a formula is almost putting it into the equivalent of a bit of a board game … It does remind me of some of the Ludo games and things; if you buy B you can go on to get C and that kind of thing. (Judge 08)

> I mean I take the point that 'Oh thank God we got a chart. Yes or no, yes or no, yes or no. That means we've got down as far as here. Jump to go. Pass over this. Down the ladder. Up the snake'. (Judge 21)

Once again, judges highlighted the reductivist potential of written directions, but in these quotes their concerns focused on the risk of oversimplifying jurors' deliberations. As one judge further commented: 'I would have a serious difficulty if there was a risk of it becoming a box ticking exercise or the possibility of a mathematical formula of sorts.' (Judge 19). Overall, there were concerns about the potential impact of RTVs on the rights of accused persons, and some interviewees viewed them as providing a route to guilt rather than to a considered verdict.

(iii) Disrespectful to jurors

Other negative perspectives identified by judges focused on the fear that the provision of RTVs possibly encroached upon the role of the jury, or could be viewed as 'dumbing-down' the trial process. Among these judges, there was a strong feeling that such materials may have the effect of constraining juries in their approach to their deliberations:

> I think that juries would probably quite like … the independence of their function and to formulate their verdict in their own style rather than being presented with a road map to a verdict as it were … I think Irish juries in general … are very intelligent juries. I almost think that to give them this would be slightly insulting. (Judge 11)

> [I]f you can do that, why bother with juries at all? ... I think that would tend to rob the jury of their deliberative right, and their right to examine. You're putting them on tram tracks. You're boxing them in. (Judge 03)

Some practitioners echoed the judges' fears about encroaching on the jury's role, for example:

> I think it is a usurpation of the jury's role to do this. I don't think it is right. I would struggle to find circumstances where I could see that it would be useful. (Practitioner 10)

(iv) Practical barriers

Several of the negative perspectives shared by judges and barristers broadly focused on some of the practical challenges that the use of written directions might present. Although not cited as a barrier by judges themselves, one barrister highlighted the potential impact of written directions on judges' workloads:

> I don't think you will find many judges agreeing that they should be getting written directions, because that would multiply the amount of work the judge would have to do to charge a jury. (Practitioner 04)

Rather than citing the potential impact on their own workloads, judges were more concerned with how counsel would react to written directions. Several pointed out that the content or wording of written directions would have to be agreed in advance by defence and prosecution counsel, and that this would not be easy:

> The difficulty with written directions is that it requires … legal argument and generally it may be difficult to get the agreement of prosecution and defence to hand in written directions to a jury. So if one were to hand in written directions where, for example, the defence or the prosecution or both were not agreed to the directions or to part of the directions then that would form a ground of appeal. (Judge 13)

> If counsel could agree, but I think there is great scope for discomfort on both sides and unless they're completely and utterly in agreement and unless you think yourself, presiding at the trial, that this properly encapsulates first of all the charge, how the evidence might fit with it ... (Judge 07)

The potential for barristers to contest not only the content of written directions but also their format, including font size, was referred to (Judge 22). Practitioners shared these concerns:

> I think that there would possibly be a huge amount of controversy in terms of exactly how the document is compiled in terms of the input from both sides. (Practitioner 05)

> I'm amused in one way of the idea of trying to get the defence and the prosecution to agree as to what should go into this kind of short document. I wonder would it cause enormous delays and rows as to what should be in the document? And appeals as to what went into the document and why the verdict was the way it was because of what was in the document in circumstances where we haven't been made aware of a particular need for such documents. (Practitioner 04)

> I can see hours, even at times, days of argument as to what precisely is to go into the written directions in any given case which could end up unbalancing, delaying and just torturing a trial just as easily as it could clarify it. (Practitioner 06)

One judge expressed reluctance to innovate in the absence of a mandate, legislative or otherwise:

> [Y]ou have to be very very careful. So unless there was an approved template or something into which there had been, you know, collective defence counsel feedback before it was finalised let's say...into a bench book. You would be very wary yourself, as an individual judge, striking out in something like that. (Judge 22)

Some interviewees also noted that the use of RTVs may present issues related to accessibility and inclusion. These perspectives mainly focused on jurors' experiences and needs in this regard:

> You might as well be speaking Chinese as trying to give that to a jury…I think that has huge grounds for confusion…honestly I think that the risk of further confusion is probably just as great by providing written instructions (Judge 12).

> You've got to remember as well that you might have an illiterate juror. You know, you might have somebody just when they see boxes and circles it all goes into a blur in front of their eyes. You know, people are different…So you're kind of excluding certain people maybe with that a little bit. (Judge 21)

Similar views were offered by some practitioners, who mentioned fearing the potential exclusion of jurors with literacy challenges. It is also interesting to note that some judges told us that they themselves would find such documents 'confusing' (Judge 01) or 'difficult to comprehend' (Judge 12).

(v) Muted positive responses

It is worth pointing out that while the reactions of almost half of the judges in our study were negative, a small number of judges saw value in the idea of using RTVs, describing them as 'helpful' (Judge 02; Judge 05), or 'logical' (Judge 09). Some of the practitioners we interviewed also saw potential uses for these documents, for example in complex cases or as an aid to understanding the oral charge. However, a cautious outlook remained; for example: 'I think it's something that can be used but it should be used sparingly' (Practitioner 01).

One judge found the visual representation of the flowchart logical and appealing:

> I always draw these sorts of things for myself … Well it's the kind of thing I personally find helpful. (Judge 22)

About one-half of the judges interviewed said they would be open to providing written materials to juries in the future, particularly in the context of complicated prosecutions, although levels of enthusiasm varied:

> I can certainly see where it might have been a good idea, particularly where something like provocation was in the mix, to give the jury a clear and written instruction on that. That may well have been helpful. (Judge 02)

> I'd be totally in favour of being allowed to give juries…written legal directions to supplement the oral ones so that they will have them. They would have recourse to the material when they're actually having their discussion rather than trying to remember what you said. (Judge 09)

> [I]n the Circuit Court...where they have extraordinarily complex trials, there might be room for that. One of the concerns I would have is that they would then not be evaluating the evidence, they'll be concentrating on the piece of paper. (Judge 04)

Around a third of the judges we interviewed were unsure or had mixed views about the RTV documents we showed them. Several suggested that they would need to consider the issue further, for example:

> I mean I wouldn't dismiss it out of hand; I'd have to think about it a little bit…I don't know. I'm not sure. I'm not sure. I'm not sure. (Judge 21)

Three judges considered that such documents would be useful as a checklist for the judge, rather than for the jury. Several drew comparisons between RTVs and issue papers in civil jury cases. While most practitioners perceived more disadvantages than advantages in the provision of written directions, one identified a rationale in their favour similar to that which would be foregrounded in *Lane*:

> [I]n cases juries can get an awful lot of information. And to take it down would be very difficult for them. And then therefore an agreed aid to assist them, similar to what students are given, would probably help. (Practitioner 08)

The varied reactions judges and practitioners had to the sample documents we showed them highlights that there are a range of different preferences for receiving and processing information, a point equally true in relation to juries.

After *Lane*

The main question after the Supreme Court judgment in *Lane* is whether the introduction of written directions will become part of Irish criminal trials, and if so how it will happen. Our interview data from 2017/2018 suggests that trial judges and indeed lawyers may not be receptive to the change. However, a number of things have occurred in the interim which may mean that there will be greater openness to the introduction of written materials than there was when we conducted our interviews. First, the COVID-19 pandemic resulted in unprecedented levels of change to well-established practices in many areas of life, including the legal system. Practitioners and judges who have participated in remote hearings and worked in socially-distanced courtrooms may not perceive giving written aids to jurors as a major departure from the norm. In light of other changes to practice and procedure over the past four years, changes such as the provision of written materials to jurors may now seem less radical. Second, the passage of the Judicial Council Act 2019 and the associated rollout of judicial training means that structures are now in place for judges to discuss and devise coordinated approaches to questions, including specifically 'the conduct of trials by jury in criminal proceedings'.[60] Third, in the past few years there is greater awareness that people consume and process information in different ways, alongside a growing perception of shortening attention spans, the prevalence of neurodiversity and the impact of technology on cognitive processes. As well as academic scholarship,[61] there has been a proliferation of media articles, self-help books and popular discourse on the challenges of remaining focused on tasks for lengthy periods.[62] In the sphere of higher education, academics are increasingly

[60] Judicial Council Act 2019, s 17(3)(c)(ii).

[61] For example, Sarah D'Aurizio, 'Are Attention Spans Actually Decreasing?' (Centre for Brain, Mind and Society, Columbia University) <https://brainmindsociety.org/posts/are-attention-spans-actually-decreasing> accessed 4 November 2024; Ziming Liu, Rui Hu and Xiaojun Bi, 'The Effects of Social Media Addiction on Reading Practice: a Survey of Undergraduate Students in China' (2023) 79(3) Journal of Documentation 670; Martin Korte, 'The Impact of the Digital Revolution on Human Brain and Behavior: Where Do We Stand?' (2020) 22(2) Dialogues in Clinical Neuroscience 101; Josh A Firth, John Torous and Joseph Firth, 'Exploring the Impact of Internet Use on Memory and Attention Processes' (2020) 17(24) International Journal of Environmental Research and Public Health 9481.

[62] See for example, 'Is technology short-changing our attention spans?' *The Guardian* (27 April 2021); Johann Hari, *Stolen Focus: Why You Can't Pay Attention* (Bloomsbury 2023). There has been a particular emphasis on the effects of technology

incorporating principles of Universal Design[63] to enhance the accessibility of information for diverse learners.[64]

The introduction of written directions could occur in a number of ways. It is possible that a small number of trial judges will lead the way, and that the reform will take hold organically as judges grow in confidence and the Court of Appeal has an opportunity to comment on how it is playing out. Alternatively, a more centralised approach could be taken through official judicial training channels in the 2019 Act. This would enable trial judges to receive input from academics and judges from other jurisdictions and to learn from their peers. These two approaches are not of course exclusive and could be combined. If trial judges prove resistant to written directions it is possible that procedural change could be introduced in legislation. However, this is perhaps unlikely, given that political reluctance to reform the jury system is very pronounced in Ireland.[65] Separation of powers concerns may also play a part; there is a reluctance legislatively to prescribe how judges run trials.

In addition to the issue of how written directions might come to be introduced in Ireland, the shape they will take, and the frequency with which they will be used also fall to be considered. In relation to content, Donnelly J's judgment in Lane appears to expresses a preference for the RTV model[66]. The trend in England and Wales is for both a summary of the legal directions and an RTV to be provided.[67] In relation to when written directions should be given, Donnelly J stated that they would not be a feature in every case.[68] This was also the starting point in England and Wales, and the situation has now evolved so that they are expected in the vast majority of cases. Donnelly J returned to the issue of RTVs in *The People (DPP) v Crawford*.[69] While she did not refer to *Lane*, or restate the advantages of written materials, she included what she described as 'a sample route to verdict'[70] in her judgment.

Conclusion

The Supreme Court's endorsement of written directions in *Lane*, while obiter, is undoubtedly important. It signals a potential shift in Ireland's status as an outpost of orality in relation to the charging of jurors. It indicates that a trial judge who provides written directions is doing something that is not only permissible but approved of by the highest court in the jurisdiction. Such signposting is important; in our 2017–2018 interviews of Irish judges we perceived that many of them were unsure if they were 'allowed' to do certain things, or worried about being seen as out of step, disruptive or transgressive.

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and social media on young people; see for example, 'Hooked on TikTok', *Irish Times* (11 May 2024). Minister for Education Norma Foley told the Irish National Teachers' Organisation's (INTO) annual congress in 2024 that pupils' attention spans were being damaged by technology and social media. See Carl O'Brien and Peter McGuire, 'Sharp rise in sexual images generated by primary school pupils, Foley warns' *Irish Times* (1 April 2024) <https://www.irishtimes.com/ireland/education/2024/04/01/sharp-rise-in-sexual-images-generated-by-primary-school-pupils-foley-warns/> accessed 4 November 2024.

[63] Section 19A of the National Disability Authority Act 1999 as inserted by section 52 of the Disability Act 2005 defines 'universal design' as 'the design and composition of an environment so that it may be accessed, understood and used (i) to the greatest practicable extent, (ii) in the most independent and natural manner possible, (iii) in the widest possible range of situations, and (iv) without the need for adaptation, modification, assistive devices or specialised solutions, by persons of any age or size or having any particular physical, sensory, mental health or intellectual ability or disability'.

[64] On Universal Design for Learning (UDL) definitions and initiatives, see further <www.ahead.ie/udl> accessed 4 November 2024.

[65] Coen (n 1) 96–99; Mark Coen, 'A Certain Ambivalence: Independent Ireland and Trial by Jury' in Mark Coen (ed), *The Offences Against the State Act 1939 at 80: A Model Counter-Terrorism Act?* (Hart 2021) 43, 55–57.

[66] [2024] IESC 30, paras [73]- [76].

[67] Peter Hungerford-Welch, 'Helping the jury to do their job' in Monaghan (n 1) 7, 19.

[68] [2024] IESC 30, para [72].

[69] [2024] IESC 44.

[70] ibid, para [171].

Our interviewees were very divided on the usefulness of written directions, and many were openly hostile to such an innovation. It will be interesting to see the extent to which those views endure after *Lane*. Our research on written directions is ongoing, and we plan to conduct further interviews with trial judges and practitioners as the post-*Lane* situation evolves. The Supreme Court has certainly given a clear signal to trial judges that the judge's charge is in need of reform. It will be fascinating to see how they respond.