

Directing Jurors in England and Wales:
The Effect of Narrativisation on Comprehension.

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Abstract

This thesis reports the first empirical study to specifically measure and attempt to improve the comprehensibility of jury instructions in England and Wales. While a wealth of research has established that the majority of American jurors substantially misunderstand the crucial legal instructions they are given by the judge at the end of a trial, to date there has not been any comparable rigorous testing of jury instructions in England and Wales and we do not have a clear picture of how well they are understood. It is unwise to extrapolate the findings from American jury trials because the instruction methods are very different: In the English summing-up, English judges not only instruct the jury on the law but also review the evidence, and judges may, if they wish, both integrate their legal instructions with the specific evidence in the case and ‘narrativise’ the language of their instructions.

102 mock jurors drawn from the community were tested for their ability to recognise, recall and apply eleven legal instructions given in a summing up at the end of a rape trial simulation. They were randomly assigned to receive one of three summings up, which systematically differed in their degree of narrativisation: one based on model instructions published by the Judicial Studies Board; a second that integrated evidence from the case into the instructions; and a third that further narrativised the integrated instructions by applying discourse features previously hypothesised as having a narrativising function. The thesis, then, examines both the comprehensibility of legal instructions within the English summing up and the effect on comprehension of narrativising those instructions.

A highly persuasive pattern of results occurred: Increasing levels of narrativisation increased jurors’ understanding of the instructions, and specifically aided jurors’ ability to apply the law to the evidence in the case. Discussing the results in terms of Accommodation Theory and the Cognitive Story Model, the thesis concludes that a judge may better guide jurors through the categories of the law by accommodating the narrative approach that jurors bring to their role.

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1

Introduction

Less than five percent of criminal cases culminate in a Crown Court jury trial (Elliott and Quinn, 1998; Lempert, 2007), but trial by jury is widely regarded as the cornerstone of the criminal justice system in Common Law jurisdictions (Auld, 2001). For many, jury trials embody the traditional right of offenders to be tried by their peers, while at the same time encouraging active citizenship and social responsibility (Matthews, Hancock and Briggs, 2004). This is because the adjudication of the facts of a case, separate from expounding and applying the law, is the responsibility of twelve lay people sitting on a jury, rather than legal professionals. Jurors' roles are precisely and narrowly defined; they must listen to evidence, decide the facts, learn from the judge about the relevant formalised legal standards, and then collectively arrive at an impartial and legally enforceable verdict (Horowitz, Willging and Bordens, 1998). Although seemingly straightforward, this task presents jurors with three unique challenges: first, they must be able to fairly evaluate the evidence presented. Second, they must be able to understand the law as instructed by the judge during the trial. Third, the jurors must systematically consider the evidence in light of the law to come to a verdict.

The second challenge is paramount. The *sine qua non* of jurors performing their duty is comprehension. They must understand the law in order to fairly evaluate the evidence and they must understand it in order to apply it to the facts. If a jury does not comprehend the law, its verdict, while possibly being legally binding, will not necessarily be one that is in accordance with the law. Jurors' ability to render reliable verdicts is therefore dependent upon the practices and procedures of the court. Jurors, by their very nature are not experienced with law, so responsibility for their comprehension must lie with the trial system, seeing that it provides jurors with the requisite tools to enhance their decision-making (ForsterLee, Kent and Horowitz, 2005). A good jury system makes it possible for a conscientious jury to understand the law and perform their duty appropriately, but poor courtroom practices will prove detrimental to jurors' decision-making (Tinsley, 2001).

As it stands, there are some courtroom practices that place burdens on jurors' comprehension: In England and Wales, for example, jurors are not permitted to ask questions directly to witnesses (though they may do so through a written note to the judge), they may not ask questions during the judge's summing up of the law (though they may subsequently send notes from the jury room), they do not usually have access to a written transcript of the trial in the jury room, and they do not always hear evidence in a temporal, sequential order. Potentially exacerbating these problems, the information that the jurors have to process may be too long (Darbyshire, Maughan and Stewart, 2002), too complex, (Breedon and Bryan, 2000; Cecil, Lind and Bermant, 1987) or too technical (Lieberman and Sales, 1997). In light of these impairments to comprehension, it is essential to ask whether the great claims made for the jury system as a democratic and just institution are being undermined by the elements of its practice. This is an issue which has prompted strong and polarised views from academia, journalists and social scientists (Flango, 1980). There remains, however, a number of unresolved research questions in this area, particularly in England and Wales, where traditional notions of secrecy (enshrined in the Contempt of Court Act 1981) have restricted efforts to explore trial by jury. This dissertation examines some of those questions and builds a picture of how well the trial system facilitates jurors' comprehension of the law.

In England and Wales, the immediate responsibility of ensuring that the jurors can cope with the cognitive demands of the trial lies with the judge during the 'summing up' at the end of the trial. In broad terms, this summing up is a speech given to the jurors before they retire which details the law, the key evidence and also clarifies the jurors' role so that it is fresh in mind as deliberations commence. The summing up reminds them of the evidence, and it also educates them of their duties, their responsibilities, and about general and case-specific matters of law and procedure. It is a practice that may last up to several hours (Lloyd-Bostock and Thomas, 1999). The judge is the 'master of ceremonies' of the trial, acting as a liaison between the judicial system and its citizenry, and the summing up is therefore his means to enable and focus jurors' decision-making, ensure procedural fairness, and to promote the uniform application of the law across trials (Judicial Studies Board, 2010).

Typically, the summing up, which is also used in jury trials in New Zealand (Cameron, Potter and Young, 1999) and Canada (Schuller and Vidmar, 2011), is comprised of two parts; the first part is a set of legal instructions which outline the law governing each case and the second is review of the case evidence. In the review of the evidence, the judge must substantially, but impartially, review the theories of the prosecution and the defence, and the evidence presented by both sides. This review does not detail the whole of the evidence given throughout the trial, but rather acts as a 'big-picture' recapitulation. It is prepared by the judge throughout the trial, using notes he has made on the evidence that has been presented and the facts that each side seeks to establish, as well as their own questions which clarify what the witnesses and counsel have said.

The jury instructions, which typically precede the review of evidence in the summing up (Judicial Studies Board, 2010), outline the procedural and substantive laws applicable to each case. 'Procedural law' addresses how jurors are to assess evidence and 'substantive law' defines the crime that the defendant is being charged with, stipulating a set of features for each crime (Smith, 1991). These instructions fulfil a number of functions, but in essence explain the law to the jurors as it relates to either trial procedures or the evidence. The instructions about trial procedures explain the trial and the task ahead for the jury in terms of the mechanics of decision-making and what discretion the jury has to decide the facts of the case. The instructions relating to the evidence explain how evidence should be treated. For example, jurors are told how to evaluate the credibility of a witness and that it is important to compare the plausibility of differing explanations of the facts. The judge may also tell the jury to accept certain facts of the case as true, or to refrain from drawing inferences about certain details of the trial (the judge often explains that the defendant's refusal to testify should not be taken as an indication of guilt, for example). As well as instructing the jurors how to use the evidence, he also instructs them on how matters of the law bear on the evidence. These instructions are designed to teach jurors the principles of law (a definition of 'actual bodily harm', for example), the different verdicts they can decide for each charge ('count') on the indictment, the criteria that must be proven to justify various verdicts, and the burden and standard of proof. The burden and standard of proof are an essential

part of procedural law. The standard of proof addresses the threshold of proof necessary to bring a guilty verdict, and that threshold is beyond a reasonable doubt. The burden of proof instructions explains that it is for the prosecution to prove beyond a reasonable doubt that the defendant is guilty, and not for the defence to prove innocence.

It is solely via these jury instructions that lay citizens are transformed into legal fact-finders, and as such they are a critical and indispensable element in every jury trial. Indeed, the Court of Appeal considers judicial instructions to be part of the fair trial requirements of Article 6.1 of the European Convention of Human Rights (*R v. Francom and others* 2001 Cr. App R). Jurors must decide whether a defendant is guilty within the definition of the law, rather than to decide on the truth of the evidence in everyday terms (Bankowski, 1988: 19), and given that they do not have to pass a bar exam to sit on a jury, their transformation from citizen to juror is a demanding one. In view of the extraordinary power given to jurors and the necessity of the jury instructions to create a reliable and functional jury, it is important to look for evidence of how well the jury instructions are understood and serve their intended purpose. This is the central aim of this thesis.

From linguistic, psychological and legal standpoints, there are very good reasons to explore the comprehensibility of jury instructions. Firstly, the exploration has much to offer the fields of language and communication. As the 'gatekeeper' to the judicial process, the judge has a duty to both the law and to the citizenry. In directing the jury, the judge therefore takes on a challenging role of 'legal interpreter'. He must be accurate and thorough with the law, but at the same time must be a clear guide for the lay jury. To fulfil both his responsibilities, his instructions must be a coherent hybrid of the everyday language of the lay jurors and the very different technical language of the law, which has previously been identified as difficult to understand (see for example, Tiersma and Solan, 2012). The linguistic tension that the judge must face results in an unusual form of discourse worthy of study, and it remains to be seen whether such a hybrid can be successfully communicated.

Second, issues surrounding how jurors comprehend and apply their instructions are important for theoretical insight into how people process and apply

information. This basic theoretical insight is valuable because it could be useful for improving comprehension with subject matter other than the law.

Lastly, there are legal justifications for exploring the efficacy of jury instructions. For centuries, the jury has been revered as the soundest means of administering justice. Based on the premise that legal minds are brought together with the lay, trial by jury is considered one of the greatest achievements of common law and a 'bastion of liberty' (Lloyd-Bostock and Thomas, 1999: 7). However, jury instructions are a pressure point in every trial and are relied upon to guarantee the fairness of every case. If it is found that jurors fail to understand or follow their instructions, there would be serious implications for the legitimacy of trial by jury as it stands (Elwork, Alfini, & Sales, 1982). A verdict cannot be fair or just if the jurors do not know the law or do not apply it when making their decision.

Given their importance, it is unsurprising that jury instructions have been the subject of debate and scrutiny for more than fifty years (Daftary-Kapur, Dumas and Penrod, 2010; Devine, Clayton, Dunford, Seying and Pryce, 2001). As the next chapter will show, a wealth of empirical research by linguists, psychologists and lawyers in the United States of America has overwhelmingly argued that jurors, despite being willing and capable, are being confounded by their jury instructions (for example, Charrow and Charrow, 1979; Elwork, Sales, and Alfini 1977, 1982; Smith 1993; Finkel, 2000). Even the most positive studies suggest that jurors understand little more than 70 percent of the legal instructions given to them (for example Saxton, 1998; Strawn & Buchanan, 1976). In essence, this previous research has found that legal language drawn from case law or statutes, complex sentence structure, and an indiscernible organisation (Marder, 2006) means that the jurors do not understand the judge's instructions as they are intended. Without having legal training or experience, jurors interpret them in a different way, or worse, fail to interpret them at all.

Crucially, however, as these studies have nearly all been conducted in the United States of America, it is unclear how well jurors in England and Wales understand their instructions and whether they face the same comprehension difficulties as their American counterparts. This is because jury instructions in England and Wales are very different in form and content than the jury instructions

in America. Although serving the same purpose, jury instructions in America tend to be a set of standardised, written instructions which the judge reads verbatim to the jury in every trial he presides over. In England and Wales, however, the jury instructions are not fixed, and judges have greater discretion to instruct jurors on each case as they see fit (Judicial Studies Board, 2010). Judges are supplied with a Crown Court Bench Book which provides illustrations of many of the necessary instructions, but they are designed as examples or as guidelines rather than scripts. For this reason, it would be unwise to extrapolate the findings based on American jurors to jurors in England and Wales. As such, this thesis will look to the previous research to provide insight into how jurors might process instructions and how juror comprehension can be measured, but it will directly answer the remaining question remaining as to whether jurors in England and Wales experience comprehension difficulties with their jury instructions.

Looking to one example of jury instruction in England and Wales, the potential for comprehension difficulties is evident. The following instruction is given to judges in England and Wales by the Judicial Studies Board (JSB) as an illustration of how to explain to jurors consent in relation to a sexual offence:

The submission of free choice to repeated demands is not to be confused with consent. For example, submission achieved by persistent psychological coercion so that free choice was overborne will not amount to consent freely given. On the other hand, reluctant but free agreement is not the same thing as submission, and is still consent, even if reluctantly given. It is for you to decide whether, in the context of this particular relationship (or encounter), consent was freely given by the complainant. If you are sure it was not, you must, secondly, decide whether you are sure the defendant had no reasonable belief that it had.

Judicial Studies Board Crown Court Bench Book (2010: 358)

If this definition required re-reading at any point, or appeared in any way indigestible, consider the jurors' predicament if this was the instruction they were actually given, which happens to be only part of a much lengthier instruction pertaining to a rape charge. For the jurors, they would receive this instruction at the end of hours or days of evidence, and only as part of an orally-presented, rapidly-fired succession of other instructions. The jurors seldom have the luxury of reading

and re-reading the instruction; they merely have the opportunity to hear them once during the summing up.

This question of comprehensibility of jury instructions in England and Wales might be more than simply speculative. In *R v. Schofield* [1993] after giving a verdict of guilty for affray, one member of the jury told the court usher that the jury had not understood the meaning of affray and had written a note to that effect but had not felt able to hand it to the judge. This was to some extent confirmed by the finding of a note in the jury room reading: 'we would like a full definition of affray'. It seems that there was, at least, a real risk that the jury convicted the defendant without properly understanding the relevant law.

The possibility of comprehension problems has not gone unnoticed by the courts or by the government. There have been recent persistent attacks on the English and Welsh system of jury instruction (Munday 1996, 2006; Montgomery, 1998) and some critics have even advocated the outright abolition of trial by jury in particular types of cases (for example, Goldsmith, 2007). In an influential inquiry into the practices and procedures of the criminal courts in England and Wales by Lord Auld (2001), jury instructions were identified as possible subjects of revision for the justice system. 'The Review of the Criminal Courts in England and Wales' aimed to find ways to streamline all the court processes and increase their efficiency with a view to ensuring that courts deliver justice fairly. Auld described the jury as 'the jewel in the crown of the criminal justice system', yet recommended a total of 328 improvements. In his section on 'judges' directions on law and summing up' (pp. 532-538), Auld argued that, at present, trial procedure places too high a demand on jurors and he recommended key changes to the judges' directions to make jurors' task more manageable. He maintained that, as far as possible, the law should be contextualised within the relevant evidence of the case necessary for a verdict:

I consider that judges should continue to remind the jury of the issues and, save in the most simple cases, the evidence relevant to them... But they should do it in more summary form than is now common... Whilst each case calls for its own treatment, they should, in the main, refer only to evidence which bears on the issues. (p. 535)

Auld identified a need for further investigation into the extent to which jurors have difficulty with their instructions, and called further for a test of whether changes to the procedures – such as his own recommendations – can improve juror functioning. To date, his call remains unanswered, yet his proposal to integrate evidence of each case into the legal jury instructions offers a fresh perspective on the issue of instruction comprehension. As most research to date has been conducted on American jury trials, where instructions are not case-specific, the impact of integrating evidence into the instructions on comprehension has never been explored before. It is possible that the poor comprehension rates found among American jurors are a direct result of the decontextualised and abstract nature of their jury instructions; few jurors will be well-versed enough in legal discourse to understand the principles and how they should be used with the evidence. Contextualising the instructions with evidence of the particular case makes use of the existing knowledge that the judge and jury both share. They have seen and heard all of the same evidence and, by integrating it into the instructions, the judge makes explicit what each legal instruction refers to. The evidence, which the jurors have already processed and understood, would act as a bridge to understanding the law. As a result, the comprehensibility of case-specific instructions may be better than the comprehensibility of decontextualised instructions like those used in American trials.

This thesis will explore Auld's proposal for case-specific instructions. To date, his suggestion that a judge should construct instructions with an eye on what details the jurors have already processed about the case has received little attention in the research literature. However, since jurors are not in a position to represent their own interests during the course of the trial, it is important to study the comprehension issue from their perspective. As such, after exploring Auld's proposal for contextualising the instructions with integrated evidence, this thesis goes on to consider whether jury instructions that are even more case-specific and go even further to accommodate the jurors will improve comprehensibility.

It has been argued that there is a notable stylistic dichotomy between the lay members of the jury and legal practitioners in a trial, in which jurors will approach the case with a 'narrative' frame of mind, using the evidence presented at trial to

mentally construct one coherent crime story (Bennett and Feldman, 1981), whereas those who have been legally trained will reason in a paradigmatic fashion, viewing the trial in terms of decontextualised legal categories (Heffer, 2005). If this is the case, if a judge moves away from abstract legal argumentation and uses a more narrative approach to conveying the instructions, it might aid comprehension of the legal instructions themselves (Heffer, 2005) by helping to adapt the legal direction to the particulars of the case. In order to test this hypothesis, this thesis will examine the discourse features previously identified as serving a narrative function, use them to rewrite the jury instructions and then measure if jurors find them easier to understand.

In summary then, in order to build a picture of the efficacy of jury instructions in England and Wales, this thesis asks three questions:

1. *How comprehensible are decontextualised jury instructions when based primarily on the Crown Court Bench Book?*
2. *Do levels of comprehension improve when decontextualised instructions are integrated with evidence from the case?*
3. *Do levels of comprehension improve when decontextualised instructions are both integrated with the evidence and reworded using 'narrativising' linguistic features?*

To answer these three research questions, a quantitative research paradigm will be adopted so that the answers can be applied as widely as possible. By conducting an experimental investigation, it will be possible to systematically manipulate different versions of the jury instructions, controlling the amount of the contextualisation each version has and measuring its comprehensibility on a large number of participants. Reviewing the variety of quantitative methods used in the vast body of jury research, it will be possible to design a robust experimental setting which directly measures juror comprehension.

In doing so, this research will produce the first study to investigate the efficacy of case-specific jury instructions, testing both Auld's proposal to integrate evidence from the case and Heffer's hypothesis that narrativising linguistic features will improve comprehension. It aims not only to contribute to our understanding of juror processing, but also offers an empirically-tested understanding of legal-lay interaction more generally. The intention is that it will serve as a starting point for the empirical examination of the summing up on a wider scale, enable comparisons between the American and English style of jury instruction, and may begin to answer the questions that have previously been avoided: Should judges be given the freedom to direct as they see fit, or are standardised instructions, like those used in the United States of America preferable? Are the illustrations provided in the Crown Court Bench Book a useful guide for the judge? Do judges require professional training to communicate effectively with their jury?

This thesis arrives at an understanding of instruction comprehensibility by bringing together linguistic theory and psychological models of lay decision-making within a juror simulation research paradigm, and so it is organised around six core issues to which the chapters correlate:

- (1) Assessing the cause for concern regarding comprehensibility of jury instructions in England and Wales;
- (2) Evaluating the reforms proposed to improve instruction comprehensibility;
- (3) Exploring whether contextualisation and 'narrativisation' could improve the comprehension of jury instructions;
- (4) Developing a suitable methodology to test the comprehensibility of jury instructions;
- (5) Discussing the findings from this empirical study;
- (6) Discussing the research findings in light of the literature reviewed in Chapters Two, Three and Four.

Chapters Two, Three and Four (Part I) set the context of jury instruction research. In Chapter Two, the research criticism and support for the claim that jury

instructions are a potential problematic trial practice are considered. This issue has received little empirical attention in England and Wales, and in order to gain some insight into the field, the large body of work from other common law jurisdictions is taken into account. The chapter finishes with a discussion of the comparability of these contexts to England and Wales and what can be learned from their conclusions. In Chapter Three, the proposals that have been made to improve the comprehensibility of judicial instructions are assessed. These include: rewriting the instructions in Plain English; offering preliminary instructions; increasing jurors' involvement in trials; offering the instructions in a different medium such as in written form, by flow chart or audio-visual animation; and 'debunking' juror preconceptions. Identifying where the successes and limitations of these approaches lie, this chapter brings to light the importance of taking a 'juror-centred' approach to improving comprehension. Leading on from this, in Chapter Four, the impact of jurors as 'active' participants in the trial process is analysed. Accommodation Theory (Giles and Powesland, 1975a; Bell, 1984) and the Cognitive Story Model of Juror Decision Making (Hastie, Penrod and Pennington 1983; Pennington and Hastie, 1986, 1988, 1991, 1992, 1993) are used to discuss how comprehension could be improved by satisfying jurors' cognitive expectations of their role and task. From this, 'narrativisation' (Heffer, 2005) is introduced as a new and untested proposal to improve instruction comprehension. The chapter concludes with the research questions that have been briefly introduced here regarding the efficacy of the current system of jury instruction in England and Wales using the Crown Court Bench Book, as well as the efficacy of 'narrativised' judicial instructions.

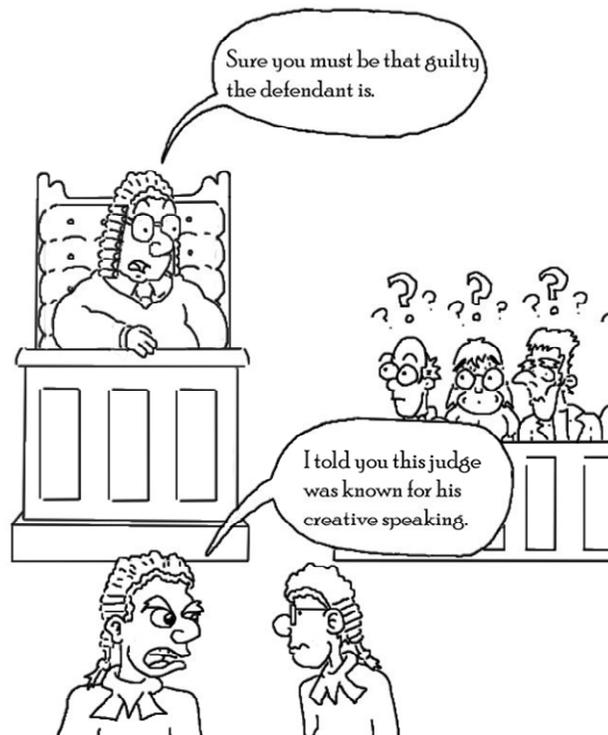
Chapters Five, Six and Seven (Part II) are dedicated to the empirical study itself. Chapter Five outlines the methodology of this jury simulation. It discusses the difficulties inherent in researching jury instructions in Crown Courts in England and Wales, and uses these to develop a comprehensive methodology in which the research questions can be answered. The extant psychological and linguistic literature is used to identify the features that must be accounted for to construct a robust research paradigm, as well as valid and reliable comprehension measures with which to investigate legal-lay discourse. Chapter Six then presents the findings from the realisation of this experiment, as related to each of the research questions,

and Chapter Seven discusses the value of these results as a contribution to our knowledge of the jury instruction process in England and Wales, and the wider pressing question of the capability of lay people in the courtroom, and the defensibility of trial by jury. The concluding chapter then sets the parameters and implications of the findings of this research for the current instruction context, and discusses their value to further psycholinguistic and legal study.

Three final remarks need to be made. First, this thesis is not about delineating the failures of trial by jury. Research of this type often finds it easy to pick holes in trial practices. Given the importance of the institution, it is only right that it should be subject to empirical scrutiny, but this investigation is mindful to do so without political agenda or over-generalised conclusions. Second, this thesis discusses the comprehensibility of judicial instructions. This should not be confused with the issue of judicial bias in jury instruction. Though equally important, this is a separate matter which is not relevant to how the law is comprehended per se. Lastly, to avoid cumbersome reading, the judge is sometimes referred to in male terms. Where 'he' is used, it refers to both 'she' and 'he'. This is done only for practical purposes, and is an unfortunate consequence of formal discourse norms.

2

Criticisms of the comprehensibility of jurors' instructions



2.1 Overview of Part I

Part One of this thesis explores the empirical research that addresses the concern often raised that jurors face challenges during the trial process which inhibit their understanding of their instructions, and outlines the approaches that can aid jurors in their task. In the present chapter, the concerns expressed about miscomprehension of jury instructions are discussed. In the next chapter, the efforts that have been proposed to improve the comprehension of these instructions are reviewed. Within this section the key problems associated with these suggested reforms are discussed, and are followed by a discussion about how a view of the instructions as oral communication rather than written text is fundamental to jurors' instruction comprehension. Finally in Chapter Four, the empirical relationship between instruction comprehension and 'narrativisation' as a means to facilitate comprehensible oral communication is explored, finishing with the research questions and hypotheses of the present research not previously tested in the extant literature,

regarding how jurors in England and Wales can be instructed comprehensibly and effectively.

The idea that trial by jury is being undermined by jury instructions, rather than being undermined by the jury itself, is not a novel suggestion. Academic research and critics of the English and Welsh system of jury instruction (Munday 1996, 2006; Montgomery 1998; Robertshaw 1998) suggest that jury instructions all over the world have been confounding jurors for nearly a century (Finkel, 2000). Problematically, only a handful of these studies have assessed the efficacy and comprehensibility of jury instructions in England and Wales. This is largely because in the eyes of the government, bringing any element of the jury trial under scrutiny risks opening 'Pandora's box', and there is a reluctance to allow academics to probe into how jurors reach their verdicts in real cases. This was compounded with the establishment of the Contempt of Court Act 1981, which was enacted after a juror published the inside story of the deliberations in the Jeremy Thorpe trial in *New Statesman* magazine. Under Section 8 of the Act, it is a criminal offence to 'obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings' (Contempt of Court Act 1981 s.8(1)). In essence, while the Act rightly protects jurors from pressure and outside influences to ensure that deliberations can be frank and open (*Gregory v United Kingdom*, 1998 EHRR), the jurors are liable to prosecution if they divulge any secrets of the jury room. This makes it difficult for researchers to directly question whether the jury understood their case and came to a verdict based on the right reasons. Its existence therefore has contributed to an 'information vacuum' (Thomas, 2007: 5) about juries in England and Wales.

2.2 A review of jury instruction research in England and Wales

What empirical research there is on juries and jury instruction in England and Wales begins with seminal work by Sealy and Cornish (1973a, 1973b) prior to the Contempt of Court Act. Sealy and Cornish (1973a) conducted a broad study examining the effects of juror characteristics like age, class and gender, by using mock juries of London

residents to give post-deliberation verdicts after having listened to recordings of actors reading transcripts of real trials. Whilst this thesis is not directly concerned with juror characteristics, the study by Sealy and Cornish is useful because in part it examined how the mock jury groups reacted to various instructions (1973b), including the introduction of evidence, previous convictions, and the standard of proof. They found that three different versions of the standard of proof direction – the threshold of proof needed to convict, ('beyond reasonable doubt', 'sure and certain' and 'balance of probabilities') affected the number of guilty verdicts rendered. The change in wording varied the jurors' preference for guilt by four – 23 percent, a worryingly large bracket which suggests that the jurors did not understand what the standard of proof was.

The findings of Sealy and Cornish (1973a, 1973b) were corroborated shortly afterwards by one of the best shadow jury studies to date: McCabe and Purves (1974). Jurors taken from the pool who had been selected for jury duty at Oxford Crown Court sat in the public gallery watching a real trial. They were then observed and recorded in deliberation before giving their verdict to the researchers and subsequently interviewed. On the basis of their interviews, McCabe and Purves concluded similarly to Sealy and Cornish (1973b) that although jurors conscientiously tried to follow the instructions, there were instances where they could not really understand them. McCabe and Purves' study only looked at thirty cases, however they found that the verdicts of the real and shadow juries were very similar, which increases the confidence in the validity of their observations. Furthermore, McCabe and Purves (1974) bolstered their findings by subsequently conducting a wider-reaching survey of judges, counsel and solicitors who had been involved in 226 contested trials. They found a rate of 12.5 percent 'perverse acquittals', that is, cases where the jury verdict is contrary to the law and the weight of the evidence (Posey and Wrightsman, 2005: 131). Acquittals are not necessary evidence that jurors do not understand and follow their instructions, because they may be a product of juror equity or nullification, but the study corroborates the previous research that jurors in England and Wales could be failing to apply the law. Zander's (1974) similar study of jury trials at the Old Bailey and the Inner London Crown Court in the same year reported that perverse acquittals comprised six percent of the total. This was less than the perturbing percentage

reported by McCabe and Purves, but repeats the suggestion that jurors could have reached unjust verdicts.

Crucially, these alarming conclusions about the reliability of jurors' decision-making were replicated on a much larger scale four years later. Baldwin and McConville (1979) pioneered a wide-scale statistical jury research paradigm, analysing the operations of 370 jury trials at Birmingham Crown Court. They put forward assessments of jury performance by seeking the opinions of trial judges, defence solicitors (with a response rate of 94 percent and 84 percent respectively) and the police in questionnaires about their satisfaction with the jury's verdict. They identified that 41 out of 114 acquittals in Birmingham were considered questionable, and there was a significant though much smaller proportion of dubious convictions. One in four of the prosecuting solicitors and one third of the judges were dissatisfied with the jury's verdict. In a small but nevertheless worrying 1.2 percent of cases, all four respondents, including the police and prosecuting counsel doubted the decision. Baldwin and McConville (1979: 28) concluded in general that, contrary to the principles underlying trial by jury in England and Wales, the jury appeared on occasion to be 'over-ready to acquit those who were probably guilty and insufficiently prepared to protect the possibly innocent'. Baldwin and McConville were unable to find any clear explanation for this anomaly; however, their study failed to explicitly address the issue of jury comprehension in the way that its predecessors did. For the purposes of the present thesis then, all that can be taken from Baldwin and McConville's damning conclusion that 'trial by jury is a relatively crude instrument for establishing truth' (p. 67) is further confirmation that juries are not functioning as they should.

Zander and Henderson's (1993) study conducted for the Runciman Royal Commission on Criminal Justice presents a more informative investigation of jurors' experience in the jury system, exploring a wider range of issues which included jurors' understanding of the jury instructions and evidence. As part of the extensive investigation, questionnaires similar to those used by McCabe and Purves (1974), Baldwin and McConville (1979) and Zander (1974) were given to over 8,300 former jurors from 800 cases all over England and Wales. The survey included 81 questions for the jurors (that did not contravene the Contempt of Court Act 1981 firmly in place by the time of the research), including 'did the jurors understand the evidence?',

'Could the jury understand the summing up?', 'Could the jury remember the evidence?', and 'Is the jury system a good system?' The answer given by the overwhelming majority was 'yes' and as such, Zander and Henderson's findings were much more positive than those of Baldwin and McConville (1979). They found jurors to be much more competent, balanced and motivated than previously suggested, with only 6.4 percent claiming to find the judges' directions on law 'fairly' or 'very' difficult (1993: 209). 90 percent of the 7,303 former jurors that responded said that it had been 'not at all' or 'not very' difficult to understand scientific evidence and follow the judge's instructions (1993: 216-217). 19 percent of the jurors surveyed said that they would have found it 'much harder' had the judge not provided a summing up, and the longer the trial, the more likely they were to find the summing up useful. Furthermore, 42 percent of the 667 judges who provided their view as to how easy it was for the jury to understand the summing up thought it was 'easy', and another 43 percent thought it was 'fairly easy'. Only three percent said they thought it was 'difficult' and 13 percent that it was 'fairly difficult'.

Problematically, however, Zander and Henderson's study did not directly test jurors' competence and their findings are therefore limited by using only a self-report measure. There is no guarantee that jurors were accurate in their self-assessments, and despite a degree of anonymity, social pressures to appear knowledgeable may have produced the high rates that were reported. Zander (2001: 76) later said of the research:

Obviously these findings are not as solid evidence as would be obtained from research based on observation and recording of the jury's actual deliberations. But they do tend to suggest that the jury on the whole does not have much of a problem with the judge's summing up either on the facts or the law. That is not to say that there is no need for considering whether they can be helped more. But it does suggest that there is no case for establishing a major new system to deal with the problem when the problem, if there is one, may be quite minor.

In spite of this, however, there remains the possibility that jurors' capabilities were exaggerated in Zander and Henderson's Crown Court study (1993), because a similar study conducted by Jackson (1992) found lower reports of instruction comprehension, despite being conducted around the same time. In Jackson's

investigation, questionnaires relating to a number of aspects of jury service were completed by 227 people who had been called for jury service over a six-month period. On being asked to indicate on a scale 'how much could you understand of what was said by the judge?', 65 percent of jurors claimed to have understood 'all' of the instructions that they heard, and an additional 25 percent indicated that they understood 'most' of the instructions. A crucial difference to the Crown Court Study however, is that the jurors in this study had been called to sit on trials in Belfast Crown Court. Though trial by jury is similar in many ways (for example with close relations between the Judicial Studies Board and Judicial Studies Board Northern Ireland, and the use of a Crown Court Bench Book which has been adapted from the Bench Book in England and Wales), there are fundamental differences which means that these findings may not correspond to the jurors of English and Welsh courts.

In more recent times, other studies have also attempted to gauge public opinion of juror functioning through the analysis of national survey data and statistical reports (Mirrlees-Black, Mayhew and Percy, 1996; Mirrlees-Black 2001, Hough and Roberts, 1999). These also fail to provide objective accounts of how much jurors understand. Furthermore, new juror eligibility rules were introduced in 2004, which limit the extent to which the jurors – both real and mock – in these earlier studies and surveys can be compared to the jurors of today. Following Lord Auld's recommendations (2001), beginning in 2002 with the White Paper, *Justice for All*, (*Justice for All*, 2002. Cm. 5563, s.7.27) the government outlined their intention to increase the proportion of the population eligible for jury service, in part as a means of ensuring that juries properly reflect the diversity of the communities they serve. The Criminal Justice Act 2003 removed ineligibility and the right of excusal from jury service for MPs, clergy, medical professionals, those aged 65 to 69, and those involved in the administration of justice. As such, current juror eligibility rules cover all registered electors between 18 and 70 years of age who have been resident in the United Kingdom for five years (Juries Act 1974 as amended by Criminal Justice Act 2003 s.321 Sch.33.) It is possible that educated lay people and legal professionals may experience fewer problems with the jury instructions, and whilst this has not been empirically tested, their inclusion in jury service means that comprehension levels

found on these juries cannot be safely compared with the comprehension levels of jurors before the eligibility rules were altered.

Shortly after these amendments, the Lord Chancellor gave permission to a team at the Centre for Criminology at Middlesex University (Matthews, Hancock and Briggs, 2004) to examine jurors' experience of the criminal justice system. Though still reliant on jurors' self-assessments, Matthews et al's (2004) enquiry was somewhat grounded by interviewing a total of 361 people who had completed jury service. Amongst those who had not been jurors before, over two-fifths (43 percent) said they had left jury service with a higher level of confidence in the court system than before their service. When examining jurors' understanding specifically, they found that jurors reported a high level of understanding of court proceedings in general. However, they also reported confusion and misunderstanding - 20 percent of jurors wanted a fuller explanation of legal terms, and 16 percent said that they would have benefitted from a plain English summary of the legal charges. Although there is disagreement about how well jurors have been functioning, the findings of Matthews et al repeat the conclusions of the previous studies that there is room for improvement.

In contrast, Marder (2011) more recently painted a staunchly positive picture of jury instruction in England and Wales having spent two weeks observing the inner-workings of the Old Bailey. With a view to identifying trial practices that should and should not be adopted in the United States of America, Marder stated that the jury instructions in England and Wales are to-the-point and 'delivered in a fairly straightforward manner and in a language that the jury can understand' (p. 4). She concluded that 'it is reassuring to know that instructions have been made more understandable' (p. 10). Taken at face value, this could suggest that jurors today do not have an issue with comprehending their jury instructions. However, the finding is highly impressionistic and it is not an empirically tested assumption (particularly as two weeks' worth of observation provides a mere snapshot of trial practice), but it does raise a question pertinent to this thesis that jury instructions in England and Wales (irrespective of their comprehensibility per se) could be more understandable than their American counterparts.

2.2.1 A Review of studies investigating specific jury instructions in England and Wales

Other juror studies conducted in England and Wales have focused on specific directions given in the summing up, rather than considering decision-making or the instructions as a whole. Two directions in particular – the burden of proof and the standard of proof – having been shown as problematic in other jurisdictions, have been the focus of research in England and Wales. The burden and standard of proof are arguably the most fundamental legal concepts to ensure fair trial by jury. The former direction informs the jury that they must presume that the defendant is innocent until they are proven guilty by the prosecution's evidence, and the latter direction concerning the standard of proof refers to the level of certainty necessary for the jury to find that charges against a defendant in a criminal case are true. As already noted in Chapter One, that level is given as 'beyond reasonable doubt', the same as in American and commonwealth legal communities. In England and Wales however, the standard is usually conveyed as 'you must be sure' (Heffer, 2006). The standard, regardless of how it is expressed, has been designed to minimise false convictions by setting a stringent high probability for conviction, albeit, at the expense of possible false acquittals (see Arkes and Mellers, 2002; DeKay, 1996). Though the expressions are given in qualitative terms and should not be quantified, there is some consensus regarding what scientific or mathematical meanings are being implied. 'Beyond a reasonable doubt' has been estimated by judges to require approximately 90 percent certainty of guilt (McCauliff, 1982; Kagehiro and Stanton 1985; Stoffelmayr and Diamond, 2000; Newman, 1993; Montgomery 1998). In the United States, the results of empirical studies as to the understanding of 'beyond reasonable doubt' have been mixed. Simon (1970) found that student-participant reports of the level of guilt needed for conviction ranged from 74 to 80 percent. Simon and Mahan (1971) however revealed that judges, jurors and undergraduate students had a good sense of the standard and reported similar estimates, around the 90 percent level (judges 88 percent, jurors 86 percent and students 91 percent). In England and Wales however, Montgomery's (1998) research worryingly found that 73.5 percent of research participants who received standard of proof directions equated the word 'sure' with

having 100 percent proof. Zander's (2000) findings were similar. Testing versions of a 'sure' direction on samples of 1,763 members of the public, 1,364 magistrates and 128 criminal justice professionals, 51 percent of the public and 31 percent of the magistrates and professionals interpreted variations of the standard direction as requiring 100 percent proof of guilt. Although to a lesser degree than Montgomery (1998), this study reinforces the suggestion that jurors do not have adequate understanding of the concept.

Thomas (2010) offers the most recent investigation into the comprehensibility of jury instruction in England and Wales. Her study, commissioned by the Ministry of Justice, examined a range of variables thought to challenge the fairness of jury decision-making. Using a series of mock trials across three different courts, Thomas measured jurors' self-reported understanding of a judge's instructions, and, to increase the validity of her conclusions, also attempted an objective measure of comprehension, which previous research had failed to do. The study involved 797 participants who had been selected for jury service but not called into a trial. They were asked to watch a videotape of a simulated case of Actual Bodily Harm. The mock jurors had to rate on a scale of 0 – 5 how understandable they found the instructions (where 0 represented 'extremely easy to understand' and 5 represented 'extremely difficult to understand'). Unfortunately the report does not offer complete statistics, but the data seems to show that 63 percent of the mock jurors scored 0 – 2, and 37 percent reported 3 – 5, leading to Thomas' conclusion that 'most jurors thought that the judge's instructions were easy to understand' (p. 40). However this conclusion appears too simplistic as there were discrepancies in the results among the three court sites. At two of the sites, Blackfriars and Winchester, over two-thirds of the jurors indicated a high level of confidence in understanding the instructions. In comparison, half of the jurors at Nottingham reported that they felt the directions were difficult to understand. A third of the jurors were also measured objectively for their comprehension. They were asked if they could identify the two points of law for self-defence that had been given in the jury instructions from a small number of distractors. The first point of law was to question whether it was necessary for the defendant to defend himself, and the second was to question whether reasonable force was used. Of this subsection of jurors, 68 percent had scored themselves 0 – 2

on the Likert scale, yet only 31 percent accurately identified both legal questions. 20 percent were not able to identify either question. Thomas (2010: 40) concluded from this that 'the majority of jurors were not able to understand the instructions in the terms given by the judge'. While her results provide some concern about juror comprehension in England and Wales, and have been subject to much media interest (for example Dickinson, 2010; Hough, 2010; Sturke and Gabbatt, 2010) and academic attention (for example Fielding, 2011; Walby, Armstrong, and Strid, 2010), Thomas' conclusion was over-generalised and should not have assumed that jurors' comprehension would be equally poor for all criminal law concepts and other legal instructions. It has been found, for example, that comprehension levels vary according to the concept that is tested. In Potas and Rickwood's study (1984: 52), instructions concerning 'alibi' were the best understood, while instructions on 'self-defence' and 'joint criminal enterprise' were the least understood by two groups of university students. This means that, contrary to the media reports, Thomas' conclusions cannot be safely applied to any legal concepts beyond self-defence.

The methodology employed in Thomas' study did not make for an in-depth investigation into comprehension, having only offered one Likert scale to gauge jurors' self-reported comprehension, and one recognition question to probe actual comprehension, but its large sample size nevertheless means that it can provide a good starting point for the present research. It not only demonstrates the dangers of over-reliance on self-report measures and the importance of measuring actual comprehension, but also calls for further investigation into ways to improve jurors' understanding of the jury instructions.

With so few investigations into juror processing in England and Wales, and with such variation in data and methodology of the studies that have been conducted, there is not a clear picture of how well jurors understand their jury instructions, or if there is scope for improvement. Although influenced by the confusion caused by the Contempt of Court Act 1981 about how juries can be studied, it is astonishing that there still remains to be a thorough and up-to-date investigation focused specifically on juror comprehension, considering actual comprehension measures of a range of directions rather than a select few, as well as possible methods to improve them, if necessary.

2.3 A review of jury instruction research from other common law countries

The level of research conducted on jury instructions in England and Wales is demonstrably limited and it remains unclear how well the jurors actually understand their instructions. This absence of thorough investigation is particularly noticeable in comparison to the wealth of research carried out in other common law countries, particularly the United States. Studies in these other countries find, as the following section will show, that conveying legal instructions is an issue in all countries throughout the world that use lay people as jurors. As there have been a number of extensive assessments of this research published elsewhere (for example, Lieberman and Sales, 1997; Darbyshire, Maughan and Stewart, 2002; Dumas 2000a; Severance, Green and Loftus, 1984), and given that this work is not easily applicable to the English and Welsh context, this discussion will be restricted to a discussion of the pioneering and most compelling work in this field.

2.3.1 New Zealand

There are very close similarities between the judicial system in New Zealand and England and Wales and a series of reports released by a major jury study from The New Zealand Law Commission (Young, Cameron and Tinsley, 1998, 1999, 2001) enables valuable comparisons of the intricacies of decision-making by jurors. The study was designed in response to concerns that some jurors have difficulty understanding technical evidence. The principle objectives of the study were to inquire into the impact of media publicity on juror behaviour, as well as study the effectiveness of judicial instructions and how jurors go about assessment of the evidence. In a sample of 48 jury trials over a six-month period, 575 anonymous jurors completed a pre-trial questionnaire, and just over half of them were also interviewed after the trial. In each case, judges were also interviewed and researchers observed parts of the trial, obtained copies of notes and tape-recorded the summing-up. The semi-structured interviews explored what the juror understood the law to be and how he or she applied it to the factual issues. It also looked at the way in which jury

deliberations were structured and how the jurors' own view of the evidence and the law was affected by the deliberation process. In 35 of the 48 trials, the Commission found 'fairly fundamental misunderstandings' (1999: 53) of the law. The misunderstandings included failure to understand the following: the elements of the offence; the wording of the indictment; the meaning of intent; the concept of reasonable doubt; when the burden of proof shifted; how to deal with multiple alternative charges; how to draw inferences; and the weight to be attached to the fact that the accused had not told the truth. However, the Commission concluded rather positively that these misunderstandings only resulted in hung juries or questionable verdicts in four of the trials, and that the collective deliberation process was effective in correcting most of the errors (1999: 55) as they found that some '70 jurors in 26 cases changed their mind during deliberation from their initial view' (1999: 50). The Commission's confidence in the curative power of deliberation warrants considerable scepticism. It did not explain or provide proof for the conclusion that in most of the trials the fundamental misunderstandings of the law did not lead to unfair verdicts. Further, its report relied on juror self-reporting rather than any form of objective testing. In fact, despite showing the juries in such positive light, in a subsequent article the researchers admitted that 'much more needs to be done to present the law to the jury in a succinct and comprehensible form which they can readily apply to the facts of the case' (Young, Tinsley and Cameron, 2000: 98). Like the studies conducted in England and Wales, then, these findings suggest that instructions in New Zealand are failing to instruct jurors sufficiently in the first instance.

2.3.2 Canada

Jury studies from Canada and Australia can be of some use when considering the comprehension issue in England and Wales because they also provide a review of the evidence to help frame the legal instructions. The most recent study (Rose and Ogloff, 2001) was the first to test the comprehensibility of fixed pattern instructions designed for use in Canadian criminal jury trials. The researchers tested mock jurors' comprehension of the standardised instruction on conspiracy law. The 300 participants included undergraduate university students, first year law students and

citizens that had been summoned to jury service but not selected. They concluded that jurors' ability to apply those instructions was 'abysmally low', although conspiracy law is notoriously complex and so the finding that mock jurors performed poorly did not necessarily reveal anything new. In the same way that Thomas' (2010) study was limited, this research would have been better designed to test other criminal legal concepts besides conspiracy to act as points for comparison. Given the absence of this wider testing, it would be unfair to suggest that all the Canadian pattern instructions are incomprehensible to juries. That said, however, drawing on the extensive literature review by Ogloff and Rose (2005), studies in Canada have reported rates of verdict reversals by appellate courts as high as 74 percent. As inadequacies of jury instructions are frequent grounds for appeal, this might suggest that jurors have difficulty processing their instructions. Indeed, Ogloff and Rose concluded that 'jurors appear largely incapable of understanding judicial instructions as they are traditionally delivered by the judge' (p. 425). The problem with this conclusion is that verdict reversals, like self-report measures, are not direct measures of juror miscomprehension and so the finding that there is a significant problem with jury instructions in Canada is debatable. At the same time, however, there is no evidence that there are *not* a comprehension difficulties. The issue therefore is not simply that jury instructions are potentially hard to understand; it is also that there is insufficient research to judge how serious any misunderstanding may be. This is the same murky picture that has emerged in England and Wales, and serves to reinforce the need for direct measurement of multiple instructions in order to conclusively test whether instructions are meeting the needs of the jury.

2.3.3 Australia

Looking to research evidence from Australia, in 2006, a survey by the Australian Institute of Judicial Administration (Ogloff, Clough, Goodman-Delahunty and Young 2006) into judges' perceptions of juror comprehension found that 57 percent of judges believe that jurors experienced some or a great deal of difficulty in understanding legal directions provided at the end of the trial. Trimboli (2008) reported that the vast majority of jurors (85.3 percent) she surveyed however

reported that they understood either everything the judge said or nearly everything the judge said. Likewise, Eames (2003) reported that 85 percent of jurors serving on 48 trials responded that the jury instructions were 'clear' and 80 percent also found that the instructions to be helpful. Jurors in the Crown Court Study by Zander and Henderson (1993) reported similar comprehension levels. However, as argued previously for much of the Canadian and English research, there can be a serious disconnection between jurors' perceptions of their comprehension and actual understanding. Corroborating this, Eames found that in 35 of the 48 trials, jurors had, in actuality, misunderstood the law. The conclusions about the comprehensibility of jury instructions therefore differ as a result of the measures used, and this will require consideration for the design of the present study (discussed in more depth in section 5.2.3). At this stage however, to better understand the issues surrounding jury instruction, it might be more helpful to look to the larger body of jury research in America.

2.3.4 The United States of America

There are fewer restrictions against academic study of jury trials in America, and the comprehensibility issue has been primarily studied within this context. Though the taping and filming of deliberations is not permitted, trials can be recorded and jurors can be (and are often) interviewed after the trial. In the USA, pattern jury instructions are the standard means for instructing juries, and it is these which have received the majority of the attention. We must be cautious in extrapolating the findings from these studies to the English and Welsh context, because there are number of different cultural norms and trial practices. For example, unlike America, in England and Wales (and New Zealand, Australia and Canada), the function of the jury is confined to deciding whether a defendant is guilty and the judge decides a sentence. A large portion of the research investigates the comprehension of instructions in capital trials, where the need for the jurors to follow the law accurately is at its highest. However, because capital trials are bifurcated into two phases (a guilt phase and a penalty phase) they differ in many ways from the usual task of a juror (Haney, Sontag and Constanzo, 1994) and the instructions in the penalty phase are

very different to the fact-finding instructions in other criminal trials. As such, this thesis will not consider much of the research that has dealt with instructions from capital trials.

Although empirical research on juries in America began in the 1950s with a lengthy nationwide study by Kalven and Zeisel (1966), it was not until the 1970s that psychologists, psycholinguists, and lawyers focused on how well both mock and former jurors understand judicial instructions. Owing to different measures and methodologies, these studies reveal comprehension rates of various levels, but the weight of the research presents a clear picture that the average juror does not understand many aspects of the instructions, with comprehension levels therefore far inferior to the law's implicit assumption of complete or near-complete comprehension. Low overall levels of understanding have been found across America, in jurisdictions including Florida, California, Arizona, Wyoming, Missouri and Michigan.

The most seminal study addressing the comprehension issue was conducted by Robert and Vera Charrow in 1979 (Charrow and Charrow 1979). The Charrows tape-recorded a set of fourteen instructions taken from the state of California's Book of Approved Jury Instructions (BAJI). They played the tape twice to 35 participants, who had been called for jury duty but had not yet served. Participants were asked to paraphrase the instructions. When the paraphrases were recorded and analyzed, only about one third of the information contained in the instructions was correctly paraphrased. Even when the analysis was pared down to consider only the legally most important information, only about half of that information had been correctly paraphrased.

Although the Charrow's study has been heavily criticised (see for example Benson, 1985) most research since has confirmed their findings. A large jury simulation conducted by Ellsworth (1989) in which jurors' deliberations were videotaped and analysed, identified that half of the jurors' references to the law were inaccurate, and comprehension levels were no better than chance. When jurors were influenced during their deliberations to alter their understanding of the law, they were as likely to substitute accurate understandings with errors as they were to correct mistakes. When researchers asked legal questions after the deliberations, 49 percent of juror responses were unclear or wrong. This finding stands in contrast to the

assumption made by the New Zealand Law Commission (1999) that deliberation corrects misunderstandings. In light of this discrepancy, this study might more reliably measure the comprehensibility of jury instructions prior to deliberation. This consideration is discussed in section 5.3.3.

Benson (1985) replicated Charrow and Charrow's (1979) results using the same materials but a different measure of comprehension on ninety Loyola University law students. Using a 'Cloze' measure rather than a paraphrasing technique, which requires the reader to restore words that have been deleted from a passage, Benson found that only the participants scored only 49 percent correct with the original Californian pattern instructions. Although this Cloze measure may be more of a test of memory, than of comprehension per se, Benson argued that these instructions are not completely understood by even well-educated law students.

Forston (1975) also indicated that jurors were confused by legal concepts. As part of this study, mock jurors were given information regarding a trial, given instructions, assigned to juries of six and then given a multiple-choice test based on the instructions. 86 percent of the deliberating juries were unable to respond properly to what constituted proof of guilt and further 25 percent of jury discussions contained reference to the instructions which indicated a lack of clarity.

Saxton (1998) conducted one of the more recent substantial studies. He gave questionnaires to 253 jurors directly after they were discharged from service from 49 trials in Wyoming (17 civil and 32 criminal cases). Questionnaires specifically tailored to test jurors' understanding of the particular substantive issues which arose in each trial were designed, and distributed immediately after deliberations were completed. To obtain control data, 146 abbreviated questionnaires were also sent to individuals who had never served on a jury. 97 percent of the former jurors believed that they understood the instructions either very well or completely. In reality, when participants were asked true/false questions about specific legal rules on which they had been instructed, only 70 percent of their responses were correct. For example, around 40 percent of the participants who had served in criminal cases believed that the fact that the state brought a charge against the defendant was evidence that he or she had committed the crime, which is directly contrary to their instructions. Overall, instructed jurors did perform better than uninstructed control jurors, who only

answered a mean of 53 percent of questions correctly, compared to the mean 70 percent returned by instructed jurors. So although the instructions increased comprehension to an extent, jurors' levels of understanding were still less than ideal. Saxton's work also reinforces the limitations of self-report measures of comprehension, showing that it is not uncommon for jurors to perceive that the judicial instructions were useful in helping them understand the law, yet fail to demonstrate subsequent understanding when measured objectively (Ogloff and Rose, 2005).

2.3.5 Studies investigating specific jury instructions in the United States of America

Alongside these studies that have found low overall comprehension, it has been argued that the misunderstandings by jurors frequently relate to the most important legal issues, in particular, the burden of proof and presumption of innocence (Elwork and Sales 1985). The research suggests that jurors do not always comprehend the asymmetric allocation of the burden, which is perhaps unsurprising as it is a concept that has few parallels in everyday life. For example, Reifman Gusick and Ellsworth (1992) reported that among jurors who had previously served on Michigan criminal trials, exposure to instructions on procedural law significantly improved juror comprehension, but exposure to instructions on substantive law had no significant effect on juror understanding of the law. However, the benefit of the instructions is mediated by the fact that the level of comprehension was just less than 50 percent on both types of instructions, and fewer than one third correctly understood the allocation of the burden of proof (p. 546). However, this study tested juror comprehension at the end of jury duty, rather than immediately following a trial. This could mean that it was recall – not understanding – of the instructions that was being assessed, which casts some doubt over the especially low level of comprehension recorded in this study. Nonetheless, the results indeed confirm that jurors in real trials do experience considerable difficulty comprehending and applying substantive judicial instructions.

Similarly to Reifman et al (1992), Strawn and Buchanan (1976: 481) reported that only 50 percent of the jurors presented with the Florida Standard Jury Instructions believed that the defendant did not have to present any evidence and that the state held the burden of proof. Mock jurors were shown videotaped instructions from a burglary case and then received a 40-item objective test. Strawn and Buchanan concluded that the 'results of the study confirmed the fear of many trial lawyers and judges that jurors, even after receiving instructions, may not understand the law sufficiently' (p. 480)

Comprehension problems have likewise been found on the presumption of innocence instructions. The presumption of innocence instruction is considered as serving the role of 'tiebreaker', conveying the concept that if the evidence against the defendant does not meet the necessary standard of proof, they should be acquitted. Here, too, there is reason for concern. Almost one-quarter of Strawn and Buchanan's (1976) instructed jurors in Florida believed that when faced with two equally reasonable sets of evidence, the defendant should be convicted.

Similarly, Steele and Thornburg (1988) report that 79 percent of participants were unable to paraphrase the presumption of innocence concept at all, and only 17 percent were able to correctly paraphrase it. In one of the earliest mock juror studies, Buchanan, Pryor, Taylor and Strawn (1978) reported a higher (but still problematic) rate of 51 percent of participants who comprehended the concept. Recruiting research participants who were called to jury service, but not used, they exposed their mock jurors to either criminal pattern instructions or to no instructions at all. They found that the pattern instructions did significantly improve comprehension, but that there were a number of areas where jurors still had difficulty with comprehension. These areas included both substantive definitions of the crime as well as other legal terms such as 'information', 'reasonable doubt', and 'material allegation'. Only three in ten of the jurors correctly understood the prosecution's burden.

Saxton's (1998: 97) research reported above also demonstrated that jurors have considerable difficulty with instructions relating to fundamental legal issues like the presumption of innocence and the burden of proof. For example, on further analysis of the results for individual questionnaire items, Saxton found that approximately one fifth of the Wyoming respondents didn't understand that the

burden of proof always rests with the prosecution, and wrongly believed that once the state produced evidence to make its case, the burden shifted to the defendant to prove that he did not commit the crime.

The standard of proof instructions - or reasonable doubt instructions, as they are sometimes known in criminal trials America and other jurisdictions (Heffer, 2006) – similarly are important legal issues that jurors have shown difficulty with. Ellsworth (1989) found that jurors were very clear on the notion that they had to be convinced ‘beyond a reasonable doubt’, but at the same time, none of the jurors were able to define what reasonable doubt meant. Even when reasonable doubt is defined, confusion seems to occur. Kramer and Koenig (1990) compared reasonable doubt standards for jurors who had served jury duty and those who had been called but had never served. They found that only 25 percent of jurors in both groups thought they should return a ‘not guilty’ verdict if they had any reasonable doubt. Additionally, defining the concept of reasonable doubt actually led to greater confusion for participants as opposed to clarification: 52 percent of uninstructed jurors thought that reasonable doubt could only be based on the evidence, and not the conclusions drawn from the evidence, but 68 percent of the instructed jurors made this mistake.

Painting an even bleaker picture, Severence and Loftus (1982) found that mock jurors given pattern instructions on intent and reasonable doubt did not perform any better than jurors who received no direction at all. This observation that instructed jurors are no more knowledgeable than non-instructed cohorts has been replicated in a number of studies. Some studies have found a modest improvement (for example Buchanan et al, 1978). Strawn and Buchanan (1976) found that only half of the jurors presented the Florida pattern instructions understood the burden of proof, but they also found that the accuracy of non-instructed jurors was even lower, which suggests that the instructions had a moderately positive impact on comprehension. However, the data are mixed as to whether the instructions actually improve jurors understanding of the law, and it has been argued that ‘what you find [from empirical research] is that the uninstructed jurors are equally accurate or inaccurate as the instructed jurors’ (Dann, Heiple, Saks, McGowan Wald, Blanck, 1993: 1071).

In a further study showing how exposure to instructions may have no effect, Elwork, Sales, and Alfini (1977) reported that subjects who watched Michigan civil

instructions on the law of negligence performed no better on a comprehension test than subjects who were not exposed to the negligence instructions. In their study, mock jurors were assigned to one of three groups, and each group viewed a videotaped trial using actors of an automobile injury case. A control group received no instruction, while the experimental groups received either the original pattern instructions or rewritten instructions. After the trial, each juror was sent a questionnaire to complete in an effort to determine the effect that jury instructions had on the understanding of the law. The researchers found that only 44 percent of the participants who watched the videotape could answer more than half of the comprehension questions correctly, and that 'the presentation of pattern instructions was as effective as not presenting [instructions] at all' (p. 176). They later wrote about the study (1982: 13-14) 'The most alarming finding was that the jurors receiving the pattern instructions made about the same proportion of errors in their verdicts as jurors not receiving any instructions at all (39 percent vs. 40 percent errors)', and on the basis of further testing concluded that prior to deliberation, the average juror may understand only about half of the legal instructions the judge presents.

The results of Elwork et al (1977) were supported by Wiener, Pritchard and Weston (1995) who found no difference between participants presented with Missouri criminal instructions directions and those who weren't presented with any, and by Finkel and Handel (1988) who found that jury instructions on insanity had no more effect on verdicts than giving no instructions at all.

These findings were replicated when actual jurors, rather than mock jurors were tested. Kramer and Koenig (1990) surveyed 884 Michigan citizens who were called to jury duty. Those who had been called were exposed to different instructions, the researchers had a naturally occurring comparison group and were able to determine if being exposed to judicial instructions improved comprehension. They found that more often than not instructions had no significant impact on how well former jurors answered true or false questions based on the relevant judicial instructions. Specifically, 22 questions in the survey could have been significantly impacted by the instructions, but only nine questions showed a statistically significant relationship between exposure to judicial instructions and increased level of comprehension. Kramer and Koenig concluded that their study 'supports a growing

body of literature suggesting that jury instructions are often lost on jurors, and can sometimes even backfire'. They further found that the comprehension of instructions is particularly low when they pertain to issues about which jurors hold incorrect preexisting beliefs or which entail unfamiliar mental tasks.

Similar questions arise when lay people are tested on their ability to apply jury instructions to legal situations. Studies with jurors in Washington (Severance and Loftus, 1982) and Florida (Buchanan et al, 1978) found that instructed and uninstructed participants performed similarly in applying instructions. In 1982, Severance and Loftus tested the comprehensibility of Washington pattern instructions on reasonable doubt, intent, the use of prior convictions, and the general duties of the juror. They found that jurors applied the instructions correctly only 60 percent of the time, and much like Strawn and Buchanan, they found that receiving instructions only resulted in a performance improvement of only six percent. Notably, studies have found that decisions are often unaffected by the instructions given. For example, in a study investigating homicide cases, it was found that two groups of mock jurors rendered the same verdicts under two discrepant definitions of the murder, despite defining it differently according to the instruction they had been given (Spackman, Belcher, Calapp and Taylor, 2002). Similar ineffectiveness was found in experiments that compared discrepant instructions for the crime of rape (Kahan, 2010) and for the insanity defense (Ogloff, 1991). Kahan (2010) for example found no significant difference in the number of guilty verdicts among three contrary definitions of rape (ranging only from 53 percent to 55 percent). Only minor differences were observed with two unconventional instructions (rates of 62 percent and 65 percent).

2.4 The unique context of jury instruction in England and Wales

The results of numerous American jury comprehension studies since the 1970s, as well as studies from other jurisdictions, provide cogent reasons to think that jurors are either not helped or confused by their instructions. The results of these studies suggest that there are consistent patterns of confusion, in which jurors might fail to understand and fail to apply key elements of the legal concepts upon which they must base their verdict. The present study can profit from both the results of these studies

and their methodological decisions, which will be considered in depth in the coming chapters. Prior to this, however, it is necessary to remember that the legal jurisdiction in England and Wales has distinctive trial practices which means that caution needs to be exercised in assuming similar conclusions. For example, as noted by Heffer (2002: 229), in England and Wales it is more difficult to be excused or refused from jury duty than in America, which means that the average juror will probably differ between the two. As briefly identified in Chapter One, there is also a difference in how closely the judicial instructions relate to each case, which is manifested in content of the judicial instructions as well as the process of judicial instruction:

First, the instructions given in the summing up in England and Wales are delivered alongside a review of the trial evidence, so in that sense bear some connection to the facts, but jurors in America are not given a review of the evidence and their instructions are consequently more general (Marder, 2011). In America, the judge rules on evidentiary issues and instructs the jury on the law, but leaves interpretation of the evidence in the hands of the jury. In fact, if American jurors ask a question relating to the evidence to the judge during their deliberations, the judge is typically reluctant to provide assistance and usually refers the jurors back to the evidence without comment (Greene and Wrightsman, 2003).

Second, judges in England and Wales do not provide as many instructions as their American counterparts (Marder, 2011). There are particular matters of law that they need to instruct the jury on in a particular case and there are other matters which may not be relevant, and they do not have a fixed set to deliver like those typical in an American judge's final instructions to the jury.

Third, most jurisdictions in the United States of America use standardised or pattern instructions. As already outlined, these are scripted directions for the elements of various offences and defences, as well as for the several cautions which may need to be given in a trial concerning categories of evidence. The premise of developing these model instructions is to increase the efficiency of judges by reducing their workload by not having to write new instructions for every trial, and 'to guarantee uniformity and clarity' for each jury, and to lessen the chance of any verdicts being appealed and reversed on account of instructions of the judge's innovation (Buchanan et al 1978: 32; Marder 2011: 9). In contrast, in England and

Wales, judges have access to a 'Crown Court Bench Book' (Judicial Studies Board, 2010) provided by the Judicial Studies Board which offers examples of how to direct juries, as well as discussions on the law and other relevant trial matters. These suggestions are numerous and relate to both specific and wider matters of law and trial procedures, including instructions pertaining to intention and recklessness, evidence, defendant failures, defences and jury verdicts. They do not, however, provide suggestions of how to instruct for all of the possible offences. The Crown Court Bench Book is revised at least every three years to amend points of law and to update the examples, suggestions and discussions of how to craft jury directions. Until 2007, the Crown Court Bench Book centred around a very large set of 'Specimen Directions' – templates of instructions that judges could use in their own case if they so chose. The following example shows the Specimen Direction for circumstantial evidence:

Reference has been made to the type of evidence which you have received in this case. Sometimes a jury is asked to find some fact proved by direct evidence. For example, if there is reliable evidence from a witness who actually saw a defendant commit a crime; if there is a video recording of the incident which plainly demonstrates his guilt; or if there is reliable evidence of the defendant himself having admitted it, these would all be good examples of direct evidence against him.

On the other hand it is often the case that direct evidence of a crime is not available, and the prosecution relies upon circumstantial evidence to prove guilt. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime and the defendant which they say when taken together will lead to the sure conclusion that it was the defendant who committed the crime.

Judicial Studies Board Crown Court Bench (2007)

In 2010, however, the Specimen Directions were replaced with 'illustrations'. These illustrations were broader examples for the instructions than the specific Specimen Directions to encourage judges to write their own directions (Judicial Studies Board, 2010: v). Whilst the Specimen Directions imagine a trial and how a judge might instruct a jury in a case, the illustrations are more indicative. The following example shows the illustration for how to instruct the jury on circumstantial evidence:

The prosecution has sought to prove a variety of facts by evidence from different sources. The prosecution submits that the effect of that evidence, when considered as a whole, is to lead to the inescapable conclusion that the defendant is guilty. In other words, the variety of facts proved cannot be explained as coincidence. Circumstantial evidence, as it is called, can be powerful evidence but it needs to be examined with care to make sure that it does have that effect...

Judicial Studies Board Crown Court Bench Book (2010)

Regardless of how extensive the amendments and revisions to the Bench Book, they remain a collection of texts designed for the judge to use with the jury and are written without case-specific information so that the judges can adopt them in any case they preside over. In this regard, they are similar to the American pattern instructions. However, the pattern instructions in America are written by much larger committees of lawyers and judges who draft them in terms taken directly from previous appellate decisions or legislation. Save for the occasions when the American drafting committees have called on the expertise of linguists, (as in the case of Californian Criminal Jury Instructions and the Tennessee Criminal Pattern Jury Instructions), the Specimen Directions or illustrations provided in the Bench Book are comparatively written much more in plain English (Heffer, 2005: 181). This can be demonstrated by comparing the above Bench Book examples with the following instruction on circumstantial evidence taken from the New Jersey Model Criminal Charges:

You, as jurors, should find your facts from the evidence adduced during the trial. Evidence may be either direct or circumstantial. Direct evidence means evidence that directly proves a fact, without an inference, and which in itself, if true, conclusively establishes that fact. On the other hand, circumstantial evidence means evidence that proves a fact from which an inference of the existence of another fact may be drawn. An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence...

New Jersey Criminal Model Charges (2012)

Looking briefly, the illustration in the 2010 Bench Book identifies ‘the prosecution’, seeks to clarify a key point, uses more accessible vocabulary and fewer embedded clauses than its New Jersey equivalent. The Specimen Direction on circumstantial evidence is plainer still, and makes use of examples and the second person pronoun ‘you’. The Jersey Criminal Model Charge by comparison has a highly impersonal style which serves to distance the judge from the jury. It is also likely that many jurors will not understand the meaning of ‘inference’ from within the heavily embedded syntax.

As judges in America read their instructions verbatim to the juror, they therefore do so using the legal discourse of the appellate decisions or legislation that has been used to construct them. Judges in England and Wales on the other hand do not use the wording of the instructions in their Bench Book indiscriminately, but use them as a guide to help their summing up instead (Judicial Studies Board, 2007: iv). The Court of Appeal in England and Wales is less likely to interfere with a judge’s choice of wording than in America and as such they are not as bound to the wording of the instructions offered in the Bench Book. The extent to which these Specimen Directions and illustrations are used by judges varies. Some may follow them very closely, particularly those who are less experienced, but others will use them only as a general indicator of the substance – but not style – for the instructions, and others again will prefer to entirely write their own jury instructions (Thomas, personal communication 2nd February 2010; Darbyshire et al, 2002: 25). Some of the instructions that the judges deliver are instructions that they must give at the end of every trial they preside over (such as the burden and standard of proof). In these instances, many judges will read from instructions they have written before (Thomas, personal communication 2nd February 2010; Marder, 2011). All of these differences create a notable difference in the form and process of jury instruction when compared to most other American jurisdictions. In this sense, there are limitations in the comparisons that can be drawn with this American research, and it highlights again the need to investigate the individual and under-tested system of jury instruction in England and Wales.

2.5 Conclusion

In summary, the convergent results of the body of research from outside England and Wales clearly and consistently demonstrate that despite attempting to understand their jury instructions, and often having the feeling that they have successfully achieved this, jurors' overall comprehension rates are far from perfect, and are often no better off than if they had not received any instructions at all. Jurors continue to misunderstand key instructions, such as the burden and standard of proof, in ways that could affect trial outcomes.

However, from the dearth of relevant recent research in England and Wales and the lack of research from comparable jurisdictions, it is evident that there is not a clear account of the comprehensibility of directions in England and Wales. Whilst some argue that jurors do not find their instructions difficult to understand, others suggest that particular issues of the law are problematic. These conflicting conclusions have predominantly been based on studies which have either compared real verdict decisions with the verdicts of shadow or mock juries or with the views of legal professional, or by self-report questionnaires which have been shown in this chapter to be an unreliable measure of comprehensibility. What this means for the present study is that it is paramount to develop an objective investigation into these conclusions. As it stands, the extent of juror comprehension in England and Wales is as yet unknown, and it is this research gap that forms the foundation of the present research.

The instructions provided in the Crown Court Bench Books have never before been tested for their comprehensibility. The Judicial Studies Board delegates the drafting of the illustrations to a committee of two senior circuit judges who may send them out to consultations with other circuit judges and members of the judiciary. Neither linguists nor psychologists are consulted in the writing of these illustrations, and nor are they 'road-tested' beforehand (Diehl, personal communication 26th February 2010). Despite the fact that at least some of the instructions are written in plain English, they have still only been drafted by those with legal minds and legal experience. Given that these instructions are supposed to be reliable guides upon

which the judges can construct their summing up, it is important for this study to test how comprehensible they are to provide a baseline measurement.

Furthermore, as these instructions are written in decontextualised and general terms so that that can be applied to any case, they provide an excellent point of comparison to the standardised instructions that are used in other jurisdictions. The relatively plain English nature of the Bench Book may mean that comprehension levels may not be as poor as found in prior research. As such, the first research question of this thesis is:

- *How comprehensible are decontextualised jury instructions when based primarily on the Crown Court Bench Book?*

Importantly, measuring the decontextualised instructions alone will not provide a full picture of the comprehensibility in England and Wales because of the judges' freedom to reword the instructions. This research therefore also goes on to consider the effect that this freedom has on the comprehension of jury instructions, and in so doing considers how jury instructions can be made more comprehensible. This will be dealt with in the following two chapters.

3

The effectiveness of proposed improvements for comprehensible jury instructions



3.1 Introduction

The body of literature reviewed in the previous chapter makes it abundantly clear that juror instructions are in need of improvement. The issue of juror comprehension remains paramount, and if this thesis finds that jurors in England and Wales also have difficulty comprehending their instructions, it will be important to consider potential reforms that will help them to understand.

Any innovation designed to improve the comprehensibility of jury instructions must be inherently built on the premise that the law is not too complex to be reduced and comprehended by a lay person. In the words of former Bar Council Chairman Roy Amlot QC (cited in Grove, 2000: 249), 'All complex issues can be made easy to understand. That is the task of the judge, the advocate and the expert... It is not necessary to pile Pelion on Ossa in order to secure a conviction'. In practice, this means that the instructions must be altered in such a way that they can be understood and applied to the evidence, but that their legal meaning remains

unchanged. A variety of reforms and juror-aids have claimed to meet these demands (Munsterman, Hannaford, and Whitehead, 1997). These reforms include rewriting the instructions, offering preliminary instructions, increasing juror involvement in the trial, altering the medium by which the instructions are presented and 'debunking' juror bias. Each of these reforms has been subjected to different levels of empirical testing (Ellsworth and Reifman, 2000) and will be reviewed in this present chapter. By drawing on the strengths and weaknesses of them in turn, it will expose a new proposal for reform to be tested in this thesis – using case-specific and narrativised instructions as a means to improve comprehension. This new proposal will be discussed in Chapter Four.

3.2 Rewriting instructions in plain English using psycholinguistic principles

Many critics of jury instruction have long claimed that the lexicogrammar of the instructions is responsible for jurors' confusion and low comprehension levels. Drawing upon the fields of psychology and linguistics, researchers have documented a number of syntactic and semantic barriers to jurors' comprehension, including the use of legal jargon (Forston, 1975; Strawn and Buchanan, 1976), ambiguous language (Eisenberg and Wells, 1993; Meyer and Rosenberg, 1971) awkward grammatical constructions (Charrow and Charrow, 1979) and an organisation that is difficult to discern (Marder, 2011). The majority of instruction research has therefore examined the effect of rewriting the instructions into plain English by employing the techniques of experimental psychology which improve language processing and comprehension (Schwarzer, 1981). According to Imwinkelried and Schwed (1987), this 'psycholinguistic' rewriting tackles four principles - words, use of phrases and clauses, sentence structure, and overall organization of the instruction. For example, abstract words, legalistic words, and nominalisations should be avoided in favour of concrete and familiar terms, like replacing 'complainant' with the complainant's actual name; subordinate clauses should not omit the words 'which is'; sentence length, the voice of the sentence, and the complexity of the sentence should be considered and finally, an appropriate organizational pattern or combination of patterns should be used (See Elwork, Sales and Alfini, 1982 for more extensive outline).

By applying these psycholinguistic recommendations, multiple research teams (for example, Benson, 1985; Dumas 2000b; Kimble, 2002; Severance et al, 1984; Severance and Loftus, 1982, 1984; Steele and Thornburg, 1988 Tanford, 1990, 1991; Tiersma, 1993, 1999, 2006), using diverse samples of undergraduate students, law students, and representative samples of actual jurors and individuals who matched the general characteristics of jurors in a community, have demonstrated some success at improving instruction comprehension levels, albeit to varying degrees.

In the Charrow and Charrow (1979) study introduced in Chapter Two for instance, the researchers argued that 'specific linguistic constructions may be the root of at least some of the comprehension problems' (p. 1328). After measuring mock jurors' comprehension of the Californian BAJI instructions, the Charrow's isolated some of the linguistic features that appeared to make them more difficult to process. They identified a number of such features, including the use of technical terminology, convoluted word order, excessive embedding, multiple negation, and the use of passive verbs in subordinate clauses. They then rewrote the instructions to eliminate some of these troublesome linguistic features and repeated their experiment. Redrafting the instructions in this way led to an overall improvement of thirty eight per cent, indicating that 'these constructions-rather than the legal complexity of the instructions-were responsible for comprehension problems' (p. 1359).

In a similar effort, Elwork, Sales and Alfini (1982), in a follow up to their previous groundbreaking research on this topic (Elwork et al, 1977), increased comprehension rates from approximately 60 percent to 80 percent when the instructions were rewritten with a combination of psycholinguistic tools and common sense. They replaced infrequently-used words with common ones, abstract words with concrete ones, removed negations, reduced legal jargon, minimised sentence length and complexity, used active voice and created a more logical order of legal concepts. Volunteers from the community were recruited as mock jurors to watch a four-hour videotaped trial of a personal injury case. They were assigned to one of thirty-three juries consisting of about six jurors each. Some of the juries received Michigan's pattern instructions and some received rewritten instructions designed to improve comprehension. The juries deliberated, and their deliberations were recorded and analysed. The jurors also completed individual questionnaires to test their

comprehension of the instructions. Those who received the Michigan pattern instructions 'showed significant deficits in their understanding' of contributory negligence compared to those who had received re-written instructions (p. 15).

Severance and Loftus, 1982: 194 argued that 'psycholinguistic changes in pattern instructions can improve jurors' abilities to both comprehend and apply jury instructions'. Severance and Loftus examined the questions that jurors ask about judicial instructions during deliberations to identify sources of misunderstanding. They measured jury comprehension for standard instructions concerning topics such as reasonable doubt and intent, showing that comprehension was frequently low and could significantly improve by rewriting and simplifying the language, changing order and improving sentence construction. In 1984, Severance, Greene and Loftus provided more evidence that mock jurors' comprehension of criminal jury instructions improved after they were given instructions that had been rewritten to avoid jargon and to simplify structure. When the study was repeated using former jurors, rather than college students, the study found that they had better comprehension when they were given the revised, rather than the pattern, instructions.

More recent research has continued to reinforce the findings of these earlier pioneering studies. Diamond and Levi, (1996) revised Illinois' capital sentencing phase instructions with an emphasis on improving comprehension in three areas: unenumerated mitigating factors, non-unanimity on mitigating factors, and weighing factors. They were able to achieve a performance increase of 15 percent on a comprehension questionnaire (from 53 percent to 67 percent for deliberating jurors). Steele and Thornburg (1988) asked jurors who had been brought for jury duty but not called in to listen to a judge give instructions and were then asked to paraphrase them. The jurors who had received the original version of the instructions correctly paraphrased 12.85 percent, but after being rewritten jurors paraphrased 25.59 percent correctly. 'The results of the experiment confirmed what other researchers had found: jurors' comprehension of the pattern instructions was low, and jurors understood the rewritten instructions better than the pattern instructions...' (p. 251) More recently, Frank and Applegate (1998) exposed individuals called to jury duty to either a set of instructions previously used in the penalty phase of an Ohio capital case or a rewritten version of the instructions. They asked both groups to answer a series

of comprehension questions. The jurors exposed to the rewritten instructions answered 68.4 percent of the questions correctly, while jurors exposed to Ohio's pattern instructions only answered 49.7 percent of the questions correctly.

Despite the wealth of evidence supporting re-writing of this kind, Wiener, Pritchard and Weston (1995) however provide evidence that rewriting instructions is not always beneficial. They compared Missouri's penalty phase pattern instructions against psycholinguistically revised instructions. Using jury-eligible participants, the researchers examined comprehension based on two different sets of facts (that is, two different accounts of death-eligible homicides). The less heinous fact pattern involved the murder of a wife for pecuniary gain, while the more heinous fact pattern concerned the strangulation of a small child by a neighbour. Of the two fact patterns presented to subjects, the rewritten instructions only produced significantly better comprehension with the less heinous fact pattern. The researchers claimed that because this set of facts was less cognitively and emotionally demanding of subjects, it was easier for them to comprehend the jury instructions. Although this was a speculative view, their overall finding was conclusive: 'jurors instructed with model instructions, those that were intentionally written in simple and clear language, failed to improve comprehension beyond that which was achieved by the MAI and in some cases (that is, by defining the reasonable doubt standard of evidence) actually reduced juror comprehension...' (p. 464).

Though a majority of social scientific research suggests that jury instructions can be made more understandable using psycholinguistic techniques, the problem remains that these techniques alone do not produce adequate levels of comprehension. In improving overall comprehension to slightly below 70 percent, the Frank and Applegate (1998) study, for example, is typical. There are normative and potentially legalistic concerns that this level of comprehension is not high enough, and it has been suggested that there is a ceiling to the benefits that can be attained by rewriting instructions (English and Sales, 1997; Smith, 1991; Wiener et al, 1995). Furthermore, as Solomon (1996) points out, there are good reasons why some linguistic constructions should not be removed from the text. For example, nominalizations are useful to summarize the ideas previously discussed in a text, and passives are sometimes necessary in order to delete uncertain agents, to organize

information flow in texts, or to make certain participants the theme or topic of a text. These elements, taken away by the Plain English movement, are actually beneficial cohesive devices. This observation, together with the concern of a ceiling effect, means that this may not be a suitable approach for the present study to investigate. There are other techniques that researchers have developed to improve comprehension, focusing beyond the lexicogrammar of the instructions.

3.3 Offering preliminary instructions

In contrast to rewriting jury instructions, some researchers have advocated an approach in which jurors receive instructions at the start of the trial to lessen their cognitive burden. In typical jury trials in England and Wales, the judge will instruct the jury after the counsel's closing speeches just before the jury goes out to deliberate. As briefly explained in Chapter One, the overriding principle behind presenting the instructions at this point in the trial is based up on the reasoning of recency. It allows the laws and duties to be relatively fresh in jurors' minds as the deliberations commence. Though this is a sound principle in many circumstances, in the trial context this can be likened to telling jurors to watch a baseball game and decide who won without telling them what the rules are until the end of the game (Grove, 2000: 257). The practical difficulty with instructing the jury at the end of trial is that jurors have had no warning of the theoretical framework by which they will be asked to sift and assess the evidence (Tanford, 1990; Cohen, 2000). Some researchers argue therefore that this is an illogical approach (Darbyshire, 1990; Hodgetts, 1990) which places an unnecessary cognitive burden on the jurors. They suggest that parts of the judges' instructions would be useful for the jurors at the start of trial or at different points throughout the trial, particularly as the instructions can last from twenty minutes to several hours (Dumas, 2000a). The idea is that this will assist jurors in organising and understanding the law in the context of the evidence as they hear it.

Even if judges still give the bulk of the instructions at the end of the trial, if they give some of the instructions earlier in the proceedings (like the burden and standard of proof, and the precise legal definition of the charges) jurors will have some framework in which to place the evidence as it unfolds (Heuer and Penrod,

1989). In England and Wales, most judges restrict their opening instructions to preliminary observations, a number of basic 'house-keeping matters' (Heffer, 2005: 75) but some jurisdictions in America have started using preliminary instructions. In Arizona for example, judges provide jurors with background information about relevant substantive law, the standard of proof as well as other matters that might be useful (Dann and Logan, 1996: 281). In his review, Auld (2001) recommended the adoption of this practice, suggesting that in addition to the preliminary observations conventionally given, judges should provide a summary of the case and legal issues, and a list of likely questions for their decision. Previously, it was impossible to direct jurors pre-trial in England and Wales because of the defendant's right to see the whole of the prosecution case first, but since the Criminal Procedure and Investigations Act 1996 in which the defence have provided a statement of defence, it is possible to give the jury at least an outline direction on the law before the trial, once agreed between the counsel and judge before the trial.

The results of studies examining the impact of pre-instructions have produced mixed results in terms of comprehension however. Some research suggests that jurors' comprehension of the law improves (Smith, 1990, 1991; Young, Cameron and Tinsley, 1999). Choong (cited in Darbyshire, 1990) found that mock juries were markedly superior in their grasp and application of the law when they had been given a modified version of the judge's directions before the trial. In support, Lempert (1992) argues that preliminary instructions help jurors to focus on relevant evidence and remember it and prevent them to place undue weight on legally irrelevant factors. Similarly, ForsterLee, Horowitz and Bourgeois (1993) found that pre-instructed jurors appear to make better decisions about complex evidence than jurors who were only instructed after the evidence was presented. This could be because giving instructions at the start of the trial means that the instructions at the end of the trial are shorter and less of a burden to follow. This could prevent the jury from being overwhelmed and improve their recall (Marder, 2011: 8).

However, other research indicates only a minimal improvement (Heuer and Penrod, 1988) and other research suggests that pre-instruction does not improve comprehension at all (Severence, Green and Loftus, 1984; Elwork et al, 1977). Additionally, some research has indicated that jurors are more acquittal-prone after

being presented with pre-instructions that highlight issues designed to protect the defendant, such as the burden of proof: Kassin and Wrightsman (1979, 1988) found that mock jurors who were given preliminary instructions were less likely to view the defendant as guilty than those jurors who received no instructions, or who had received instructions only at the end of trial. Lieberman and Sales (1997) noted further drawbacks with this approach, suggesting that preliminary instructions may not be possible because the judge may not be able to decide in advance on the appropriate direction. Pre-instruction may mean that the jurors take a hypothesis-seeking approach to the trial, which means that they seek out evidence which favours the prosecution (although this is contrary to Kassin and Wrightsman's 1979 conclusion). Lastly, and crucially, preliminary instruction could mean that the jury may arrive at a verdict before all the evidence has been given (Kalven and Zeisel 1966; Bridgeman and Marlowe 1979).

3.4 Increasing jurors' involvement in the trial

Research concerning the efficacy of preliminary instruction introduces the idea that jurors process evidence as the trial progresses. This is at odds with many legal commentators and much legal doctrine (see for example McBride, 1969 and Prettyman, 1960) that proceeds on the assumption that jurors are passive participants in the trial process, up until the start of deliberations. Jurors are selected and placed in the jury box where they are instructed to sit through the trial and a morass of evidence, observe witnesses, see exhibits, hear testimony, listen to the judges' instructions, and retain all of this information. They are instructed to listen carefully but not form any impressions or opinions about their verdict until all the testimony is completed and the summing up has been delivered. When they retire, they must be able to recall at will what has transpired and been said during the trial, (crucially including the judge's instructions) and use only that to reach a verdict. Metaphors like 'sponge' and 'blank slate' accurately capture this passive model of jurors.

It has been suggested that this passive role in the trial process is highly problematic, reducing jurors' arousal levels and ability to concentrate on the evidence (Dann, 1992: 1241). Some have hypothesised therefore that by encouraging jurors to

take notes during the trial and summing up, and to ask questions to the witnesses or judge, the jurors' self-involvement would lead to them being more confident, better informed about the evidence and the law, and better able to follow the summing up and apply it during deliberations (Cameron, Potter and Young, 2000: 205).

3.4.1 Note taking

The theory behind note taking is that it is an aid to jurors during a trial in the same way that it is to students in a classroom. It enables jurors to take responsibility for learning and assimilate information on an ongoing basis, enabling them to write down any issues that they want to discuss during deliberations (Marder, 2001; Dann, 1992). A short film, entitled *Order in the Classroom*, has been used to illustrate what would happen if students were asked to learn in the same way as jurors, including the prohibition on note taking. The students in the film are incredulous when they are told that they cannot take notes, ask questions, or even know the subject matter of the course, yet their final exam will entail reaching a unanimous group decision upon which their entire grade will be based (Institute of the International Association of Defense Counsel Foundation, 1998). However studies about note taking as an aid to improve juror comprehension have yielded conflicting results. Flango (1980) found few adverse effects and a very positive reaction to note taking. Having conducted a field study which compared a note taking condition to a non-note taking condition in both a criminal and civil trial, Flango found that the notes were regarded as a good memory aid. Sand and Reiss (1985) drew similar conclusions when they interviewed jurors who had been allowed to take notes in 18 civil and 14 criminal trials. Seven of the twelve jurors interviewed reported that their notes were useful for recalling facts and keeping track of exhibits. The researchers said that the procedure was generally well-received, particularly when the note-taking was permitted during the judge's instructions.

Both Sand and Reiss (1985) and Flango (1980) used real jurors in actual trials, which increases confidence in the external validity of their findings. However, the number of participants they researched was very low, and their conclusions are somewhat divergent to other studies concerning the merits of juror note taking.

Heuer and Penrod (1988, 1989) investigated note taking in a field experiment in Wisconsin. They found that being able to take notes increases jurors' satisfaction in the trial process because it makes 'the case seem more manageable, or less complex as the jurors could outline important issues' (1988: 233). In spite of this, Heuer and Penrod did not find any evidence to suggest that the notes meant jurors had better recall of the instructions, had increased confidence in their verdicts, or were a useful memory aid. Problematically however, the jurors answered the questionnaire several days after the trial and were not permitted to refer to their notes. In a later review article, Penrod and Heuer (1997: 282) conceded that the design of their field experiments were not well-suited to detecting improved comprehension, not least because the questionnaires had been given to the judge to distribute in advance of the trial, which meant they were unable to tailor the questions to the particular issues and offences raised. Hastie (1982) however drew similar conclusions to Heuer and Penrod (1988) in his jury simulation. Participants (who were actual jurors) were randomly assigned six-person juries to note taking versus non-note taking conditions, before watching a videotape of an actual armed robbery trial and deliberating on a verdict. Hastie tested for memory of the jury instructions and reported a marginally significant tendency for jurors in the note taking condition to perform less well on this test than non note taking controls. Hastie thus concluded on these grounds that note taking should be discouraged.

The research evidence which directly tests comprehension therefore does not support the extension of note-taking, yet it is already a standard trial practice in England and Wales (indeed, 'jury bundles' are given to jurors in most trials. These differ according to the case, but will typically contain a notepad, post it notes and highlighter pens, as well as copies of evidential documents like photographs or maps and a written copy of the indictment on which to make notes (Marder, 2011)). Despite being authorised, note-taking is not without its problems and in some instances may even be considered prejudicial. For example, jurors' notes might be an unfair or inaccurate record of the trial, they could be incomplete because of the inability to keep up with the pace of the trial, or the jurors may have written something down which is ruled as inadmissible later on. Furthermore, note taking could distract jurors from the witness evidence. On these grounds, it is preferable that this study should

look for another tool for comprehension that encourages jurors to actively participate in the trial. One such tool might be enabling jurors to ask their own questions.

3.4.2 Asking questions

Jurors have the opportunity to submit written questions to the judge, and they may also submit written questions to the witnesses (these questions also have to be submitted to the judge, who decides if the questions can be asked of the witness, and if so, the judge asks it). Crucially though, jurors are not regularly informed that they can do this. This means that questions are permitted, but not encouraged, so jurors have to be motivated to ask their question without actually knowing that they can do so.

Giving jurors the opportunity to ask questions has several benefits, and several academics have recommended the practice (see for example Marder, 2006: 501) First, it allows jurors to have their questions answered so that they are no longer confused about a word or concept that the judge, a witness or a lawyer has used (Lucci, 2005: 17) or a practice that an expert witness has described (Mott, 2003), or about the procedures they have to follow (Tiersma, 1999: 146). Furthermore, it also helps them to get answers so they do not have long to be distracted by what they may have failed to understand, potentially avoiding speculating as to the answer in the jury room. As Zahorsky (2009) writes, quoting Chief Judge James F. Holderman: 'If [jurors] are not allowed to ask questions, they are going to worry about it and they are going to try to come up with their own solution'.

From the empirical studies that have been done thus far and judges' and lawyers' anecdotal experience, jurors do not ask many questions but the questions they do ask are usually good ones (Wolfson, 1987: 17; Lucci, 2005: 17) Lucci found that 'the vast majority (over 90 percent) of juror questions are good questions and many are excellent'. It has been found that jurors appreciate the opportunity to ask questions (Munsterman et al, 1997: 129) appearing to be more engaged, attentive, and empowered (Anderson 2007: 127). Asking questions provides jurors with a safety net: They know they can ask questions if they become confused (Marder 2006: 129).

The New Zealand Law Commission recommended juries be actively encouraged to ask questions during deliberations.

3.5 Changing the medium of presentation

The research supports the use of questions as means to improve comprehension, but in practice they are problematic. The traditional way of answering jurors' questions during the deliberations is for the jury to send a note to the judge, for the judge to call everyone back into the courtroom, and for the judge to reread the relevant instructions to the jury. One problem with this approach is that it does not necessarily answer the jury's questions. Another problem is that this practice takes time and disrupts the deliberations and may even deter the jury from asking the question at all. It has already been shown in Chapter One that the jury in *R v. Schofield* (1993) had written a note to the judge asking for a definition of affray, but had felt unable to hand it in. In light of these practical issues, questioning is not a robust method to test in this study. A written copy of the summing up, on the other hand, can help to satisfy the jurors' questions without interrupting deliberations. Should a question arise, they can simply refer to that part of their copies where the judge has expressed the relevant instruction. They are able to discuss the instructions and re-read them as many times as necessary.

3.5.1 Supplying a written copy of the instructions

Many researchers argue that a written copy of the instructions should be given to jurors as an aid to comprehension. It is thought that jurors tend to be unfamiliar with lengthy oral presentations, being more attuned to acquiring information through the internet and PowerPoint technology (Thomas, 2010). Judge's instructions at the end of trial are presented as a lecture, but unlike a lecture in educational settings, jurors are not able to interject for clarification, and they do not have an outline or any visual aids on a whiteboard. Although the whiteboard and interjections are unlikely to be seen in jury trials any time soon, written directions have to some extent already been introduced in both England and Wales and America, so that the jurors can read the words on the page at the same time as the judge says them aloud (Thomas, 2010;

Tiersma, 2009). The practice was first recommended and used in the context of fraud trials by the Roskill Committee and the Royal Commission on Criminal Justice, and the Fraud Advisory Panel, and in March 2005 improvements in judicial case management were introduced and written copies have gradually penetrated normal criminal trials at the discretion of the presiding judge (Thomas 2010). These written copies are drafted by the judge and agreed by counsel and then introduced verbally by the judge.

The use of written directions for the jury in England and Wales is discussed at length by Madge (2006) who argues in favour of such measures, despite the history and custom of oral justice in the common law tradition. As part of Thomas' (2010) study into the fairness of jury trials in England and Wales, she considered the benefits of an 'aide memoire' - a written summary of the legal directions of self defence that were taken directly from the oral instructions. While only 31 percent of respondents understood the instructions, she found that the level of comprehension increased to almost 50 percent when the written aide memoire was provided.

Unfortunately this is the only study of written aids conducted in England and Wales, and it impossible to know how replicable Thomas' findings are. This is important because in other legal jurisdictions, where research has been more widely conducted, results are mixed regarding the benefits of written instructions. Several studies have shown that jurors presented with written instructions are better able to apply the law (Forston, 1975; Sand and Reiss, 1985) and have higher instruction comprehension levels. Kramer and Koenig (1990), for example, tested the comprehension of 600 jurors through a questionnaire administered to them after they completed their jury service. They found that those who had received written instructions in addition to oral instructions performed significantly better than those who had only received oral instructions. Those who received no copies answered less than 50 percent of the questions correctly, whereas those who received copies answered almost 60 percent correctly.

It has been suggested that written instructions are associated with higher comprehension levels particularly when the instructions have been revised using psycholinguistic principles (Frank and Applegate, 1998). Prager, Decklebaum and Cutler (1989) carried out a simulation experiment which tested the effects of both simplified (oral) instructions and written instructions, and found that the highest level

of comprehension occurred when participants received both conditions. Other studies, however, have demonstrated conflicting results that suggest written instructions do not aid comprehension (Reifman et al, 1992) or affect juror verdicts (Greene and Johns, 2001), despite the fact that jurors may feel satisfied that written instructions improve their comprehension of the law (Young, Cameron and Tinsley, 1999). Heuer and Penrod (1989) found that written instructions helped to reduce juror disputes, but they did not find that the recall powers of jurors who received the written instructions were any different from those who received the instructions only in oral form. However, as mentioned earlier, the design of their field study was ill-suited to detect improvements in comprehension, and this drawback means that an improvement may have been present but was not captured.

In practical terms, providing written copies or written summaries is straightforward to test in an empirical environment but less easy to implement in a real setting. It is a relatively inexpensive practice, but it does put an additional administrative burden on the court. Furthermore, having the instructions in writing could mean that jurors place too much focus on the instructions rather than on the evidence, and could increase deliberation times (Heuer and Penrod, 1989; Forston, 1979). Also, as Justice Bleby in *R v Dunn* (2006) emphasised, the oral nature of summing up is essential, and one should be cautious about over-reliance on written directions. Having the judge read the instructions aloud means that jurors' attention is riveted on the judge, the jurors cannot be doing anything else at the same time as the judge is reading the instructions to them. Although there is no guarantee that they are paying attention, at the very least they must sit through the instructions in their entirety. If jurors were left on their own to read the instructions, they might not get beyond the first page. Furthermore, they have heard the law from the judge, a figure of authority in the courtroom; this serves to reinforce the lesson that the law is to be respected and that the jurors are to follow it as best they can.

3.5.2 Visual aids

Judges could borrow tools from other settings like business or the classroom that help convey difficult material like legal instructions. These include visual aids such

as flow charts, decision trees, road maps or illustrations to supplement the instructions (Ogloff, 1995; Otto, Penrod, and Dexter, 1994, Dumas, 2000a). It is thought that some concepts and ideas can be better grasped with the aid of a simple diagram (Dattu, 1998). According to Brund (2001: 23), 'a person retains eighty five per cent of information received visually, and markedly less of the information received orally.'

Since 2010, the Crown Court Bench Book provides illustrations of 'routes to verdict', which outlines the legal conclusions which flow from the answers to legally-relevant questions. Routes to verdict therefore encourage jurors to make reasoned verdicts, ensuring that they attend to key elements that are conveyed in jury instructions. They can arguably aid comprehension by outlining the questions that the jury must answer and the consequences that follow from its conclusions (Watt, 2007: 89). Similarly, researchers have also explored the effects of presenting a flow-chart diagram to identify the legal questions that need to be answered, the order that they should be dealt with, and the appropriate verdict that should be rendered as a result of the decisions made (Heuer and Penrod, 1994; Ogloff, 1998; Wiggins and Breckler, 1990).

Routes to verdicts might be relatively easy to implement in a real setting, and have now been advocated in the Bench Book. However, they are not without their limitations. Some routes to verdicts and flow charts may be short and easily read, but others may be complex or contain difficult language to jurors, containing notes. In addition, some may contain essential items for which definitions are not provided. Due to these limitations, it is not surprising that mixed results have been obtained in the few studies that have examined special verdict forms (the American routes to verdict) and flow diagrams. For example, an Australian study (Semmler and Brewer, 2002) found using community-drawn mock jurors that participants who received both legal directions on self-defence and a flow chart concerning the order that the legal questions of self-defence should be addressed performed significantly better on a comprehension test than those who did not. However, performance was only improved when the participants were allowed to refer to the flow chart while taking the test. The researchers also found that during deliberations having a flowchart facilitated discussions about the criteria for self-defence and discussions were more

accurate as compared with those who received verbal instructions only. However, when the participants were asked to apply their knowledge to four new fact scenarios, there was only slight improvement in performance by those who had the benefit of both the instructions and a flow chart. In support of Semmler and Brewer's (2002) findings, Wiggins and Breckler (1990) found that a special verdict form improved mock jurors' understanding of burden of proof questions, but did not affect overall verdict decisions. However, Ogloff (1998) found that the use of a flow chart did not improve comprehension levels, and that jurors tended not to use the chart in their deliberations. Such flowcharts are uncommon in most jurisdictions, including England and Wales, but routes to verdicts are provided for in both Spain and Russia (Kaplan and Martin, 2006) and over two-thirds of judges in New Zealand successfully regularly employ flowcharts when instructing the jury (Young, 2003).

Though flow charts and routes to verdicts can be a useful tool, they might however cause legal concepts to become oversimplified and qualify as 'non-direction' at appeal, or may have the potential to magnify errors in the charge.

3.5.3 Audio-visual aids

Audio-visual presentations have been a more recent innovative proposal to improve the instruction comprehension. Brewer, Harvey and Semmler (2004), using an experimental setting, presented mock jurors (both law students and jury-eligible citizens with no legal training) with audio-taped self-defence instructions in either a traditional format (alone), supplemented with a flow chart, or accompanied by a computer animation used to explain legal concepts. For example, when the judge discussed the issue of 'reasonable proportionality' in a self-defence case, participants were shown two sequences. In the first animation a man slapped a woman once, before she responded disproportionately by shooting him. When the animation changes to show the man slapping and kicking the woman repeatedly until she falls to the ground, when she responds by shooting the man, her response is labelled proportionate. The results indicated that although law students outperformed the jury-eligible citizens when the instructions were given in the traditional manner, the difference between the groups was eliminated by presenting the computer-animated

instructions and flow chart, which improved jury-eligible citizens' comprehension. However, despite this improvement, comprehension rates remained low regardless of the group or the improvements made.

Dattu (1998) proposed a similar technique of illustrating instructions, based on research findings that the presentation of pictures aids learning. Problematically, Dattu does not present the results of any empirical assessments of the approach. Auld (2001: 526) suggested that information technology could be of powerful tool for the jury, although he referred to the computer animations of evidence rather than in explanation of the law. He also stressed the dangers of such technologies in which the content of the animations might overshadow other important details of the case in the minds of the jurors. Clearly, the use of computer or other animation/illustration of legal concepts requires far greater investigation by researchers before any support for the practice can be given and policy recommendations be made, and the task of creating animated sequences that could withstand barristers' objections and appellate review might be unappealing for a trial judge.

3.6 'Debunking' juror bias

So far, none of the proposals have thoroughly solved the problem of inadequate juror comprehension. It has already been discussed that while jurors are more or less treated implicitly as legal blank slates in the trial, there is substantial evidence that like other human decision-makers (Wong and Weiner, 1981), jurors do not conform to these assumptions of passivity. It is assumed that jurors' only source of information is the judge's instructions and that the aim of instruction is to create legal concepts for the juror where none exist. Research argues, however, that jurors are not so passive in this respect. They bring expectations and preconceptions with them into the jury box and are influenced by extralegal variables like prior memories and scripts about the law and by media influence (Finkel and Sales, 1997; Wiener, Habert, Shkodriani and Staebler, 1991; Pennington and Hastie, 1986; Kalven and Zeisel, 1966; Bridgeman and Marlowe, 1979). Further, there is substantial evidence suggesting that jurors are unaware of these potential preconceived biases (Vidmar, 2002). Diamond (1993) contends that when jurors are confronted with an instruction that is inconsistent with

their preconceived notions about the court system, even the clearest of instructions can fail to instruct.

The existence of incorrect beliefs about the law among mock jurors is more than hypothetical; it has been empirically demonstrated on perceptions of homicide (Wiener, Richmond, Seib, Rauch, and Hackney, 2002) and other offences (Smith, 1991) and for capital sentencing concepts (Otto, Applegate and Davis, 2007; Wiener et al, 2004). Pryor, Taylor, Buchanan, and Strawn (1980) were the first to demonstrate that jurors' attitudes toward the law affected their perceptions of the law's accuracy. Pryor et al showed that jurors were more favourable toward statements about the law that they believed were correct than statements they believed were incorrect. This effect existed even in those situations where the jurors were wrong in their belief about the legal statement. In a second experiment, the researchers established that this 'affective-cognitive distortion' existed even after subjects had been exposed to the appropriate judicial instruction. As a solution, Pryor et al proposed that judicial instructions should directly mention and refute such juror biases towards the law.

Similarly, Smith (1991) asked mock jurors to list features associated with various crime categories (for example kidnapping or robbery). She found that these 'naïve concepts' serve as information about the law and influence jurors' processing, but importantly many of them were legally incorrect. For instance, Smith observed that the naïve script for robbery correctly involves 'taking', but also that the item has to be valuable, that the offence has to be committed in the home, and the accused has to be armed, none of which are ingredients of the legal offence. Using the results from these open-ended questions, Smith observed enough of a pattern to develop crime scenarios that were either consistent or inconsistent with jurors' biases. When Smith exposed mock jurors to the typical and atypical crime scenarios, she found that jurors were more likely to render guilty verdicts for the typical scenarios than for the atypical scenarios. After observing this effect, she attempted to disabuse jurors of their prior lay concepts. She found that giving mock jurors relevant pattern instructions did nothing to mitigate this effect (Smith, 1991; Smith, 1993). Consistent with the recommendation of Pryor et al (1980), Smith (1993) developed jury instructions that directly addressed the mismatching elements between the lay and legal conceptions of a crime, and was able to eliminate the increase in guilty verdicts

for typical versus atypical crime descriptions. Smith's research appears compelling. However, a limitation of her research, which she acknowledges, is that her participants were given a written summary of crime scenarios and they did not have to perform the cognitive tasks of interpreting evidence or assessing credibility. The design is therefore too artificial to be safely generalised to the real world courtroom setting (English and Sales, 1997).

More recently, a study of this issue (Wiener et al, 2004) examined mock jurors' comprehension of several variations of instructions, including the Missouri Approved Instructions (that is, standardised instructions), baseline instructions that eliminated certain definitions, and debunking instructions that mentioned and refuted common misconceptions. Unlike the success of previous studies, they found that debunking instructions failed to improve understanding of declarative state law, procedural state law, or procedural constitutional law, and only showed enhanced comprehension of declarative constitutional law with debunking instructions.

In 2008, however, Tiersma and Curtis demonstrated the success of debunking with regard to the comprehensibility of the new California instructions on circumstantial evidence. The authors reported that when subjects' prior knowledge or preconceptions conflicted with the legal definition of circumstantial evidence (that is, when they believed circumstantial evidence to be inherently inferior), they did substantially worse on a comprehension test. However, the effect was much stronger for those who received the old instruction rather than the new one which informed jurors that '[a]s far as the law is concerned; it makes no difference whether evidence is direct or indirect.' Tiersma and Curtis recommended that judges should be more vigorous in discrediting the popular notion that circumstantial evidence is inferior and in emphasizing that what matters is the strength or weakness of the evidence and not its characterisation (p. 257).

If schemata and bias (and other attributes of the cognitive system) limit attention, perception and recall (Fiske and Taylor, 1991), then this could explain why plain English and well-timed instructions, irrespective of medium, have not consistently and significantly reduced juror miscomprehension. As such, the debunking approach, in moving beyond the passive notion of the juror, identifies the means to improve comprehension in this study: by attending to the cognitive beliefs,

experiences and knowledge that a juror has, this study may demonstrate a way in which jury instructions can be made more understandable. However, the research conducted on the debunking approach has been rather limited in its scope, and has only gone as far as addressing jurors' specific expectations and beliefs about the court and the legal system. This could account for why Wiener et al (2004) found that debunking directions corrected misunderstanding in particular types of instructions. Jurors will have more fundamental experiences, schemas and knowledge than simply ideas about crime and jury trials, and these too could affect the way that they understand their jury instructions and decide their verdicts. It is possible that attending to these broader attributes of the cognitive system could improve jurors' comprehension of the whole of the instructions, rather than just a specific few, and this presents a compelling direction for this thesis.

3.7 Conclusion

The different proposals to improve juror comprehensibility in this chapter have seen varying degrees of success. However, they bring to light a fresh possibility to improve the comprehension of the jurors being investigated in this thesis. Rewriting jury instructions and offering preliminary instructions have, comparatively, received a large amount of empirical discussion and research, yet have yielded mixed results. It appears that any improvements in comprehension observed were subject to a ceiling effect, which could be a consequence of taking an entirely instruction-focused, rather than juror-focused, approach. In contrast, the reforms which increase jurors' participation in trials acknowledge that comprehension levels are influenced by the jurors themselves as well the instructions they receive – jurors have an active role in how they process the instructions. However, the tools proposed to increase jurors' involvement, such as asking questions and note-taking, only tackle this idea at a surface level. The tools are well-received by the jurors, but research has not conclusively found improved levels of comprehension. Considering in more depth how the jurors' cognitive processes are involved in comprehension, studies which have altered the medium of presentation of instructions have shown some success, finding that visual information can be easier to comprehend and recall than oral information.

The problem with these reforms, however, is that they take away from the fundamental and crucial oral nature of the summing up. As such, they can only act as a supplement to the existing instructions rather than tackling the comprehensibility of the instructions per se. The 'debunking' approach considers even more closely the role of the juror in comprehending the instructions and has demonstrated that there is substance to the view that cognitive attributes like schemas and prior knowledge may be at work. If specific cognitive scripts of crime and law have an influence, it might also be the case that more fundamental scripts and schema have an influence as well. This study will explore this possibility further and the next chapter discusses in more detail the importance of taking a active, juror-centred approach to increasing comprehension, and outlines how jurors' narrative cognitive schemata could play a key role in how the summing up is understood.

4

Modes of meaning-making in juror instruction: The Narrativisation Hypothesis

'Law is all about human life, yet struggles to keep life at bay'
- Gewirtz (1996: 135)

4.1 Introduction

In the previous chapter it was identified that jurors' biases and mental schemata of the legal world may have an impact on comprehension. This suggests that the traditional model of the juror as a passive and reactive decision-maker should be rejected in favour of the view that jurors are active and constructive processors of social information (Diamond, 1993). They bring to bear their existing knowledge of the law and their life experience to help their decision-making. This finding should not be surprising, given that jurors qualify for their role on the grounds of their being ordinary citizens rather than legal experts, and are specifically entrusted to infuse their common sense and knowledge of the world with the decision-making process (Heffer, 2005: 17). However, it is the case that the previous suggestions of reform reviewed in the previous chapter have been designed without fully taking this into account. Crucially, the proposals built on the traditional model of the juror have failed to solve the comprehension problem. As such, the present chapter introduces a new suggestion to improve the comprehensibility of jury instructions. This chapter discusses research that has found fundamental differences between the cognitive scripts of lay jurors and legal professionals, and identifies that jurors notably adopt a narrative approach to their decision-making. This chapter goes on to draw a link between this narrative decision making and narrativised language, and, using insights from Accommodation Theory (Giles, Mulac, Bradac and Johnson, 1987), postulates that narrativised language could make jury instructions more understandable.

4.2 'Narrative' reasoning

As jurors are actively involved in the construction of meaning, using their prior knowledge and opinions in their understanding of the law, it is possible that other

cognitive scripts or schemata might be at work. Heffer (2002, 2005, 2006, 2007, 2008) argues that this is the case. As the first large-scale study of the discourse of English and Welsh crown courts, Heffer (2005: 221-225) conducted a corpus-aided analysis of official transcripts from 229 British criminal trials into what he calls 'unidirectional' verbal courtroom communication; the observation that the main focus for legal professionals' talk in the courtroom is the jury, who are unable to reply. The texts in the corpus consisted of witness examinations, judicial summings-up as well as opening and closing speeches and the judge's sentencing remarks. In his consideration of legal-lay interaction in court, Heffer suggested that the language of the courtroom reflects the specific way in which they view the trial. He argued that jurors, as lay participants who have been called on to use their common sense and knowledge of life, will view the trial in the same way that they would conceptualise common sense notions and value-judgements in everyday life, and that is in 'narrative' terms. This sense of 'narrative' here is not interpreted in the restricted sense of 'literary story', but as a broader organisation of temporality, interpersonal actions and cultural experience. Drawing on Bruner's (1986, 1990) 'cultural-cognitive modes', in which narrative 'operates as the instrument of mind in the construction of reality' (Bruner, 1991: 6), Heffer suggests that as 'fundamentally intersubjective beings' (Heffer, 2008: 49), people make sense of their lives in terms of transactions in a social world, reconstructing these experiences in terms of time-bound narrative. In other words, this everyday, narrative mode of reasoning about the world entails 'striving to understand the actions and intentions of humans situated in place and time' (Heffer, 2008: 49). Heffer argues therefore that this narrative mode of meaning-making is highly suited to jurors' sense-making task in trials, because criminal cases fundamentally concern human stories with intentions and vicissitudes. He writes:

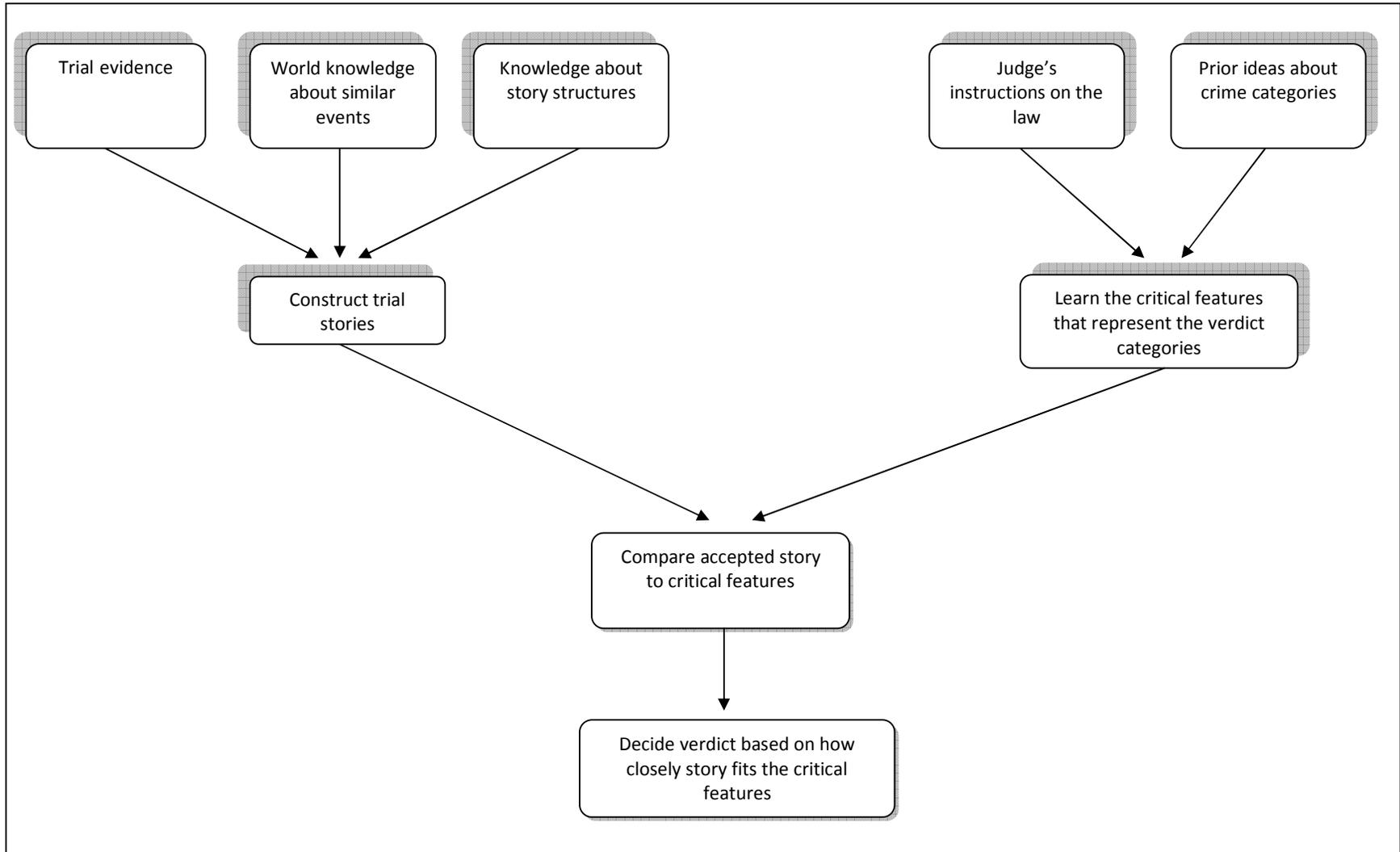
[The trial is] ideally suited to a narrative mode of reasoning: [we have] a trial concerning the stories of human agents who are said to have carried out certain acts which may transgress the norms of society, and who are being judged by lay jurors who have to attempt to intersubjectively understand their probable intentions. (Heffer, 2005: 22)

There is widespread agreement that courtrooms provide the context for narratives to be told and processed, and this has long been recognised in both legal

domains (for example Bennett and Feldman, 1981; Jackson, 1988; Maynard, 1990; Wagenaar, van Koppen and Crombag, 1993; Philips, 1998; Robertshaw, 1998; Amsterdam and Bruner, 2000) as well as in linguistics and discourse analysis (for example Penman, 1987; Komter, 1994; Stygall, 1994; Jacquemet, 1996; Conley and O'Barr, 1990, 1998; Matoesian, 1999, 2001; Harris, 2001). In spite of this, until Heffer (2005), narrative had not been considered with regard to the production and comprehension of jury instructions. Research by behavioural scientists and psychologists who have sought to model how jurors make legal judgements corroborate Heffer's observations, however. On the argument that juror decision-making is purely subjective and that jurors, as finders of fact, are confronted with a problem that has no logical solution (Wagenaar et al, 1993; Wagenaar, 1995), Pennington, Hastie and Penrod suggested that a juror will decide a verdict based on the construction of a cause-and-effect explanation of the information available to them (Hastie, Penrod and Pennington 1983; Pennington and Hastie, 1986, 1988, 1991, 1992, 1993). They argued that this explanation is a story-like representation of a defendant's actions in which they evaluate the reasons for these actions, much like they are reading a detective novel or watching a crime mystery drama on television. This 'Story Model' is the prevailing and most comprehensive model of juror processing. As communication theorists Bennett and Feldman (1981: 5) and Van Dijk (1977) argued, information about social behaviour can be systematically interpreted, compared, and tested by means of building a story.

According to the Story Model, there are three separate phases in jury decision-making (Pennington and Hastie, 1992): 'Story construction', 'verdict representation' and 'story classification' (see Figure 4.1). First, the juror constructs a logically cohesive and complete story, using evidence learned through the trial, personal knowledge about events similar to the event in question and by using their expectations about what constitutes a coherent story. This means that through an active process of comprehension, jurors organise the evidence into a series of events linked by causal chains. In other words, this is a complex mental representation which is elaborated and explained by inferences about causal relations between pieces of evidence, inferences about motivations or goals of the event's participants, and then any gaps in

Figure 4.1 The Cognitive Story Model of Juror Decision Making



Adapted from Pennington and Hastie (1993: 193).

the sequence of events are filled based on their knowledge of similar events and their knowledge of stories more generally (Kintsch, 1988; Trabasso and van den Broek, 1985). Pennington and Hastie (1992) suggest that jurors may construct multiple stories as the evidence is presented, but ultimately one story will be chosen as the most acceptable based on the satisfaction of coverage, coherence and uniqueness. Second, in the verdict representation phase, jurors learn what different verdict categories and decision alternatives are available to them. These definitions include not only 'guilty' and 'not guilty', but also notions like 'rape', 'acting in self-defence', 'intention' or 'premeditated murder'. Jurors must understand each alternative in terms of concepts such as 'mens rea', 'actus reus' and case circumstances. Although jurors may use previous knowledge (whether correct or incorrect) of these matters, the jury instructions, which will explain these categories, are vital to ensure this stage of processing is thorough and accurate. Lastly, in the 'story classification' phase, the jury reach a verdict decision by choosing the verdict definition that best matches the story they constructed while interpreting the evidence. If there is a good fit between the story and a verdict, that verdict will be selected. If the story and any available verdict indicating culpability do not match, then the juror will determine that the defendant is not guilty. The closer the fit, the more confident the jurors will be.

It is possible to see that Heffer's (2005) argument fits neatly within this theory. Narrative processing manifests itself at the story construction stage of the model. Stories are the mode by which the trial particulars can be considered as a whole – the cause and effects of participants, actions, times and places – and therefore are the crux to making sense of the evidence upon which a verdict has to be reached. The Story Model of Juror Processing has been extensively supported by empirical research (see Hastie and Pennington, 2000 for a detailed review). In their early research on the model, Pennington and Hastie (1986) had jurors describe their decision-making process. They found that jurors' discussions of interpretations of the evidence were structured like stories. Evidence that was not relevant to the stories was less likely to be discussed by the jurors and the presence of story-relevant elements that were missing from the evidence was inferred. They also found that the stories constructed by the jurors differed based on the verdicts they rendered. Pennington and Hastie (1988) provided further evidence for jurors' use of narratives in order to develop an

explanation for events. In the first study, participants read a mock trial summary, rendered a verdict and then completed a task in which they had to recognise the evidence from the trial. Participants' recognition of trial facts that supported a story consistent with their chosen verdict was better than for story-inconsistent facts.

Alternative models of juror decision-making have been proposed, most of which offer a mathematical approach (others which will not be surveyed here include Commonsense Justice (Finkel, 1995), generic prejudice (Vidmar 1997, 2002, 2003), as well as psychological theories that can be applied to juror decision-making, such as the Elaboration Likelihood Model (Petty and Cacioppo, 1981; Petty and Wegener, 1999) and the Heuristic-Systematic Model (Brekke and Borgida, 1988; Robbennolt and Studebaker, 1999)). Mathematical models like the Bayesian Probability Model (for example Moore and Gump, 1995), the Stochastic Process Model (for example Kerr, 1993) and the Algebraic approach (for example Slovic and Lichtenstein, 1971) suggest that jurors begin with an initial opinion about the guilt or innocence of the defendant. Then jurors undertake an evidence evaluation process, in which they extract implications from each piece of evidence, weigh them, and apply the evidence to adjust their 'mental metre', which measures their certainty of guilt. At the end of deliberations, jurors compare their final measurement with their threshold or criterion for conviction. If the jurors' ratings of the defendant's guilt exceeds the threshold to convict, they will convict. Otherwise, they will acquit. (For a comprehensive review of mathematical models see Hastie, 1993a). There has been some evidence to suggest that jurors assign weight to each piece of evidence (for example Kaplan and Kemmerick, 1974; Ostrom, Werner and Saks, 1978) but several critiques of the mathematical models of jury decision-making have been offered (see Ellsworth and Mauro, 1998; Pennington and Hastie, 1981). Smith and Studebaker (1996), for example, manipulated the strength of statistical evidence as well as instructions on the use of Bayes' theory and found that jurors underused probabilistic evidence as compared to Bayesian norms. This finding is consistent with other empirical studies (for example Faigman and Baglioni, 1988; Schaklar and Diamond, 1999), but the most serious criticism of the mathematical models stems from the assumption that jurors weigh each piece of evidence on a single dimension: the certainty of guilt. Specifically, the law assumes that the jurors' task is multidimensional, in that the jurors are asked

to determine whether they are sure that the defendant committed each element of a crime. The single-metre postulate of the mathematical approaches only accounts for a single decision (Hastie, 1993b). Furthermore, the mathematical models make the assumption that pieces of evidence are examined independently of each other, and the presentation order of the evidence is irrelevant. Research by Pennington and Hastie (1992) in which the presentation of information to jurors was either organised in story format (that is, each witness told a complete story) or by issue (for example, testimony addressing motive was presented together, testimony addressing character was presented together, such that each witness provided discrete pieces of information without providing story context) suggests that both assumptions are false. In their first experiment, jurors read two cases, and the researchers also varied the credibility of one of the witnesses (that is, high, low, no information). The evidence was designed to favour innocence in the first case and guilt in the second case. They found that participants' memory for evidence was the same in all cases. However, similar to previous research, verdict decisions were stronger in the conditions in which jurors read the evidence in story-form. The presentation of the evidence in the form of a narrative also affected juror perceptions of evidence concerning credibility. The more easily the credibility information could be integrated into a story, the greater impact it had on decision-making. Therefore, when it was easier for the jurors to create a story, they were more likely to decide in accordance with the preponderance of the evidence. These findings therefore suggest that the mathematical models, unlike the Story Model, are not able to address the complex process of juror decision-making.

Furthermore, the mathematical models view the jurors as passive listeners, recording and weighing evidence. We have already seen that jurors are active participants in the trial, who attempt to make sense of the evidence during the trial. Studies investigating the Story Model with regard to decision-making in rape (Olsen-Fulero and Fulero, 1997) and sexual harassment cases (Huntley and Costanzo, 2003) have shown that jurors do not fit this passive sponge-like model by demonstrating the effects of individual experiences and individual differences on final verdicts. Olsen-Fulero and Fulero (1997) proposed the 'empathy-complexity' theory of juror story-making, in which they argue rape empathy attitudes predispose jurors to construct

particular stories and that the type of stories constructed were linked to verdict. Huntley and Costanzo (2003) also suggested that personal characteristics mediate how stories are constructed and accepted, but also provided further evidence that story-elements are a powerful part of decision-making. In their study, jurors rendered a verdict in one of four mock sexual harassment trials. When asked about their reactions to sexual harassment story elements, including evidence relevant to verdict and extra-legal factors, it was found that reactions were strongly related to verdict. Story elements were much stronger predictors of verdict than the individual characteristics of the jurors, with only gender having a predictive value such that females favoured liability.

To this end, the Story Model's approach to studying jurors' decision-making provides a more comprehensive and sophisticated reflection of cognitive processing, by taking into account jurors' subjective experiences, knowledge, attitudes and schemata that will impact on how they reason about the evidence and ultimately decide whether a defendant is guilty (Bennett and Feldman, 1981; Hastie, 1993b; Pennington and Hastie, 1986). It is the case then that research supports the argument that jurors take an active, narrative approach to determining the facts of the case, which is manifested by the construction of a complete story which details all of the necessary particulars of the trial to enable the jurors to make sense of the evidence as a whole. In finding an effective means to improve jurors' comprehension therefore, this study should centre on this knowledge. However, in order to do so, it is necessary to understand the interplay between the jurors' narrative reasoning and comprehension. As such, the next section of this chapter will consider how failing to address the narrative approach of decision-making is detrimental to jurors' understanding of the law.

4.3 'Paradigmatic' reasoning

Although much work has been informed by the Story Model in general, very little research has been conducted to test its internal constructs; it has been shown that presenting evidence in a story-like format makes processing the evidence easier, but we know little about the process by which the legal categories are represented and

then compared with the story that has been constructed (Figure 4.1). Crucially, it is this process that is most vital to the debate about jurors' comprehension of the law, and to the very foundation of trial by jury which is to link legal rules with community values (Heffer, 2008: 47). According to the verdict representation stage of the Story Model, jurors have to conceptualise different verdict categories in legal terms. This means understanding the themes of identity, 'mens rea', 'actus reus' and case circumstances as they are directed in the summing up (Wagenaar et al, 1993). These are logical categories of the law, entirely decontextualised from the evidence of the trial. The rationale for these abstract categories (like 'rape' and 'manslaughter' for example) is to make them universal so that they can be applied across a multitude of contexts. It stems from historical legal tradition in which the law is bound to logical constraints concerned with testing hypotheses rather than comparing the stories of everyday life. As Heffer (2005) explains, returning to Bruner's (1996) cultural-cognitive modes, this legal tradition is entrenched in a 'paradigmatic' or logico-scientific mode of reasoning. Trial procedures have been developed 'in terms of timeless logic, definitional certainty, and the working of universal rules and principles' (Heffer 2005: 22), so that cases are decided on a rational observation of reality based on verifiability. Jackson (1988: 171) exemplifies this ideological normative legal stance as 'in all cases p , q ought to follow' so that facts of the case are categorised according to the premise 'this is a case of p . The conclusion therefore follows: consequence of q ought here to be applied'.

Looking to appellate judges' decision-making can provide some illustration of this paradigmatic mode of reasoning. Unlike lay jurors who assess the credibility of witnesses and render a verdict, the job of the appellate judge is to determine whether the law has been correctly applied in previous decisions by judges, juries, prosecutors and police. Rather than deciding which piece of evidence is most probative, they must decide which statute, case decision, or legal principle should be applied to the issue at hand. Appellate judges will often claim (perhaps idealistically) that, according to the processes of paradigmatic reasoning they learned at law school, they decide cases by considering the facts and issues of the current case and relating them to the aforementioned types of considerations. In this view, owing to reasoning based on logic, there are right and wrong answers to legal questions. This is therefore a very

different experience to lay jurors' narrative approach of encoding human reality, experience and emotion based on verisimilitude.

Table 4.1 adapted from Heffer (2002: 232, 2005: 23) suggests some key strategies of these two different modes of reasoning:

Table 4.1 Key tendencies in the narrative and paradigmatic modes of reasoning

Narrative Mode Context-dependence	Paradigmatic Mode Decontextualisation
Fundamentally concerned with human or human-like action and intention	Fundamentally concerned with categorisation and conceptualisation
Aims for verisimilitude (lifelikeness)	Aims for veracity (truth)
Applies to particular, time-bound cases	Applies to universal, timeless cases
Appeals to shared experience	Appeals to universal logic
Retrospective – relies on past experience	Prospective – hypothesises possible worlds
Personal	Impersonal
Evaluative	Non-evaluative
Dialogic	Monologic
Prefers modal probability	Prefers logical necessity
Tends to oral mode	Tends to written mode
Prefers temporal sequencing	Prefers logical sequencing

Heffer's (2005: 214) analysis is that 'bringing together the paradigmatic skills of the legal professionals with the narrative skills of the jury' is a necessary requirement of criminal trials. Using the jury instructions, jurors must learn these abstracted legal categories which they are later required to apply to the facts of the evidence. However, as the crux of the judicial process, it follows that the judge will use his knowledge base and experience of legal rules, principles and statutes to present these directions, and the mode in which he will do so reflects this familiarity and expertise in this domain (Rettinger and Hastie, 2003: 179), that is, in a paradigmatic mode. As a result of instructing from this 'knowing' position however, the jurors' response is constrained to the judge's pre-held legal perspective. As such, the jurors are being asked to converge with the legal mode and reason paradigmatically – that is, to dispassionately consider the relevant verdict categories and straightforwardly follow the weight of them. And yet, in lacking such expertise in the law, preference for a narrative explanation-based reasoning strategy will supercede a paradigmatic strategy (Rettinger and Hastie, 2003) because as we have seen, jurors' familiarity and expertise lies in making complex pragmatic inferences from people they encounter. Unlike the

appellate judges, and other legal professionals, jurors will not necessarily be prepared to categorically reach a verdict or build an argument based on logico-scientific proof. Heffer (2008: 49) notes that: 'the jurors might infer from a defendant's actions that he was hit by road rage, but the law will require them to establish according to a number of tests whether the steering wheel lock in his hand constituted an offensive weapon or not'.

It appears then, that the trial and the jury instructions, under the control of the judge, will favour written legal logic over oral narrative communication, and jurors must come to terms with this. Robertshaw (1998) confirmed the 'anti-narrativity mode of trial narration' in English and Welsh trials, a view which sums up a number of features of trial language which create what Stygall (1994) considers to be a significant disjunction between the legal discourse and the narrative expectations of jurors. Harris (2005) argues that one such feature which heightens the disjunction is the lack of temporal succession (see Table 4.1). She suggests that the structure of evidence, and in particular the ordering of witnesses, does not reflect a chronological ordering or, indeed, any easily discernable relationship to the events in question which are at the centre of the trial itself, that is, what actually happened. Research by Hastie and Pennington (1982) confirmed that the temporal presentation of evidence *is* key for jurors. In their second experiment, participants read a mock trial summary in which the presentation of evidence was varied such that it was presented witness-by-witness format or in story format. This manipulation was done separately for the prosecution and for the defence. The ease with which stories could be constructed affected verdict decisions, such that participants were more likely to favour the side of the case presented in story format.

According to Heffer (2005: xv, 22) and Harris (2005: 224), this disjunction causes a cultural-cognitive tension to emerge, in which the decontextualised paradigmatic mode of the legal discourse is at odds with the context-dependent narrative processing of the lay jurors. For example, if the judge satisfies the paradigmatic requirement of the law in his instructions, he will compromise the lay juror's need for narrative-based construction of social experience. According to Jackson (1998: 171), 'the further the form of the [legal] rule moves from the narrative model to a purely abstract conceptual formulation, the more likely we are to

encounter difficulties in both the application of the law to fact and the interpretation of general rules...’ Here, then, it is possible to see that incomprehensibility of the jury instructions could stem from this tension in cultural-cognitive modes between the lay jurors and legally-minded judge. For this study to find a means to improve juror comprehension, it must seek to alleviate this tension.

Heffer (2005, 2006, 2008) argued that if we consider jury instruction as an oral communicative act, rather than the reading of a written legal text, we can use insights from discourse theory to marry these two indispensable cognitive modes, thereby meeting the demands of trial by jury. Previous suggestions for improving comprehensibility have not taken into account the oral context of the instruction process, and have instead viewed the instructions as a written text. This could account for why the comprehension problem witnessed in other jurisdictions has not been satisfactorily solved. As decades of discourse analysis shows, meaning-making in communication is a collaborative experience and is achieved by consideration, coordination and convergence between speaker and audience (for example, Bell, 1984; Clark and Brennan, 1991; Giles, 1973; Lyons, 1977). This idea will be discussed in more detail in the following section.

4.4 Linguistic accommodation as a means of effective communication

In terms of language, for a message to be successfully communicated, a speaker must conceptualise what is to be conveyed, and formulate a linguistic structure that is capable of conveying it (Levelt, 1989). Communication is therefore a process involving the exchange of messages and the creation of meaning (Barnlund, 1962; Tiersma, 2006). Communication is only effective when the person interpreting the message attaches a meaning to the message that is relatively similar to what was intended by the person transmitting it. In other words, communication is effective to the extent that we are able to maximize understandings.

The vast majority of the time, we interpret others’ messages using our own frames of reference and they interpret our messages using their frames of reference. It is possible that our interpretations are different than they intend. In the times when these differences in meaning are recognised, the problem can be repaired. Correcting

misrepresentations requires mindful consideration of the context and frame of reference in which the listener will interpret the utterance. As Dumas (2000b: 67) describes, ‘...A ‘message’ model of human communication, an assumption that language provides watertight linguistic ‘vessels’ (words, phrases, clauses, sentences) in which meaning is contained while being delivered to auditors, is wholly inadequate to explain how language and communication actually function’. As Penman (1992: 11, cited in Penman, 1988) neatly explains,

First, people and not the message per se, are seen as the process of meaning generation; they are actively involved in constructing their understanding in discourse. Second, the people are not seen as sending and receiving messages in some sort of reactive fashion: instead they are seen as voluntarily intertwined so as to bring about their understandings. Third, people are not sending messages to have effect on others, but are jointly involved in the ongoing creation of meaning. And, finally, the message is not concrete entity, meaning does not exist outside the joint action and the context of that action.

With this in mind, it is widely agreed that an addressee's representation of the listener's perspective is a critical component of their understanding of the discourse, with a focus on the shared context that communicators must identify or create through a process of reciprocal perspective-taking in order to produce and comprehend messages (Lewis, 1969; Schiffer, 1972; Clark and Marshall, 1981). Both speakers and hearers must, in Mead's (1934) familiar characterization, ‘take the role or attitude of the other’ — that is, each must try to experience the situation as it is experienced by the other participants. Rommetveit (1974: 24) contended that “taking the attitude of the other’ constitutes an integral, basic, and thoroughly intuitively mastered component of communication under [a variety of] institutional and situational conditions....It constitutes the most pervasive and most genuinely social aspect of our general ‘communicative competence’...”

In this perspective-taking approach therefore, there is a focus on the ways that participants' assumptions about each others' perspectives constitute part of a message's interpretive context. The construction of meaning derives from participants' implicit theories about what their partners know, feel, think, and believe. This can be illustrated by thinking of language as a map. Everyone approaches the

world from their particular perspective and subjective experience, so in this sense an individual's language is a map of their world. Trying to understand another person's language is like reading a map then, a map of the same world as yours, but from a different perspective. Map-reading is a craft and requires skill, and some learn to do it better than others. Just as maps can lead and confuse, the more so if used without a compass, so too can language, particularly if the differing perspectives are not appreciated.

Extensive literature investigating the processes involved in utterance production supports the theory that beliefs and knowledge about the listener play a key role in the production process, and it has been widely expressed that communicators will design their speech for their listener according to these beliefs (for example, Bakhtin, 1981; Clark and Marshall, 1981; Clark and Carlson, 1982; Krauss and Fussell, 1991; Mead, 1934; Rommetveit, 1974). Communication Accommodation Theory (CAT) (Coupland, Coupland, Giles, and Henwood, 1988; Giles et al, 1987; Thakerar, Giles, and Cheshire, 1982) remains one of the most prominent theories in the social psychology of language and communication (Tracy and Haspel, 2004) which models the social variables that determine the way that speakers will attempt or not attempt to adjust their speech to match that of their partners.

CAT provides a framework that predicts and explains many of the adjustments individuals make to create, maintain, or decrease social distance in interaction. It argues that communication is driven by our personal identities, but is also fuelled by our social identities as members of particular groups. This means that communication is not merely about the exchange of referential information like facts, ideas and emotions; it is also used to negotiate salient social category memberships. For example, when speaking to an audience of jurors, John may not address the jury as 'the individual John', but rather he addresses them as 'Judge Thomas' – someone who represents the prototype of his group; in this case, crown court judges. CAT posits that the change in communicative behaviour, whereby communicators move towards and away from their audience to signal social distance, is called 'accommodation'. 'Convergence' is a core strategy for accommodation (Giles, 1973), in which speakers adapt their communicative behaviours in terms of a wide range of linguistic (for example, speech rate, lexis), paralinguistic (for example pauses, utterance length), and

nonverbal features (for example, smiling, eye contact) in such a way as to become more similar to their interlocutor's behaviours (see for example, Azuma, 1997; Hannah and Murachver, 1999; Neiderhoffer and Pennebaker, 2002).

It has been found that converging to a common linguistic style and taking into account the listener's interpretative competence or knowledge about a topic (Coupland et al, 1998) serves cognitive purposes. It is associated with increased predictability of the other and hence lowers uncertainty, prevents misattributions and facilitates understanding (Gudykunst, 1995). Although research has tended to focus more on the affective purposes of accommodation rather than the cognitive purposes, Bourhis, Roth and MacQueen (1988) found that physicians, nurses as well as hospital patients considered it more appropriate for health professionals to converge to the patients' everyday language than to maintain their medical jargon. In fact, not attending to the other can be considered 'under-accommodative' (Williams and Nussbaum, 2001). Indeed, in researching the comprehensibility of jury instructions in criminal trials, Steele and Thornburg (1988: 99) found that lawyers and judges are often unaware that the language they produce is not intelligible to a lay audience, but not because of language per se but because of a lack of shared knowledge and an inability to share the perspective of their audience. Lieberman and Sales (1997) argue that at its extreme, this sort of miscommunication can result in jurors ignoring their instructions, because they have their own understanding of justice and are not prepared to accept the version manifested in the legal system.

It is possible, then, that failure to accommodate the jurors interpretive stance, perspective and knowledge will lead to jurors' misunderstanding the communication, regardless of how comprehensible the language. For this study to improve comprehension therefore, the jury instructions must take into account the jurors' perspective. Achieving effective communication between these two parties however is not straightforward. As Sarangi and Slembrouck (1992) point out, the extent of accommodation can depend on the relative status of the communicators. The imbalance of power between the judge (as 'Master of Ceremonies') and juror (who does as instructed by the judge) means that the judge is less likely to assess the jurors' perspective as extensively as the jurors have assessed the judge's. This problem is further compounded because the judges' instructions have to be engineered for more

than one listener at a time, who may have different knowledge-bases and perspectives. Though these listeners may include the trial counsel, the appellate courts, as well as others with lower 'participatory statuses' (Bell, 1984; Clark and Carlson, 1982) like courtroom personnel or journalists, the intended and primary addressees are the twelve jurors. As such, the judge should be tailoring his instructions specifically for the jurors. Adding to this issue is that, even if judges take their jurors' perspective into account, having an accurate appreciation of the audience is difficult when feedback is unavailable (Traxler and Gernsbacher, 1992, 1993). The specific responsibilities of the judge and his higher expertise level therefore makes the issue of effective communication complex and time consuming. However, as already acknowledged in Chapter Two, the formulation of the judges' instructions in England and Wales is considerably at the discretion of the judge, and regardless of how complex or time consuming it might potentially be, English judges are free to change the wording of their instructions within certain guidelines. They are thus able to make their instructions more or less convergent with the jurors as they see fit. Furthermore, as the jury instructions are written down first (albeit not always word for word), there is not a 'real-time' constraint on production and this provides the opportunity to perfect the message before it is communicated as oral discourse. As such, within the English and Welsh trial context, there is the scope for accommodation in the instructions to enable the judge to better share his knowledge with the jury.

Processes of linguistic accommodation have been noted by both Philips (1985) and Heffer (2002, 2005) with respect to jury instructions. In both cases, judges working from Bench Books of instructions adapted those instructions to fit the oral context and be more narrative in nature. Philips noted that judges switched 3rd person 'he' to 2nd person 'you', used interactive checks and broke up long and complex sentence structures. Heffer (2002, 2005: 17–35, 166–80) studied 100 English judges' summings up, looking specifically at the directions on the burden and standard of proof, to primarily investigate the extent to which the judges' delivery of the instructions showed 'convergence with and divergence from the jury's narrative mode sensibilities' (2005: 158). The presence of particular discourse features (set out in Table 4.2) identified as either narrative or paradigmatic in function were counted in each direction in the corpus. Heffer's detailed analysis found that while all directions

were ‘highly paradigmatic in comparison to an oral narrative’ (2005: 174), there were a number of judges who also used a range of experiential, textual and interpersonal narrativising discourse features to greater and lesser degrees.

Table 4.2 Linguistic features of paradigmatic or narrative tendency

Narrative Mode Context-dependence	Paradigmatic Mode Decontextualisation
Naming	Abstract person category
Deictic reference to participants and circumstances	Embedding of agent, e.g. in adjunct
Human agent +process	Agentless passives
Deictic or defined reference to time or place	Abstract subject + relational process
Past tense	Legal ‘Classifiers’ (<i>Halliday, 1994: 184</i>)
Perfect or progressive aspect	Double-headed NPs (<i>Sinclair, 1991: 90</i>)
1 st and 2 nd person pronouns	Genitives with abstract noun head
Vocatives	Defining ‘of’ qualifiers
Rhetorical questions (and tags)	Defining relative clauses
Discourse markers	Abstract nominalisations
Intensification: quantifiers/superlatives; synthetic negation; repetition	Generalisation of circumstances
Authorial comment in disjuncts	External obligation
Lexical appraisal (<i>Martin, 2000</i>)	Modal certainty
Subjective modalities	Conditional subordinators
Temporal succession	Other logical connectors
Lexical simplification	Binomials
Truncated clauses	Degree-defining adverbs
Explicit paraphrase	Polarity paradigm structures
Exemplification	Negative non-finite clauses and phrases
	Qualification of subordinate structures

(see Heffer 2002: 234-237 for further explanation and exemplification of these categories)

Heffer’s results showed that 40 percent of his corpus of proof directions contained more narrativising features than paradigmatic. Further, over three-quarters of the texts showed a greater degree of narrativisation than the specimen directions, which comprised 62 percent paradigmatic features. In considering this data however, we must be mindful that the link between linguistic expression and cognitive mode is by no means transparent, and the narrative and paradigmatic discourse features identified by Heffer warrant further investigation. Nevertheless, Heffer’s (2005: 160) analysis suggests that judicial instructions will be harder for the jury to understand

when the judge delivers a text 'which is simply too highly paradigmatic with respect to its mode (oral), function (instruction), and audience (lay)'. He subsequently hypothesised that linguistic convergence between the two cognitive modes would facilitate comprehension. He suggests that while the narrative mode is typically realised in narrative discourse and the paradigmatic mode in scientific argument, they can both become strategic input to any form of discourse, thus creating a 'hybrid' form of discourse. Consider, for example, how one judge in Heffer's corpus balances the narrative and paradigmatic way of thinking about the difference between knowing and believing that goods are stolen. The law defines it in typical paradigmatic fashion as:

A person handles stolen goods if (otherwise than in the course of stealing) knowing or believing them to be stolen, he dishonestly receives the goods or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so (Theft Act 1968 s.22).

To help the jurors decide whether the accused handled stolen goods, the judge did not read this statute, as might be given in the American style of jury instruction. Instead, he narrativised the instruction in two ways, by incorporating narrative discourse features and by providing narrative examples (both shown in bold) onto the paradigmatic legal frame (indicated in plain text):

Figure 4.2: Example of hybrid paradigmatic and narrativised jury instruction

'Let me just move on then to the offence of handling, because **you need to consider** the definition of that. That is **a bit more complicated** and **I will go through rather more slowly with you...**

I have to find the right page. A person handles stolen goods, if (otherwise than in the course of stealing) knowing and believing them to be stolen, he dishonestly receives them. Now that is the offence which is handling **here...**

What you would have to be **satisfied in this case** – and in **each of these cases** if **you are considering** the handling counts – was that **the defendant received** them, **took** them into **his** control **as it were**. And that **at the time that** he **took** them into **his** control (he **received** them) **he knew** they were stolen or **believed** they were stolen...

You can appreciate the difference between knowledge and belief. When it comes to knowledge **of course that means** you have direct knowledge of the actual theft and therefore for that reason you know they are stolen.

If for example **you were standing in Marks and Spencers and you watched a shoplifter steal and then ten minutes later you took the goods from the shoplifter** you would receive them knowing that they were stolen. If on the other hand **you were not in Marks and Spencers when the shoplifter stole that elegant hat and you were outside in the Crown and Robe and someone came up to you and said "Look what I have just nicked from Marks and Spencers"**, you do not have direct knowledge of it but you have belief based on what you have been told. So that is the distinction **if I can put it that way.**

Heffer (2005: 177-180)

Previous research has shown that hybridisation of the two cognitive modes already takes place in trials with beneficial effect. As Bennett and Feldman (1979: 316) exemplified:

It is often found that the counsel will offer their own narratives ready for the juror to consider. For example, when questioning a female defendant in order to establish a motive for running away from a crime scene for instance, the prosecuting attorney may try to form a story in the mind of a fact finder by saying 'isn't it true... the reason you gave your purse to D___ [before the crime] was because you wouldn't be burdened down with it when you ran?

Similarly, Harris' (2001, 2005) research using the Marv Albert sexual assault trial in America demonstrated that examining counsels are aware of the tension between the narrative and paradigmatic modes and attempt to communicate their case to the jury by characterising their opening statements as 'story-telling narratives' and questioning witnesses according to a narrative structure. They 'construct witness narratives as a

powerful and persuasive way of achieving a measure of discourse coherence in the giving of evidence by witnesses despite the constraints of the rules of evidence...’ (2005: 230). (The rules of evidence will typically filter out potential narrative elements which are either not considered relevant to the legal definition of the offence or are considered to compromise the fairness of the decision-making process). This shows that this unusual hybrid of discourse is not simply possible in theory, it is actually achievable in practice in a legal context and offers a unique means to potentially improve jurors understanding of their instructions.

4.5 Conclusion

This chapter has demonstrated that despite the paradigmatic mode of much trial language, it is narrative which carries the power in communicating with the jury. If it is possible for counsel to successfully intermingle narrative and paradigmatic modes in their speeches and questioning, perhaps when judges accommodate the jurors’ narrative sensibilities in their instructions, the message may be more comprehensible (Giles and Powesland, 1975b; Bell, 1984).

There has not yet however been any specific empirical evidence to substantiate Heffer’s speculative hypothesis that accommodation of the narrative mode within judges’ legal instruction will improve comprehension. There is some evidence that narrative features in isolation are associated with higher levels of comprehension, for example by clarifying the meanings of different abstract concepts by providing concrete, narrative examples (Dumas, 2000b), and by using the names and details of the parties of the case consistently (Greene and Mills Spaeth, 2010; Kimble, 2002; Tiersma, 2006) However, there has not yet been any research which has explicitly considered and measured the comprehensibility of fully narrativised judicial instructions. This would involve introducing narrativisation at two levels. First, each legal direction would be subsequently exemplified with ‘narrativising’ evidence presented at trial, so that the law is explained in terms of the issues in the case rather than in abstract. As explained in Chapter One, this type of evidence integration has been encouraged in the English and Welsh context (Auld LJ, 2001; Marder 2011) but has not been tested empirically. Second, the legal directions per se would be

narrativised as well, by incorporating the narrative discourse features that Heffer identified (Table 4.2). Whilst Heffer's research identified these features, he did not test them empirically across a range of legal instructions.

As such, research questions that have yet to be addressed emerge. These form the foundation for the present study. First, as already identified in Chapter Two, this research will address the question:

- *How comprehensible are decontextualised jury instructions when based primarily on the Crown Court Bench Book? (Research Question One)*

Second, to test the argument that narrativisation could be an effective reform for incomprehensible instruction, this research will investigate the efficacy of narrativisation at two levels, by asking:

- *Do levels of comprehension improve when decontextualised instructions are integrated with evidence from the case? (Research Question Two)*
- *Do levels of comprehension improve when decontextualised instructions are both integrated with the evidence and reworded using 'narrativising' linguistic features? (Research Question Three)*

In order to adequately address these three issues, it is necessary to investigate what comprehension measures are both robust and suited to this kind of research. This will be dealt with in the following chapter. In satisfying these research questions, the present research will therefore offer first empirical study to specifically measure and attempt to improve the comprehensibility of jury instructions in England and Wales. Furthermore, by drawing on the current methods of comprehension assessment and applying it to the English and Welsh context, this study will be the first experimental exploration into the effect of the discursal freedom of judges' linguistic choices during summings-up. As called for by Marder (2011), this will enable comparisons between jury comprehension in America and the very different instructional context of England and Wales. At the same time, this work will also rigorously test Heffer's

(2005) hypothesis that narrativising strategies introduced by judges during their oral delivery of legal directions in England and Wales might aid comprehension.

5

Methodology

Introducing narrativisation to the (mock) courtroom



5.1 Introduction

This chapter outlines and justifies the method used in this study to measure jurors' comprehension of their jury instructions and determine whether comprehension can be improved by increasing levels of narrativisation in the summing up. To facilitate understanding and provide the requisite background knowledge, it is useful to offer a brief overview of the methodology here.

In a mock juror paradigm, 102 jury-eligible participants from the local community watched a simulated rape trial and received a summing up consisting of either decontextualised legal directions, jury instructions integrated with the evidence, or instructions which used both narrativising language and integrated evidence. After the summing up, jurors were given a jury survey to measure their comprehension. The survey comprised three separate tasks: First, a paraphrase measure which tested how well mock jurors' recalled the instructions they had been given; second, a novel-scenario task which measured mock jurors' ability to use and

apply the instructions they had been given; lastly, multiple-choice questions which tested how well mock jurors' could correctly recognise their instructions. Participants were also asked to respond to three attitude scales which gauged their feelings towards the summing up.

This chapter will show that this experimental paradigm enabled the systematic comparison of different summing up styles on comprehension, which would not have been possible in a naturalistic setting. With consideration of the verisimilitude of this simulation, this chapter will demonstrate that this research strategy, through using a combination of both objective and subjective data, measures the extensive and intensive nature of jurors' comprehension.

5.2 Design

Using a mock juror paradigm (McEwan 2000), this study measures the comprehensibility of three different styles of instruction to test the hypothesis that increasing the level of contextualisation and narrativisation of a summing up will improve comprehension. 102 participants were recruited to act as jurors in a trial simulation. The mock jurors were assigned to one of three conditions. These conditions were designed to correspond to each of the three research questions:

Condition 1: Decontextualised instructions only

Mock jurors in the first condition received a summing up which contained decontextualised instructions. This is a control condition which replicates the conditions under which instructions are delivered in most US courts – i.e. read out from a fixed text – but using the relevant statutes and Specimen Directions in the 2007 Crown Court Bench Book. The findings of this condition act as a baseline measure to which the subsequent conditions can be compared.

Condition 2: Evidence-integrated directions

A different group of mock jurors received a summing up that used the instructions from Condition 1, but also included evidence from the case to explain and illustrate the legal points.

Condition 3: Narrativised legal directions

A third group of jurors received instructions that had been re-worded from the directions of the integrated evidence condition using a set of narrativising linguistic features discussed below.

An independent measures design, in which different jurors were used in each condition, was applied to eliminate any effects of repeated exposure. This is because once jurors have heard one summing up, they would find subsequent jury instructions progressively easier to understand.

5.2.1 Mock juror paradigm

A mock juror paradigm was selected because of the myriad legal and logistical problems in studying jurors as they sit in actual trials. As already indicated in Chapter Two, the primary obstacle to conducting valid and reliable research into juror functioning is Section 8 of the Contempt of Court Act 1981. This Act means that jurors are liable to prosecution if they discuss deliberations, and therefore restricts direct questioning regarding jurors' decision making and reasons for their verdicts (see Zander and Henderson, 1993). While it is true that this has caused an 'information vacuum' in court research in England and Wales (Thomas, 2007, 2010), fears that it poses a 'formidable obstacle to any rational understanding of the cornerstone of the criminal justice system' (Robertson, 1993: 259) are grossly overplayed. The Act does not necessarily inhibit valuable jury research in this jurisdiction in its entirety; indeed, Lord Falconer of Thoroton QC (1997: 22), the former Solicitor-General, expressed that 'even within the provisions of the Contempt of Court Act 1981... there is still scope for obtaining useful material by jury research in order to determine how well juries have understood and remembered evidence

...'. The Act does not entirely prohibit assessment of the jury, and by using a mock juror paradigm, it is resolutely possible to gain sound – but cautious – insight into the real courtrooms in England and Wales.

Using jury simulation offers a tremendous amount of flexibility and control in a systematic design of the events that take place in the 'courtroom'. This brings a number of advantages. First, it allows the implementation of a procedural innovation that could not be carried out in a real courtroom. By adopting this laboratory setting, this study can manipulate and experiment with the jury instructions and disentangle them from other variables in a way that is not possible in actual trials for legal, ethical and pragmatic reasons (Darbyshire, Maughan and Stewart, 2002: 9; MacCoun, 1989). Second, it means that it is possible to measure all sorts of behavioural reactions that are otherwise too intrusive. For example, with mock jurors it is possible to ask questions while the trial is in progress, measure their comprehension, their ability to recall proceedings, and their feelings towards the trial process. Thirdly, and most importantly, by being able to compare jurors' behaviour in different conditions that are identical apart from instruction style, the result is that it is possible to establish a causal relationship between instruction style and comprehension (Pfeifer, 1990; Diamond, 1997). Ultimately, then, jury simulation is the most appropriate design for this study because mock jurors can be observed in action, which would not be achievable in a real trial.

For this reason, naturalistic research methodologies like archive searches, actual-verdict analyses and conducting post-trial interviews with people who have served as jurors and other trial participants are unsuitable for this study because they are too indirect in their approach. Though these methods offer realism and representativeness in dealing with actual juries and cases, they raise fears that any conclusions made are based only on surmise and anecdote (Runciman, 1993). Archival studies only reflect past data and experience, and cannot offer the ability to say whether any trend observed will continue (Diamond, 1993). They also make it impossible to draw causal inferences and the information of interest to the researcher may well be missing (Devine et al, 2001). Similarly, post-trial interviews are limited because they are subject to memory recall, which may affect responses to questions involving comprehension, and possible wrong inferences drawn by the

experimenter from the respondents answers (Darbyshire et al, 2002: 10). Post-verdict interviews with jurors (like those used by Bowers, 1995; Constanzo and Constanzo 1994), like actual verdict analysis, also cannot establish causal relationships, only possible correlations between case factors and jury verdicts. Interviews rely entirely on jurors' self-reported perceptions and recollections, and it is well documented that individuals often lack the ability to accurately determine the effect different factors have in their thinking processes (Nisbett and Wilson, 1977) Furthermore, verbal reports of mental events are often incomplete. A laboratory design, on the other hand, avoids the kind of 'armchair speculation' which would otherwise limit the quality and the persuasiveness of the results and permits understanding of the causal relationship between juror comprehension and factors such as narrativisation.

As with all methods of inquiry, it must be acknowledged that the mock juror paradigm is not perfect. Jury research literature has grown significantly in the past thirty years, and simulation studies have faced serious review in that time (see Kerr and Bray, 2005 for more detailed discussion of the issue). The criticism most frequently levied at the mock jury paradigm relates to the trade-off which inevitably arises between internal and external validity. In return for a tightly controlled experimental environment, the problem of external validity arises; that is, questioning if the results can be generalised to real trials. In relation to the present study, it raises the question as to whether it is safe to assume that narrativisation of the jury instructions will improve comprehension in real trials if that was what was found in the simulation. The only way to gain confidence in such an assumption is to approximate the aspects of a real trial as closely as possible – the greater the approximation, the better the generalisation from the former to the latter, and to conduct as many of these sensitive and sophisticated trials as possible.

In order to achieve the delicate balance between achieving realism in the simulation without compromising experimental control – within the confines of the unavoidable economic and time constraints of this study – it is important to address decisions about the choice of participants and the materials to be used. Only with these considerations can a finely tuned and applicable piece of research be conducted. These will be addressed in detail in the following sections.

5.2.2 Independent variable: Manipulating narrativisation

In an effort to extend the body of knowledge of jury trials in England and Wales, this study measures the comprehensibility of judges' instructions. Whilst there is consistent findings among empirical jury instruction work that comprehension is limited (see Chapter Two for example, Buchanan, Pryor, Taylor, Strawn, 1978; Charrow and Charrow, 1979; Elwork, Sales and Alfini, 1977; Elwork, Sales and Alfini, 1982; Severence and Loftus, 1982; Steele and Thornburg, 1988; Strawn and Buchanan, 1976), studies suggest that the level of comprehension varies depending on the instruction being examined. For instance, Sealy and Cornish (1973a) found that mock jurors understood 'beyond reasonable doubt' in the criminal standard of proof direction as nearer to meaning 'more likely than not' than 'sure and certain'. Luginbuhl (1992) found that jurors in his study had substantial difficulty concerning the standard of proof, and the role of mitigating factors in the final decision. In addition, Blankenship, Luginbuhl, Cullen and Redick (1997) reported that juror comprehension in their sample was low for questions involving the weighing of aggravating factors.

In the most recent empirical study of comprehension of judicial instructions in England and Wales, Thomas (2010) only tested one instruction - the instruction of self defence. Importantly however, jury instructions do not occur in isolation, so it remains that they need to be studied in the context of the summing up, where multiple instructions are provided within one speech. This is particularly useful given the research that has identified that different instructions vary in terms of their comprehensibility. Furthermore, looking at the summing up in its entirety and measuring a number of different directions, allows us to study the effects of narrativisation since the very nature of narrativisation involves making one coherent and contextualised oral text.

By using a laboratory setting, it is possible to systematically manipulate and create different versions of a summing up, and measure and compare mock jurors' comprehension of each of them. For the purposes of the present study, three summings-up were constructed, the only variation between them being the increasing degree of contextualisation.

The summings up needed to reflect a legally accurate and appropriate summings up for the rape case that had been chosen as the trial stimulus (discussed subsequently in section 5.4). For this reason, a corpus of English rape-trial summings-up was used to identify a complete set of legal directions that would be necessary and sufficient in a summing-up for the case chosen in this study. The corpus comprised of thirteen transcripts taken from rape trials from different presiding judges in Crown Courts in England between 1995 and 2002 (from Heffer, 2005). Each instruction given in these summings up was identified and coded using XML and then loaded into the concordancer program Xaira. This allowed specific instruction-by-instruction comparison across texts and established two things: First, a list of the instructions necessary and sufficient for an accurate summing of a rape trial, and second, the order in which those directions are typically given. It was found that, although the judges varied quite considerably in the extent to which they deviated in wording from the Crown Court Bench Book, there was consistency across the board as to which instructions were given to the jurors and only minor differences in how they were ordered. This therefore provided a good model on which to begin drafting the experimental summings up.

One deliberate difference between the corpus summings up and the summings up in this study is the review of evidence. As already discussed in Chapter One, summings up usually comprise a review of evidence alongside the legal directions (Heffer, 2005), which serves to remind the jury of the evidence they have been presented throughout the course of the trial. This is particularly necessary for a rape trial, which could last weeks. However, as the evidence shown to participants in the simulation was abridged and presented immediately before the summing up, it was felt that such a review would be unnecessary. This happens in real trials which are short (Thomas, personal communication 2nd February 2010) so it was felt that an abbreviated version would not impair results. As the decontextualised instructions made no reference to the evidence in the case, a short explanatory note was given to explain the absence of the review of evidence, to replicate a real trial situation: 'At this point I would normally summarise the evidence in the case, summarising the various points to bring it back into your memories. However as you have only just heard the evidence, I am not going to repeat it (line 95).

Consultation with circuit judges corroborated most of the findings from the corpus search. However, two directions concerning recklessness in rape were identified as being no longer applicable since the 2003 Sexual Offences Act came into effect. These instructions were removed and exchanged with the current legal directions for rape. There was consensus between the judges consulted and the corpus as to the order in which the instructions should be given: To begin, general directions are offered, then a definition of the offence is given, followed by specific instructions of law and evidence needed for the case, and lastly, closing directions.

The general directions, or the function of judge and jury, as they are called in the Bench Book, were subcategorised into four discrete directions: an explanation of the judge's role, an explanation of the jury's role, an explanation of how to use the evidence and a disclaimer about a judge inadvertently expressing his own opinion. This latter direction is particularly important because the discretion in wording permitted in the English and Welsh courts could allow a judge to inadvertently express an attitude which may influence the jury's verdict (Blanck, Rosenthal and Cordell, 1985). After these instructions, judges gave directions concerning the burden and standard of proof. These six opening directions are given in all trials, and are sometimes given before the judge begins the review of evidence. After the opening directions, instructions pertaining to the offence of rape were given. As advised, two directions were necessary for the case being used in the simulation: A direction explaining the three elements that must be proven for a conviction of rape and a direction explaining reasonable belief. After these directions, there was a specific direction about circumstantial evidence, before the closing directions which were subdivided into two instructions: the first instructs jurors about the need to reach a unanimous verdict, and the second explains what to do once the jury have retired. In total then, eleven directions were identified, detailing procedures and the evidence of the trial, as shown in Table 5.1.

Table 5.1: The categorisation of jury instructions

Procedure-Based	Evidence-Based	
	How the matters of law bear on the evidence	How to use the evidence
Jury's role Judge's role Judge's opinion Unanimity of verdict	Burden of proof Standard of proof Three elements to rape Reasonable belief in rape	Circumstantial evidence How to consider the evidence Availability of exhibits

The decontextualised summing up for Condition 1 was constructed first. All but two of the directions were able to be taken directly from the Crown Court Bench Book. At the time of constructing these summings up, the 2007 Bench Book was in use, so it was the Specimen Directions from this Bench Book that were used. The Bench Book discusses sexual offences but does not provide explicit Specimen Directions on how to convey the legal charge of rape, and so the two directions pertaining to rape were taken from the statute set out in the Sexual Offences Act 2003 as well as the legal discussion of reasonable belief in rape given in the Bench Book. This is the same as judges are expected to do in their own summings up. All eleven directions were used verbatim (save for some minor changes which will be outlined shortly) and organised according the order found in the corpus (see Appendix 2.2).

Without explicit Specimen Directions for the two directions required to define rape, some adjustments were required so that they were appropriate for the summing up. These instructions were predominantly taken from the statute in the Sexual Offences Act:

A person (A) commits an offence if –

- (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
- (b) B does not consent to the penetration, and
- (c) A does not reasonably believe that B consents.

(1) Whether a belief is reasonable is to be determined by having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

Sexual Offences Act 2003 s.1

The language of this statute is typically paradigmatic in nature, and in this instance all circuit judges advised that 'person (A)' and 'person (B)' would more likely be referred to as 'defendant' and 'complainant' in a real trial. As these names were used in other Specimen Directions, they were substituted accordingly. Furthermore, in the trial used in the simulation, the issue of whether penetration had taken place was not in dispute. As such, the distinction of penetration by 'vagina, anus or mouth' was not necessary and 'sexual intercourse' was used instead. For the same reason, it was necessary to add an explanation into the instruction to inform the jurors that they only had to decide the second and third elements of rape: 'In this case there is no dispute between the defence and prosecution that sexual intercourse took place so the issue for you is the second and third elements only' (line 41). This wording for this explanation was taken from the corpus and agreed during consultation. To make the instruction fit cohesively within the summing up, an introductory and concluding sentence were added: 'The allegation against the defendant is one of rape. It is set out in the copy of the indictment which you have' (Appendix 2.2, line 37) and 'those are the three elements spelt out in the particulars of the offence' (line 65). These were taken explicitly from the corpus and did not impact on the decontextualised nature of the instructions. The final decontextualised instruction can be seen in the plain text within Figure 5.1.

To make the summing up for Condition 2, specific details of the case were integrated into the decontextualised instructions (see Appendix 2.3). These case details included brief identification of the relevant evidence, as well as finer details of the case such as the names of the defendant, complainant and witnesses. When integrating these details, the wording from the decontextualised instruction was not changed at all, but rather was introduced as exemplification. It was ensured that all of the evidence raised during the simulation was included in the summing up so that the judge appeared impartial about what evidence was important to the jurors' decisions. To make the summing up cohesive, it was necessary to sometimes integrate evidence for two instructions at once. For example, both of the decontextualised instructions relating to rape were given first, and then the evidence was used afterwards to exemplify both instructions (see Figure 5.1):

Figure 5.1: Legal instructions relating to rape in the integrated evidence summing up

(The decontextualised instructions from Condition 1 are given in plain text and the additions of the evidence new to the summing up for Condition 2 are given in **bold**)

The allegation against the defendant is one of rape. It is set out in the copy of the indictment which you have.

<Direction concerning three elements necessary to prove rape>

The prosecution must prove three elements for the offence of rape. A person commits an offence if, first, he intentionally has sexual intercourse with another person (in this case there is no dispute between the defence and prosecution that sexual intercourse took place so the issue for you is the second and third elements only). A person commits an offence if, second, at the time of the sexual intercourse the other person does not consent to it. A person consents only if he or she agrees by choice and has the freedom and the capacity to make that choice. A person commits an offence if, third, he does not reasonably believe that the other person consents. Whether a belief is reasonable is to be determined by having regard to all the circumstances, including any steps the defendant took to ascertain whether the complainant was consenting.

<Direction concerning reasonable belief>

This raises two further questions. You must first consider whether or not the defendant may have genuinely believed that the complainant was consenting. You are entitled to take into account any evidence of the defendant's intoxication when considering this question. A drunken belief can still be a genuine belief. If you are sure that the defendant did not have such a belief, the prosecution will have proved this element of the offence. However, if you conclude that the defendant may have had such a belief, you should go on to consider secondly whether that belief was reasonable in all the circumstances. Here the defendant's intoxication is irrelevant. A person's drunkenness does not make an otherwise unreasonable belief reasonable. Equally, just because a person is drunk, it does not mean that he cannot have a reasonable belief. You will judge what is reasonable by the sober and appropriate standards of modern life. Those are the three elements spelt out in the particulars of the offence.

Bringing it back to the circumstances of the case, you have to decide whether rape took place on the 27th November, and you decide it on the evidence. The issue is one of consent. You have Miss Palmer saying that she did not consent: Mr Roberts used force against her, holding her hands, putting his hand over her windpipe. She said she told Mr Roberts 'stop', 'I don't want to' and 'get off', and tried to push him off her chest with her knees. The defendant Mr Roberts denies that. He told you that Miss Palmer consented to the sexual intercourse. He says she played her part in it and appeared to be enjoying it. He says she kissed him, was giggling and laughing, and lifted her bottom off the bed to allow him to take her knickers off. He says she said "go on, go on, fuck me".

If you reach the conclusion that Miss Palmer did consent, or may have consented, to having sexual intercourse with Mr Roberts, that is the end of the case and you need go no further; you must find him not guilty. But if you accept Miss Palmer's evidence and you are sure that she did not consent, then that leaves the next question open to you to consider: Whether the defendant genuinely believed that she was consenting, and if so, whether that belief was reasonable. If you accept the possibility that Mr Roberts may have had a reasonable belief that Miss Palmer was consenting, then you acquit him of rape. If however, after considering all the evidence and deciding the circumstances of that night, you are sure that Mr Roberts did not reasonably believe that Miss Palmer was consenting, then you find him guilty of rape.

I will come back to alcohol for a moment. This may not be an issue because both parties claim to clearly recall the events of that night. There seems to be no blurring of the

main issue by the presence of alcohol and that, of course, is: Was there consent? You have heard evidence that they had both been drinking, though nobody thought they were helpless by any means. The prosecution rely on Miss Palmer's evidence. They do not say that she was so drunk she could not make up her mind. Their case is perfectly clear that she was capable of deciding. You also heard evidence that Mr Roberts had also been drinking. You may take this evidence into account on the question whether he may genuinely have believed that Miss Palmer was consenting.

Appendix 2.3, lines 43 – 108.

The evidence was introduced in the same relatively plain, but formal, style as the decontextualised English in the Specimen Directions: The sentences are short with no relative clauses or agentless passives and few subordinate clauses. This wording was heavily borrowed from the corpus, exchanging only the details of the cases.

Evidence was integrated into the procedure-based directions as well as the evidence-based instructions, where relevant. For example, the closing direction about what the jurors should do when they retire in the decontextualised instructions was as follows:

When you retire you should select a foreman or forewoman who will chair your discussions and act as spokesperson on behalf of all of you. You can take with you your notebooks and paper exhibits placed before you. The other exhibits will be sent through to you if you need them. So now, members of the jury will you please, when the jury bailiffs have been sworn, retire to your room to consider your verdicts.

Appendix 2.2, line 105 – 109.

In the integrated evidence condition, the instruction became:

When you retire you should select a foreman or forewoman who will chair your discussions and act as spokesperson on behalf of all of you. You can take with you your notebooks and paper exhibits placed before you. The other exhibits will be sent through to you if you need them. So now, members of the jury will you please, when the jury bailiffs have been sworn, retire to your room to consider your verdicts.

You can take with you your notebooks, and your copies of the indictment, the police interviews, and the photographs of injuries placed before you. You may return to the courtroom to replay the CCTV videotape if you need to see it again.

Appendix 2.3, line 164 – 171.

To construct the summing up for Condition 3, the decontextualised instructions were contextualised using the evidence from the case as in the second

summing up, but the instructions themselves were also re-worded and re-structured according to the set of discourse features identified as narrativising (Heffer, 2005: 163 see Table 5.2). Narrativisation is achieved by the combination of these different linguistic features, and discourse becomes more oral, personal, spontaneous and dialogic by the interplay between them. In this sense, there is no precise definition of narrativisation and, as the first investigation into narrativisation, this study assumes that no single feature is more or less important to achieving narrativisation. To construct the narrativised summing up therefore, all of the features that Heffer identified were used, but the frequency in which they were applied was determined by the directions of this case, rather than artificially inserting a specified number a priori. It is not necessarily a criticism that narrativisation cannot be precisely, mathematically defined, but it might be a suggestion for future research to consider whether some features have more or less of a narrativising tendency than others.

Table 5.2: Linguistic features of narrative tendency

Narrative Mode Context-dependence
(A) Naming
(B) Deictic reference to participants and circumstances
(C) Human agent +process
(D) Deictic or defined reference to time or place
(E) Past tense
(F) Perfect or progressive aspect
(G) 1 st and 2 nd person pronouns
(H) Vocatives
(I) Rhetorical questions (and tags)
(J) Discourse markers
(K) Intensification: quantifiers/superlatives; synthetic negation; repetition
(L) Authorial comment
(M) Lexical appraisal (<i>Martin, 2000</i>)
(N) Subjective modalities
(O) Temporal succession
(P) Lexical simplification
(Q) Truncated clauses
(R) Explicit paraphrase
(S) Exemplification

In the following section, the narrativisation of the original decontextualised summing up is detailed systematically primarily for the purposes of methodological clarity and transparency. This re-writing process, however, also has the potential to be a model for how other written standardised instructions can be rewritten. Such a model could be useful as a pedagogic aid for judicial training, applicable to the jurisdiction of England and Wales and especially to the US, where judges are given less discretion to deviate from the words written in front of them. This modelling is not the principle aim of the present study, which is an experimental investigation of narrativisation and comprehension, but its findings, together with the outline in the section below, could be useful to future research in this area.

To demonstrate how the narrativised summing up (Appendix 2.4) was developed from the decontextualised summing up (Appendix 2.2), it is useful to trace the moves using two of the directions as an example. The instructions on the burden of proof and the standard of proof have been selected for this purpose since they are the sole legal directions which must be given in all trials and they were the basis for Heffer's (2002, 2005) development of the narrativisation hypothesis. Figure 5.2 below shows how these instructions were used in the decontextualised summing up. They were taken verbatim from the Specimen Directions:

Figure 5.2: Proof instructions in the decontextualised summing up

In this case the prosecution must prove that the defendant is guilty. He does not have to prove his innocence. In a criminal trial the burden of proving the defendant's guilt is on the prosecution.	1 3
How does the prosecution succeed in proving the defendant's guilt? The answer is - by making you sure of it. Nothing less than that will do. If after considering all the evidence you are sure that the defendant is guilty, you must return a verdict of 'guilty'. If you are not sure, your verdict must be 'not guilty'.	5 7

Looking at this instruction, it is possible to see there are already some narrativising features. For example, there is deictic reference to 'this case' (line 1), a rhetorical question, 'How does the prosecution succeed in proving the defendant's guilt?' (line 4), occasional use of second person pronoun 'you' (lines 5, 6 and 7), and a truncated clause 'The answer is – by making you sure of it' (line 4). These show some attempt to engage the jury. However, the instructions also contain notable

paradigmatic features, such as repeatedly using abstract legal categories to represent the participants ('the prosecution', lines 1, 3 and 4, and 'the defendant', lines 1, 3, 4 and 6). The circumstances are also generalised to all trials ('in a', line 2), and the trial is legally classified as 'criminal' (line 2). The syntax contains qualification of subordinate clauses (If, after considering all the evidence...' line 5). Lastly, the criteria required for the standard of proof are presented in logical relation to each other, rather than in temporal succession, using the conditional subordinator 'if': 'If you are sure... your verdict must be...' (line 6) and 'If you are not sure...your verdict must be...' (line 7).

Figure 5.3 shows how the same instructions were revised for Condition 2 (The integrated evidence is shown in **bold**):

Figure 5.3 Proof instructions in the integrated evidence summing up

In this case the prosecution must prove that the defendant is guilty. He does not have to prove his innocence. In a criminal trial the burden of proving the defendant's guilt is on the prosecution.	1 3
How does the prosecution succeed in proving the defendant's guilt? The answer is - by making you sure of it. Nothing less than that will do. If after considering all the evidence you are sure that the defendant is guilty, you must return a verdict of 'guilty'. If you are not sure, your verdict must be 'not guilty'.	5 7
It is not for this defendant, Stephen Roberts, nor Miss Evans who represents him, to prove anything in this case. The prosecution has to satisfy you of Mr Robert's guilt based on the whole of the evidence, which includes his own evidence from the witness box. You can only convict him of rape if you are sure that he is guilty.	9 11

By comparison to the decontextualised instructions, in the integrated instructions the defendant has been named and deictically referred to as 'this defendant Mr Roberts' (Figure 5.3, line 8) or 'Mr Roberts' (line 10), and likewise 'the defence' has assumed human individuality ('Miss Evans who represents him', line 9). The case is identified specifically ('this case' line 9) and the jury is always addressed directly with second person pronoun 'you'. These features were carried through into the narrativised summing up, as is the clarification that 'the whole of the evidence' includes the defendant's 'own evidence from the witness box' (line 10).

In constructing the summing up for the third condition, narrative linguistic features were layered onto the decontextualised summing up in three stages. First, linguistic features (A) to (F) (See Table 5.2) were introduced into the text. These linguistic features emphasise the fact that the trial ‘involves a specific case occurring at a specific time and place with human participants acting on, thinking about and communicating things’ (Heffer 2005: 168-9). Secondly, linguistic features (G) to (N), which have an interpersonal function, were applied. Lastly, features serving the structure and cohesion of the discourse (O) to (S) were introduced. With this cumulative construction of the text, the addition of larger units (rhetorical questions, for example) could often incorporate other narrativising features that had been added in a previous stage. This not only improved the flow of the text, but ensured the summing up was rich in narrativising language. These instances are noted in the discussion below.

First, the categories of the law given in the decontextualised directions were anchored within the circumstances, participants and time of the trial events and case evidence from the simulation:

Figure 5.4 Construction of a narrativised direction: Stage I – Agency and deixis

It is for <u>Mr Laws</u> of the prosecution to <u>prove</u> to you that the defendant <u>Mr Stephen</u>	1
<u>Roberts</u> is guilty. It is not for <u>Mr Roberts</u> , or his representative <u>Miss Evans</u> , to	
<u>prove</u> that he is innocent. <u>They</u> do not have to <u>prove</u> anything in <u>this case</u> ; it is	3
about what <u>Mr Laws</u> can <u>prove</u> .	
How does <u>Mr Laws</u> succeed in <u>proving</u> that <u>Stephen Roberts</u> is guilty? The	5
answer is - <u>he</u> has to <u>present</u> evidence that makes you sure he is guilty. Anything	
less than sure is not sufficient. If after considering all the evidence, which includes	7
Mr Robert’s own evidence from the witness box, you are sure that <u>Mr Roberts</u>	
<u>raped</u> <u>Miss Palmer</u> , you must find <u>Mr Roberts</u> guilty. If you are not sure, your	9
verdict must be ‘not guilty’.	

In both of the proof directions and in the rest of the narrativised summing up, naming (A) was the predominant means to evoke human individuality. In this excerpt, ‘the prosecution’ (lines 1, 3, 4) and ‘the defendant’ (lines 1, 3, 4, 6) were replaced with ‘Mr Laws’ and ‘Mr Roberts’ respectively. In so doing, the participants are personalised more than in the decontextualised summing up, which only identifies ‘the prosecution’ as the team of lawyers ‘in this case’ (Figure 5.2, line 1).

Similarly, within the decontextualised instruction, in the line ‘he does not have to prove his innocence’ (line 1), ‘he’ is a generalisation for both the defendant and his counsel. The narrativised summing up sought to identify these participants in more specific terms, and was reworded as ‘It is not for Mr Roberts, or his representative Miss Evans, to prove that he is innocent’ (line 2). As well as the defendant and counsel, the complainant was also named: in line 5 (Figure 5.2) of the Specimen Direction (‘If after considering all the evidence you are sure that the defendant is guilty’), ‘guilty’ assumes universal application; the statement can be used for any criminal trial. However, in the trial used in this study, ‘guilty’ means ‘guilty on the charge of raping the complainant Miss Palmer’. For this reason, both the defendant and the complainant were named: ‘If after considering all the evidence you are sure that Mr Roberts raped Miss Palmer’ (Figure 5.4, line 7). The second part to this ‘if-then’ clause, ‘...you must return a verdict of ‘guilty’, is also depersonalised in the Specimen Direction (Figure 5.2, line 6) and by using naming in the narrativised summing up, the participant inherently associated with the verdict in this trial (Mr Roberts) was contextualised: ‘you must find Mr Roberts guilty’ (Figure 5.4, line 8).

The instructions were also made more concrete in the narrativised summing up by deictic referencing to circumstances and to participants (B), such as ‘they do not have to prove anything in this case; it is about what Mr Laws can prove’ (line 3). In conjunction with the use of names, this situates the instruction in the immediate context. It now stands apart from its original, highly paradigmatic Specimen Direction counterpart: ‘In a criminal trial the burden of proving the defendant’s guilt is on the prosecution’ (Figure 5.2, line 2). Deixis was also applied to other directions in the narrativised summing up (Appendix 2.4):

‘Well, in this trial, Mr Laws must make you sure about three elements to prove Mr Roberts is guilty of rape’ (line 70)

‘The evidence you have heard might not answer all the questions raised in this case, but it must make you sure ...’ (line 182)

‘When you retire to the jury room to consider this evidence, you must try and reach a unanimous verdict’ (line 185).

To highlight the human participants in the trial process, 'human agent + process' structures were added, such as 'it is about what Mr Laws can prove' (Figure 5.4, line 4) and 'Mr Roberts raped Miss Palmer (line 8). The decontextualised expression of the burden of proof 'the prosecution must prove that the defendant is guilty' (Figure 5.2, line 1), which is very generalised, was changed to 'it is for Mr Laws of the prosecution to prove to you that Mr Roberts is guilty' (Figure 5.4, line 8) in the narrativised summing up. Unlike the decontextualised instructions, 'Mr Laws' becomes a human agent of the material process 'prove', in place of the abstract legal category 'the prosecution', and the jury are marked as the receiver of that process by the second person pronoun 'you'. In the narrativised summing up (Appendix 2.4), this increased reference to specific case evidence led to a notably higher number of verbal processes than used in the decontextualised instructions, such as

'Miss Palmer says that she did not consent: She says that Mr Roberts used force against her' (line 83)

'Mr Roberts denies that' (line 87)

'He told you that Miss Palmer consented' (line 88)

'Mr Roberts says he had a reasonable belief' (line 148)

The verb 'to say' occurs twelve times in the instructions overall compared to three in the decontextualised summings up.

As well as using human agency and individuality to contextualise the instructions, narrativising features were added which situated the summing up in time and place. For example, deixis was used to make reference to specific times. This did not occur in the proof directions, but did occur elsewhere:

'...the alcohol that Mr Roberts and Miss Palmer consumed that night relates to the decisions that you have to make...' (Appendix 2.4, line 137)

'... Miss Palmer and Mr Roberts claim to clearly recall the events of that night' (line 140)

Where evidence of the case and specific trial events were referred to, these occurred in past tense and (more commonly) perfect or progressive aspect:

'He told you that Miss Palmer consented to the sexual intercourse' (line 87)

'Mr Roberts said that he genuinely believed Miss Palmer consented to the intercourse' (line 101)

'The evidence you have heard...' (line 182)

'you have heard all the evidence and you have listened to the closing speeches' (line 1)

'...Miss Palmer must not have consented to the sexual intercourse' (line 80)

'did Stephen Roberts *genuinely* believe that Miss Palmer was consenting?' (line 114)

The proof directions do not contain many examples of this as they are predominantly discussing something that has not yet happened.

Having introduced linguistic features which situate the discourse in terms of participants, time and place, another group of linguistic features – which served to engage the jury or indicate the judge's personal perspective – were layered onto the directions. The result of these additional features was a narrativised summing up that was much more interpersonal than the decontextualised summing up:

Figure 5.5 Construction of a narrativised direction: Stage II – Interpersonal features.

<p><u>You may have heard</u> the phrase 'innocent until proven guilty'. That applies 1 here. <u>People often think</u> that defendants are guilty if they are on trial, but <u>that is</u> <u>quite wrong</u>. <u>You</u> must presume that the defendant Mr Stephen Roberts is 3 innocent, and it is for Mr Laws of the prosecution to prove to <u>you</u> that Mr Roberts is guilty. It is not for Mr Roberts, or his representative Miss Evans, to prove that he 5 is innocent. They do not have to prove anything in this case; it is about what Mr Laws can prove. <u>This is important</u>. <u>Do not get confused: This trial is not a battle of</u> 7 <u>which side has the most or the best evidence</u>.</p> <p><u>How then does</u> Mr Laws succeed in proving to <u>you</u> that Stephen Roberts is 9 guilty, <u>you may ask</u>. <u>Well</u>, he has to present <u>you</u> with evidence that makes <u>you</u> sure he is guilty. <u>Members of the jury</u>, even if <u>you think</u> 'Mr Roberts is probably 11 guilty', or if <u>you think</u> 'he is likely guilty', that is not sufficient. <u>You</u> must be sure that Mr Roberts raped Miss Palmer and <u>you</u> must be sure on the basis of the 13 evidence, which includes Mr Roberts's own evidence from the witness box. Only then can <u>you</u> find Mr Roberts guilty. If <u>you</u> are not sure, <u>your</u> verdict must be 'not 15 guilty'.</p>	
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First and second-person pronouns (G) were used as the primary means to heighten intersubjectivity in the text, because it was a narrativising feature that

already existed in the decontextualised instructions. The Specimen Directions for the burden and standard of proof (Figure 5.2) contained second person pronoun 'you' four times and possessive determiner 'your' once:

The answer is - by making you sure of it' (line 4)

'you are sure' (line 6)

'you must return a verdict' (line 6)

'If you are not sure, your verdict must be 'not guilty'' (line 7)

During construction of the narrativised version of these instructions, some personal pronouns had already been introduced as a consequence of the previously-added human agent + process constructions; for example, 'it is for Mr Laws of the prosecution to prove to you' (Figure 5.5, line 4). At this stage in construction, more personal pronouns were added alongside: 'How then does Mr Laws succeed in proving to you that Stephen Roberts is guilty' (line 9). Here, 'proving' is no longer abstract but attached to a specific audience. It is they who are the object of Mr Laws' proving. Similarly, in '...he has to present you with evidence that makes you sure he is guilty' (line 10), the evidence is presented specifically for the jurors in this case.

Personal pronouns were introduced prolifically to repeatedly target the listener and reinforce key points. For example, 'you are sure' (line 12) was repeated (K) to indicate its importance. The previous version of the narrativised direction (Figure 5.4) read 'If after considering all the evidence ... you are sure that Mr Roberts raped Miss Palmer' (line 8). With the insertion of another pronoun, this became 'You must be sure that Mr Roberts raped Miss Palmer and you must be sure on the basis of the evidence' (line 12). In this way, '...after considering all the evidence' was no longer embedded, and with the use of the pronoun, the jurors could be targeted specifically and the point became more salient; the jurors had to be sure having weighed the evidence (following judicial advice, 'after considering' was reworded to 'on the basis') and they also must be sure that Mr Roberts raped Miss Palmer.

First person pronouns did not appear at this stage in the proof directions, (although one is later introduced during the third stage: 'I must explain to you'

(Figure 5.6, line 3), but both first and second person pronouns were inserted heavily throughout the rest of the summing up (Appendix 2.4):

'I am going to tell you how you go about making this decision, and I'll begin by explaining the different functions that you and I have' (line 4)

'As I said, it is your responsibility, not mine or anyone else's, to decide...' (line 11)

If I do not mention something which you think is important, you should still think about it, and give it as much attention as you think it is worth (line 34)

'We are sure about that so this is not an issue and you can move on to deciding the next element' (line 78)

'Let us move away from what the law says about rape to now consider the type of evidence you have received in this case' (line 153)

'...we do not have a video recording of the incident, and we do not have a reliable independent witness...' (line 155).

These presented the instructions more dialogically than before. The majority of the personal pronouns in the summing up appeared in the four opening instructions which direct jurors on the role of the jury, the role of the judge, how to consider the evidence and the disclaimer about the judge's inadvertent expression of opinion. Given their topic, it is unsurprising that 45 personal pronouns were used in total across these four instructions. This is not such a large number in light of the 34 personal pronouns that were used in the corresponding decontextualised instructions (Appendix 2.2), for example:

When I do so, you must accept those directions' (line 4)

'... I do not mention something which you think is important, you should have regard to it, and give it such weight as you think fit' (line 23)

As well as personal pronouns, rhetorical questions (H) were used in the narrativised summing up to engage the jurors further, such as 'What does the law say about deciding rape?' (Appendix 2.4, line 69). The Specimen Direction for the standard of proof already contained a rhetorical question, 'How does the prosecution succeed in proving the defendant's guilt?' (Figure 5.2, line 4). This

question was retained in the narrativised condition, but extra narrativising features were also embedded to make it more contextualised: ‘How then does Mr Laws succeed in proving to you that Stephen Roberts is guilty, you may ask.’ (Figure, 5.5, line 9). Naming (A) had been used to individualise the participants in the trial (‘Mr Laws’ instead of ‘the prosecution’ and ‘Stephen Roberts’ in place of ‘the defendant’). Also, the addition of the second person pronoun ‘to you’ (G) engages the audience. The discourse marker (J) ‘then’ signals to the jurors a continuation from the previous point to next point. The final addition of ‘you may ask’ transforms that rhetorical question into a probable question in the jurors’ minds. This technique, in which questions and thoughts from the judge were projected onto the jurors, was applied to other directions in construction of the narrativised summing up (See Appendix 2.4):

‘Firstly, you must ask ‘did Stephen Roberts *genuinely* believe that Miss Palmer was consenting?’ (line 114)

‘... go on to ask a second question. And that question is, ‘was that belief reasonable, considering all the circumstances?’ (line 122)

‘Ask yourselves ‘Is it reliable? Does it prove that Stephen Roberts is guilty?’ (line 177)

Projections of this kind were not restricted to the narrativised summing up. In the Specimen Direction on circumstantial evidence (Appendix 2.2), the judge says, ‘You may think it would be an unusual case indeed in which a jury can say “We now know everything there is to know about this case” (line 80). Whilst this direction shows the judge accommodating to the jury, the instruction still maintains a degree of abstraction, describing what a hypothetical jury is unlikely to say, rather than what the actual jurors should be saying. The projections inserted in the narrativised summing up therefore serve a much more interpersonal function, and the judge more explicitly expresses intersubjective awareness. In the proof directions, for instance, the judge says ‘You may have heard the phrase...’ (Figure 5.5, line 1) and ‘Do not get confused: This trial is not a battle of which side has the most or the best evidence’ (line 7). Further, the line ‘even if you think “Mr Roberts is probably guilty” or if you think “he is likely guilty”, that is not sufficient’ (line 1) was used to replace

'anything less than sure is not sufficient' from the previous version (Figure 5.4, line 6). These examples show that the judge is aware that the jurors' previous experiences may have an impact on their comprehension of the law and their task.

Vocatives (H), discourse markers (J), subjective modalities (N) and the expression of judge's perspective using lexical appraisal (M), intensification (K) and authorial comment (L) were all applied to the third version of the summing up. Working together, all of these features help the judge to persuade the jury to do their duty, rather than simply informing them of their duty. For example, the corpus search revealed that the vocative 'members of the jury' was a surprisingly common feature and was therefore added into the standard of proof direction. In this instance, 'members of the jury' (line 11) explicitly draws the jurors' attention to the two thoughts he is projecting: 'if you think "Mr Roberts is probably guilty", or if you think "he is likely guilty", that is not sufficient'.

Discourse markers (J) were used to guide the jury to focus on a key point. For example, in the standard of proof instruction, the discourse marker 'well' (line 10) indicates to the jurors the forthcoming answer to a previous question: 'he has to present you with evidence that makes you *sure* he is guilty' (line 10). This 'well' served to replace 'the answer is' from the decontextualised instruction (Figure 5.2, line 4). Elsewhere in the summing up, discourse markers were used to get the jurors' attention: 'Now, members of the jury, you have heard all the evidence...' (Appendix 2.4, line 1). This was particularly effective as it was coupled with the vocative 'members of the jury'.

Typical of the interpersonal nature of the narrative mode, linguistic features were added to indicate the judge's evaluation of the content. Judges are not permitted to express their own opinion of the case evidence or the trial they preside over, but in giving a narrativised summing up, a judge can offer his own perspective and appraisal (M) of the instructions per se. For example, 'This is important' (Figure 5.5, line 7) was used to stress that the burden of proof is on the prosecution rather than the defence. Achieving a similar evaluative purpose, the intensifier (K) 'quite' was used: 'people often think that defendants are guilty if they are on trial, but that is quite wrong' (line 2).

Other explicit lexical appraisal shows the judge's evaluation of other instructions in the narrativised summing up (Appendix 2.4): 'This simply means that' (line 159) and 'You will find it helpful, I think and the court will find it helpful' (line 196). Furthermore, outside of the proof directions, modality was expressed as subjective judgements (N) in the narrativised summing up:

'You may wish to think about their arguments' (line 29)

'You may take that evidence into account when you are considering this question' (line 116)

This contrasts with the decontextualised instructions in which obligation and certainty are objectively dictated by the law, such as:

'In this case the prosecution must prove that the defendant is guilty' (Figure 5.2, line 1).

'The prosecution must prove three elements for the offence of rape' (Appendix 2.2, line 39).

'...the evidence must lead you to the sure conclusion that the charge which the defendant faces is proved against him' (Appendix 2.2, line 82).

The decontextualised instructions contain ideas on several different topics, but the relationship between those topics was never indicated. In Stage III of construction, a number of the narrativising features were added to the summing up to make it a coherent discourse. With the addition of these textual elements, the narrativisation of the proof directions was completed:

Figure 5.6 Construction of a narrativised direction: Stage III – Discourse coherency.

<u>It should be clear to you by now that you decide if Stephen Roberts raped</u>	1
<u>Rebecca Palmer on the basis of the evidence. Before I tell you what the law</u>	
<u>specifically says about rape, I must explain to you a few things about how Mr</u>	3
<u>Roberts can be proven guilty.</u>	
You may have heard the phrase 'innocent until proven guilty'. That applies	5
here. People often think that defendants are guilty if they are on trial, but that is	
quite wrong. You must presume that the defendant Mr Stephen Roberts is	7
innocent, and it is for Mr Laws of the prosecution to prove to you that Mr Roberts	
is guilty. It is not for Mr Roberts, or his representative Miss Evans, to prove that he	9
is innocent. They do not have to prove anything in this case; it is about what Mr	

Laws can prove. This is important. Do not get confused: This trial is not a battle of	11
which side has the most or the best evidence. <u>What this means is that when you</u>	13
<u>are deciding the evidence brought forward by Miss Evans, you need to consider it</u>	
<u>in terms of the extent to which it weakens Mr Laws' case. Remember that Mr</u>	15
<u>Roberts and Miss Evens are not obliged to raise doubts or provide an alternative</u>	
<u>version of events, because it is only Mr Laws' job to prove anything.</u>	
How then does Mr Laws succeed in proving to you that Stephen Roberts is	17
guilty, you may ask. Well, he has to present you with evidence that makes you	
sure he is guilty. <u>Sure is the word. You must be sure that Mr Roberts raped Miss</u>	19
<u>Palmer and you must be sure on the basis of the evidence, which includes Mr</u>	
<u>Roberts's own evidence from the witness box. Only then can you find Mr Roberts</u>	21
<u>guilty.</u>	
Members of the jury, even if you think 'Mr Roberts is probably guilty'- or	23
'likely guilty' - that is not sufficient. <u>In those circumstances you have to give Mr</u>	
<u>Roberts the benefit of the doubt because you are less than sure.</u> If you are not	25
sure, your verdict must be 'not guilty'.	

Here, general contextual information introduced the directions (Figure 5.6, lines 1-4). They round up key points from previous directions: '...you decide if Stephen Roberts raped Rebecca Palmer on the basis of the evidence' (line 1). Other narrativising features such as naming (A), human agent + verbal process (C), first and second person pronouns (G) were deliberately included at the same time. This introduction is designed to situate the instructions in the context of the other directions, using signposts like 'by now' (line 1) and 'before' (line 2). This temporal succession (O) helps to turn the paradigmatic macrostructural organisation of the directions into narrative linear discourse, and was used throughout the narrative summing up (See Appendix 2.4):

'It is now down to you to decide whether rape has been proved' (line 3)

'Let's now move on to consider the law that applies in this case' (line 66)

'Let us move away from what the law says about rape to now consider the type of evidence you have received in this case' (line 153)

'You must work through each of these elements in turn, and I will explain them to you fully now' (line 74).

Truncated clauses (Q) were also used to help the flow of the discourse: '...if you think Mr Roberts is likely guilty' (Figure 5.5, line 12) used in the previous stage of construction was truncated to '-or likely guilty' in the final stage of construction:

‘Members of the jury, even if you think ‘Mr Roberts is probably guilty’ – or ‘likely guilty’ – that is not sufficient’ (Figure 5.6, line 22). This truncation removed the parts of the instruction which made the discourse unnecessarily cumbersome, but was only applied where the construction did not have any bearing on the legal meaning of the message. In contrast, where points of law were given, often they were reinforced via paraphrase (R) or exemplification (S). For example, by adding ‘Sure is the word’ (line 19), the standard of proof direction was reorganised so that the instruction ‘You must be sure that Mr Roberts raped Miss Palmer and you must be sure on the basis of the evidence, which includes Mr Roberts’s own evidence from the witness box. Only then can you find Mr Roberts guilty’ (Figure 5.5, line 12) became a paraphrase of ‘...he has to present you with evidence that makes you sure he is guilty’ (line 18):

‘...he has to present you with evidence that makes you sure he is guilty. Sure is the word. You must be sure that Mr Roberts raped Miss Palmer and you must be sure on the basis of the evidence, which includes Mr Roberts’s own evidence from the witness box. Only then can you find Mr Roberts guilty’ (Figure 5.6, line 18).

In the explanation of the burden of proof, the judge tells the jury that the ‘...trial is not a battle of which side has the most or the best evidence’. This point was then clarified with the help of the paraphrase being explicitly signalled:

‘What this means is that when you are deciding the evidence brought forward by Miss Evans, you need to consider it in terms of the extent to which it weakens Mr Laws’ case. Remember that Mr Roberts and Miss Evans are not obliged to raise doubts or provide an alternative version of events, because it is only Mr Laws’ job to prove anything.’ (lines 12-16).

Where passages like this had to be constructed without the basis of the decontextualised instructions, the corpus of summings up was used as the source to ensure that they were appropriate. Details of the case and narrativising features

were then substituted or included as appropriate, but the paradigmatic categories that were necessary for an accurate expression of the law were maintained. In this instance, jurors must learn that the burden of proof is on the prosecution, which means that the defence do not have to prove innocence. This logical connection was maintained in the paraphrase 'Mr Roberts and Miss Evans are *not* obliged to raise doubts or provide an alternative version of events, *because* it is only Mr Laws' job to prove anything' (line 15). Likewise, the key condition-consequence sequence 'If you are not sure, your verdict must be 'not guilty'' (line 25) was paraphrased as 'you have to give Mr Roberts the benefit of the doubt *because* you are less than sure', albeit not with the same 'if...then' binary paradigm. Similarly, expressions of obligation and certainty were still necessitated externally by the law, rather than subjectively from the judge: '...you must be sure on the basis of the evidence' (line 20).

At other points in the narrativised summing up (See Appendix 2.4), paraphrases were more succinct in explaining or defining a legal category:

'You must ask whether a reasonable person, that is, someone who exercises qualities of attention, knowledge, intelligence and judgement, could genuinely believe that Miss Palmer was consenting' (line 105)

'The prosecution is therefore relying upon 'circumstantial evidence' to prove that Mr Roberts raped Miss Palmer. This simply means that he is relying on evidence about various circumstances relating to Mr Roberts and the event' (line 157)

'When you retire to the jury room to consider this evidence, you must try and reach a unanimous verdict. That is, you all must agree that he is guilty, or you all must agree that he is not guilty' (line 185)

Clarification was also given via exemplification (S) in other parts of the narrativised summing up, such as 'There has not been any direct evidence. For example, we do not have a video recording of the incident, and we do not have a reliable independent witness of the event itself' (line 154). By the addition of examples, this specific case is embedded into the definition of the legal term.

To date, the effect of this process of narrativisation has only been hypothesised. This systematic composition of the summings up means that it is possible to test whether the suggestions made by Bruner (1986, 1990) and Heffer (2002, 2005) have any empirical foundation. Crucially, all of the versions of summings-up went through numerous drafts and were carefully reviewed by four circuit judges (one of whom is the Recorder of Cardiff Crown Court), a solicitor and a linguist knowledgeable on the summing up in English and Welsh courts. This was necessary to ensure that they were accurate, cohesive and realistic, particularly in the case of the narrativised summing up. These carefully constructed summings up therefore mean that the hypothesis that narrativisation will improve comprehension can be soundly tested.

5.2.3 Dependent variable: Measuring comprehension

In this study, comprehension was assessed by testing mock jurors' ability to recall, recognise and apply the instructions they were given. Before outlining these three tests in more detail, it is necessary to justify how they were chosen. Constructing the instrument by which mock jurors' understanding of the summing up is measured is challenging because comprehension involves a complex set of processes. For a juror to understand their instructions, they must hold concepts in working memory, make inferences, and schematise the gist of a passage in their minds (Bower and Morrow, 1990). A reliable measure therefore needs to be constructed that permits access to these various facets of understanding. Unfortunately however, there is no ready mechanism for evaluating jurors' ability to complete these tasks. A number of measures have been applied in previous research, with varying degrees of success.

The difficulty in measuring comprehension has led to many researchers relying upon jurors' own assessments of their understanding. While this may on the face of it appear reasonable, analysing comprehension in this way is open to a number of limitations because what jurors say does not necessarily indicate what they really understand; jurors may claim to understand things they do not fully comprehend (Zander and Henderson, 1993: 205). Firstly, mock jurors may be susceptible to social bias. As a matter of self-presentation, jurors may be reluctant to

admit that their knowledge was limited and seek to avoid any embarrassment and claim to know more than they really did. Secondly, jurors may also be susceptible to acquiescence bias, and might provide the answers they believe the researcher wants to hear. Thirdly, jurors may genuinely believe they understand the instructions, when it is actually the case that they do not. Given the overlap in lay and legal terms, it is possible that they assign meanings to words and phrases without realising that their lay meanings are different from their intended legal meaning (Jackson 1995: 427; Diamond and Levi 1996: 232). While statements of comprehension based on self-report data are unreliable, it must be remembered that jurors are active participants, rather than simply sponges of information. As jurors will each bring their own expectations and understandings to the task of interpreting the summing up, they may well be a valuable source of guidance for improving comprehensibility (Diamond and Levi 1996). It is therefore unwise to ignore their voice entirely, and demonstrates the need to include questions about jurors' feelings and experiences of the summing up, though this should not be the primary means of assessing comprehension.

One of the most commonly-used techniques for assessing comprehensibility of judicial instructions has been the paraphrase test, initially used by Charrow and Charrow (1979). This measure asks jurors to paraphrase accurately the instructions they have heard, resting on the premise 'that a subject will not be able to paraphrase accurately material that he or she has not understood' and that they will omit the concepts they believe are less important or incomprehensible (p.1310). As jurors are invited to generate an answer of their own but using knowledge that was given in the instructions, the paraphrase technique is a more appropriate measure than the self-report. It is easily replicable and has been shown to be both reliable and workable (Steele and Thornburg, 1988) at 'getting inside someone's head' (Charrow and Charrow, 1979: 1310). The paraphrase test, however, can be criticised on the basis that the findings have equated assessing juror comprehension with memory for instructions, rather than the ability to correctly apply those instructions, which is the real task of the jury (Severence and Loftus, 1982). Even if the members of a jury were able to recite the contents of judicial instructions verbatim, the guidance provided by those instructions would be limited by the meanings that the

jurors drew from them. If those meanings deviated substantially from the legally intended ones, the result would be perfect recall – and substantial miscommunication.

Clearly then, some sort of application test would be a more relevant measure of performance, in which jurors cannot merely rely on their recall of the instructions. Some steps towards this have been taken, for example by Wiener, Pritchard and Weston (1995), Severance and Loftus (1982), and Frank and Applegate (1998). Severance and Loftus (1982) assessed participants' abilities to apply jury instructions correctly to novel fact patterns. For these, participants were presented with evidential facts of hypothetical cases and they had to indicate how far they concurred with a proposed solution or verdict given at the end. In Frank and Applegate's (1998) study, respondents were asked to state whether a juror in a hypothetical case had acted in accordance to the law. Rather than relying on memory, this test requires participants to use the knowledge they have acquired in the jury instructions. If they understand the law they should be able to apply it to the given facts of a case. In a real trial situation, jurors must also apply the law to the facts as found. However this requires two discrete cognitive functions: they must understand the law as given in the instructions and they must be able to apply that correctly to the facts. This novel-scenario task measures the second component of the jurors' role very well, however without direct questioning of the understanding of the instructions themselves, the first component remains untested.

Many researchers have opted for true/false direct questions to measure jurors' comprehension of their instructions. Studies using these measures tend to report less extreme miscomprehension than is measured in paraphrase tasks (Reifman, Gusick and Ellsworth, 1992 and Kramer and Koenig, 1990). Strawn and Buchanan (1976) compared the responses on a 40-item true/false test of jurors who had received a videotape of jury instructions and those who were not provided any instructions. Those participants who heard no jury instructions answered 60 percent of the questions correctly, while the jurors who viewed the videotape showed 70 percent comprehension overall. There are limitations to this approach, as true/false questions might lead to correct responses through guessing. This makes it difficult to get an exact read of comprehension levels. Guessing would result in a 50 percent

correct response rate, and it must be noted that any scores significantly above this level reflect at least some understanding of the concept tested. However scores below 50 percent are more difficult to interpret – it could be the presence of misconception (a belief that the wrong answer is correct rather than the absence of knowledge) or a problem with the question itself. As such, multiple-choice questions that require a more informed decision, such as those used by Greene and Johns (2001), are more appropriate. Multiple-choice questions ask about a given jury instruction, and participants have to identify the correct answer from a selection of at least three or more possible responses. Closed questions, rather than open-ended questions as a means of directly assessing jurors' comprehension are necessary because the wording of the questions can have an effect on the results obtained. If participants are unsure of what is being asked of them and that question is misinterpreted, their answer will not be an accurate reflection of their understanding of the law. Constraining jurors to recognise the correct response from a pre-written answer avoids this issue.

It should be noted that being able to distinguish the preferred answer in a multiple choice format does not imply that one has complete understanding of the concept. This is why a combination of measures looking at different facets of jurors cognition is appropriate. Using a combination of tasks will also mean that the tasks will vary in difficulty for the jurors. This variation is desirable for two reasons. First, by using the wording in the instructions to form the questions, the questions will reflect a reality about the difficulty of the instructions themselves. Secondly, it reflects the fact that the jurors' abilities are likely to vary broadly (Anastasi, 1976). A questionnaire with uniformly easy items probably would do little to assess jurors' comprehension of more difficult aspects of instructions, while uniformly difficult items might differentiate comprehension levels among the brighter jurors. Variability in the difficulty of items, however, might reveal whether jurors understood the basic meaning of the instructions as well as their more subtle distinctions (Kramer and Koenig, 1990). Paraphrase, multiple choice and application tasks test different aspects of comprehension as well as varying in their level of difficulty. They therefore make a good combination of measures appropriate for this study. Further, assuming that no measure is perfect and that all measures suffer from some

weaknesses, there is a strong case for use of multiple measures; Agreement across multiple methods with differing weaknesses builds strong inference (Campbell and Stanley, 1966). Many researchers have employed such a multi-task approach, likely with this in mind (for example Frank and Applegate, 1998; Severance, Greene and Loftus, 1984; Wiener et al, 1995). Support for a multi-task approach comes from Rose and Ogloff (2001), who found that participants may be able to apply instructions to a certain extent, but they may not be able to verbalise them. This use of question-by-question declarative analysis allows identification of those parts of the application test (and by inference, those parts of the instructions) that caused problems for respondents and the parts that did not. This ability to focus on the underlying content of the judicial instructions may be the most important feature of the application test.

In this study, a juror comprehension inventory (hereafter 'jury survey') was constructed, comprising a paraphrase measure, multiple-choice questionnaire and novel-scenario test (see Appendix 3.1). The multiple-choice questionnaire and paraphrase task relate to assessing comprehension in terms of jurors' recall and recognition memory for instructions. Additionally, because a key task for the jury is to understand those instructions in order to correctly apply them to the case, a novel-scenario task was constructed as a third relevant measure of performance..

In order to obtain the right items and questions for the survey, two circuit judges reviewed early drafts to comment on possible misinterpretations and offer alternative questions. In order for difficulty to vary inter- and intra- task, it was important to ensure that the questions posed to jurors were not too general or lacking in context. Every effort was made to ensure that wording of the questions was kept to the wording of the instructions in simple and plain English. The survey was subject to extensive pilot testing, primarily to ensure that each of the questions and tasks were successful. For example, if all jurors in the pilot sample had answered a question correctly, testing with that question in the real study would probably be uninformative. In such a case, the question would have been replaced with another which would have been more revealing about possible sources of juror misunderstanding. The survey and experimental materials was piloted on 62 participants, and no problematic questions were revealed. Follow-up group

interviews with twelve of the pilot participants confirmed that there were no unforeseen ambiguities in the wordings of the questions. Although no changes were necessary for the tasks, minor revisions were made to the survey more generally. For example, the survey initially had been designed with open-ended qualitative questions at the very end. Very few participants answered these questions, and those that did wrote exceptionally little. The focus-group with the twelve participants indicated that participants were suffering fatigue effects as a consequence of the length of the experiment. As such, these open-ended questions were removed as they shortened the survey and may not have yielded substantial information. Another change made to the survey was to indicate to participants to turn over the page for the next section of the survey. This was to ensure that participants completed all of the tasks.

The main section of the survey comprised 33 items to provide an objective measure of jurors' comprehension. Each of the three tasks asked eleven randomly-ordered questions which related to each of the directions in the summing up. In the novel-scenario task, each question described how a hypothetical juror interpreted certain facts of the case, and then stated whether the juror voted in favour of a guilty verdict. The respondents were asked a yes/no question as to whether this juror had correctly followed the legal direction. For example the following scenario was used to measure the mock jurors understanding of the standard of proof:

Based on the evidence, a juror decided that Stephen had more likely than not raped Rebecca. Consequently, the juror gave a guilty verdict.

Did the juror follow the judge's directions? YES NO

The scenarios were made using recordings of the actual deliberations from the televised mock trial. The application questions had been randomly assigned such that five questions were correctly answered in the affirmative, and six in the negative. These were scored either 1 or 0 depending on whether the participant had

answered correctly or not. Participants who said 'I don't know' or didn't answer were scored 0.

Adopting the approach used by Rose and Ogloff (2001), the paraphrase task to test recall was incorporated within the application test. This reduced the time it took for participants to complete the questionnaire and would reduce the likelihood of boredom or fatigue effects. After each application question, respondents were required to write in their own words the legal principle given by the judge that they applied to the question. Their answers were scored 0 or 1 according to whether or not the legal principle was paraphrased correctly. The combined novel scenario and paraphrase item that tested jurors' understanding of the standard of proof direction was as follows:

<p>1. Based on the evidence, a juror decided that Stephen had more likely than not raped Rebecca. Consequently, the juror gave a guilty verdict.</p> <p>Did the juror follow the judge's directions? YES NO</p> <div style="border: 1px solid black; padding: 10px; margin: 10px 0;"><p>In your own words, explain the judge's direction that the juror did or didn't follow.</p></div>
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The paraphrase task and the novel scenario task were completed simultaneously and undertaken before the multiple-choice questionnaire. This order was not counterbalanced between conditions because the questionnaire could inform jurors' answers on the paraphrase and novel-scenario task. The multiple-choice test was directly related to the case the respondents had just heard. They were required to

recognise one correct answer from other incorrect expressions of the meaning of a given direction. For example the multiple-choice question testing jurors' understanding of the standard of proof was as follows:

16. Complete the sentence: Before convicting Stephen Roberts of rape, you must _____ that he raped Rebecca Palmer

- a) be absolutely certain
- b) think it is more likely than not
- c) think there is a reasonable probability
- d) be sure

There were 11 questions (one for each direction in the summing-up) with four plausible alternatives to each question; one point was awarded for each correct answer. The order of questions did not correspond to the order that the directions were presented in the summing up. The major and often quoted criticism of multiple choice questions (that respondents' answers are constrained by researchers choices) is offset by the other two methods of comprehension measure, and the use of subjective measures at the end of the survey.

To probe more into the jurors' mindset, the survey closed with three seven-point attitude scales which gauged how well jurors felt that they concentrated, how much they understood and how interested they were in the summing up:

23. How much of the judge's summing-up did you understand? (Circle a number on the scale)

1	2	3	4	5	6	7
I didn't understand						I understood everything

These subjective measures were used to help interpret the findings from the three tasks, and not used to measure for jurors' actual comprehension. Participants

in the pilot testing showed central tendency bias and so the attitude scales were changed from five points to seven points. An odd number of points were chosen for the scale rather than adopting a forced-choice method, in case jurors genuinely did not feel one way or another and wanted to place themselves in the middle of the scale, particularly for the questions relating to interest and concentration.

Alongside the objective measures and attitude scales, the jury survey also included elements to improve the external validity of the design, and to provide possible justification for the findings. For example, in order for the participants to approach their task in the mindset of jurors, they were asked to individually decide a verdict based on the evidence they had seen in the film. As such, the survey asked for their verdicts as the opening question. An analysis of these decisions is redundant as they yield no information as to the comprehensibility of the directions; however, they do serve to increase the strength of the design, and as a result increase confidence in the findings.

5.3 Participants

A total of 102 participants (34 participants in each condition) were recruited across the three mock trials. Each condition included at least 30 participants as this number allows approximately 95 percent power to detect significant effects (Faul and Erdfelder, 1992). This number of participants was deemed appropriate because employing an alpha at the 0.5 level, assuming a medium effect size and using an ANOVA, statistical power was 90.6 percent. Participants were obtained by opportunity sampling from a jury eligible community in Southampton. This was achieved through advertising (see Appendix 1.1) on notice boards on each floor of the two largest NHS hospitals in Southampton City Centre and in one outer-city hospital, and in two different free monthly local newsletters in the parish where the study was to be conducted. In the absence of access to the electoral register, it was felt that recruiting from a hospital ensured the flier would be seen by a large number of people and by a cross-section of the public in one specific catchment area. Also, the local newsletters are posted through every door in the town and as such do not discriminate for socio-economic status, gender, employment etc. These approaches

therefore intended to control for catchment area and the statutory requirements for jury service.

Research widely suggests that individual characteristics are rarely determinants of juror comprehension (Sealy and Cornish, 1973a; Hepburn, 1980; Bonazzoli, 1998; Thomas, 2010) and as such no steps were taken to engineer specific demographic representation across socio-economic, age, racial, education or gender groups. Although research has found that age, gender or race has no effect on instruction processing (Frank and Applegate 1998; Lieberman and Sales 1997), some researchers have found however that there *is* a relationship between education and instruction comprehension (Buchanan et al 1978; Charrow and Charrow, 1979; Diamond and Levi, 1996; Frank and Applegate, 1998). A comparison of the participants between the three groups shows that education levels are distributed comparatively between the three groups (see Appendix 3.2), which means that any improvements in comprehension from one condition to another in this study is unlikely to be because participants in one condition were more highly educated than another. Further, to control for the effect of tuition on jury instruction, any participant who had previously received any formal legal training was excluded. Although legal professionals are now allowed to sit on a jury, and have the opportunity to impart their knowledge to other members during deliberation, this study is concerned with the comprehension of individual jurors, and not the group comprehension of a deliberating jury. None of the participants had served on a jury in the past five years, which controlled for exposure to courtroom proceedings and jury directions. Participation was voluntary, and only one participant withdrew. Subject to the University's ethical clearance procedures, participants were fully informed and debriefed, and consented to being tested (see Appendix 1 and section 5.6).

5.3.1. The sampling pool

Unable to fully test jurors sitting on actual trials, other participants were sought to role play as jurors for this study. Importantly, research has found that comprehension levels of jury instructions are poor in real jurors and mock jurors alike (Kramer and Koenig, 1990; Moran and Comfort, 1982; Reifman et al, 1992;

Sandys and Dillehay, 1995; Sealy and Cornish, 1973b; Hepburn, 1980; Bonazzoli, 1998). However, as mock jurors should resemble 'real' jurors as far as is achievable in order for (externally) valid conclusions to be drawn, attention still needs to be paid to the sampling pool from which the participants were recruited.

To be a juror in England and Wales, members of the public are selected by the Central Summoning Bureau using a computer programme that randomly selects potential jurors from the Electoral Roll framed by the postcode areas included in the catchment area of a criminal court. A potential juror must be aged 18-70 and have lived in the UK for at least five years after the age of thirteen. People who are suffering from a serious mental disorder or have been sentenced to a term of imprisonment of five years or more are disqualified. The scope for selecting jurors is very limited in the UK, Australia and New Zealand and there is no 'voir dire' (pre-trial questioning of jurors) equivalent to that in the USA. This landscape offers the criteria by which mock jurors in the present experiment were selected.

Although these selection criteria are quite broad, this study needed to recruit a large number of respondents in order to draw statistically valid conclusions. University students who are required to participate in studies in exchange for course credit provided a readily available sampling frame which would yield high numbers of participants to take part in the study. However, participants were recruited from the wider community by advertising in local newsletters and hospital notice boards, even though this type of sampling would yield fewer respondents.

This choice to rely on volunteers has its limitations as there are problems inherent in self-selecting participants. For example, jurors who volunteer may mean that they differ, not only demographically, but also attitudinally and cognitively, from those who participate on real juries. For example, it has been suggested that participants who volunteer to take part in an empirical study may be brighter and generally may have higher rates of comprehension than jurors who do not volunteer. Further, participants may volunteer as jurors because of a particular interest in the subject matter, or because of an inherently altruistic or socially conscious nature that differentiates them from the average person on a jury (Braunack-Mayer, 2002; Catania, 1997).

In light of these limitations of self-selection, most researchers have turned to – and advocate – the use of university students as participants (Weiten and Diamond, 1979). Aside from being easy to recruit in large numbers, they can also be recruited at relatively low cost. However, using the student population also presents certain limitations. Primary among these is the lack of control over a variety of factors that might influence juror comprehension, and therefore the verisimilitude of the study. Sears (1986) found that students are particularly susceptible to normative pressures, especially from peers, and are more accomplished at cognitive tasks than many members of the general population. Similarly, Miller, Fontes, Boster and Sunnafrank (1976) found that student jurors manifested significantly greater retention of trial-related information than did actual jurors. Thus, there may be important cognitive as well as attitudinal differences between students and real jurors which could plausibly produce divergence in their decision making, and researchers might risk overestimating the ability of ‘real’ jurors to handle complex trial testimony or instructions.

Research does find, however, that there are few differences between student and jury pool samples (Casper, Benedict and Perry, 1989), even though they are not representative of an actual jury in terms of age, education level, wide life experience, or the relative frequency with which they serve on actual juries (Darbyshire et al, 2002). With this in mind, it is not altogether clear what the impact of using students is on juror studies. Until it is possible to identify the differences that will or will not have an impact, recruiting from a sample of eligible jurors from the community is the more suitable source for maximizing both face and external validity (see for example Bermant, McGuire, McKinley and Salo, 1974) and modelling juror behaviour.

5.3.2. Assessing how well mock jurors emulate real jurors

As this study aims to apply the findings from the simulation to the real setting, it is important to be mindful of how closely participants are likely to adopt the role of juror. In this simulation, participants were required to ‘role play’ jurors, yet they may not have been motivated to pay attention to the instructions and evidence or take the task as seriously as much as ‘real’ jurors. For ethical reasons,

participants were made aware from the outset that they were in an experiment, and as a consequence, regardless of how realistic the setting was, they may simply not have taken their role as seriously as they would have if they were in a real trial. This is because they do not bear the responsibility of the fate of the defendant (Baldwin and McConville, 1979: 12; Ogloff, 1991; Bermant et al 1974). As Balch, Griffiths, Hall and Winfree (1976: 281) point out, no matter how intensely experimental participants become involved in a case, they are only playing a game. Games can be as engrossing as real life, but the players still realise that no one's future depends on the outcome.

It is true that this 'role-playing' aspect of mock juror simulation creates an inevitable lack of verisimilitude, and makes any uncritical generalization of experimental findings to 'real' courtrooms problematic. That said, it is important to emphasise that previous research has not found compelling evidence that there are problems associated with mock jurors not taking their tasks seriously (Hastie, Penrod and Pennington, 1983: 41, McCabe and Purves, 1974: 4). If the claim, for example, is that mock jurors will be less inclined to take their task seriously, then this suggests that they would be more likely to make legal mistakes than their 'real' counterparts. But this does not appear to be the case. Indeed, researchers have established the existence of a similar rate of error among 'real' jurors (Reifman et al 1992). Moreover, if the point is not so much that jurors will make more mistakes, but rather that they will be less engaged overall, then this again is not fully established. Studies that have specifically tested differences in verdicts between real and role-playing jurors have produced inconclusive results (Kerr et al, 1979 and Zeisel and Diamond, 1978), and further, Bornstein and McCabe (2005) argue that mock jurors, despite their 'pretend' role, do become highly involved in the trial process, often taking the role as jurors very seriously indeed.

5.3.3 Determining the extent of the role play

This study asks the participants to role play jurors, but it deliberately does not ask jurors to fully encompass the role to sit as a jury and deliberate. Very few jury simulations, even those that are more elaborate and lengthy, include an

opportunity for extended group deliberation. The prevailing view, which can be traced back to Kalven and Zeisel's 'liberation hypothesis' (1966), is that most jurors have already decided their verdict before they retire to deliberate and that deliberations play a minor role because the pre-deliberation decision of the majority generally prevail in the end. This has been borne out by studies by Sandys and Dillehay (1995); Stasser, Kerr, and Bray (1982); Rose and Ogloff (2001). Kalven and Zeisel (1966) found that 90 percent of the 'real' jurors in their post-deliberation survey had reached their decisions before deliberation. The research of Hastie et al (1983) on the Story Model suggests that once jurors have constructed their narrative of what they believed happened as the evidence is being presented, it is resistant to change (although they did admit in later work (Pennington and Hastie, 1990: 102) that the relationship between individual jurors' initial verdicts and the final jury verdict is more complex than previously assumed). Hastie (1983) also demonstrated the biasing effect of extralegal evidence, even in the face of judicial instructions to disregard it. This suggests that providing deliberation may be more likely to interfere with juror's comprehension than to enhance it.

Many authors, however, argue that focusing on the decisions of individual jurors tells us very little about the decisions which a jury, as a whole, would make (Davis, Bray and Holt, 1977; Loh, 1981; Weiten and Diamond, 1979), and a growing number of studies indicate that deliberations sometimes do influence outcomes. For example, Young, Cameron and Tinsley (1999: 50) concluded that 'in most cases, deliberations were a highly significant part of the process', with 22 percent reaching a decision after having begun discussions undecided. Kerwin and Shaffer (1994) found that student jurors who participated in deliberations were more likely to follow judicial instructions to ignore inadmissible testimony than jurors who responded individually without deliberating. Thus, including deliberations in the study provides jurors an opportunity to share information and correct one another's errors and consequently improve comprehension.

One would hope of course that deliberation does improve comprehension of the judicial instructions – it was stated in *Free v. Peters* (1993) USLW that each individual juror does not have to understand all the instructions, rather jurors simply need to reach some level of understanding as a group. Crucially, however, there has

been no consensus about the overall direction of influence in comprehension during deliberations (MacCoun and Kerr, 1989; Devine, Olafson, Jarvis, Bott, Clayton and Wolfe 2004). Jurors in Ellsworth's (1989) study showed greater comprehension of trial testimony following deliberation, but they did not show greater comprehension of the judicial instructions on the law. And in Diamond and Levi's (1996) study, jurors showed a significant improvement in comprehension of legal instructions, but only when a substantial majority began deliberations with a correct understanding of the relevant instruction. On the other hand, when Landsman, Diamond, Dimitropoulos, and Saks (1998) tested the impact of deliberation on comprehension of four issues related to liability and damages, they found that understanding of three of the four items was worse after deliberation. In this case, some of jurors may have been misinformed about these issues and may have led the others astray. The pattern in the research therefore suggests that deliberations will reduce error rates only if a significant proportion of the jurors begin deliberations with correct information; otherwise, deliberation may simply reinforce the inaccuracies of the majority. This provides a compelling argument to measure and improve the comprehension of individual jurors *before* they deliberate. Post-deliberation testing of juror comprehension may not provide an unambiguously clear picture of how comprehensible the instructions are when they are given. The problem with deliberation-inclusive studies is that the researchers have placed too much importance on the output, or function, of participants as jurors asking, for example, for verdicts, sentencing decisions and guilt ratings. They therefore neglect the importance of input variables, or the process of the phenomenon being studied. For the purposes of this study, the concern is an element of the trial - jurors' comprehension of the instructions - *not* with the verdicts jurors decide. It would be a mistake therefore to fall into this trap of focusing on functional verisimilitude at the expense of structural verisimilitude. So with this in mind, though the general call is for simulations to include deliberation, the primary outcome of this research is to enable jurors to go into deliberation with a clear understanding of the law and their duties. There is undoubtedly value in examining the individual juror, so given that previous research has shown that going into the jury room can exacerbate any misunderstandings a juror has if they are similarly misunderstood by the majority,

the present study is concerned with pre-deliberation juror comprehension. In discussing the results of this study, individual decisions will not be equated with group verdicts.

5.4 Materials

There can be considerable scope in how closely a simulation of a trial approximates the real thing. In this study, it was decided that using a videotape of a trial was a practical and effective choice to examine the linguistic comprehensibility of jury directions, without compromising the external validity of the results.

Permission was granted to use a constructed rape trial from a programme entitled 'Consent' that had been made for and aired on Channel 4 in 2001. This show was useful for the purposes of this study because there was no essential disagreement about the 'facts' of the case; instead the evidence and counsel arguments centred on the *interpretation* of the 'facts', that is, whether the sex was consensual or rape. This means it has the potential to really highlight the disparity between the cognitive modes – the paradigmatic perspective concerned with weighing the evidence in terms of the definition of 'consent' and 'rape', and the narrative reasoning concerned with the details of the event, reading emotions, attitudes and opinions. It therefore provided an excellent reconstruction of a trial to use in the present study. The trial was based on fictitious events with actors playing the defendant and primary witness, but was set in a real English Crown Court with a genuine judge and barristers building a real case. This is the most comparable scenario to an actual trial until the relaxation of the Contempt of Court Act 1981, and thus provides the most ecologically valid set of legal directions achievable.

The case offers a realistic interpretation of a rape case brought to trial. The defendant 'Mr Roberts' and primary witness 'Miss Palmer' are work colleagues in their twenties, who on the night in question, attended a party that was hosted by a client. The facts agreed are that when the heel on Miss Palmer's shoe breaks, she leaves the party. Mr Roberts follows her and they kiss. The disputed facts in the case are whether the subsequent intercourse was consensual or not.

The programme was edited so that the mock jurors received the same information the jury would see had they been in court. That is, they saw the opening of trial by the court clerk and judge in full, and the closing speeches from Counsel in full also. The examination-in-chief and cross-examination of witnesses taking the stand was presented as an edited montage, with substantive evidence left for the jurors to hear. Photographic evidence of injuries were presented on-screen for the jurors also. The film was therefore brief (44 minutes) in comparison to a real rape trial which can last days or weeks. This brevity was deliberately sought to help maintain the interest and motivation of the participants, whilst providing sufficient information for them to perform their task.

To remove the effects of familiarity on test performance, any participant who had been previously exposed to the trial material that had been publicly broadcast on Channel 4 was excluded from the study. A professional actor familiar with the law played the judge and was filmed delivering each of the summings up, with the recording added to the end of the Channel 4 *Consent* programme. Film recordings were used rather than live delivery so that all participants heard the material the same way, to control for any variables such as tone or pace that might confound the results. An actor was used because of the difficulties of finding a judge available for the role. The use of the actor made it easier to ensure the recordings could be as consistent as possible across the conditions.

5.4.1 Assessing how to simulate the trial

Alongside the choice of participants, the choice of materials and trial stimuli poses a serious threat to the external validity of jury simulations (Weiten and Diamond, 1979). As already observed, there needs to be a fine balance between achieving realism to the study and maintaining an appropriate level of experimental control. If the trial stimuli are too artificial then the results are less likely to reflect the behaviour of real juries (Elwork et al 1977; Severance and Loftus, 1982).

Whilst jury simulations have ranged from the extremely schematic to the extremely realistic, studies have frequently relied on minimally complex and artificial stimuli, such as brief 300-word trial vignettes or excerpts from trial transcripts.

Certainly, as Lieberman and Sales (1997: 592) described, there have been a number of simulation studies conducted in which the stimuli are 'so far removed from the dynamics of an actual trial that it is difficult to place high confidence in their findings'.

Trials are complex, time-consuming events, and without a real-time enactment of a trial, jurors are denied a significantly more detailed and engaging stimulus. Apart from anything else, these stimuli are problematic because their written format deprives mock jurors of a key source of information available to 'real' jurors, who are known to devote considerable attention to the non-verbal behaviour of the parties (Pryor and Buchanan, 1984). It may therefore be the case that in the context of an abbreviated trial – where for example jurors lack the overall trial context, or the counsel addresses – experimental effect sizes will be magnified and jurors' comprehension is compromised (Charrow and Charrow, 1979 and Baumeister and Darley, 1982). Weiten and Diamond (1979) provide limited evidence that the mode and the complexity of stimulus material makes a difference to the verdicts of simulated juries. When mock jurors have been given skeletal case information, distorted thought processes are particularly likely because the likelihood that stereotypes will be used to 'fill in the gaps' is maximized (Diamond, 1997; Hamilton and Sherman, 1996). The idea is therefore that the more extensive the familiarity with the trial participants and events, the greater ground the juror has for informing their task.

However, there is research which demonstrates the falsity of this hypothesis, observing no difference between reactions to abbreviated and more extensive trial stimulus materials (for example Kramer and Kerr, 1989). Elwork and Sales (1985), using a videotape of an actual trial (and therein including all elements of a trial), found that subjects who had watched the trial and deliberated on a verdict still performed at an average of 40 percent on a post-deliberation questionnaire, misunderstanding many of the most important legal points.

There is ample evidence that 'real' jurors may not have needed much longer (Zander and Henderson, 1993; Kalven and Zeisel, 1966). Further, Bornstein (1999) much more recently reviewed case summaries and audiotaped transcripts and found that the effect of presentation is minimal and often non-existent. He found that

presentation medium does not have an effect in the majority of cases, exerting a main effect on mock jurors' verdicts in only three of eleven studies. Furthermore, the studies where a main effect was found offer conflicting results. Rose and Ogloff (2001) found that there is very little comprehension difference between written and videotaped presentations of legal instructions, on either application or paraphrase-recall tasks. They did note, however, that video presentation of instructions did result in participants being more confident of their correct answers on their application test than their incorrect ones, both in terms of their understanding of the legal principles involved and their ability to apply those principles to the facts. This suggests that, for the purposes of this research, providing a full trial context was not necessary, which is opportune given the large cost and amount of time it takes to make elaborate materials. Showing jurors a video is arguably sufficient, and by providing both the audible and visual components of a trial, the format provides a highly engaging situation which instils greater confidence than using written vignettes and audiotapes, where the judicial instructions are dealt with in isolation (Dumas, 2000a: 723).

Jurors in this study were provided the instructions within the context of a case, able to see defendants and witnesses take the stands, photographic evidence, as well as the closing speeches before the judge's summing up. The videotape is also helpful because jurors could glean information through intonation, facial expression and other body language. At the same time, it was possible to scale down the sheer volume (though not necessarily substantive content) of evidence presented to the jurors, and omit the usual periods of disruption and delay that typify 'real' court proceedings, and thereby truncating the stimuli to less than an hour. If comprehension levels are found to be low in this truncated trial context, it is unlikely that providing those instructions, along with two or more hours of other legal instructions at the end of days or weeks of evidence and addresses, would make the particular instructions more comprehensible. Therefore, in the present study, any lack of situational verisimilitude in the stimulus materials only strengthens the evidence of the incomprehensibility of such jury instructions (Elwork et al 1982; Elwork and Sales, 1985).

5.4.2 Deciding the case to present

Choosing the right type of trial to present to the jurors is an important decision. The jury instructions will relate to that trial and that is what any conclusions will be drawn upon, so it needs to be useful. In this study, a rape trial was deliberately chosen, which is a less typical choice compared to other jury research.

The focus in American jury research tends to lie with capital punishment cases, predominantly cases of homicide because this is where the need for the jury to carry out their task fairly in accordance with the law is paramount, because their decision is one of life and death and the consequences of bringing a wrong verdict could not be more severe. In England and Wales, capital punishment has been abolished, but for the purposes of this research there needs to be an equally serious offence for the jurors to take their role seriously. As in the US, murder is one of the most serious offences a person can commit, with sentences of up to life imprisonment. The offence of rape is another serious offence, but with more reported cases than murder it is arguably more of a social problem and in no other crime is the victim subject to so much scrutiny at trial.

Home Office data on reported rape cases in England and Wales show a continuing and unbroken increase in reporting to the police over the past two decades, and today, recorded rapes are at an unprecedented high (the tally of recorded rapes rose by 247 percent between 1991 and 2004 (Cochrane, 2010), with the figure thought to be well in excess of 50,000 rapes per year). The British Crime Survey 2010 (Home Office 2010) indicates that one in every 24 women aged over 16 in England and Wales will suffer an attempted rape or rape in their lifetime. The use of a rape trial is pertinent to this study because, firstly, concern has long been expressed in the UK in regard to the legal processing of rape cases, such as the high rate of attrition as cases 'fall out' of the formal criminal justice system (Gregory and Lees, 1996; Harris and Grace, 1999). Secondly, there has been a relatively recent reform of the English law on sexual offences, and there have not yet been any studies investigating the updated jury instructions from the Sexual Offences Act 2003. Thirdly, it has been reported that when rape cases do get to trial, jurors are

confused by the law of rape because there is disparity between lay conceptions of rape and the actual legal definition, and they are susceptible to prejudicial assessments of the complainant (Ellison and Munro, 2009). Under current legislation, Part One of the 2003 Sexual Offences Act dictates that it is largely a matter for the jury both to determine the absence of a complainant's consent, and to assess whether the defendant has a reasonable belief that the complainant consented which constitute the grounds for criminal liability. However, research suggests jurors have other criteria which they use when deciding rape. A lack of physical resistance (Ong and Ward, 1999), delayed reporting (LaFree, 1980), calm emotional demeanour (Taylor and Joudo, 2005) and the powerful idea that women frequently lie about rape (Jordan, 2001) have all been shown as persistent criteria that jurors use to undermine a guilty verdict.

Given such confusion about the law, there is a great need for the judge to instruct, guide and educate the jury coherently and comprehensibly about these issues (Wolchover and Heaten-Armstrong, 2008). The Court of Appeals' recent decision in *R v. Doody* (2008 EWCA Crim) has confirmed the feasibility of this and, as such, a rape trial was the appropriate choice for the present study.

5.5 Procedure

Testing took place on three separate evening dates, two at the weekend and one on a weekday to recruit as many participants as possible. A community centre was selected as the testing location, because it had multiple rooms which meant all three conditions could be tested on the same occasion. Initially the study was to be conducted in Cardiff University moot court, to provide jurors with a greater sense of realism about their task. However, the size of the room would not be big enough to allow the jurors space to complete their survey with privacy. Furthermore, the centre meant projectors and large screens could be used which were a more suitable means for showing the video to a group of people. In most mock jury research, participants are offered a monetary incentive or course credit in exchange for taking part. By using the community centre it was possible to offer jurors a hot buffet in

exchange for their participation, which would have not been possible using the moot court.

After reporting to the testing location at a specified time, participants were randomly allocated to one of the three conditions. The three conditions were staggered by ten minute intervals, which meant that participants who had arrived late could still take part in the study by joining the condition that had not started yet. Although this meant that the allocation of these late-comers was no longer random, it allowed for the inclusion of four more participants in the study. The staggering of conditions meant the same researcher could answer any questions for every group after the instructions had been given. The ordering of the how the conditions were staggered across the three dates was counterbalanced to control for any effects that time of day might have on the respondents. The instructions (see Appendix 1.5) were given by videotape to ensure consistency across all groups and testing dates. They explained the purpose of the study and explained that the jurors would be watching summarised proceedings of a rape trial, including a judge's summing up, and acting as jurors to decide a verdict. They were told they would then complete some written tasks based on their role. Before the opportunity to ask questions and sign their consent forms, participants were told they were allowed to make notes if they wished and were each given a written copy of the indictment for the case (see Appendix 2.1). These are tools available to jurors in real trials. Research has shown that consequentiality of the task may have an effect (Bornstein and McCabe, 2005) and so jurors were also told in the instructions that they were to decide a verdict. The judicial instructions or summing up were not mentioned. It was felt that the jurors had to approach the trial stimulus in the mindset of jurors deciding a verdict, rather than as participants being tested on the comprehension of the summing up. Asking the jurors for their verdict, also provided them with additional motivation for engaging with the task seriously. The jurors were then played the appropriate film and summing-up depending on the condition.

True to real trials, the film was only played once before completing the jury survey. For all the tasks, participants were given unlimited time to write their answer. Giving participants a time constraint would risk losing detail and would affect performance by adding pressure. Instructions were written at the top of the

page before each of the tasks (see Appendix 3.1). In turn, mock jurors completed the combined novel-scenario and paraphrase task, then the multiple-choice questionnaire and lastly the seven-point attitude scales. Participants were told they were not allowed to amend any answers on a previous task once a new task had been started, in case subsequent activities informed prior answers. Finally, participants filled in a demographic questionnaire and received a full debriefing. None of the materials were collected until the respondents had completed all of the instruments. The entire procedure took approximately one and a half hours, depending on the condition.

5.6 Ethical Considerations

Social research must take into account many ethical considerations along with scientific and practical ones as already discussed in this chapter. Every researcher has an obligation to protect their participants from physical, social, economic and psychological risks (Babbie, 2010) and there are a number of ethical principles which apply to juror research, particularly in studies like this which focus on rape. In this study, five basic safeguards were applied:

- 1) All volunteers did so freely; there was no pressure exerted;
- 2) Only volunteers who were fully informed of the study and its procedure could consent to taking part;
- 3) Participants were free to leave at any time and for any reason, without having to explain
- 4) The study was explained in a thorough debriefing
- 5) Participants were granted anonymity and confidentiality in their responses

Specifically, the precautions developed for this study concerned: the materials that were used, voluntary participation (points 1 to 3 above), deception and debriefing (point 4 above), data protection (point 5 above) and lastly, monitoring.

5.6.1. Materials

From the outset, it was a possibility that some participants might experience discomfort or distress because of the decision to use a rape trial for the study. The video of the trial and the summings up contained some occasional explicit language and some graphic evidence. This material could have been disturbing to both participants and to those who were involved in the construction of those materials, particularly if these sensitive issues resonated with any personal experiences. Since there may be some general concern about the use of a rape trial, the depictions of the evidence and the trial itself were adapted and abridged from a program already available to participants via public television. This program showed a mock trial, that did not involve actual people or events and had been aired without any warnings to viewers. Nevertheless, to minimise the risk of distress, the materials were explicitly discussed before anyone was exposed to them (see 5.6.2). This way, participants knew what to expect and were able to opt out if they so chose. Furthermore, the researcher remained close at hand throughout the study in case any questions or problems arose, and also to monitor the jurors for any signs that they were uncomfortable or unhappy.

5.6.2 Consensual voluntary participation

Most professional and institutional, national and internal guidelines and ethical codes for research demand that participants consent to research before it commences (American Sociological Association, 1999; British Society of Criminology, 2003; RESPECT, n.d.). Crucially, this consent to participation must be both voluntary and informed. In this study, participants self-selected themselves for the study having responded to the flyers advertising the research (See Appendix 1.1). The study required a few hours of their time and asked them to engage in an activity they had not requested, so it was important that participants had volunteered rather than being coerced. As discussed earlier, self-selection may lead to an attitudinal or cognitive composition that may not be wholly representative of the general population, but this practical constraint is outweighed by the assumption that participants are unlikely to have volunteered for something which they would find

uncomfortable or dislike. Considerable care was taken to ensure that at the outset participants were all given a detailed but non-technical description of the study and its purpose (both orally and in writing, see Appendices 1.4, 3.1) and that they fully understood what their participation would entail, which included watching a rape trial. This meant that volunteers were free to take part or not take part as they chose. Furthermore, when the participants arrived for the study, it was made clear to them that they could decide not to participate and were free to leave at any time without having to offer a reason. They were also given the opportunity to discuss any issues or questions with the researcher before signing a consent form and beginning the study. In many instances it is necessary to obtain consent at different points throughout a research project (Silverman, 2000: 201); however, the standardised, overt and short-term format of this study meant that the research activities would unfold in a predictable context. For this reason, it was possible to provide participants with realistic assurances and detailed information at the outset of the experiment and give out consent forms at that initial stage (see Appendix 1.2).

5.6.3 Debriefing

The debriefing at the end of the study provided a more detailed explanation of the aims of the study introduced at the start (See Appendix 1.3). At the outset, participants were told that they were being studied to understand the thought-processes of jurors when deciding verdicts in rape cases. The debriefing at the end explained further that the study was primarily concerned with the thought processes in relation to the summing up that they had heard, rather than the rest of the trial or the verdict they gave. Providing this much detail at the start of the study may have bombarded the participants with too much information and could have led them to approach their task as a listening-comprehension test rather than behaving as jurors deciding a verdict. However, as deception can compromise both the informed and voluntary nature of consent, the information given to the participants at the start of the study was accurate and truthful, and gave the participants all the necessary information to decide whether to take part, whilst still ensuring that participants

simulated real jurors as much as possible. The detailed final debriefing was delivered orally by the researcher, and also in writing for the participants to take home.

5.6.4 Data protection

The right of the individual to privacy is a pre-eminent ethical driver in empirical social research (Israel and Hay, 2006). In this investigation, this translates into two imperatives: anonymity and confidentiality. In pragmatic terms, a significant danger to the participant is posed by what happens to the data after it has been collected, and it is likely that participants will be less willing to take part if they think that identifiable information might be widely disseminated (Israel, 2004). In this study, the data collected was not particularly personal or sensitive, but nevertheless appropriate precautions were taken to protect the anonymity of participants' data. In advance of the study, volunteers were assured about the protection of their identities and no names were collected with the data. Sampling from a large population also helped to disguise participants' identities and, as such, it was impossible to associate the survey responses to an individual. Data like this which is completely anonymous and cannot be reconstructed to reveal the identity of the participant does not constitute 'personal data' and so is exempt from the UK Data Protection Act (1998). In reality, however, it is difficult to achieve 'true' anonymity, and ethical codes of practice meant it was advisable to strip all identifying information that was not needed for the research and only collect data for which consent had been obtained. In this way, information about the participants in this study could not become available to audiences other than those to which the participants have agreed.

As already discussed, participants were asked to fill in a demographic questionnaire and this could have yielded more clues to the identity of an individual. However, this questionnaire was used solely to provide collective information about the composition of each of the three groups to ensure they were comparable. It was not used to consider the responses and characteristics of any one individual. In every case, participants were assured of the confidentiality of their responses.

5.6.5 Monitoring

It is important for social research to be formally and carefully scrutinised by an outside body, and this study was given approval from the Cardiff University School of English, Communication and Philosophy (EN CAP) Research Ethics Officer. Participants were made aware that the project was being overseen and regulated; the information sheet, debriefing sheet and consent form all contained the contact details of the researcher, the University department and the project supervisor should they later require any assistance.

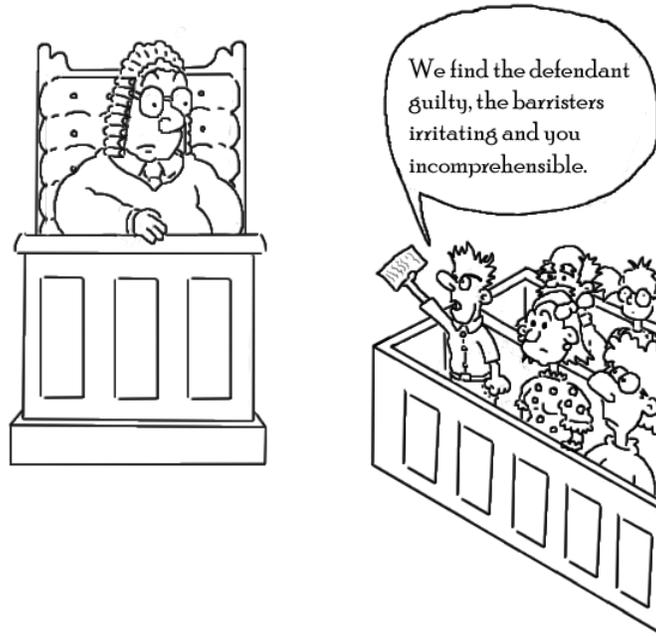
5.7 Conclusion

It is possible to see that jurors in this study were not only drawn from a wider constituency than is the case in much previous mock juror research, but were also provided with an extended, more realistic and more engaging stimulus than the brief vignettes that are often relied upon. Whilst not seeking to trivialise the inherent limitations discussed of this method as discussed, it is reasonable to be cautiously optimistic that the paradigm adopted in this study concerning the summing up in rape trials in England and Wales has both theoretical and pragmatic potential. With this in mind attention is now turned in the following chapter, to the key findings of the study.

6

Results

The measured impact of narrativisation on juror comprehension



6.1. Introduction

Jury instructions are an integral part of the trial process to the extent that they transform a lay citizen into a reliable juror. The central aim of this thesis therefore is to build a picture of how well jury instructions facilitate jurors' comprehension of the law and equip them for the demands of their task. The main hypothesis in this study is that jury instructions that are narrativised will be better understood than instructions that are decontextualised from the case. To address this, mock jurors were tested for their ability to recall, recognise and apply eleven instructions that they had been given in one of three types of summings up – a decontextualised summing up, a summing up which narrativises instructions with integrated evidence and a summing up which narrativises instructions using narrativising language and integrated evidence. The data collected from this survey will be used to answer these three primary questions:

1. How comprehensible are the decontextualised jury instructions when based primarily on the Crown Court Bench Book?
2. Do levels of comprehension improve when the decontextualised instructions are integrated with evidence from the case?
3. Do levels of comprehension improve when the decontextualised instructions are both integrated with the evidence and reworded using 'narrativising' linguistic features?

This chapter answers these questions at a general level first. The measured levels of comprehension for each of the three styles of instruction are analysed, and they are compared to assess any improvements in performance. This data will show overall how well mock jurors understand their instructions and whether narrativising instructions are easier to understand than decontextualised legal instructions. The chapter then looks at these research questions in more depth, by subsequently asking of the data a set of closely related but more specific questions. These questions govern the organisation of the rest of this chapter: It will first answer the question as to whether there were specific instructions within the summing up that were harder to understand than others, and the effect that narrativisation had. Second, the data is used to observe how performance differed across tasks, answering the question whether the three styles of summing up affect different facets of comprehension. Lastly, this chapter looks at the jurors' subjective opinions of the summing up, using the data to show how well they thought they concentrated, understood, and were interested in the summing up, and how that compares to their actual performance.

Throughout this thesis the protocols common to most quantitative research in social science were employed. For example, relationships between the variables were analysed using version 20 of the IBM Statistical Package for the Social Sciences (SPSS) and in the interpretation of these analyses, consideration is given not only to the size of the observed differences in results, but also to whether those observations are statistically significant. 'Statistical significance' is a term that

signifies that the likelihood that two measurements differ by chance is less than an acceptable level. Social scientists have traditionally accepted that the minimum level is 0.05, represented as $p < 0.05$ (see Wonnacott and Wonnacott, 1985). This means that the probability that the statistical event being measured (in this case, an improvement in comprehension) occurred by chance is less than 1 in 20 (5/100). As the p value increases, the likelihood that the observed difference has occurred by chance increases. Thus, $p < 0.001$ means that the probability that these comprehension scores could have resulted by chance and were not due to experimental manipulations is less than 1 in 1000, implying that the difference is unlikely to be caused by chance and more likely to be caused by the instructions. Following convention, 0.05 is the level applied in this research. This will produce satisfaction as to the statistical representativeness of the study - the probability of a Type I error (falsely rejecting the null hypothesis) is less than or equal to 5 percent. It is acknowledged therefore that any significant results are not hard accuracy, but rather I claim that the figures give a good indication of the likely position. The more clear-cut the figures, the greater the likelihood that the indication is broadly right.

6.2. The comprehension of different styles of summing up (Research Questions 1 – 3)

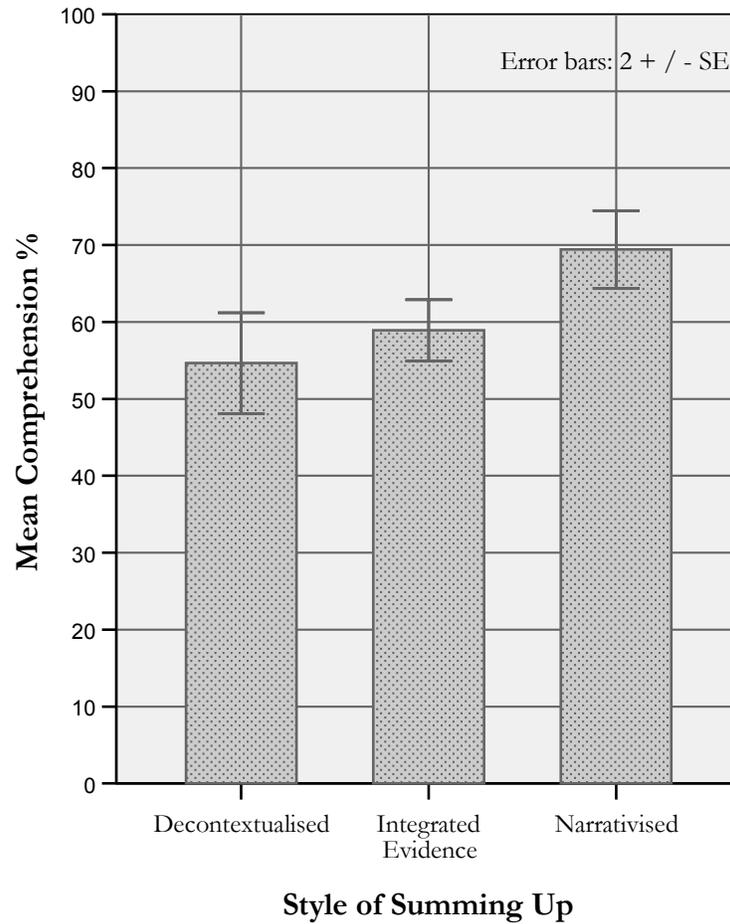
6.2.1. The comprehension of decontextualised instructions (Research Question 1)

Research Question One asks how comprehensible the decontextualised summings up were. This measurement provides the starting point to finding out if narrativisation improves juror comprehension because decontextualisation acts as a control to which the comprehension levels of the two narrativised summings up can be compared. Thirty-three questions across three tasks assessed participants' comprehension of the eleven directions delivered in the summing up. For each participant, a comprehension score was calculated by dividing the number of correct responses by 33 and then multiplying by 100. Overall, participants correctly answered on average 61 percent ($n = 102$, $SD = 16.1$) of the questions. Overall scores

as a function of direction and task can be seen in Appendix 3.3. Importantly, mock jurors who received the decontextualised summing up answered on average 54.8 percent ($n = 34$, $SD = 18.6$) correctly.

This decontextualised score of 54.8 percent acts as a comparison for the other two conditions. Mock jurors in the second condition who heard the summing up with integrated evidence scored an average of 58.7 percent ($n = 34$, $SD=11.3$). Participants in the third condition, who heard a fully narrativised summing up correctly answered an average of 69.3 percent ($n = 34$, $SD = 14.3$) of the questions. These scores are illustrated in Figure 6.1 below. The error bars (representing plus or minus 2 standard errors of the mean) demonstrate how confident the claim is that the means (shown by the bars) represent the true comprehension levels. The upper error bar for the decontextualised condition overlaps the range of values within the error bar of integrated evidence condition. This lowers the likelihood that the means of these two conditions are significantly different. However there is no overlapping with the error bars for the final condition which means that we can be more confident that the comprehension of the decontextualised summing up is significantly less than the comprehension of the narrativised instruction.

Figure 6.1 Mean comprehension levels by style of summing up



These descriptive statistics suggest that the means of the decontextualised condition and the other two conditions are not equal. A one-way Analysis of Variance (ANOVA) was employed to see if these differences were significant. ANOVA is a statistical test that allows one to infer whether the observed difference between groups is the result of random chance or the reliable result of some systematic difference in the way the groups were treated. For the ANOVA to be accurate, four assumptions must be met. The data must be measured at least at the interval level, must be independent, must have normal distribution and have homogeneity of variance. In this study, the data are measured at least at the interval level (that is, equal intervals on the scores represent equal differences in the comprehension. The difference between 10 and 12 is equivalent to the difference between 20 and 22, for example). The data are also independent (the comprehension scores of one

participant are not influenced by the scores of another). A Kolmogorov-Smirnov (K-S) test for normality found that the comprehension scores for both the decontextualised group $D(34) = 0.12, p > 0.05$ and the integrated evidence group $D(34) = 0.13, p > 0.05$ were not significantly different from a normal distribution. The comprehension scores for the narrativised condition, $D(34) = 0.16, p = 0.03$, were found to be significantly non-normal. However, the K-S test can derive significance in sample sizes of more than 30 even in the case of a small deviation from normality, although this small deviation will not affect the results of an ANOVA (Oztuna, Elhan and Tuccar, 2006; Field, 2009; Ghasemi and Zahediasl, 2012). Accordingly, further analysis using P-P plot, histogram and values of skew and kurtosis suggest the data in condition three do not deviate significantly from normal distribution ($Z_{\text{skewness}} = -1.1, p > 0.05$; $Z_{\text{kurtosis}} = -0.5, p > 0.05$). As well as independence, interval and normality, the ANOVA requires that the data should show homogeneity of variance; that is, the spread of scores in each condition should be roughly similar. Levene's test for homogeneity of variance found that the variances for the comprehension scores were significantly different in the three groups, $F(2,99) = 3.46, p < 0.05$. This violation would cause the ANOVA to become too liberal (that is, an increase in the Type I error rate). As such, Welch's F correction was applied to produce a more valid critical F-value (that is, reduce the increase in Type I error rate).

In this study there were three styles of summing up and it was necessary to test whether the comprehension level of the decontextualised condition was different from the narrativised conditions. Using actual scores rather than percentages, the ANOVA found a significant main effect of summing up style $F(2,63.6) = 8.337, p < 0.01$, which indicates that the group means are significantly different. There was a significant linear trend (which observes whether the means increase across groups in a linear way) $F(1,99) = 16.3, p < 0.01$, which means that as contextualisation increases between the conditions, the mean level of comprehension increases proportionately.

In summary, the mean performance in the decontextualised condition was 54.8 percent, and the ANOVA found that this was significantly different from one or both of the means of the narrativised summings up. These findings provide confidence to reject the null hypothesis of the study that an increase in

narrativisation across the three summings up does not have an effect on comprehension. However, whilst the ANOVA indicates that there is a significant effect of narrativisation and that there are one or more differences between the conditions, it does not identify where those differences lie. By analysing further this effect of narrativisation it is possible to answer Research Questions Two and Three.

6.2.2. Improvements in comprehension through contextualisation (Research Questions 2 and 3).

Research Questions Two and Three ask whether comprehension improved in the two contextualised summings up compared to the decontextualised summing up. Specifically, Research Question Two asks whether levels of comprehension improve when the decontextualised instructions are integrated with evidence from the case, and Research Question Three asks whether levels of comprehension improve when the decontextualised instructions are both integrated with the evidence and reworded using 'narrativising' linguistic features. Two hypotheses derive from these questions:

1. Contextualisation in general will improve comprehension compared to the decontextualisation group;
2. Narrativising linguistic features combined with integrated evidence will improve comprehension more than just a summing up which only integrates evidence. The descriptive means and error data demonstrated in *Figure 6.1* suggest that this could be the case.

Planned contrasts were carried out with the one-way ANOVA according to these two hypotheses: The first contrast looked at how much variation was created by the two contextualising conditions compared to the decontextualized condition. In the second contrast, the variation explained by narrativisation was broken down to see how much is explained by narrativising linguistic features relative to integrated evidence. By using weights to define the contrasts and ensuring they

were orthogonal (so that a group singled out for comparison was not incorporated into any other comparison), the family-wise error rate was not inflated (that is, reducing the probability of making a Type I error in any family of tests when the null hypothesis is true in each case). SPSS provides two-tailed significance value; however as the hypothesis was that the narrative summings up would increase comprehension above the levels observed in the decontextualised group, the hypothesis was one-tailed. As the means for the groups bear out the hypothesis, the significance values of the SPSS output were divided by two to obtain one-tailed probability.

The first contrast, which compared the performance of the decontextualised instructions to the two experimental summings up, found that, as hypothesised, contextualisation significantly increased comprehension compared to the decontextualised instructions $t(49.32) = 2.65, p < 0.01$.

The second contrast was designed to make sense of the two experimental conditions. The comparison found that the mean comprehension of the third summing-up was significantly higher than the mean comprehension of the second summing up, $t(62.5) = 3.39, p < 0.01$. This supports the hypothesis that instructing jurors with narrativising linguistic features combined with evidence integration significantly increases comprehension compared to instructing jurors with integrated evidence alone. From this finding it logically follows that comprehension in the third summing up, which had the highest mean, significantly increased from the decontextualised summing up. It also implies that comprehension of the integrated evidence instructions alone may be no different from the decontextualised instructions. A post hoc Games-Howell test confirmed there was not a significant difference between the conditions ($p > 0.01$).

In summary, what this data shows is that narrativisation in general increases comprehension compared to the decontextualised instructions. In relation to Research Question Two, mean comprehension in the integrated evidence summing up was 58.7 percent compared to 54.8 percent in the decontextualised summing up, but this was not a significant improvement at the 5 percent level. In answer to Research Question Two, the average comprehension of the fully narrativised summing up, on the other hand, was 69.3 percent, which significantly improved

performance from both the decontextualised and integrated evidence groups. Consequently, the data supports the hypothesis that introducing narrativising linguistic features to the summing up significantly improves comprehension compared to integrated evidence alone.

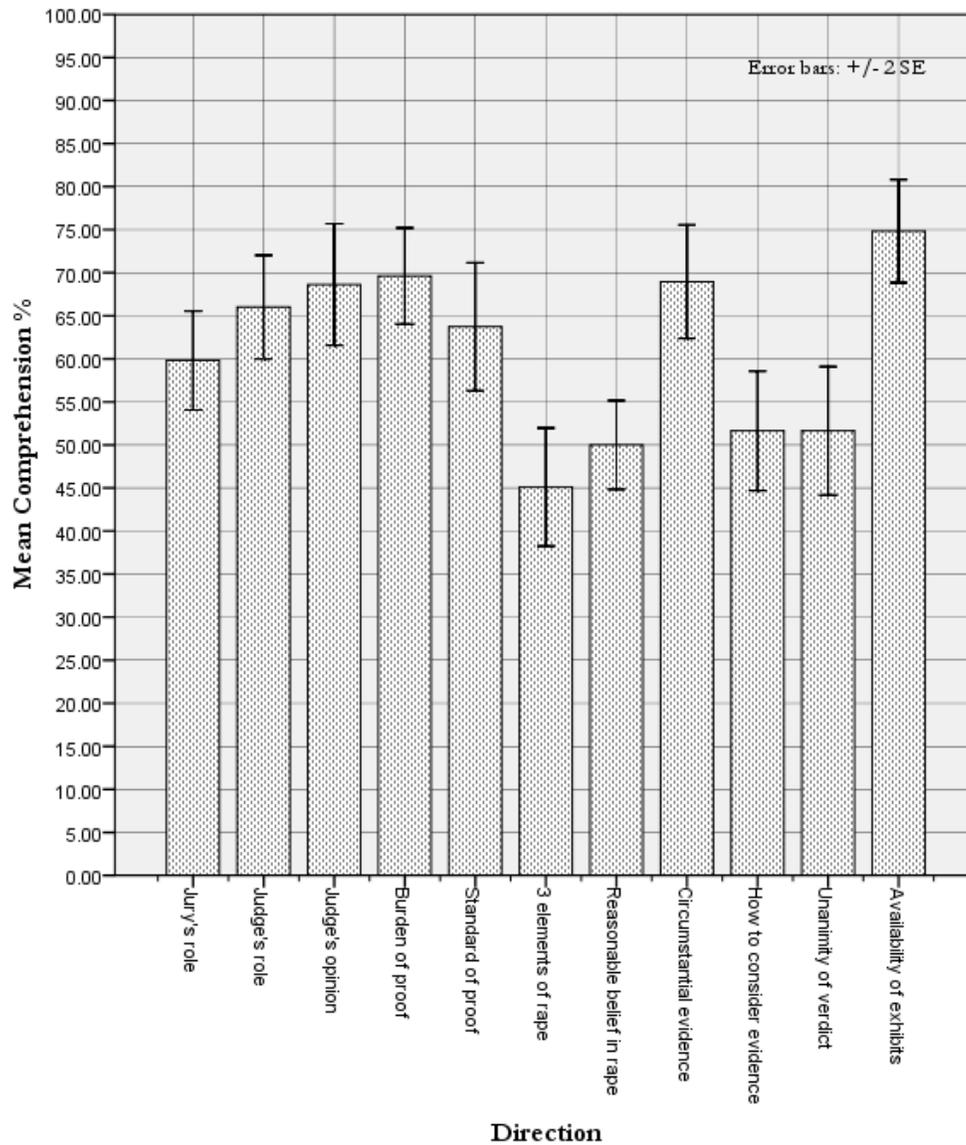
6.3. The comprehension of individual directions and the impact of summing up style

Having found that there is an increase in comprehension with narrativisation, it is possible to pinpoint further the differences found between the three styles of summing up. This can be achieved by comparing jurors' scores for each of the eleven directions in the summing up and observing whether increases in comprehension were specific to particular directions. Previous research has focused on the incomprehensibility of a single jury direction in isolation (see 5.2.2) and ignored the influence of the wider context of the summing up. It is therefore interesting to question which instructions were difficult to understand and whether there is an interaction between instruction and summing up style on juror comprehension. More specifically, I ask of the data – does narrativisation improve the comprehensibility of some directions more than others?

This research was designed carefully so that each of the eleven directions in the summing up (see section 5.2.2) had to be correctly used to answer three questions within the survey. Each direction was measured by a paraphrase question, a novel-scenario question, and a multiple-choice question. By isolating each direction in turn, and using the percentage score for the sum of the three questions, it will be possible to begin by comparing jurors' performance for each instruction and pinpoint any deficiencies in juror comprehension in terms of where the directions are falling short.

Figure 6.2 illustrates the jurors' average correct performance across conditions according to direction:

Figure 6.2 Mean comprehension by individual direction



A mixed factor two-way ANOVA was conducted, measuring style of summing up by individual direction. 'Style of summing up', relating to the three conditions, was classed as a between-subjects factor by having different participants perform in each of its three levels – 'decontextualised', 'integrated evidence' and 'narrativised'. Individual direction (henceforth 'direction') is a within-subjects factor made up of eleven levels relating to the list of directions that were contained in each of the three summings up (see section 5.2.2): 'Jury's role', 'judge's role', 'judge's opinion', 'burden of proof', 'standard of proof', '3 elements of rape', 'reasonable belief in

rape', 'circumstantial evidence', 'how to apply the evidence', 'unanimity of verdict' and 'availability of exhibits'. Mauchly's test indicated that the assumption of sphericity had been violated $\chi^2(54) = 128.4, p < 0.05$, therefore the degrees of freedom were corrected using the Greenhouse-Geisser estimates of sphericity ($\epsilon = 0.8$). (Sphericity can be likened to homogeneity of variances in the earlier ANOVA. It is the condition where the variances of the differences between all combinations of related groups are equal. Violation of sphericity is when the variances of the differences between all combinations of related groups are not equal).

The results of the ANOVA show that direction significantly affected jurors' comprehension. A significant main effect was observed for direction, $F(7.8, 773.2) = 11.7, p < 0.01$, suggesting that comprehension levels were not the same for every direction. In other words, jurors found some directions harder to understand than others. The error bars on Figure 6.2 suggest that the comprehensibility of the directions can be split into two, distinguished by directions that fall around and under the 50 percent level, and the directions that scored at least 60 percent. Four directions fall into this first group, appearing to be more poorly understood than the rest: The two directions pertaining to the legal offence of rape were the most difficult to understand, with mock jurors obtaining mean comprehension levels of 45.4 percent and 50 percent, respectively. This is an interesting observation given that these are the two directions which are not given explicitly as Specimen Directions in the Crown Court Bench Book and are predominantly based on the legal statute. The direction about how jurors should consider the whole of the evidence, and the direction explaining how a verdict decision should be unanimous were also poorly understood, with means of 51.6 percent and 51.7 percent respectively, though the wider error bar for the latter suggests that there was greater variability in these scores. The error bars of these four directions overlap with each other, suggesting that their means are not significantly different. However, these error bars are all distinct from the rest of the directions, which range between 59.8 percent (the direction relating to the jury's role) and 74.9 percent (a straightforward direction concerning the availability of exhibits).

The above findings provide a general picture of which instructions may be more problematic than others, but rather than testing further to determine if these

overall differences are meaningful or simply a product of chance, it is of more value to see how performance on each direction was influenced by style of summing up. This will show whether narrativisation helped improve the mean comprehension scores for each direction across the board.

It was hypothesised that the directions in the narrativised summing up would be better comprehended than the directions in the summing up that had evidence integrated, but that the directions with integrated evidence would be better understood than the decontextualised instructions. Under these circumstances, an interaction between style of summing up and direction would not occur. However, a significant interaction was found, thus suggesting that there was not such a clear cut pattern of comprehension of the directions between the three styles of summing up: $F(15.6, 773.2) = 3.6, p < 0.01$. The result shows that the profile of comprehension across different instructions was different for the Decontextualised, Integrated Evidence and Narrativised conditions. Table 5.1 outlines these differences and indicates whether the differences were significant (the means are reported and the standard deviation is in brackets):

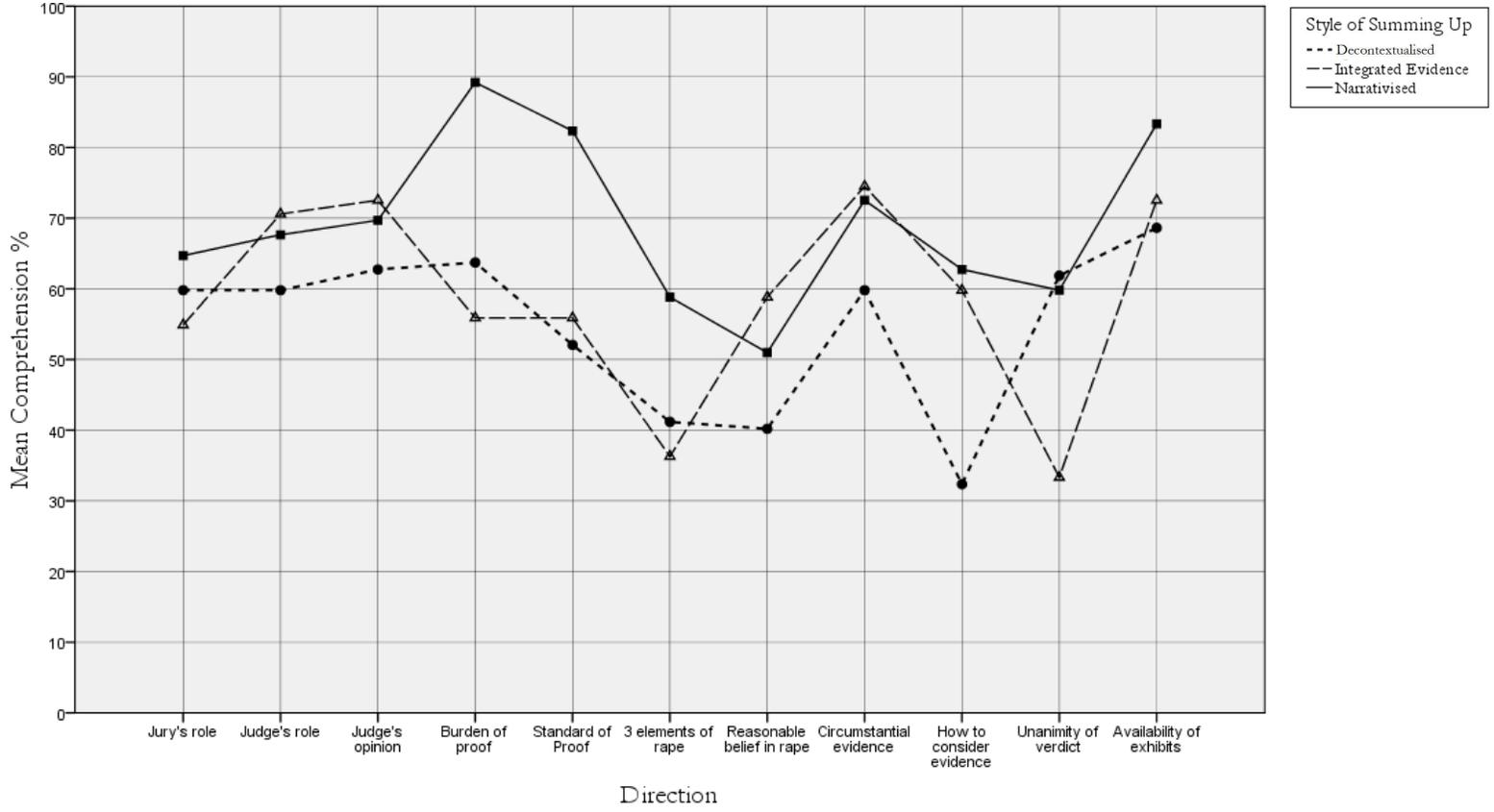
Table 6.1 Mean comprehension levels of directions as a function of summing up style

Direction	Decontextual ^a (%)	Integrated Evidence ^b (%)	Narrativised ^c (%)	Comprehension Difference (%)		
				Decontextual and Integrated Evidence	Integrated Evidence and Narrativised	Decontextual and Narrativised
Jury's Role	59.8 (30.5)	54.9 (25.8)	64.7 (30.6)	-4.9	9.8	-4.9
Judge's Role	59.8 (25.7)	70.6 (25.6)	67.6 (30.6)	10.8*	-2.9	7.8*
Judge's Opinion	62.7 (38.3)	72.5 (26.6)	70.6 (40.8)	9.8	-2	7.8
Burden of proof	63.7 (26.4)	55.9 (26.9)	89.2 (19.6)	-7.8	33.3**	25.5**
Standard of proof	52.9 (34)	55.9 (39.1)	82.4 (33)	2.9	26.5**	29.4**
3 elements of rape	41.2 (31.8)	36.3 (35.2)	57.8 (34.1)	-4.9	21.6*	16.7*
Reasonable belief in rape	40.2 (24.3)	58.8 (21.8)	51 (28.7)	18.6**	-7.8	10.8*
Circumstantial Evidence	59.8 (33.6)	74.5 (33.9)	72.5 (31.2)	14.7	-2	12.7
How to consider the evidence	32.4 (29)	59.8 (33.6)	62.7 (34.6)	27.5**	2.9	30.4**
Unanimity of verdict	61.8 (31.9)	33.3 (37.6)	59.8 (37.4)	-28.4**	26.5*	-2
Availability of exhibits	68.6 (29.5)	72.5 (32.3)	83.3 (27.5)	3.9	10.8	14.7*

^a n=34 ^b n=34 ^c n=34 *p<0.05 **p<0.01

A main effect of style was found in which narrativisation improves overall comprehension. Table 6.1 indicates however, that the picture is more complex than a simple case of narrativisation improving comprehension of all the directions across the board. This can be shown with greater clarity in Figure 6.3. With the exception of three of the directions, jurors who received the narrativised summing up performed significantly better than those who received the decontextualised summing up. Of these significant improvements, on three occasions the narrativised instructions were also significantly better than the integrated evidence summing up. These related to the directions on the burden of proof, standard of proof and the legal direction concerning the three elements of rape. This is a key finding because these

Figure 6.3 Mean comprehension of individual instructions as a function of summing up style



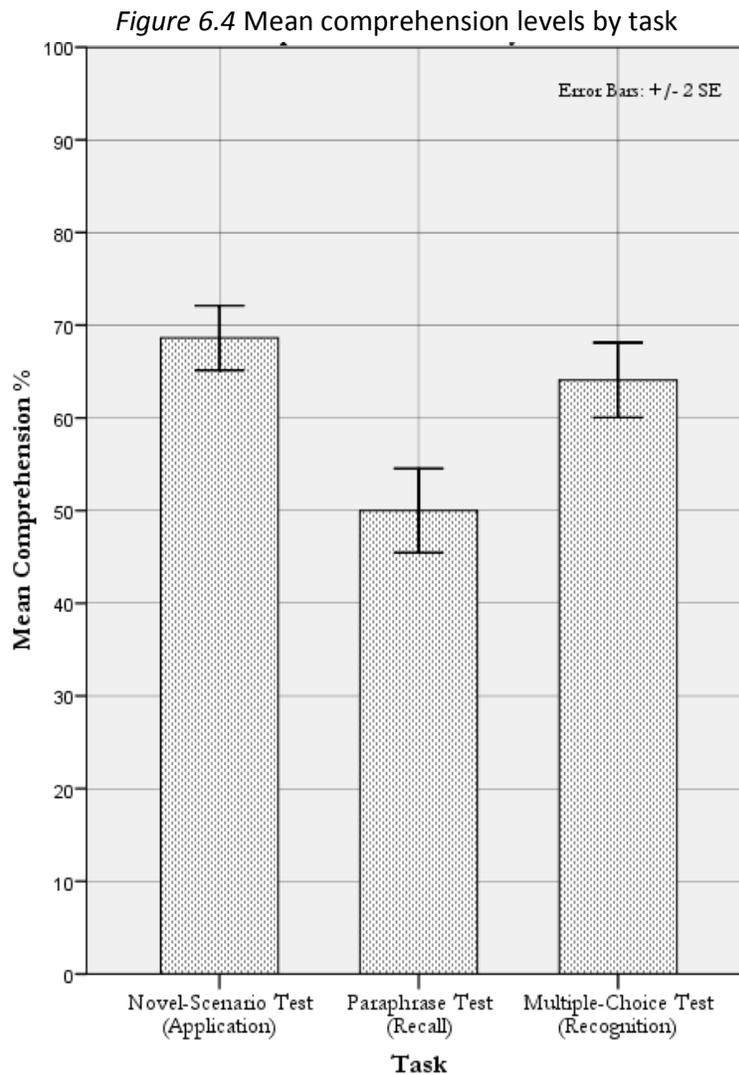
directions are arguably the most crucial instructions in the summing up of a rape trial. Interestingly, for these directions there were no significant differences found between the integrated evidence style and decontextualised style. This effect is most noticeable for the direction about the three elements of rape, where the mean comprehension in the decontextualised and integrated evidence summing up groups was particularly low (41 percent and 36 percent, respectively). The direction concerning the availability of exhibits also demonstrated a similar pattern of comprehension to these three directions, though there was not such a large effect of comprehension: Whilst there was a significant effect of narrativisation compared to decontextualised instructions, when compared to integrated evidence the mean difference fell short of significance ($p = 0.07$).

Narrativisation had no apparent effect on the directions concerning the jury's role and the direction concerning the judge expressing opinion. In fact, all three summing up styles did not significantly differ from each other. Narrativisation also had no apparent effect for the direction about unanimity of verdict, with mock jurors faring no better or worse than mock jurors who had received the decontextualised summing up. However, performance in both the decontextualised group and narrativised group were significantly better than in the integrated evidence group. This is in stark contrast to the rest of the pattern of comprehension, indicating that jurors' processing was significantly hindered during the integrated evidence summing up.

6.4. The different measures of comprehension and the influence of summing up style

As discussed in section 5.2.3, the literature suggests that comprehension is not a one-dimensional process. Accordingly, the design of this research measured three main aspects of comprehension in separate tasks: Firstly, the ability to recognise correct information; secondly, the ability to recall correct information; and lastly, the ability to correctly apply what has been learned to a new situation – all aspects of comprehension that are central to juror processing.

In a similar way to teasing out the effect of style on the comprehension of individual directions in the summing up, separating out jurors' performance according to the three separate measures may reveal some interesting findings. The data can be used to subsequently ask, how does narrativisation influence comprehension? The data can also potentially inform the debate surrounding the appropriate methodology for observing jury functioning. Figure 6.4 illustrates the average correct performance of the jurors according to measure:



Jurors scored on average 68.7 percent ($n = 102$ $SD = 17.6$) on the application measure, 49.9 percent ($n = 102$, $SD = 22.9$) on the recall measure and 64 percent ($n =$

102, SD = 20.4) on the recognition measure. The means and variability in scores together suggest that jurors found the novel-scenario test and the multiple-choice test similarly challenging, but the paraphrase test the hardest. A mixed factor two-way ANOVA was conducted to measure style of summing up by task to see if these differences were significant. 'Task' refers to the measures of comprehension, and so has three levels – 'novel-scenario (application)', 'paraphrase (recall)' and 'multiple-choice (recognition)'. All of the jurors completed the same measures, so task was classed as a within-subjects factor. Mauchly's test indicated that the assumption of sphericity had been violated $\chi^2(2) = 6.7, p < 0.05$, therefore degrees of freedom were corrected using the Greenhouse-Geisser estimates of sphericity ($\epsilon = 0.9$). The results show that there was a significant effect of task, $F(1.9, 185.8) = 42.9, p < 0.01$, further indicating that jurors on average did not perform the same across the measures. Multiple comparisons confirmed that there was not a significant difference between the novel-scenario and multiple-choice tests, but both significantly differed from the paraphrase task at the 0.01 level.

It is interesting to find that the mean overall score of jurors in the novel-scenario task is 69 percent. In this test, there were only two possible answers to each question, which means that jurors could have scored 50 percent by randomly guessing or by circling the same answer for each question. However, there was a great deal of variation found in the answers to individual questions. For instance, 84 percent circled the correct response for scenario 4, 82 percent were correct for scenario 8, and 78 percent were correct for scenario 11. Thus, their individual responses were most likely not the result of pure guessing.

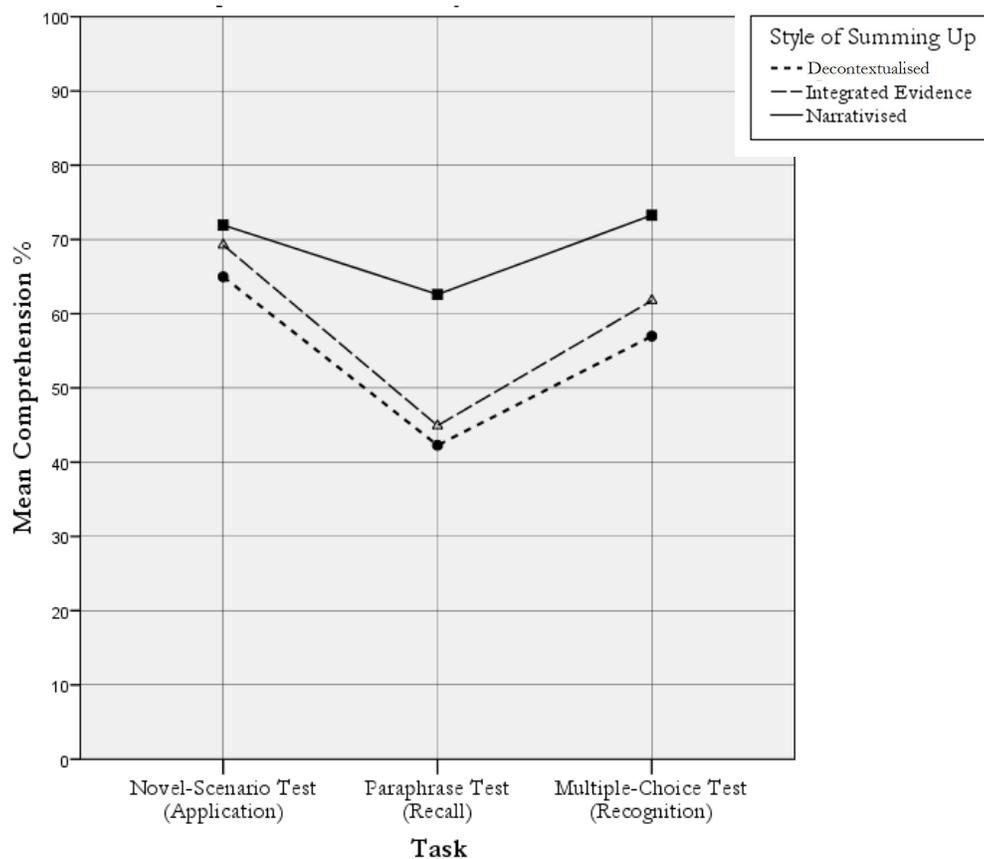
Importantly, a similar pattern of results was replicated across the tasks, that is, as expected comprehension was highest in the narrativised condition, lower in the integrated evidence style, and poorest in the decontextualised style (see Table 6.2).

Table 6.2 Mean performance on individual comprehension measures as a function of summing up style

Task	Decontextual ^a (%)	Integrated Evidence ^b (%)	Narrativised ^c (%)	Comprehension Difference (%)		
				Decontextual and Integrated Evidence	Integrated Evidence and Narrativised	Decontextual and Narrativised
Novel-Scenario Test (Application)	65 (20.4)	69.3 (16)	71.7 (15.8)	4.3	2.4	6.7
Paraphrase Test (Recall)	42.2 (24.3)	44.9 (15.3)	62.8 (23)	2.7	17.9**	20.6**
Multiple-Choice Test (Recognition)	57.2 (23.4)	61.8 (19.5)	73.3 (14.5)	4.5	11.5**	16**
^a n=34 ^b n=34 ^c n=34 **p<0.01						

A significant interaction of summing up style and task was observed, however: $F(3.7, 185.8) = 2.8, p < 0.05$. This interaction is illustrated in Figure 6.5 below. The fact that the lines are not parallel indicates that the pattern of performance in the tasks is not the same in each of the summing up styles. More specifically, it is possible to see that there was no significant main effect of style on the novel-scenario task, where jurors scored well on the application test regardless of the summing they received (between 65 percent and 72 percent). By comparison, jurors uniformly performed the poorest on the paraphrase task. However in this instance, narrativisation singly significantly improved comprehension. Narrativisation also had a significant effect on recognition in the multiple-choice test, surpassing comprehension levels by 2 percent on the high-scoring novel-scenario test – a trend not seen in the other two summing up styles. The effect of narrativisation was not as large as in the application test, however, because there was better overall performance by jurors who received both the integrated evidence style and decontextualised style of instruction. The performance in these two conditions in the recognition test was not as high as in the application test, however (57 percent and 65 percent compared to 62 percent and 69 percent).

Figure 6.5 Mean comprehension levels by task as a function of summing up style



6.5 Mock jurors' perceptions of the summing up

As well as obtaining objective measures of comprehension levels, mock jurors were also asked to complete three seven-point attitude scales about different aspects of their own perception towards the summing up that they had heard. It was thought that the data yielded from these additional scales might offer insight and aid interpretation of the findings from the objective comprehension measures.

The attitude scales asked mock jurors to rate how interesting they found the summing up, to rate their concentration levels during the summing up, and to rate their comprehension levels of the summing up. These scales are useful because they can confidently demonstrate that a juror who gave a rating of 6 found the summing up more interesting than a juror who gave the summing up a rating of 2, for example. However, it is not certain that the first juror found the summing up to be three times more interesting than the second juror. Furthermore, if all the jurors gave a rating of 5, it is unlikely that they found the summing up equally interesting because their

ratings are dependent on their subjective feelings of about what constitutes interesting. For this reason, the use of attitude-scales meant that the data (whilst often treated as interval) is strictly-speaking ordinal and could not be assumed to have a normal distribution. They therefore violate one of the assumptions necessary for parametric testing and, as such, the Kruskal-Wallis Analysis of Variance test was used, rather than an ANOVA, as it is non-parametric. Like the ANOVA, the test does not identify where any significant differences occur or how many significant differences there are between the data. Non-parametric Mann-Whitney U tests were therefore used to analyse specific pairs for significant differences. As the Type I error rate inflates with the more Mann-Whitney tests conducted, a Bonferroni adjustment was made to the critical value (from 0.05 to 0.02) so that the Type I errors did not build up to more than 0.05.

The results are shown in Table 6.3. As the data yielded from the attitude scales was assumed to have a scaled distribution, the median was the most appropriate indicator of central tendency to use (rather than mean) because it is more robust in the presence of outlier values. The corresponding measure of dispersion, interquartile range, was used for the same reason.

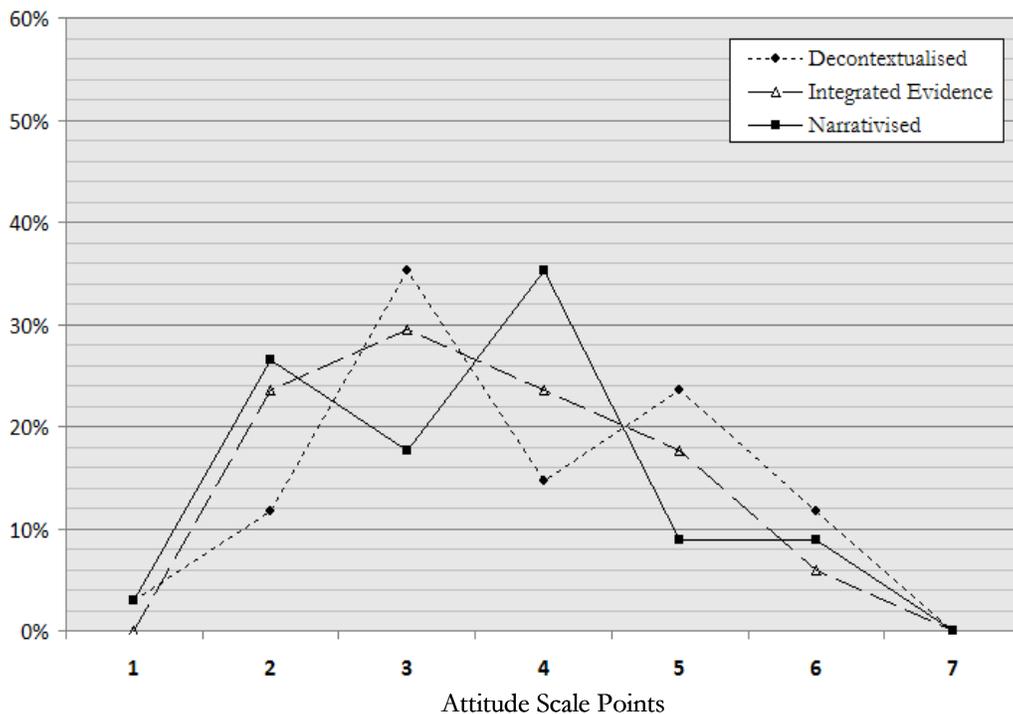
Table 6.3 Median and interquartile range (in brackets) of responses to attitude scales as a function of summing up style.

Attitude Scale	Decontext ^a	Integrated Evidence ^b	Narrativised ^c	Difference		
				Decontext and Integrated Evidence	Integrated Evidence and Narrativised	Decontext and Narrativised
Interest (1 = I wasn't interested 7 = I was very interested)	3.5 (2)	3 (1.5)	4 (2)	-0.5	1	0.5
Concentration (1 = I didn't concentrate 7 = I concentrated throughout)	3 (1)	3 (2)	4 (2)	0	1*	1*
Understanding (1 = I didn't understand 7 = I understood everything)	4 (2)	4 (1.25)	5 (2)	0	1*	1*

^a n=34 ^b n=34 ^c n=34 *p<0.05

There was not clear agreement within each of the groups about how interesting the summings up were. Variability was lowest in the integrated evidence condition, with the median score of 3. There were no significant differences found in mock jurors' perceptions of interest levels between the three summing up styles: $\chi^2(2, N = 102) = 1.1, p > 0.05$, indicating that the majority of jurors considered the summing up to be moderately interesting, regardless of the summing up they had received. As Figure 6.6 shows, none of the jurors claimed to be 'very interested' in the summing up, although some in the decontextualised and narrativised groups indicated that they were not interested at all, scoring '1' on the scale.

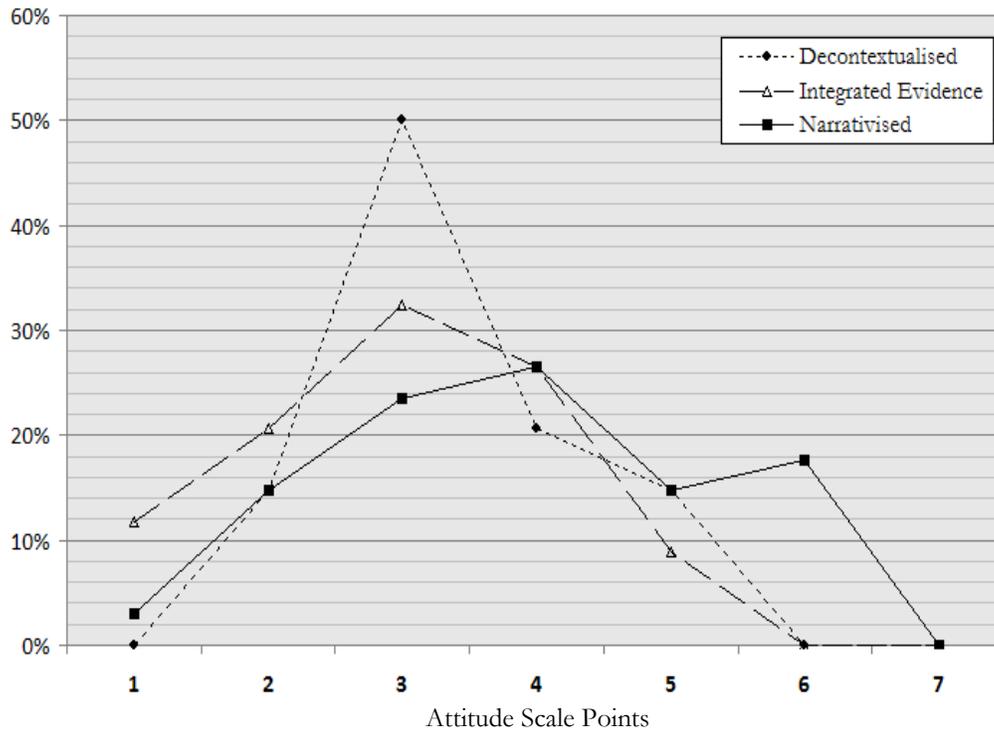
Figure 6.6 Jurors' self-reported interest in the summing up



Looking at jurors' perceptions of how well they concentrated during the summing up, jurors in the decontextualised condition were in some agreement that concentration levels were moderate during the summing up scoring a median of 3 with a low interquartile range (see Figure 6.7). The agreement was not as strong in the two styles where variability was greater. Despite this variability, on average participants

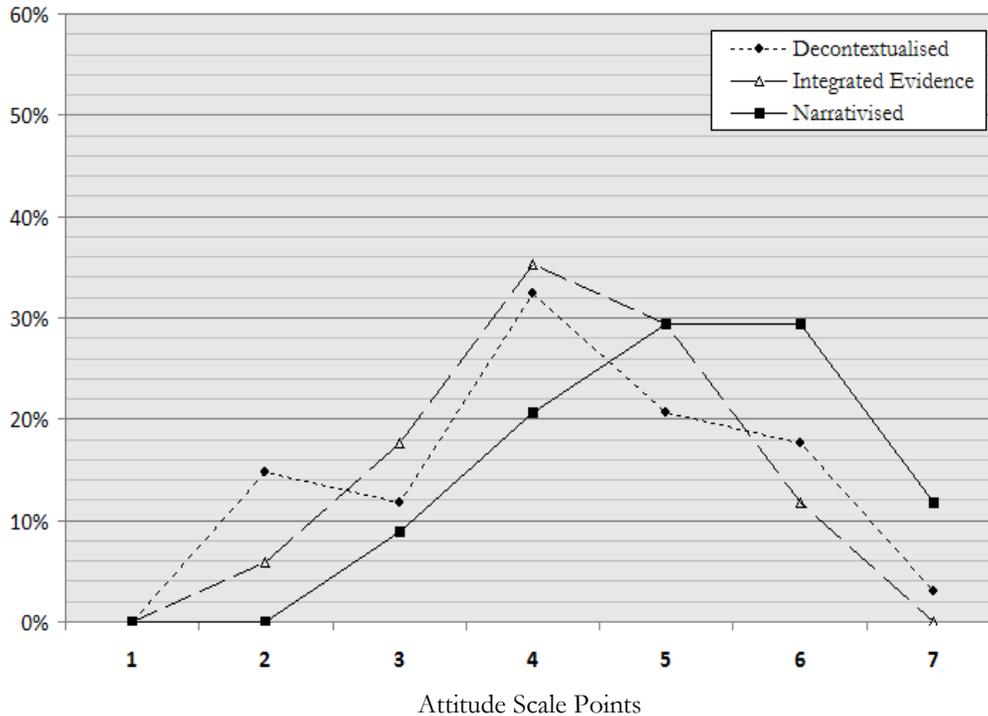
in the narrativised condition felt they concentrated more than the participants in the integrated evidence and decontextualised conditions. Unlike the interest rating, this difference was found to be significant $\chi^2(2, N = 102) = 7, p < 0.05$.

Figure 6.7 Jurors' self-reported concentration during the summing up



The final attitude scale asked jurors to assess how easy or difficult they felt it was to understand the summing up. As Figure 6.8 shows, again there was not any strong view among jurors of any summing style about their ability to understand the instructions, although no mock jurors in any of the conditions indicated that they didn't understand anything at all. Some participants in the decontextualised condition and the narrativised condition believed that they understood everything, although no mock jurors indicated this in the integrated evidence condition, where responses were more tightly clustered around the median of 4. However, there was a significant effect of summing up style: $\chi^2(2, N = 102) = 11.02, p < 0.05$. The jurors who had received the narrativised summing up scored significantly higher on the scale than the other two conditions, an indication of a stronger agreement about greater comprehension in this condition.

Figure 6.8 Jurors' self-reported understanding of the summing up

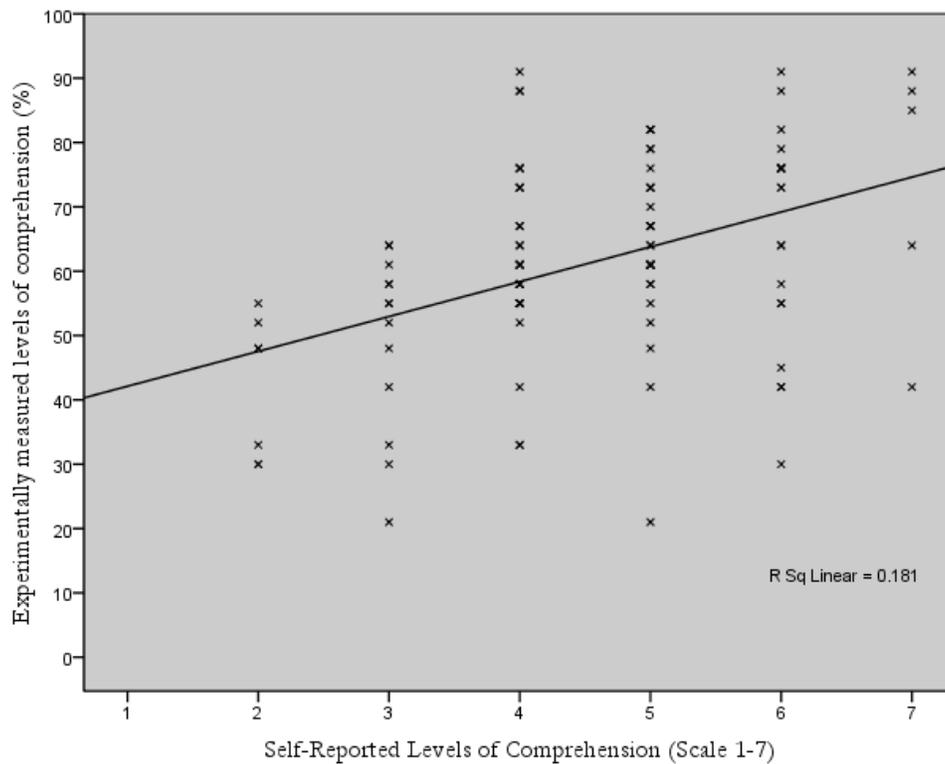


It seems that the subjective self-reports and the objective results concur. Jurors' perceptions about how well they understood the summing up reflected their actual performance – on average, participants in the narrativised condition felt more sure of their understanding than in the other conditions. This appears to match the overall effect found from the objective measure. However, a comparison of these effects, which have been based on averages, could be misleading. It is possible, for example, that a juror who recorded a 7 on the attitude scale (indicating that they thought they had understood all of the summing up) may have actually performed very poorly on the objective measures. A comparison of the average performance of the group would therefore hide this finding. As such, it is interesting to conduct a test of correlation between the individual scores of objectively measured comprehension and the individual scores of the self-reported comprehension. This will provide an indication of whether studies of juror functioning that rely on self-report measures may produce questionable data.

A significant positive correlation was found between self-reported comprehension levels and experimentally measured levels of comprehension ($r = 0.4$,

$N = 102, p < 0.01$). As the scatterplot (Figure 6.9) shows, the data points are poorly distributed along the linear regression line, with some outliers. It is a moderate correlation - only 18 percent of the variation within the self-reported data can be attributed to the actual comprehension data (and vice versa). The remaining variation is down to extraneous variables. The data therefore suggests that the two variables do not have a lot of variation in common which means that despite the significance of the correlation, it is not possible to use an individual's self-reported comprehension to predict what their actual comprehension might be (or vice versa).

Figure 6.9 Measured levels of comprehension vs. self-reported levels of comprehension



6.6 Conclusion

Bringing together the findings from the primary research questions and the subsequent data-driven questions, the results support the study's main hypothesis that narrativising the summing up with specific linguistic features significantly

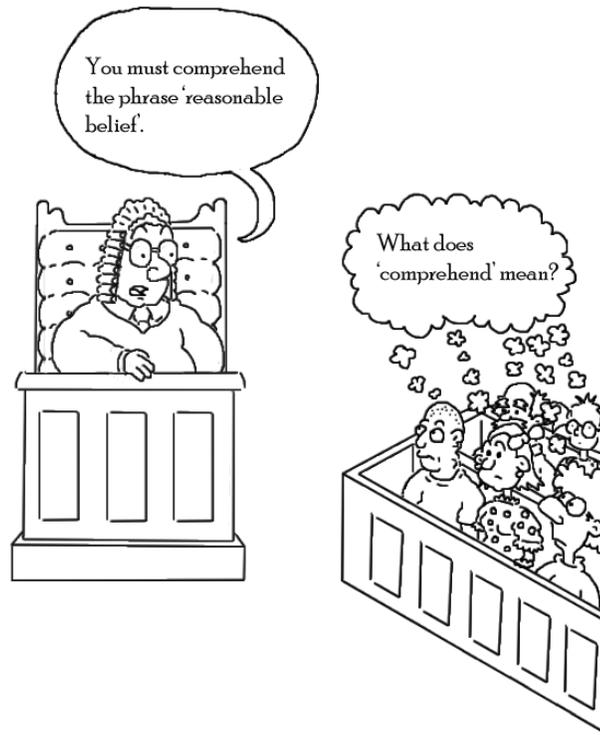
improves mock jurors' overall comprehension, compared to both a summing up based on decontextualised instructions, and a summing up that integrates evidence from the case into the decontextualised instructions. It appears that narrativisation improves comprehension by aiding juror memory, as significant improvements were made to both recall and recognition but not to application of the acquired knowledge, compared to the integrated evidence and decontextualised conditions. Narrativisation also led jurors to report higher levels of concentration in the summing up. The main effect of narrativisation can be pinpointed to dramatic improvements to four specific directions contained in the summing up: The directions concerning burden of proof and standard of proof, the legal direction concerning the three elements of rape and the direction about the availability of exhibits in the jury room.

The integrated evidence summing up and the decontextualised summing up followed similar patterns of comprehension to each other in terms of the facets of comprehension that had been targeted by the three tasks, and in terms of the jurors' self-reported levels of concentration, interest and understanding. For the self-reports, directions and tasks, comprehension in the integrated evidence condition was often reported as higher than for the decontextualised instructions. However, these differences rarely reached significance, and therefore it is possible that they were a product of mere chance. In the case of the directions however, it is possible that mean comprehension was lowered by an anomalous poor performance relating to the direction about unanimity of verdict. Further, the lower comprehension of the decontextualised instructions could potentially be attributed to four specific directions where performance was remarkably low compared to the other two conditions: Jury's role, reasonable belief in rape, circumstantial evidence, and notably, how to consider the evidence.

There are some findings in this research where style of summing up doesn't have an effect: On the application task (where performance appears uniformly high), for the directions concerning the jury's role and the judge's opinion (where again, performance was comparatively high) and levels of self-reported interest (where all participants grouped around the middle of the scale). Not finding an effect is a finding itself. In the following chapter, the results presented in this chapter will be

discussed in light of previous research to find possible reasons for the effects – and non-effects – that were found in this study.

Discussion



7.1 Introduction

In this chapter, the results of the jury simulation will be used to address each of the research questions underpinning this thesis, and interpret the findings in terms of the Story Model (Bennett and Feldman, 1981; Hastie, Penrod and Pennington, 1983; Pennington and Hastie 1992, 1993). First, it will discuss the comprehensibility of decontextualised jury instructions and compare these findings to the American trial context. Second, it will discuss whether there is merit to the proposal made by Lord Auld (2001) to improve levels of comprehension by integrated jury instructions with evidence from the case. Third, the chapter will discuss how narrativisation improves the comprehensibility of the jury instructions. After addressing each research question, the chapter will use the data of the study to discuss the methodological implications for jury research in general.

For the sake of clarity, it is useful to briefly summarise the results of the study beforehand. The overarching finding of this thesis is that decontextualised instructions are poorly understood in comparison to instructions which use details of the particular case, and that narrativisation of the jury instructions significantly improves comprehension. Specifically, there were three major findings. First, poor comprehension was shown by mock jurors when provided with simply the decontextualised instructions. Comprehension was particularly low for the directions concerning reasonable belief in rape, the three elements of rape, and how to consider the evidence. Second, there was no significant improvement from the decontextualised instruction condition seen in the integrated evidence condition, though significant improvements were made in the directions relating to judge's role, reasonable belief in rape, circumstantial evidence, and how to consider the evidence. Performance was markedly low for the direction relating to unanimity of verdicts. Third, narrativisation produced a significant improvement in comprehension compared to both the decontextualised and integrated evidence condition. This improvement was robust across a multiple-choice test and a paraphrase test, where performance was significantly poorer in the other two conditions. Narrativisation had the largest effect on the directions concerning the burden and standard of proof, the directions about availability of exhibits and the direction concerning the three elements of rape. In sum, narrativising the words in the directions produced an improvement to comprehension, with effect sizes indicative of moderate to strong effects.

7.2 Interpreting jurors' comprehensibility of decontextualised instructions in England and Wales (Research Question 1)

As previously discussed, the task of explaining the law to the jury in England and Wales falls to the judge in his summing up at the end of the trial. As long as the instructions in the summing up are appropriate for the case and reflect the current law, judges are free to write their own directions and are encouraged to tailor their instructions from case to case. This practice is in stark contrast to that of most American jurisdictions. This study measured the comprehensibility of

decontextualised English and Welsh instructions to serve as a point of comparison for more case-specific instructions. By using the instructions provided in the 2007 Crown Court Bench Book and the appropriate legal statute, it was possible to construct a summing up which was decontextualised from the case, primarily paradigmatic in nature and replicated the style of instruction used in America. Average comprehension levels of the decontextualised instructions were 55 percent, which means that the average juror in this study understood just over half of the directions when they were read verbatim.

This low figure confirms the overwhelming finding by American research that non-accommodating abstract instructions are poorly understood. As already discussed in Chapter Two, Elwork and Sales (1985), in reviewing the literature, claimed that research up until that year had demonstrated comprehension levels for American pattern instructions in various states at about 50 percent or less. Since then, research has revealed comprehension rates of various levels, with assessments including 13 percent (Steele and Thornburg, 1988), 41 percent (Reifman, Gusick and Ellsworth, 1992), 52 percent (Ellsworth, 1989) 70 percent (Severance, Greene and Loftus, 1984) and 73 percent (Buchanan, Pryor, Taylor and Strawn, 1978), according to the dependent measures used. The research similarly concludes that the focus on the legal accuracy of the instructions, rather than the purposeful communication of those instructions, unnecessarily restricts jurors' understanding, especially when more difficult points of law are involved.

This finding paints a potentially worrying picture about instruction comprehension in England and Wales. The majority of the decontextualised instructions used in this condition were taken from the Specimen Directions in the 2007 Crown Court Bench Book, which had been supposedly drafted in plain English (Heffer, 2005: 165). As many of the pattern instructions tested in America are not in plain English, it was therefore anticipated that comprehension would be better than found in most American research. This unexpected finding suggests that the Specimen Directions alone are not enough to facilitate comprehension. The fact that they were dropped because they were 'incanted mechanically without any sufficient link with the case being tried' (Judge, 2010: v) could mean that some judges were

constructing a summing up on dangerous foundations or at worst, jurors were not instructed comprehensibly enough.

However, it is important to note that the two legal instructions not in the Specimen Directions – the three elements of rape and reasonable belief in rape – played a notable part in lowering the average of the overall score in each condition. Elwork and Sales (1985) found that misunderstandings by jurors frequently relate to the most important legal issues. Similarly, in this study the performance on the two legal directions based on the statute was markedly poorer irrespective of the style of summing up. The legal statute on which the instructions are based is legal and complex in nature, and unlike the Specimen Directions, has not been designed for a lay audience. Accordingly, in the decontextualised condition, comprehension of these legal directions was 40 and 41 percent, respectively.

When the overall performance of decontextualised instructions is recalculated without these statute directions, the average score rises to 60 percent, more in line with the higher rates of comprehension found in the research from America and the comprehension levels found in some American research that has tested pattern directions that have been revised in plain English (see section 3.2). This therefore suggests that the efficacy of the Crown Court Bench Book, or more precisely, the *Specimen Directions* in the 2007 Bench Book, are not as poor as first thought and they provide a solid basis for instruction. They are not adequate alone, but using them as a foundation to instruct the jurors is better than not having them at all.

This finding does however mean that the decision to drop the Specimen Directions in the current 2010 Bench Book may have been ill-advised. In a move to encourage judges to construct their own instructions and rely less rigidly on a model provided in the Bench Book, the illustrations that have replaced the Specimen Directions have been written for an audience of judges and not with an eye for lay comprehensibility. The results of this research keenly support such emphasis on the responsibility of the individual judge to craft directions appropriate to each individual case. However, as Lord Chief Justice Judge acknowledges in the foreword to the Bench Book (2010: v), it is unrealistic to expect that judges will crossover immediately into self-crafted directions and that ‘all lawyers, judges included, resort

to precedent'. As such, he urges the judges to rely on the illustrations in the new Bench Book. It is possible that, if a judge did heavily rely on these illustrations during his summing up, the comprehensibility of his instructions would be lower than if he had relied on the Specimen Directions. Further testing of the comprehensibility of the illustrations in the current 2010 Bench Book and an explicit comparison with the previous 2007 Bench Book would be necessary to determine if this is the case.

One other disquieting result from the decontextualised instructions relates to the direction on 'how to consider the evidence:

'You do not have to decide every point which has been raised; only such matters as will enable you to say whether the charge laid against the defendant has been proved. You will do that by having regard to the whole of the evidence and forming your own judgement about the witnesses, and which evidence is reliable and which is not. The defendant has chosen to give evidence. You must judge that evidence by precisely the same fair standards as you apply to any other evidence in the case.

You must decide this case only on the evidence which has been placed before you. There will be no more. You are entitled to draw inferences, that is come to common sense conclusions based on the evidence which you accept, but you may not speculate about what evidence there might have been or allow yourselves to be drawn into speculation'.

Appendix 2.2, lines 8 -19.

Comprehension in this instance was exceptionally poor – 32 percent – even poorer than for the legal directions on rape. However, unlike the legal instructions on rape, comprehension significantly improved in both the integrated evidence and narrativised conditions at the one percent level. This serves as an indication that rather than there being an inherent conceptual difficulty with this direction, the fault lies with the direction itself. It is possible that the terms 'inference' and 'speculation' are not sufficiently explained. It also possible that the jurors are confounded by being told that they may not speculate about what happened because this would directly help them to construct a story of the crime (Pennington and Hastie, 1992, 1993) and is therefore at odds with their expectation.

Ultimately it is for the courts to decide what level of miscomprehension is tolerable. It is unrealistic to expect 100 percent comprehension by every juror (Penman, 1987) and the comprehension level that is realistically attainable probably will vary according to the complexity of the ideas being conveyed and the conceptual clarity of the applicable law (Elwork and Sales, 1985). Arguably, the most important instructions relate to the burden and standard of proof and the ingredients of the offence on the indictment because these feed directly into the ultimate question of any trial by jury, which is whether the prosecution evidence satisfies the legal charges. For these directions it is likely that the tolerance of misunderstanding will be much lower than for other directions, such as 'the availability of exhibits' for example, which concern procedural elements of the trial. That said, in previous research an overall comprehension level of 52 percent has been regarded as unacceptable (see Chapter Two). The evidence presented in this study therefore illustrates that whilst decontextualised instructions based on Specimen Directions may not be in such a critical state as their American counterparts, they are no exception. Any benefits to comprehension made by integrating evidence or by a narrativisation approach should therefore be embraced.

7.3 The improvements to jurors' comprehension by integrating evidence from the case into decontextualised instructions (Research Question 2)

One of the questions asked of the data was whether integrating evidence into the legal directions of the summing up would improve jurors' comprehension. An approach of this sort was suggested by Lord Auld in his Criminal Courts Review in 2001. In his report, Auld called for a simplification of the way in which judges direct the jury on the law and sum up the evidence. He contended that each case calls for its own treatment and that the judge should frame legal questions for the jurors with evidence. In so doing, judges only refer to the evidence which bears on the legal issues of that particular case (p. 534). It was expected that by contextualising the law in this way, jurors would understand the directions better than hearing a list of decontextualised instructions. According to the most prominent explanatory model

of juror decision-making, the Story Model (Bennett and Feldman, 1981; Hastie, Penrod and Pennington, 1983; Pennington and Hastie 1992, 1993), lay jurors reach verdicts by mapping what they know about that law onto a crime narrative which they construct based on their experience of the social and physical world and their evaluation of the evidence (see Figure 4.1, section 4.2). By having the judge explain the legal categories in the context of the evidence, as Auld proposed, it is thought that the two processes would become less disparate and lower the amount of mapping the jurors would need to do themselves and comprehension would improve as a consequence. In practice, however, a much more complex pattern of comprehension has emerged from the data.

Overall, average performance by jurors who received the integrated evidence directions did not significantly differ from the jurors who received the decontextualised instructions alone. However, by looking at the classification of the individual instructions within the summing up, it is possible to see that the instructions that did significantly improve were the directions that relate to the evidence. Referring back to the classification of instructions previously identified in section 5.2.2, the eleven directions in the summing up in this study fit into three categories (see Table 7.1)

Table 7.1 The categorisation of jury instructions

Procedure-Based	Evidence-Based	
	How the matters of law bear on the evidence	How to use the evidence
Jury's role Judge's role Judge's opinion Unanimity of verdict	Burden of proof Standard of proof Three elements to rape Reasonable belief in rape	Circumstantial evidence How to consider the evidence Availability of exhibits

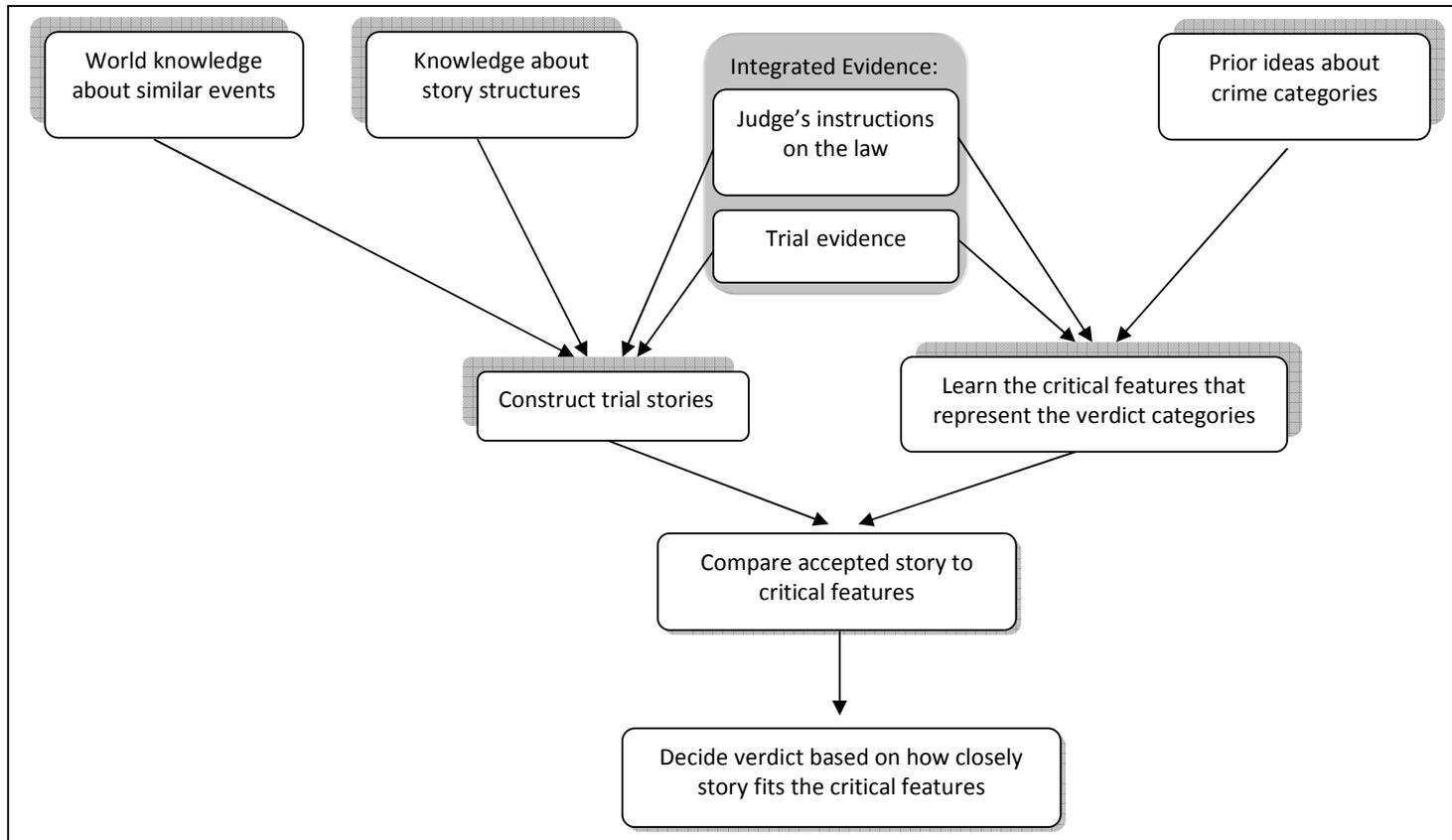
The first set of instructions is procedural: They explain the task ahead for the jury. The second set of instructions is evidence-based: They either explain how the legal categories bear on the evidence or how the evidence should be evaluated in terms of the verdict. In all but one instance (relating to the instruction on the judge's role, to be discussed subsequently), integrating evidence affected comprehension of the evidence-based directions, particularly those which relate to how to evaluate the

evidence. In terms of the Story Model, this finding is somewhat unsurprising. It is possible that comprehension improved for these instructions by integrating evidence because it drew a connection between the processing of the trial evidence with the processing of the judge's instructions (see Figure 7.1), helping to bring the story construction and legal categories in line with each other and, in so doing, already completing the mapping stage of the comparison task, which is central to the comprehension process.

The instruction relating to the availability of exhibits, which details to jurors the specific evidence that they might want to look at again in the jury room, fell short of reaching a significant difference from the decontextualised instruction condition, despite being classed in the evidence-based group of instructions. Irrespective of style, this instruction was the easiest on average of all the directions to understand. Performance in the decontextualised condition for this instruction was comparatively very high (69 percent) to begin with, and it is possible that any improvements made by integrating evidence suffer from the same ceiling effect proposed for rewriting instructions (Wiener, Pritchard and Weston, 1995). The scores achieved for the directions relating to the judge's role, judge's opinion, and circumstantial evidence support this idea; these directions were the highest scoring in this condition, yet all averaged within five per cent of the comprehension level achieved by the availability of exhibits.

Whilst performance notably improved in the legal instruction pertaining to the reasonable belief in rape (to 59 percent), performance for the other legal direction about the three elements did not correspond (36 percent). Given the large effect on the reasonable belief in direction, which is itself a subsection of the three elements direction, it cannot be that overall conceptual difficulty can foot the blame.

Figure 7.1 How integrating evidence affects juror processing



The task data would suggest, unlike the narrativised condition, that difficulties can be predominantly pinpointed to the novel-scenario task. Correct scores on the novel-scenario test rely on the jurors' ability to use the legal information they have learned from the judge's instructions and applying it to a new set of evidence. Application scores were not universally poor in this condition, only for this instruction. It is likely that when completing this task, the unique combination of both the instruction and the condition created two simultaneous challenges for the jurors. The three elements instruction contains the overarching framework that the juror must map onto their crime narrative; this means that it is the hardest of all the directions to apply. At the same time, because the directions in this condition had been directly contextualised within the case evidence, jurors would have had the extra task of separating the law from the evidence before applying it to the new evidence presented in the task. Both processes would have significantly increased jurors' cognitive burden and lowered performance.

Contrary to this pattern of results, the integrated evidence instructions were significantly different to the decontextualised instruction performance on two of the procedural directions – unanimity of verdict and judge's role. Neither of these findings deter from the suggested pattern however. The first, relating to the unanimity of verdict, found that jurors who received the integrated evidence instruction performed significantly worse than jurors in the decontextualised condition. Performance in the decontextualised condition was not markedly poor, and there was also no such effect in the narrativised condition, where the performance was consistent with the other procedural directions (60 percent). This observation of worsened performance in relation to the decontextualised instructions was the only one of its kind. Interestingly, this direction in the integrated evidence condition did not have any evidence integrated within it specifically and so comprehension should have been the same for the decontextualised condition. It is possible that suddenly receiving a decontextualised instruction after just hearing some heavily embedded instructions concerning the legal ingredients of the offence and circumstantial evidence might have negatively affected jurors' performance. Second, in respect to the instruction about the judge's role, an unanticipated

significant difference was found between the integrated evidence condition and the decontextualised instructions. Like the unanimity of verdict direction, the wording of this direction did not specifically integrate evidence at that point in the summing up and comprehension should have been the same as jurors' comprehension of the decontextualised instructions. Importantly, the difference between the scores only just reached significance. This instruction about the role of the judge involves telling the jurors that they are to listen to the judge's instructions and accept what they are told about the law. Despite not feeding into the processing of the trial evidence, it is possible that the sheer amount of inherent reinforcement about the judge's role throughout the integrated evidence summing up may alone increase comprehension enough to reach significance. This would also account for why significance was not reached in the narrativised condition.

7.4 The efficacy of using narrativisation to improve jurors'

comprehension of the instructions (Research Question 3)

This study found overwhelming evidence for the narrativisation hypothesis (Heffer, 2005). Framing the summing up with narrativising features significantly improved juror comprehension: When examining the overall performance on the comprehension measures, participants answered 15 percent more of the questions correctly than participants in the decontextualised instruction condition, and 11 percent more than participants in the integrated evidence condition. It is highly unlikely that these differences were the result of chance. The success of these significant results centres on having adopted a much more jury-centric approach than attempted by integrating evidence into the instructions alone or by previously suggested instruction reforms. This is because jurors must be truly accommodated to as both fact finders and as lay people, which requires consideration not only of the instructions as a text to be communicated, but also the process by which those instructions are communicated (Dumas 2000b; Heffer, 2008). It is the failure to acknowledge this latter point that has meant previous jury research on comprehension improvements has only achieved limited success. By recognising the summing up as a transmission process in which judges encode a message from their

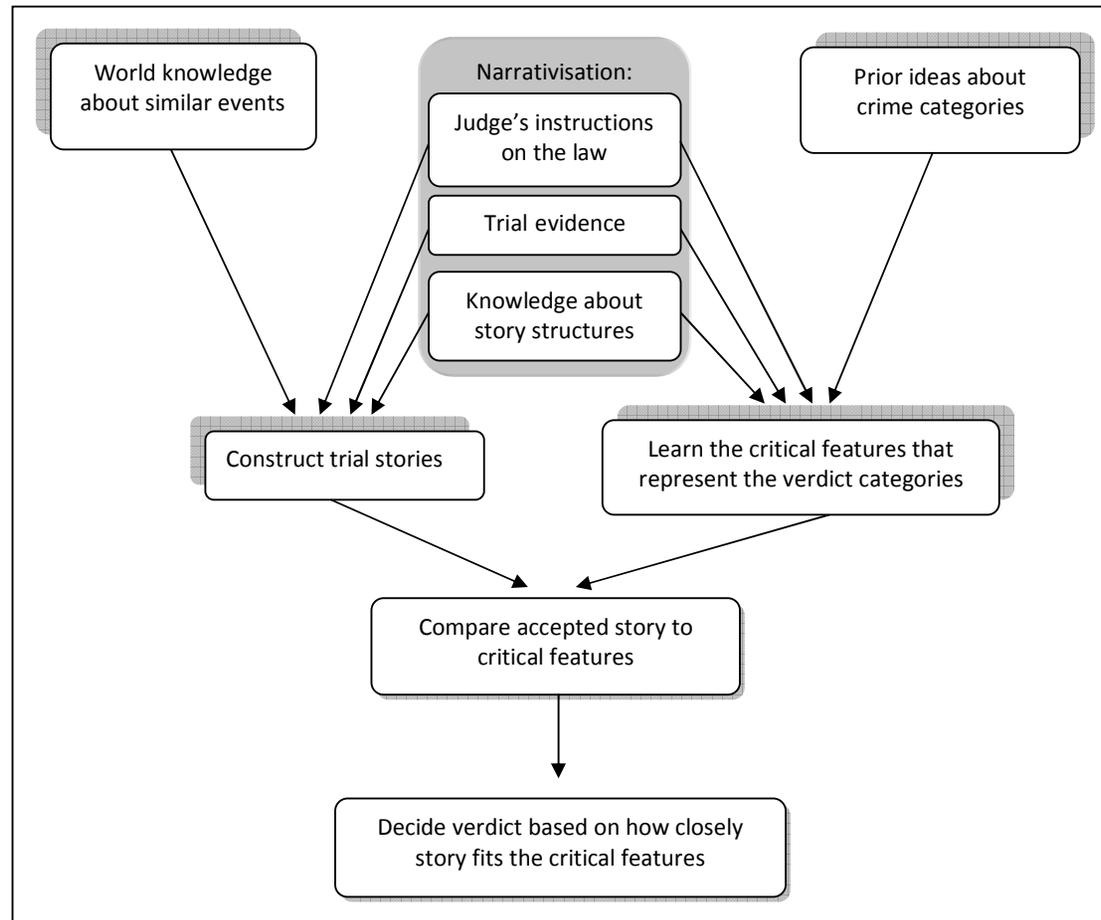
thoughts, send a signal to the juror who then decodes the ideas from that message (Reddy 1979; Shannon and Weaver, 1949), it is important to remember that, as Penman (2000: 64) notes, 'people and not the message per se are seen as the process of meaning generation; they are actively involved in constructing their understanding in discourse'. So in decoding the ideas of the judge, the juror will also bring in their own ideas, based on their experiences of their physical, social and communicative world (Smith, 1991). The narrativisation approach uniquely takes into account therefore that jurors comprehend the message as judges intend it when the judges have regard for the way the jurors are likely to reason. Jurors are likely to reason narratively (Heffer, 2005), which means they will explain, organise and predict life experiences in terms of a series of events across time based on relationships to other people and identification with them (Abbott 2002; Schirato and Webb 2004; Turner, 1996). Narrative reasoning in this way embodies jurors' capacity to empathise (Keen, 2006) and read minds (Zunshine, 2006; Palmer 2004), two common-sense functions for the juror that are acutely pertinent to their role as a fact finder. In this study therefore, it is likely that these narrativising linguistic features increased comprehension because they expressed the legal categories in a narrative way, and as such mapped directly onto the crime story that the jury mentally construct.

The findings from analysis of the individual directions in the narrativised condition also support this hypothesis, and further suggest that the previous suggestion of a ceiling effect for jury instruction comprehension is misplaced (English and Sales, 1997; Wiener et al, 1995). In this study, significant improvements through narrativisation were seen on the proof directions, the rape offence instructions, the directions on how to consider the evidence and the availability of exhibits. As anticipated, and as in the integrated evidence condition, the effects were localised to the evidence-based instructions rather than the procedural instructions. Significant effects were observed in all but one of the evidence-based directions (the difference between the decontextualised instruction and narrativised direction on circumstantial evidence only marginally missed significance: $p = 0.06$). The key finding in this condition is that performance was exceptional on the directions which instruct jurors on how matters of the law bear on the evidence and all but one of

these directions were significantly better than the instructions that had evidence integrated as well as the decontextualised instructions. Narrativisation improved comprehension for the 'three elements of rape' direction by 17 percent from comprehension of the direction in the decontextualised instruction condition. Even though mediated by the overall conceptual difficulty of the instruction, the substantial achievement of a comprehension level of 58 percent is much more acceptable for a real trial than 41 percent. Narrativisation had an even more profound effect on the burden and standard of proof directions, with comprehension levels reaching 89 percent and 82 percent respectively. These results are of paramount importance because they relate to the most crucial instructions in the summing up, and research has previously suggested that jurors find these directions the most problematic (for example Strawn and Buchanan, 1976). The data from this study similarly found that the proof directions and legal directions were the least comprehensible, but importantly, narrativisation facilitated comprehension beyond levels found in previous research, suggesting that the hypothesis that juror comprehension is subject to a ceiling effect is mistaken. In the way that a potential ceiling effect was observed in the integrated evidence condition, it is likely that a ceiling effect has previously been observed because of limitations to the reform approach, rather than limitations to jurors' comprehension. It seems that lay juror reasoning and comprehension will not be capped when the instructions are contextualised and narrativised.

The success with the evidence-based directions also reinforces the Story Model and Narrativisation Hypothesis. It is likely that narrativisation links both the trial evidence and the knowledge about story structures to the jury instructions, thereby mapping the legal categories more precisely onto the crime narrative to facilitate the comprehension and comparison process (see Figure 7.2). This would also account for why integrating evidence had a less and more mixed effect on comprehension, because it did not tap into jurors' use and knowledge of narrative structure and as such did not allow such robust mapping. The directions relating to how the matters of law bear on the evidence require a global view of the crime narrative whereas the 'how to use evidence' directions require mapping onto merely a segment of it. This means that the former is a harder task that requires a robust

Figure 7.2 How narrativisation affects juror processing



mapping. Narrativisation therefore had more effect because it does more of the mapping, lessening the amount of cognitive work for the juror and mapping the legal and lay together accurately, and perhaps accounts for why these jurors reported greater understanding and concentration than the jurors in the other conditions.

Improvements seen on the memory tasks also support this hypothesis. Jurors' memory is of paramount use during the comparison stage of processing. If narrativisation facilitates better mapping, jurors should be better able to recall and recognise the information correctly, and as such paraphrase and multiple-choice task scores would significantly increase. This was the finding most prominently for the rape offence and proof directions. In fact, the data show that narrativisation increased paraphrase abilities irrespective of direction - a notable finding given that the paraphrase task was the hardest task overall, and is the most useful skill during deliberation. Several studies of text comprehension (Graesser, 1981) indicate that material is better remembered if it has an obvious underlying structure. By highlighting the relationships between the legal categories and the trial evidence within a narrative structure, jurors' learning significantly improves.

7.5 Jury research methodology in light of the data

Although the focus of this study was to explore the relative comprehensibility of the summing up and identify the influence of narrativisation, this study also advances understanding of trial simulation techniques and objective comprehension measures as tools for psycholinguistic and legal research. In a context in which direct examination of jury decision making in actual cases is prohibited by section 8 of the Contempt of Court Act 1981, the research paradigm applied in this study has yielded valuable insights, not only in regard to the linguistic factors that influence jurors in comprehension, but also in regard to the accuracy of their understanding of the task before them, their grasp of specific legal issues with which they are presented, and the different cognitive functions involved in comprehension. This section will show that by careful and appropriate sampling, robust materials, a focused yet detailed procedure and thorough dependent measures, it is possible to successfully negotiate the Contempt of Court Act 1981. Given the increasing debate over the suitability of

juries in, for example, fraud trials, (Goldsmith, 2007) the findings from using these research techniques thus has a relevance that extends beyond the confines of rape and into other areas of the law.

In a study such as this one, inevitably sceptics will argue that it is near impossible to research juries because every jury is different. It is true that each jury is different, and also that they are presented a unique case and different instructions, so this means one must be careful how widely the findings of this research are applied. However, this research was concerned with a crucial factor which is constant in any trial – the process of instruction. All jurors receive instructions, many of which occur in nearly every trial, and it is important that those instructions are comprehensible to jurors of all intelligence-levels, attention-spans and backgrounds. It was therefore important to obtain a general picture of how a varied subset of jurors performs.

Undoubtedly random sampling is the most desirable strategy for recruiting participants in a jury simulation, replicating the system used in real juror selection. However limited resources constrained sampling to the 'opportunity' technique. Nevertheless, by advertising in a parish newsletter that is delivered to every house in one town, and in the hospitals in the wider city, bias for age, gender, profession, education or social class that can often occur with opportunity sampling was limited. Adopting this 'community locale' approach led to a more demographically heterogeneous sample than is normally achieved in jury research, where the tendency is to rely on a less diverse sample of university undergraduates. Indeed, in this study there was variability in terms of age, education level and gender in all three groups, but importantly the pattern of variability was matched to a large extent across the groups (See section 5.4). Crucially, all participants were eligible for jury service and could (or already have) been real jurors on another occasion. As such, it was still possible to successfully gather a large body of people to act as jurors (and gather one which was much more externally valid than normally achieved in jury research) and use this to suggest how well this group of people - and potentially how others - would respond to the instructions in this case.

When considering the most robust research methods for jury research, consideration must be paid to the choice of trial medium as well as the

characteristics of the mock juror sample. A case may be mounted that in this study jurors' comprehension is underestimated because the mock jurors did not have full advantage of all the contextual information that is available at trial. For example, the trial was not played out live, the length of the trial was truncated and participants did not have copies of the evidence to look through again as they may do in court. In spite of these factors, however, a significant effect of narrativisation was still observed. As such, it is possible that comprehension through narrativisation might be even higher in a more naturalistic context where these advantages are offered. The present experiment is much more ecologically valid than most other studies; often studies measuring instruction comprehension simply provide the instructions without or with the scantest preceding trial information. Striving toward greater verisimilitude in all aspects of the methodology, enormous care was taken to create a detailed trial context using a videotape with real legal practitioners rather than a written trial summary or audiotape that departs further from a real trial setup. In the same way as a written summary or audiotape, the videotape created an internal consistency between conditions that would not have been achievable by a live trial re-enactment in a real court. Furthermore, the additional contextualisation provided by the videotape added a greater level of realism than is achievable in writing. The fortune of editing a professional tape already created by Channel 4 resulted in a better produced tape with better actors that was more believable than could have ever been made afresh within the cost and time constraints of this project. However, the use of this tape did lead to an unforeseen problem: Since the filming of the 'Consent' programme, the actor who played the defendant, Daniel Mays, has become a household name in two primetime BBC programmes. As such, if any participants had recognised the actor in the video they had been watching, it is possible that they would have been made more aware that the trial they were watching was fictional, thereby reducing the sense of realism for them. Nevertheless, this research found that jurors took their task seriously and with concentration, and abundant research confirms that mock jurors take their role conscientiously despite knowing that the trial is not genuine and no one's fate hangs in the balance (Young, Cameron and Tinsley, 1999; McCabe and Purves, 1974). For example, Steele and Thornburg (1988) found that real jurors made a 'good faith effort' to understand and

apply their instructions; it is only because of incomprehensible directions that these efforts dwindle. It seems therefore that this unfortunate consequence of using a ready-made televised trial re-enactment has not outweighed the benefits of providing the tape in the first place, and more elaborate attempts at greater verisimilitude are worth the effort.

In order to conduct sufficient and accurate jury research, it is not just sufficient to set up the right conditions in which to manipulate and test the instructions, the right dependent measures of comprehension must also be selected. Previously, many studies chose to interview or survey jurors and trial participants (see Darbyshire, Maughan and Stewart, 2002). However this study has demonstrated that conclusions that are based on self-perceptions of performance are questionable. As discussed in section 6.5, a comparison of the jurors' subjective responses with their actual responses revealed a positive, but weak, correlation. A combination of the overestimations of comprehension and the variability across participants in the match between reported and actual comprehension therefore suggests that some of the time jurors understand the directions in a different sense from that intended. As Zander and Henderson (1993: 205) acknowledge, 'obviously, the fact that jurors think they could understand the evidence does not prove that they actually did understand it'. It is therefore apparent that studies using jurors' subjective responses, or the responses of other trial members, is limited. This justifies the use of objective measures in this and future research and the restriction of self reporting to the purpose of refining questions and generating further more focused research. Jurors cannot be expected to give coherent answers to the most important kind of questions one would want to ask. For example the New Zealand study (Young et al, 1999) asked such questions as 'what was your understanding of the evidence of particular witnesses?' The interviewer was then supposed to prompt the juror by selecting bits of evidence from key witnesses and to ask what were the most important points to emerge from this evidence. One cannot help but feel sceptical about whether the ordinary juror could give a satisfactory answer to such questions, particularly in light of the findings of this research. In the face of considerable criticism then, simulation studies with a primary focus on objective measures provide a better measure than self report questionnaires.

The selection of the right objective measures to use is crucially important. This study used three separate measures, thereby addressing comprehension comprehensively. The paraphrase and multiple choice tests were based on the assumption that it is easier to recall and recognise what has been understood. The novel-scenario test targeted jurors' abilities to put into practice the knowledge that they had acquired in the instructions, in much the same way as they would when deciding a verdict. By matching each direction to a question for each of the three tasks, no potentially important part of the direction was overlooked. However, when considering the data yielded from these three tests, it must be acknowledged that the methodological approach used to assess juror comprehension can have a substantial effect on the performance level of the jurors. For example, the procedure that requires jurors to articulate (the paraphrase test) rather than simply recognise correct interpretations of an instruction (the multiple-choice test) is likely to result in lower performance levels because it increases memory and cognitive burden. Thus, in assessing juror comprehension levels for current jury instructions, one must consider the difficulty of the test as well as the level of juror performance. For example, the markedly improved error rates on the paraphrase task in the narrativised condition beyond the levels achieved in the application test by the other conditions (see section 6.3) suggests that the contextualised and integrated instructions pose a more pertinent improvement to recall than has previously been credited. The three measures employed in this study therefore not only offer a picture of the different mental performance going on during instruction comprehension, but can also offer reassurance when low error rates are obtained in the more demanding task.

An objective assessment of jury comprehension can only truly be achieved by listening to jury deliberations by way of a two-way mirror and direct post-deliberation questioning. However the Contempt of Court Act 1981 prevents this from happening in England and Wales. This research has shown, though, that for the purposes of instruction comprehension research, a simulation can be a useful and worthwhile approximation of a real trial; it *is* possible to conduct sound research in spite of the Contempt of Court law. Without undermining this conclusion, the argument remains that there ought to be an exception for properly authorised

research which does not identify either the case or the jurors. The Act should not be lifted, nor should it be relaxed, however - the American position which permits the media to interview jurors at the end of the case, and the Spanish position in which jurors *must* justify their verdicts publicly (Thaman, 1999), are particularly unfavourable, for instance. Not only do they endanger the finality of the verdict, it is possible that the 'openness' would inhibit jurors from expressing their views candidly during deliberation or deter them from reaching an unpopular verdict (Cameron, Potter and Young, 1999; Marder 1997, 2011).

I propose that Clause 8 (2), initially introduced by the Conservative government in the Contempt of Court Bill but later rejected and removed by the House of Lords, should be reinstated. Having set out the prohibitions on seeking or making disclosure in clause 8 (1), Clause 8 (2) continued:

This section does not apply to publications which do not identify the particular proceedings in which the deliberations of the jury took place or the names of particular jurors, and do not enable such matters to be identified, or the disclosure or solicitation of information for the purpose of such publication.

Obviously, research which goes on in the jury room would be an extremely sensitive issue requiring delicate handling, even requiring personal approval from the Lord Chancellor or Lord Chief Justice. In the meantime, however, this research shows that it is definitely possible to obtain findings of use with the Act still in place.

7.6 Conclusion

This chapter demonstrates that narrativisation is a feature of social life, exerting influences on lay peoples' reasoning and decision-making when they enter a trial context and must be accommodated for comprehension to increase. The results of this study also found that the Specimen Directions within the 2007 Crown Court Bench Book, whilst less comprehensible than anticipated, provide a foundation for more contextualised, case-specific – and understandable – instruction.

This investigation has shown that a focus on the *process* of instruction from a lay perspective, rather than simply the *text* of the instructions, means that jurors' comprehension can improve further. This focus enables jurors to map information

contained in the judge's instruction onto a crime narrative that they mentally construct. For this reason, the jury instructions pertaining to the evidence in the case and relevant directly to the crime narrative are most amenable to being mapped. Of these, the instructions concerning how the evidence should be used are more easily mapped because the evidence is explicitly linked between the law and relevant components of the story. The instructions that relate to how matters of law bear on the evidence are harder to map because they require a look at the narrative from a global perspective. As such, the more robust the narrative, the easier it is to map these latter directions. This study has shown that a narrativisation approach which integrates trial evidence and lay jurors' knowledge of narrative structure significantly increases comprehension of the law by facilitating this mapping process more fully.

Finally, by designing a research paradigm which prioritises the reliability/validity trade-off and adopts a triangulation strategy of dependent measures, the paradigm offers both theoretical and pragmatic potential, establishing rigorous empirical evidence of the impact of English and Welsh instructional context on comprehension. It therefore provides a foundation for subsequent research, and demonstrates that the Contempt of Court Act 1981 does not necessarily compromise jury research. Although even this lengthier, more elaborate simulation cannot avoid some of the inevitable uncertainties that research can only reduce rather than avoid, this thesis supports the influence of narrativisation on jurors, and thereby provides a framework for identifying key features that moderate the comprehensibility of jury instructions. It remains to be seen how the legal domain will respond to the findings from an empirical methodology of this kind. The crucial implication of the results here suggest that attention to narrativisation in the legal context should lead both academics and practitioners to a re-evaluation of what it means for a jury to render a fully informed and just verdict.

8

Conclusion

In the English and Welsh judicial system, lay jurors play a unique role as the final arbiters on factual matters in a criminal trial. Jurors are entrusted with their task precisely because they infuse common experience and common sense into proceedings. As lay people, they are endowed with a developed narrative sense of the world and a keen eye for discerning human behaviour. They are therefore essential to the integrity of the justice system, serving as 'insurance that criminal law conforms to ordinary man's idea of what is fair and just' (Devlin, 1966: 160). The fundamental paradox of trial by jury however is that these jurors, without having any legal experience, must decide the guilt of a defendant using the formal dictates of the law.

The central question at the heart of this thesis was whether the great claims for trial by jury as the cornerstone of the justice system are being undermined by elements of its practice. This study suggests that the paradox of the courtroom favours the role of the law in jurors' decision making more than the role of their subjective experiences. The set-up of the trial requires the jury to remain in the room, listen passively to all the evidence and the law, and then make a decision at the end of the trial as to a defendant's guilt, based on logical and objective principles dominated by the paradigmatic mode. The problem is that this leaves little place for the jurors' subjective experiences and the narrative mode which is their primary means of sense-making. Being mindful of the small scale of this study, the results have shown that jurors, whilst void of legal expertise and courtroom experience, are not 'blank slates' in the courtroom. They do not sit passively and their previous experiences of life cannot be completely removed or delayed until the end of trial. Crucially, if jurors' are not accommodated as active, narrative processors in the courtroom, they will struggle to understand the law and do their duty. If, on the other hand, adjustments are made to bridge the gap between the legal and the lay, jurors are a receptive and capable audience for understanding and applying the law.

It is the judge's responsibility, in his jury instructions, to bring about this necessary convergence between the jurors narrative-based decisions with the categories of the law. His linguistic challenge is to explain the law in a manner that the jury will understand and be able to use, but at the same time prevent them from over-narrativising the issues. Given the pivotal role in the trial of the instructions in the trial, this study offers some insight into how far three different styles of jury instruction can satisfy jurors' comprehension whilst still being legally accurate.

First, this study found that decontextualised instructions are not the most comprehensible way to instruct the jury, and that plain English, whilst being necessary for comprehension, is not sufficient. This finding could have implications for a large body of jury research that has taken place in America. To date, the majority of studies attempting to improve juror comprehension have proposed rewriting instructions in plain English. In some cases this has led to jurisdictions in America re-writing their pattern instructions according to their 'psycholinguistic' principles. The primary tenet of the Plain English movement is to transform the *reading* of the instructions into *communicating* the instructions specifically to a lay audience (Tiersma, 2006). In this sense, plain English performs the same functions as narrativisation and this research supports that this is the means to facilitate comprehension. However, this study also demonstrates that by focusing on lexicogrammar and tone, and failing to address the decontextualised nature of the instructions, psycholinguistically-purified instructions are unlikely to reach high levels of comprehensibility.

Second, this study also showed that allowing judges to have linguistic freedom, rather than constraining them to the recitation of standardised instructions, is better for jurors' comprehension. As Auld (2001) suggested, legal instructions concerning the treatment and types of evidence are better explained when the evidence they refer to is explicitly used. This finding means that, for the jurisdictions where pattern instructions are used, the fear of being overturned at appeal and fidelity to the law comes at jurors' expense. The current and long-standing philosophy concerning the purpose of jury instruction in England and Wales is much preferable in comparison. Judges are explicitly encouraged to 'custom build'

their instructions for each trial, and though they may rely on their Bench Book for guidance, they are not to follow them explicitly:

The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's notebook. A direction to a jury should be custom-built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden and standard of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts.

Former Lord Chancellor Hailsham (*R v. Lawrence* 1982 AC)

In addition to showing that case-specific instructions allow jurors to understand and apply the laws to the facts with more ease, this study also demonstrates that under these circumstances the law can be accurately conveyed despite having instructions worded differently from case to case. In this regard, the system of jury instruction in England and Wales arguably caters to the needs of its jury better than many other jurisdictions.

Third, in testing Heffer's (2005) Narrativisation Hypothesis, this research found that comprehensible jury instructions must be designed with a full understanding of their juror audience. The key finding of this study is that judges are communicating (more or less successfully) with 'active, narrative processors'. For jurors to understand their instructions therefore, it is important to adopt a juror-centric style of instruction, which accommodates jurors' universal narrative competence. Accurate comprehension of the instructions is greatest with the highest degree of convergence to the narrative mode (without sacrificing the essence of the legal directions themselves). In more concrete terms, this means that comprehension significantly improves when the judges' discussion of each legal issue is offered in context of the evidence and when narrative discourse strategies are

used which benefit the oral mode of instruction. There has not been any previous research investigating the narrative-paradigmatic mode distinction in the legal context, and so there is wide scope to investigate Heffer's (2005) narrativising discourse features in future research. For example, having shown how narrative convergence at a stylistic level has an effect on comprehension, it is possible that narrativisation can improve the comprehensibility of other types of professional discourse.

Although further work on narrativisation is necessary to corroborate the findings of this study, it is possible to see the strengths of narrativisation as a potential reform for jury instruction. Narrativisation has been demonstrated to work on a number of different instructions, most remarkably on the burden and standard of proof. These directions are used in all trials and this raises the possibility that narrativisation could increase comprehensibility for jury instructions in other types of trial beyond rape. However, as narrativisation inherently involves constructing individual case-specific instructions, it could be argued that the findings from this research can only be extended to the particular case that was used in this study. It is possible that the characteristics and events of the rape trial used in the present study might be easier or harder to follow than a different case, which would lead to comprehension being unusually high or low. As discussed in section 5.4.2, a rape trial was chosen because of the prevailing concern about the high rate of attrition in these sorts of cases and because the stakes for the defendant are particularly high, not because the instructions in these trials are more difficult than others. Nevertheless, only the legal directions pertaining to rape are unique to rape trials; the other directions will occur in a very similar format across all trials. As such, this is something that should be explored in future work.

Another strength to narrativisation is that it is potentially very applicable to the real trial context. There needs to be much more investigation in narrativisation before it could be recommended for implementation in actual trials, and as such this consideration can only be hypothetical at this stage, but it is nevertheless important. Currently, judges in England and Wales are advised to write their own instructions case by case. The recent removal of the Specimen Directions in the 2010 Bench Book for having been relied upon too closely reinforces this view. Narrativisation, as a

means to contextualise the law in the evidence of the case, offers a way to do this in a manner that is comprehensible to the jury. Unlike many other reforms that have been previously suggested, narrativisation does not require major changes to existing trial processes and it is not costly or time-consuming. In terms of the jurors, being well-instructed may mean they have fewer questions, which could speed up the trial process. They may even have greater satisfaction in their role which would boost confidence in trial by jury in general. Without using extensive qualitative questioning in this study, it is impossible to say conclusively that this is the case, and as such raises ideas to be investigated.

Although narrativisation shows promise as an effective aid to comprehension, it is not without its limitations. The methodology designed to test it also presents some practical issues that must be considered. Narrativisation relies on judges' constructing their own instructions, but this could be as detrimental for jurors' comprehension as it could be positive. It is possible that, without adequate guidance, judges may revert to summing up in a primarily paradigmatic mode. As gatekeepers to the judicial process, the judge must be the bearer of proportionality, but as Heffer (2006: 177) notes, the less control institutional sources have over the wording of the delivery, the more likely it is that infelicitous instructions might be given. As judges have been immersed in law for years, skilled in the words and phrases of the law, they will be hard-pressed to put themselves in the position of lay jurors who hear these words for the first time. Without adequate guidance they may find it difficult to draft instructions that are accessible. As such, this research supports linguistic freedom for case-specific instructions only when the wider legal community are aware of the jurors' narrative processing style and when there is clear guidance for how it can be accommodated. Further research will be necessary to determine the form of that guidance, starting with an exploration of the illustrations in the 2010 Bench Book which being used currently for that purpose (see section 7.2).

By its very nature, narrativisation makes discourse natural and ordinary. It is possible however that in order for the jurors to realise the seriousness of their role, an elevated language style, separate from an ordinary everyday manner of speaking, might be necessary. The more unusual, paradigmatic speech style might

serve as a symbolic reminder to jurors that the law is special, that the judge is the undisputed authority and what he says must be adhered to. As Marder (2006: 464) explains, one of the more subtle and often unacknowledged functions of jury instructions includes 'inspiring in jurors respect for the judge and his or her expertise, and impressing upon jurors the power of the law and the need to approach their task with seriousness of purpose'. It is possible that narrativisation, whilst achieving the primary goal of educating jurors about the law and their responsibilities, falls short of this more subtle function. Based on discussions made with judges during the construction of this project, there is the real possibility that judges are deliberately non-accommodative for this reason. For example, one circuit judge said that he considered it inappropriate to use a defendant's name as if he was familiar with them. Although the corpus analysis used in this study and discussions with other judges show that this is not a universal opinion, this does however suggest the some judges might be sceptical of narrativisation and resistant to losing their style of speaking which so clearly marks them apart.

The methodology of this study itself might also be met with scepticism. In the past there has been the tendency to undervalue the results of a mock-juror paradigm and many view the approach as a forced and unfortunate consequence of the Contempt of Court Act 1981. Ideally the results of this study need to be supported with field data, but for the aims of the present study it would have been impossible to systematically measure the impact of narrativisation or the comprehensibility of decontextualised instructions per se without such an experimental paradigm. As Koski notes (2002: 73), the differences that exist between simulations and real trial does not make it impossible – or even implausible – that results will generalise to real trials'. This design attempted to be as robust and as sensitive as possible to the social and legal context of juror decision-making within the time and financial constraints of the project. In many respects this simulation has made more attempts to maximize verisimilitude than previous jury research, but it is not without its drawbacks. For example, this study was on a relatively small scale, using participants who volunteered themselves. Enough participants were recruited so that there was enough power to determine statistical significance in the data, but greater numbers would have allowed for greater reliability and lowered the

likelihood of making Type II errors. Type II errors mean the failure to reject a false null hypothesis. When looking at the data, narrativisation usually improved performance, but occasionally this improvement did not reach significance beyond the Integrated Evidence condition. Some of these non-significant findings could be Type II errors. The tests suggested that the scores between the conditions were the same, which leads us to accept the null hypothesis that there was no effect of narrativisation, however the observances were actually different and the alternative hypothesis that jurors' performance was benefitted by narrativisation should have been accepted. To test the proposition that these non-significant findings were Type II errors, this experiment should be replicated with a larger number of participants, and preferably participants who are randomly recruited rather than by opportunity sampling. This would replicate the way that real jurors are selected from the electoral roll.

The methodology of this study may also be criticised for not asking jurors to deliberate. As outlined in Section 5.3.3, this study was intentionally designed to assess *juror* processing and not *jury* processing, but the data nevertheless speaks to the issue of deliberation. The results of this study show that narrativisation significantly improves jurors' understanding of the directions. This could mean that, if this were a real trial, jurors would be retiring to the jury room with fewer misunderstandings between them. This is crucial because justice would not rely on jurors' collectively stumbling upon an accurate understanding and application of the law in their deliberations. However, this research has also shown that narrativisation makes jurors believe they understand more than they might actually do, and this may have a critical effect on the collaboration in the jury room. Future research should therefore explore the impact of narrativisation on group discussion and verdict decisions. It would be necessary for example from the findings of this study whether the understanding held by the majority corrects any misunderstandings held by a minority of jurors during deliberation.

As the first study to measure the effectiveness of a reform to the summing up in England and Wales, there is a need for further research in this regard, too. For example, future research should consider the relative efficacy of other reforms and compared directly with the narrativisation approach. We have seen, however, in

Chapter Three that there are a number of limitations with other methods. This is why it would be interesting to also assess a combination approach to instruction improvement, examining the effectiveness of the narrativisation intervention when combined with other suggested methods. Narrativisation could easily work in tandem with preliminary instructions, written directions or the ‘debunking’ approach, for example. The ‘debunking’ approach (Smith, 1991; Otto, Applegate and Davis, 2007) is gaining a lot of attention in jury research in America and further afield. As previously explained, this approach considers how jurors’ pre-trial biases, stereotypes and life experiences about crime will affect how the instructions are perceived. It is thought that by alerting jurors explicitly to the dangers of specific mistaken assumptions and expectations, they will be more likely to understand the instructions as they are intended by law. With reference to the Story Model (Hastie, Penrod and Pennington 1983; Pennington and Hastie, 1986, 1988) and to Figure 7.2, it is possible that debunking in this way could target the remaining process that narrativisation does not – jurors’ world knowledge about similar events and their prior ideas about crime categories. It would be interesting therefore to investigate whether a combination of both of these jury-centric approaches can further improve comprehension.

As a strategy for comprehension, narrativisation bridges the gap between the language of law and the language of the lay, but this raises another question for future investigation: Do jurors understand a narrativised summing up as well as those who have been legally-trained? Subsequent research of this kind will help to address the remaining issue which has not been tackled in this thesis – what minimum level of comprehensibility ought to be required and how it should be decided. This is a difficult issue of public policy and so has not been discussed here, but as Levi (1990: 22) identifies, it should only be done so ‘*in the light of empirical research.*’

In conclusion, this project has identified that convergent judicial language is a factor pertinent to the achievement of a true and just trial. The law is not inherently too complex for the average juror to understand, but the law might not be communicated adequately to the jurors during the summing up if they are not accommodated in narrative terms. This study hopes to serve as an ‘eye-opener’ into

the issues of instruction comprehension in the under-researched field of English and Welsh jury trials. It also hopes to make a valuable contribution to the study of jury instruction more widely by introducing the importance of narrativisation and case-specific instructions to comprehension. With plenty of scope for future work to build on and corroborate the conclusions in this thesis, narrativisation has the potential to empower the jury to function consistently with the original philosophies it was created to embody. By increasing comprehension, and thereby improving the fairness and legality of jurors' decision-making, narrativisation can ensure that while justice remains blind, the jurors attempting to deliver it are not (McLaughlin, 1982).

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Justice for All 2002 Cm. 5563, s7.27

Sexual Offences Act 2003 Ch.42

Appendix One:
Procedural Documents

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Jurors Wanted!



Please help my university research!

I'm looking for volunteers to act as jurors for my PhD study into how juries decide their verdicts.

Volunteers will watch a video of a criminal trial and decide a verdict, and then fill in a questionnaire about their thought-process.

The study will take no more than two hours and plenty of food will be provided! If you are interested in taking part, please come along to St. Mary's Church hall in Church Rd, Warsash on

Sat 8th March at 6:30pm

Thank you!



For more information
please contact Sally:
nelsonse@cf.ac.uk
077 2997 7176



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**Cardiff School of English,
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Cardiff University, Humanities Building,
Colum Drive, Cardiff, CF10 3EU.

phone 029 2087 6049
fax 029 2087 4502
email ENCAP@Cardiff.ac.uk

CONSENT FORM

1. I understand that my participation in this study is voluntary and that I may withdraw at any time without giving any reason
2. I have heard the information about this study and the procedure of the study has been explained to me
3. I have read the instruction and information sheet
4. I have been given the opportunity to ask any questions that I may have about the study and these have been answered to my satisfaction

Signature:

Date:

Name (in capitals) :



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DEBRIEFING SHEET

This research is concerned with how well jurors comprehend their instructions.

Psychological studies in the US have found that lay people who serve on juries have great difficulty understanding and following judges' instructions on the law, which suggests a major problem for the criminal justice system.

Judges' directions are significantly different in the American courts; this study observes if jurors in the English and Welsh court system also have difficulty understanding their instructions.

The study also finds out if presenting judicial directions in a legal style rather than in the style of a lay person has an affect on comprehension.

Using findings from the survey, it is predicted that overall comprehension will be low, but not as low as in the US. It is thought that jurors' understanding will improve when the judge directs in a style that accommodates to the way that jurors reason.

Thank you very much for participating in the study.

Sally Nelson: NelsonSE@cardiff.ac.uk
Dr Chris Heffer: HefferC2@cardiff.ac.uk (Project Supervisor)

Appendix 1.4: Oral instructions to participants (script)

Introduction to England and Wales Criminal Court Jury Survey

Firstly, thank you very much for your help today. The reason you are here is to take part in a jury survey that I am conducting as part of my PhD at Cardiff University. This survey is concerned with the judicial process in England and Wales, specifically, how jurors process information during criminal trials.

Before we begin, I'm going to tell you a bit more about the study, and what you'll have to do, and then you'll have the opportunity to ask any questions if you need to. If you are happy to continue after that, I will ask you sign a consent form that says that you are willing to take part in this research.

You have a written copy of the instructions I am about to give you on the cover of the jury survey in front of you. Please do not open this survey until you are instructed to do so.

Instructions

As a participant in this study, you simulate one member of a jury. You are going to watch a film of a criminal trial. In this trial, a man stands accused of rape. After you've watched the trial, you'll see a recording of another judge, who is going to give you some specific directions about what the law says about rape and how, as a juror, you should go about reaching your verdict. Unlike real trials, you are going to decide your verdict alone; there will be no deliberation - so please do not confer and talk with each other. You have been provided a pen and notepaper should you like to take notes during the trial.

After watching the trial and the judge's directions, peel off the sticky tab on the booklet and begin the survey. You will be asked to write your verdict, and then complete a short written task and answer some multiple-choice questions, based on what you have heard. There are five sections to the survey – please make sure you complete all five. It is important that you complete the sections in order, and do not go back to any previous questions.

The whole process should take about an hour and a half.

Please do not write your name anywhere in the booklet – your responses are completely anonymous. All the information you provide will be kept confidential.

Taking part in this survey is completely voluntary, so you can withdraw at any time, and you won't have to give any reason. You will be fully de-briefed at the end of the study.

You're going to have the opportunity now to ask any questions. If you are happy to continue, please sign your copy of the consent form. Thank you very much.

Appendix Two:

Stimuli

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Indictment

R v Roberts

Stephen Roberts is charged on this indictment with rape. The particulars of this offence are that on the night of the 27th / the morning of the 28th day of September 2005, he intentionally penetrated the vagina of Rebecca Palmer, who did not consent to the penetration, and he did not reasonably believe that Rebecca Palmer consented.



Indictment

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R v Roberts

Stephen Roberts is charged on this indictment with rape. The particulars of this offence are that on the night of the 27th / the morning of the 28th day of September 2005, he intentionally penetrated the vagina of Rebecca Palmer, who did not consent to the penetration, and he did not reasonably believe that Rebecca Palmer consented.

Appendix 2.2:
Summing up for Condition One:
Decontextualised instructions.

Judge's role	Our functions in this trial have been and remain quite different. Throughout this trial the law has been my area of responsibility, and I must now give you directions as to the law which applies in this case. When I do so, you must accept those directions and follow them.	1
<hr style="border-top: 1px dashed black;"/>		
Jury's role	However, it has always been your responsibility to judge the evidence and decide all the relevant facts of this case, and when you come to consider your verdict you, and you alone, must do that.	5
<hr style="border-top: 1px dashed black;"/>		
How to consider the evidence	You do not have to decide every point which has been raised; only such matters as will enable you to say whether the charge laid against the defendant has been proved. You will do that by having regard to the whole of the evidence and forming your own judgement about the witnesses, and which evidence is reliable and which is not. The defendant has chosen to give evidence. You must judge that evidence by precisely the same fair standards as you apply to any other evidence in the case.	10
	You must decide this case only on the evidence which has been placed before you. There will be no more. You are entitled to draw inferences, that is come to common sense conclusions based on the evidence which you accept, but you may not speculate about what evidence there might have been or allow yourselves to be drawn into speculation.	15
<hr style="border-top: 1px dashed black;"/>		
Judge's opinion	The facts of this case are your responsibility. You will wish to take account of the arguments in the speeches you have heard, but you are not bound to accept them. Equally, if in the course of my review of the evidence, I appear to express any views concerning the facts, or emphasise a particular aspect of the evidence, do not adopt those views unless you agree with them; and if I do not mention something which you think is important, you should have regard to it, and give it such weight as you think fit. When it comes to the facts of this case, it is your judgement alone that counts.	20 25
<hr style="border-top: 1px dashed black;"/>		
Burden of proof	In this case the prosecution must prove that the defendant is guilty. He does not have to prove his innocence. In a criminal trial the burden of proving the defendant's guilt is on the prosecution.	30
<hr style="border-top: 1px dashed black;"/>		
Standard of proof	How does the prosecution succeed in proving the defendant's guilt? The answer is - by making you sure of it. Nothing less than that will do. If after considering all the evidence you are sure that the defendant is guilty, you must return a verdict of 'Guilty'. If you are not sure, your verdict must be 'Not Guilty'.	35
<hr style="border-top: 1px dashed black;"/>		

<hr/>		
	<p>The allegation against the defendant is one of rape. It is set out in the copy of the indictment which you have.</p>	
3 elements of rape	<p>The prosecution must prove three elements for the offence of rape. A person commits an offence if, first, he intentionally has sexual intercourse with another person (in this case there is no dispute between the defence and prosecution that sexual intercourse took place so the issue for you is the second and third elements only). A person commits an offence if, second, at the time of the sexual intercourse the other person does not consent to it. A person consents only if he or she agrees by choice and has the freedom and the capacity to make that choice. A person commits an offence if, thirdly, he does not reasonably believe that the other person consents. Whether a belief is reasonable is to be determined by having regard to all the circumstances, including any steps the defendant took to ascertain whether the complainant was consenting.</p>	40 45 50
	<hr/>	
		<p>This raises two further questions. You must first consider whether or not the defendant may have genuinely believed that the complainant was consenting. You are entitled to take into account any evidence of the defendant's intoxication when considering this question. A drunken belief can still be a genuine belief. If you are sure that the defendant did not have such a belief, the prosecution will have proved this element of the offence.</p>
Reasonable belief in rape	<p>However, if you conclude that the defendant may have had such a belief, you should go on to consider secondly whether that belief was reasonable in all the circumstances. Here the defendant's intoxication is irrelevant. A person's drunkenness does not make an otherwise unreasonable belief reasonable. Equally, just because a person is drunk, it does not mean that he cannot have a reasonable belief. You will judge what is reasonable by the sober and appropriate standards of modern life.</p>	60
	<p>Those are the three elements spelt out in the particulars of the offence.</p>	65
<hr/>		

	Reference has been made to the type of evidence which you have received in this case. Sometimes a jury is asked to find some fact proved by direct evidence. For example, if there is reliable evidence from a witness who actually saw a defendant commit a crime; if there is a video recording of the incident which plainly demonstrates his guilt; or if there is reliable evidence of the defendant himself having admitted it, these would all be good examples of direct evidence against him.	70
Circumstantial evidence	On the other hand it is often the case that direct evidence of a crime is not available, and the prosecution relies upon circumstantial evidence to prove guilt. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime and the defendant which they say when taken together will lead to the sure conclusion that it was the defendant who committed the crime.	75
	It is not necessary for the evidence to provide an answer to all the questions raised in a case. You may think it would be an unusual case indeed in which a jury can say 'We now know everything there is to know about this case'. But the evidence must lead you to the sure conclusion that the charge which the defendant faces is proved against him.	80
	Circumstantial evidence can be powerful evidence, but it is important that you examine it with care, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt. Furthermore, before convicting on circumstantial evidence you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution case.	85
	Finally, you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them, and neither the prosecution, the defence nor you should do that.	90
(Summary of	At this point I would normally review the evidence in the case, summarising the various points to bring it all back into your memories. However as you have only just heard the evidence, I am not going to repeat it.	95
Unanimity of verdict	You must reach, if you can, a unanimous verdict. As you may know, the law allows me in certain circumstances to accept a verdict which is not the verdict of you all. Those circumstances have not arisen, so when you retire I ask you to reach a verdict on which each one of you is agreed. Should, however, the time come when I can accept a majority verdict, I shall call you back into court and give you a further direction.	100
Selection of the foreman and	When you retire you should select a foreman or forewoman who will chair your discussions and act as spokesperson on behalf of all of you. You can take with you your notebooks and paper exhibits placed before you. The other exhibits, will be sent through to you if you need them. So now, members of the jury will you please, when the jury bailiffs have been sworn, retire to your room to consider your verdicts.	105

Appendix 2.3:
**Summing up for Condition Two:
 Integrated evidence.**

Judge's role	<p>Our functions in this trial have been and remain quite different. Throughout this trial the law has been my area of responsibility, and I must now give you directions as to the law which applies in this case. When I do so, you must accept those directions and follow them.</p>	1
Jury's role	<p>However, it has always been your responsibility to judge the evidence and decide all the relevant facts of this case, and when you come to consider your verdict you, and you alone, must do that.</p>	5
How to decide the evidence	<p>You do not have to decide every point which has been raised; only such matters as will enable you to say whether the charge laid against the defendant has been proved. You will do that by having regard to the whole of the evidence and forming your own judgement about the witnesses, and which evidence is reliable and which is not. The defendant has chosen to give evidence. You must judge that evidence by precisely the same fair standards as you apply to any other evidence in the case.</p> <p>You must decide this case only on the evidence which has been placed before you. There will be no more. You are entitled to draw inferences, that is come to common sense conclusions based on the evidence which you accept, but you may not speculate about what evidence there might have been or allow yourselves to be drawn into speculation.</p>	10 15 20
Judge's opinion	<p>The facts of this case are your responsibility. You will wish to take account of the arguments in the speeches you have heard, but you are not bound to accept them. Equally, if in the course of my review of the evidence, I appear to express any views concerning the facts, or emphasise a particular aspect of the evidence, do not adopt those views unless you agree with them; and if I do not mention something which you think is important, you should have regard to it, and give it such weight as you think fit. When it comes to the facts of this case, it is your judgement alone that counts.</p>	25
Burden of proof and Standard of proof	<p>In this case the prosecution must prove that the defendant is guilty. He does not have to prove his innocence. In a criminal trial the burden of proving the defendant's guilt is on the prosecution.</p> <p>How does the prosecution succeed in proving the defendant's guilt? The answer is - by making you sure of it. Nothing less than that will do. If after considering all the evidence you are sure that the defendant is guilty, you must return a verdict of 'Guilty'. If you are not sure, your verdict must be 'Not Guilty'.</p> <p>It is not for this defendant, Stephen Roberts, nor Miss Evans who represents him, to prove anything in this case. The prosecution has to satisfy you of Mr Robert's guilt based on the whole of the evidence, which includes his own evidence from the witness box. You can only convict him of rape if you are sure that he is guilty.</p>	30 35 40

The allegation against the defendant is one of rape. It is set out in the copy of the indictment which you have.

The prosecution must prove three elements for the offence of rape. A person commits an offence if, first, he intentionally has sexual intercourse with another person (in this case there is no dispute between the defence and prosecution that sexual intercourse took place so the issue for you is the second and third elements only). A person commits an offence if, second, at the time of the sexual intercourse the other person does not consent to it. A person consents only if he or she agrees by choice and has the freedom and the capacity to make that choice. A person commits an offence if, thirdly, he does not reasonably believe that the other person consents. Whether a belief is reasonable is to be determined by having regard to all the circumstances, including any steps the defendant took to ascertain whether the complainant was consenting.

This raises two further questions. You must first consider whether or not the defendant may have genuinely believed that the complainant was consenting. You are entitled to take into account any evidence of the defendant's intoxication when considering this question. A drunken belief can still be a genuine belief. If you are sure that the defendant did not have such a belief, the prosecution will have proved this element of the offence. However, if you conclude that the defendant may have had such a belief, you should go on to consider secondly whether that belief was reasonable in all the circumstances. Here the defendant's intoxication is irrelevant. A person's drunkenness does not make an otherwise unreasonable belief reasonable. Equally, just because a person is drunk, it does not mean that he cannot have a reasonable belief. You will judge what is reasonable by the sober and appropriate standards of modern life. Those are the three elements spelt out in the particulars of the offence.

Bringing it back to the circumstances of the case, you have to decide whether rape took place on the 27th November, and you decide it on the evidence.

The issue is one of consent. You have Miss Palmer saying that she did not consent: Mr Roberts used force against her, holding her hands, putting his hand over her windpipe. She said she told Mr Roberts 'stop', 'I don't want to' and 'get off', and tried to push him off her chest with her knees.

The Defendant Mr Roberts denies that. He told you that Miss Palmer consented to the sexual intercourse. He says she played her part in it and appeared to be enjoying it. He says she kissed him, was giggling and laughing, and lifted her bottom off the bed to allow him to take her knickers off. He says she said "go on, go on, fuck me".

If you reach the conclusion that Miss Palmer did consent, or may have consented, to having sexual intercourse with Mr Roberts, that is the end of the case and you need go no further; you must find him not guilty. But if you accept Miss Palmer's evidence and you are sure that she did not consent, then that leaves the next question open to you to consider: whether the defendant genuinely believed that she was consenting, and if so, whether that belief was reasonable. If you accept the possibility that Mr Roberts may have had a reasonable belief that Miss Palmer was consenting, then you acquit him of rape. If however,

after considering all the evidence and deciding the circumstances of that night, sure that Mr Roberts did not reasonably believe that Miss Palmer was consenting, then you find him guilty of rape. 95

I will come back to alcohol for a moment. This may not be an issue because both parties claim to clearly recall the events of that night. There seems to be no blurring of the main issue by the presence of alcohol and that, of course, is: Was there consent? You have heard evidence that they had both been drinking, though nobody thought they were helpless by any means. The prosecution rely on Miss Palmer's evidence. They do not say that she was so drunk she could not make up her mind. Their case is perfectly clear that she was capable of deciding. You also heard evidence that Mr Roberts had also been drinking. You may take this evidence into account on the question whether he may genuinely have believed that Miss Palmer was consenting. 100 105

Reference has been made to the type of evidence which you have received in this case. Sometimes a jury is asked to find some fact proved by direct evidence. For example, if there is reliable evidence from a witness who actually saw a defendant commit a crime; if there is a video recording of the incident which plainly demonstrates his guilt; or if there is reliable evidence of the defendant himself having admitted it, these would all be good examples of direct evidence against him. 110 115

On the other hand it is often the case that direct evidence of a crime is not available, and the prosecution relies upon circumstantial evidence to prove guilt. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime and the defendant which they say when taken together will lead to the sure conclusion that it was the defendant who committed the crime. 120

It is not necessary for the evidence to provide an answer to all the questions raised in a case. You may think it would be an unusual case indeed in which a jury can say 'We now know everything there is to know about this case'. But the evidence must lead you to the sure conclusion that the charge which the defendant faces is proved against him. 125

Circumstantial evidence can be powerful evidence, but it is important that you examine it with care, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt. Furthermore, before convicting on circumstantial evidence you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution case. 130

You have heard evidence from Miss Palmer's colleagues and friends, and from Police Officer confirming there is no damage to Miss Palmers underwear. Gavin McKenzie, Rebecca Palmer and Stephen Roberts' boss, gave evidence as to an occasion after the party where Miss Palmer and Mr Roberts were having a discussion, which ended when she pushed past him. You also heard evidence from Miss Palmer's flatmate that she was upset and unusually quiet. As a matter of law, such comments cannot be treated as evidence that the events of the 27th September in question happened. You should only rely on these comments if you are satisfied that Miss Palmer's upset arose from the trauma of the offence, and not for some other reason such as regret at what she had done, or the effects of alcohol, or for some other reason. If you do rely on this evidence, the only relevance is that it may show Miss 135 140 145

	Palmer’s conduct on those occasions was consistent with her evidence about it, and that may help you to decide whether she is telling the truth.	
	Finally, you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them, and neither the prosecution, the defence nor you should do that.	150
(Summary of evidence)	At this point I would normally review the evidence in the case, summarising the various points to bring it all back into your memories. However as you have only just heard the evidence, I am not going to repeat it.	155
Unanimity of verdict	You must reach, if you can, a unanimous verdict. As you may know, the law allows me in certain circumstances to accept a verdict which is not the verdict of you all. Those circumstances have not arisen, so when you retire I ask you to reach a verdict on which each one of you is agreed. Should, however, the time come when I can accept a majority verdict, I shall call you back into court and give you a further direction.	160
Selection of the foreman and availability of exhibits etc.	When you retire you should select a foreman or forewoman who will chair your discussions and act as spokesperson on behalf of all of you. You can take with you your notebooks and paper exhibits placed before you. The other exhibits, will be sent through to you if you need them. So now, members of the jury will you please, when the jury bailiffs have been sworn, retire to your room to consider your verdicts.	165
	You can take with you your notebooks, and your copies of the indictment, the police interviews, and the photographs of injuries placed before you. You may return to the courtroom to replay the CCTV videotape if you need to see it again.	170

Appendix 2.4:

Summing up for Condition Three:
Integrated evidence and narrativising linguistic features.

	Now, members of the jury, you have heard all the evidence and you have listened to the closing speeches from Mr Laws of the prosecution and Miss Evans of the defence. It is now down to you to decide whether rape has been proved, and therefore if Stephen Roberts is guilty or not guilty. I am going to tell you how you go about making this decision, and I'll begin by explaining the different functions that you and I have.	1 5
Judge's role	In a trial like this, I am in charge of the law, and you are in charge of establishing the facts. This means that it is my job to direct you on the charge of rape, how rape is proved, and how to consider the evidence to establish the facts. You must accept these directions and follow them.	10
Jury's role	As I said, it is your responsibility, not mine or anyone else's, to decide whether rape has been proved. You make this decision by considering the evidence and using it to establish what the facts are.	
How to consider the evidence	You have heard a lot of evidence today, but don't get distracted or make your task harder; you only need to establish the facts that help you decide whether rape has been proved - you don't have to decide every single matter that has been raised. Establish the facts by considering all of the evidence. Form judgements about the witnesses and decide which evidence is reliable and which is not.	15
	You are allowed to draw inferences and conclusions from the evidence you believe, so long as they are based on common-sense. It is crucial, however, that you do not speculate about what evidence there might have been, or speculate about anything else.	20
	Some of the evidence you will consider has been given by Stephen Roberts, the defendant accused of rape. You must judge his evidence fairly, and treat it exactly the same as you treat the other evidence in this case.	25
Judge's opinion	You might think that you have to agree with either Mr Laws' or Miss Evans' arguments in the speeches you just heard. This is not the case. You <i>may wish</i> to think about their arguments, but you <i>do not</i> have to accept them; remember, it is down to <i>you</i> to decide the facts of this case. This means also that if I appear to express any views about the facts, or I emphasise a particular aspect of the evidence during my directions, do not adopt those views unless you agree with them. Likewise, if I do not mention something which you think is important, you should still think about it, and give it as much attention as you think it is worth. It is your judgement that counts in this case, not mine.	30 35

	It should be clear to you by now that you decide if Stephen Roberts raped Rebecca Palmer on the basis of the evidence. Before I tell you what the law specifically says about rape, I must explain to you a few things about how Mr Roberts can be <i>proven</i> guilty.	40
Burden of proof	You may have heard the phrase ‘innocent until proven guilty’. That applies here. People often think that defendants are guilty if they are on trial, but that is quite wrong. You must presume that the defendant Mr Stephen Roberts is innocent, and it is for Mr Laws of the prosecution to prove to you that Mr Roberts is guilty. It is not for Mr Roberts, or his representative Miss Evans, to prove that he is innocent. They do not have to prove anything in this case; it is about what Mr Laws can prove. This is important. Do not get confused: This trial is not a battle of which side has the most or the best evidence. What this means is that when you are deciding the evidence brought forward by Miss Evans, you need to consider it in terms of the extent to which it weakens Mr Laws’ case. Remember that Mr Roberts and Miss Evans are <i>not</i> obliged to raise doubts or provide an alternative version of events, because it is only Mr Laws’ job to prove anything.	45 50 55
Standard of proof	How then does Mr Laws succeed in proving to you that Stephen Roberts is guilty, you may ask. Well, he has to present you with evidence that makes you <i>sure</i> he is guilty. <i>Sure</i> is the word. You must be <i>sure</i> that Mr Roberts raped Miss Palmer and you must be sure on the basis of the evidence, which includes Mr Roberts’s own evidence from the witness box. Only then can you find Mr Roberts guilty. Members of the jury, even if you think ‘Mr Roberts is <i>probably</i> guilty’ or ‘ <i>likely</i> guilty’, that is not sufficient. In those circumstances you have to give Mr Roberts the benefit of the doubt because you are less than sure. If you are not sure, your verdict must be ‘Not Guilty’.	60 65

Let's now move on to consider the law that applies in this case. The allegation against Mr Roberts is that on the 27th September he raped Rebecca Palmer. This is set out in the copy of the indictment which you have in front of you. What does the law say about deciding rape?

Well, in this trial, Mr Laws must make you sure about three elements to prove Mr Roberts is guilty of rape. Firstly, that Mr Roberts and Miss Palmer had sexual intercourse; secondly that Miss Palmer did not consent to it; and thirdly that Mr Roberts did not reasonably believe that Miss Palmer was consenting. You must work through each of these elements in turn, and I will explain them to you fully now. 70 75

The first element is that Mr Roberts had sexual intercourse with Miss Palmer. I do not need to direct you about this because in this case there is no dispute that sexual intercourse took place. We are sure about that so this is not an issue and you can move on to deciding the next element.

The second element is that, at the time, Miss Palmer must not have been consenting to the sexual intercourse. Miss Palmer consented to the intercourse only if she agreed by choice, and was free and able to make that choice. Miss Palmer says that she did not consent: She says that Mr Roberts used force against her, holding her hands, putting his hand over her windpipe. She said she told Mr Roberts 'I don't want to', 'stop' and 'get off' and tried to push him off her chest with her knees. 80 85

Mr Roberts denies that. He told you that Miss Palmer consented to the sexual intercourse. He says she played her part in it and appeared to be enjoying it. He says she kissed him, was giggling and laughing, and lifted her bottom off the bed to allow him to take her knickers off. He says she said "go on, go on, fuck me". 90

If you decide that Miss Palmer did consent, or may have consented, to having sexual intercourse with Mr Roberts, that is the end of the case. You don't need to go any further; you must find Stephen Roberts not guilty. However if you accept Miss Palmer's evidence and you are sure that she did not consent, then you need to go on to consider the third element. 95

The third element is that at the time Mr Roberts did not reasonably believe that Miss Palmer was consenting to the sexual intercourse. This is perhaps a little harder to understand so I will explain this fully. 100

Mr Roberts said that he genuinely believed Miss Palmer consented to the intercourse. You must consider all the relevant evidence and decide what grounds there were for believing that she was consenting. This includes taking into account any steps which Mr Roberts took to ascertain whether Miss Palmer was consenting. You must ask whether a reasonable person, that is, someone who exercises qualities of attention, knowledge, intelligence and judgement, could genuinely believe that Miss Palmer was consenting. If you conclude that Mr Roberts, as a reasonable person, could *not* have genuinely believed in those circumstances that Miss Palmer was consenting, then you find him guilty. However, if you decide that Mr Roberts did have reasonable grounds to make him genuinely believe that Miss Palmer was consenting even though she was not, then he is not guilty. He is not guilty even though his belief was mistaken. 105 110

You must ask yourselves two questions: Firstly, you must ask 'did Stephen Roberts *genuinely* believe that Miss Palmer was consenting?' You heard evidence that Mr Roberts had been drinking. You may take that evidence into account when you are considering this question. A drunken belief can still be a genuine belief. If you are sure that Mr Roberts did not have a genuine belief that Miss Palmer was consenting, then you don't need to go any further in your deliberations; you must find Mr Roberts guilty.

If you conclude that Mr Roberts did have, or may have had a genuine belief, you must go on to ask a second question. And that question is, 'was that belief reasonable, considering all the circumstances?'

Here Mr Robert's drinking is irrelevant. Being drunk does not make an unreasonable belief reasonable. But equally, just because a person is drunk, it does not mean that he cannot have a reasonable belief. You must judge what is reasonable by the sober and appropriate standards of modern life.

That completes the three elements that you must be sure about to convict Mr Roberts of rape: Firstly, you must be sure that Mr Roberts and Miss Palmer had sexual intercourse; secondly you must be sure that Miss Palmer did not consent to it; and thirdly you must be sure that Mr Roberts did not reasonably believe that Miss Palmer was consenting. You have to decide whether rape took place according to these three elements and you decide it on the evidence.

I want to briefly talk more about how the alcohol that Mr Roberts and Miss Palmer consumed that night relates to the decisions that you have to make in this case. Alcohol may not be an issue for you, because both Miss Palmer and Mr Roberts claim to clearly recall the events of that night. You heard evidence that they had both been drinking, but nobody thought they were helpless by any means. On the question of whether there was consent, Mr Laws of the prosecution relies on Miss Palmer's evidence. He does not say that she was so drunk she could not make up her mind. His argument makes it perfectly clear that Rebecca was capable of deciding. You heard evidence that Mr Roberts had also been drinking. As I said earlier, Mr Roberts says he had a reasonable belief that Miss Palmer was consenting. You can take evidence of Mr Roberts' drinking into account if you are deciding whether or not Mr Roberts *genuinely* believed Miss Palmer was consenting, should you get to that place in your deliberations.

	Let us move away from what the law says about rape to now consider the type of evidence you have received in this case. There has not been any direct evidence. For example, we do not have a video recording of the incident, and we do not have a reliable independent witness of the event itself. The prosecution is therefore relying upon 'circumstantial evidence' to prove that Mr Roberts raped Miss Palmer. This simply means that he is relying on evidence about various circumstances relating to Mr Roberts and the event. The prosecution say the circumstantial evidence taken together will lead to the sure conclusion that Mr Roberts committed rape.	155
Circumstantial evidence	You have heard evidence from Miss Palmer's colleagues and friends, and from a police officer confirming there is no damage to Miss Palmer's underwear. Mr Gavin McKenzie, Miss Palmer and Mr Roberts's boss, gave evidence as to an occasion after the party where Miss Palmer and Mr Roberts were having a discussion in a corridor, which ended when she pushed past him. You also heard evidence from Miss Palmer's flatmate that she was upset and unusually quiet. As a matter of law, these comments cannot be treated as evidence that the events of the 27 th September in question happened. The only relevance is that it may show Miss Palmer's behaviour on those occasions was consistent with her evidence about that evening, and that may help you to decide whether she is telling the truth.	160
	Circumstantial evidence can be powerful, but it is important that you examine it with care. Consider carefully the evidence that the prosecution is using to prove Mr Roberts committed rape. Ask yourselves 'Is it reliable? Does it prove that Stephen Roberts is guilty?' You must arrive at conclusions based on reliable circumstantial evidence, and not based on speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them. You must not do that. The evidence you have heard might not answer all the questions raised in this case, but it must make you sure that Mr Roberts raped Miss Palmer for you to convict him.	170
	When you retire to the jury room to consider this evidence, you must try and reach a unanimous verdict. That is, you all must agree that he is guilty, or you all must agree that he is not guilty.	175
Unanimity of verdict	You might know already that in certain circumstances I can accept a verdict which is not unanimous. However those circumstances have not arisen in this case, and they may never arise, so I am asking you to reach a verdict on which each one of you is agreed when you retire. If the time comes when I can accept a majority verdict, I will call you back into court and give you more directions. For the time being however, please put out your minds any notion of returning a majority verdict, and strive to reach a verdict with which you all agree.	180
		185

You will find it helpful I think, and the court will find it helpful, if you select a foreman or forewoman when you retire. That person will chair your discussions and make sure that everyone who wants to contribute to your deliberations is given the opportunity to. That person will also act as spokesperson on behalf of all of you, and announce your verdict when you come back into court.

200

You can take with you your notebooks, and your copies of the indictment, the police interviews, and the photographs of injuries. You may return to the courtroom to replay the CCTV videotape if you need to see it again.

205

When the bailiffs have been sworn, please retire to your room to consider your verdicts.

Appendix Three:

Data collection and data

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ENGLAND AND WALES CRIMINAL COURT JURY SURVEY

Instructions and Information

We would like your permission to participate in this study into the judicial process in England and Wales.

As a participant in this study, you simulate one member of a jury. You will watch a short film of criminal court proceedings, in which a man is on trial for rape. You will then see the judge, who will tell you how to reach a verdict. There will be no deliberation.

After watching the film, you will be asked to write down your verdict. You will also complete a survey, which includes a short written task and a multiple-choice questionnaire. Please complete all five sections.

This process will take no longer than 2 hours.

All information that you provide about yourself will be kept confidential. Your responses are completely anonymous. Please do not write your name anywhere in this booklet. Taking part in this study is completely voluntary, so you may withdraw at any time without having to give any reasons. You will be fully debriefed at the end of the study.

Please feel free to ask any questions that you may have about this study.

Please sign the consent form.

SECTION ONE: Verdict Choice

Is Stephen Roberts guilty or not guilty of rape?

(Please circle your verdict choice below)

GUILTY

NOT GUILTY

How certain are you of your verdict?

(Please circle one number on the scale)

1 2 3 4 5 6 7

Very uncertain

Very certain

*Please continue to
SECTION TWO*

SECTION TWO: Written Task

Please read the following twelve scenarios about how other jurors considered the evidence from the trial you have just seen.

For each scenario, answer 'YES' or 'NO' to whether or not the juror correctly followed the judge's directions. Then, explain in your own words the judge's direction or directions that the juror did or didn't follow.

For example:

Although there was no evidence about this during the trial, a juror speculated that Stephen had mistreated women in the past, and this helped her arrive at a conclusion that Stephen was guilty.

Did the juror follow the judge's directions?

YES NO

In your own words, explain the judge's direction that the juror did or didn't follow

You can draw conclusions from the evidence, but you can't speculate about any evidence that wasn't presented in the trial.

1. Based on the evidence, a juror decided that Stephen had more likely than not raped Rebecca. Consequently, the juror gave a guilty verdict.

Did the juror follow the judge's directions? YES NO

In your own words, explain the judge's direction that the juror did or didn't follow

2. The defence and prosecution disagreed about what Stephen had said to Becky concerning the first time he saw her. The juror decided that this question was irrelevant to the verdict, and ignored it when considering whether Stephen was guilty or not guilty.

Did the juror follow the judge's directions? YES NO

In your own words, explain the judge's direction that the juror did or didn't follow

3. A juror imagined himself in the same situation as the defendant Stephen Roberts. He concluded that he would also have believed at the time that Rebecca was consenting. From this, he decided Stephen had a reasonable belief that Rebecca was consenting, even though Stephen might have been mistaken. Consequently, the juror gave a verdict of 'not guilty'.

Did the juror follow the judge's directions? YES NO

In your own words, explain the judge's direction that the juror did or didn't follow

4. A juror felt that the case the defence had made was very weak indeed and so she found Stephen Roberts guilty.

Did the juror follow the judge's directions? YES NO

In your own words, explain the judge's direction that the juror did or didn't follow

5. The jurors could not unanimously agree whether Stephen committed rape, so they decided to bring a 'not guilty' verdict.

Did the jurors follow the judge's directions? YES NO

In your own words, explain the judge's direction that the juror did or didn't follow

6. Based on the evidence, a juror decided that Rebecca did not sustain enough injuries for the events to count as rape. Consequently, the juror gave a 'not guilty' verdict.

Did the juror follow the judge's directions? YES NO

In your own words, explain the judge's direction that the juror did or didn't follow

7. A juror believed that the photographs of Miss Palmer's injuries were reliable circumstantial evidence. He inferred from them that Stephen used force, and that Rebecca was resisting him and not consenting. That inference helped the juror to decide that Stephen Roberts was guilty.

Did the juror follow the judge's directions? YES NO

In your own words, explain the judge's direction that the juror did or didn't follow

8. When a juror was deciding his verdict, he applied the judge's definition of rape to the evidence, even though he disagreed with that definition.

Did the juror follow the judge's directions? YES NO

In your own words, explain the judge's direction that the juror did or didn't follow

9. A juror doesn't accept either the arguments made by the defence, or the arguments made by the prosecution in the closing speeches. The juror did not use them when deciding the verdict.

Did the juror follow the judge's directions? YES NO

In your own words, explain the judge's direction that the juror did or didn't follow

10. A juror decided that he did not need to see any of the exhibits from the case again, and gave a verdict without doing so.

Did the juror follow the judge's directions? YES NO

In your own words, explain the judge's direction that the juror did or didn't follow

11. Imagine that, during his summing-up, the judge had described Rebecca as being “pressurised”. A juror ignored the judge’s comment, when deciding whether Rebecca consented to having sex with Stephen.

Did the juror follow the judge’s directions? YES NO

In your own words, explain the judge’s direction that the juror did or didn’t follow

*Please continue to
SECTION THREE*

SECTION THREE: Multiple-Choice Questions

*For the following 12 questions, please circle the correct response.
Make sure you only circle one response for each question.*

*It is important that you **DO NOT** go back to your answers in the previous task.*

12. Complete the sentence: Before convicting Stephen Roberts of rape, you must be convinced that

- a) Rebecca did not consent to having sex with Stephen
- b) Stephen did not reasonably believe Rebecca was consenting
- c) Stephen and Rebecca had sex
- d) all of the above

13. If you wish, you can ignore any of Judge Amlot's comments

- a) on any matter of law or evidence
- b) on matters of the law
- c) on matters of evidence
- d) you must never ignore the judge's comments

14. Complete the sentence: It is the responsibility of _____ to decide the evidence in the case

- a) the barristers
- b) the barristers and Judge Amlot
- c) Judge Amlot
- d) the jury

15. When you retire to consider your verdict in the jury room

- a) you can look again at any of the exhibits used in the case
- b) you can only look again at the paper exhibits used in the case
- c) you cannot look again at any of the exhibits used in the case
- d) you cannot look again at any exhibits from the case that require testimony from expert witnesses

16. Complete the sentence: Before convicting Stephen Roberts of rape, you must _____ that he raped Rebecca Palmer

- a) be absolutely certain
- b) think it is more likely than not
- c) think there is a reasonable probability
- d) be sure

17. In forming your judgement about the evidence, you must

- a) decide every point that has been raised by the defence
- b) decide every point that has been raised
- c) decide the points which allow you to say whether the prosecution have proved the case
- d) decide every point that has been raised by the defendant

18. When you first retire, you must

- a) reach a unanimous verdict, if you can
- b) reach a majority verdict, if you can
- c) reach a unanimous verdict
- d) reach a majority verdict

19. You return a verdict of 'not guilty' if

- a) Miss Evans (the defence barrister) has proved that Stephen Roberts did not rape Rebecca Palmer
- b) Mr Laws (the prosecution barrister) has proved that Stephen Roberts raped Rebecca Palmer
- c) You and other jurors are not sure whether Stephen Roberts raped Rebecca Palmer
- d) The defendant Stephen Roberts has proved that he is not guilty

20. When considering whether it was reasonable for Stephen to believe that Rebecca was consenting, you must consider

- a) what you would have believed was reasonable in the same situation
- b) what someone similar to Stephen Roberts would believe was reasonable in the same situation
- c) what Stephen Roberts believed was reasonable in all of the circumstances in which he found himself
- d) What an ordinary person would have believed was reasonable in all the circumstances of the accused.

21. One of the possible functions of the judge is to

- a) judge the evidence
- b) review aspects of the evidence
- c) explain the inconsistencies in the evidence
- d) decide all the relevant evidence

22. When you decide whether Stephen Roberts is guilty you should

- a) ignore any circumstantial evidence
- b) consider only direct evidence
- c) consider the circumstantial evidence only to the extent that it agrees with any direct evidence
- d) consider any circumstantial evidence that you think is reliable

*Please continue to
SECTION FOUR*

SECTION FOUR: Your opinion

This section asks for your opinion about the judge's summing-up.

There are no right or wrong answers. Please be honest, and remember that your responses are anonymous.

23. **How much of the judge's summing-up did you understand?** *(Circle a number on the scale)*

1 2 3 4 5 6 7

I didn't understand I understood everything

24. **How was your concentration during the summing-up?** *(Circle a number on the scale)*

1 2 3 4 5 6 7

I lost all my concentration I concentrated throughout

25. **What were your levels of interest in the summing-up?** *(Circle a number on the scale)*

1 2 3 4 5 6 7

I wasn't interested I was very interested

*Please complete
the final section
'ABOUT YOU'*

SECTION FIVE: Information about You



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Gender: Male Female

Age: 18 – 30 31 – 43 44 – 56 57 – 70

Profession: _____

Have you lived in the United Kingdom for the past five years and from the age of thirteen?

Yes No

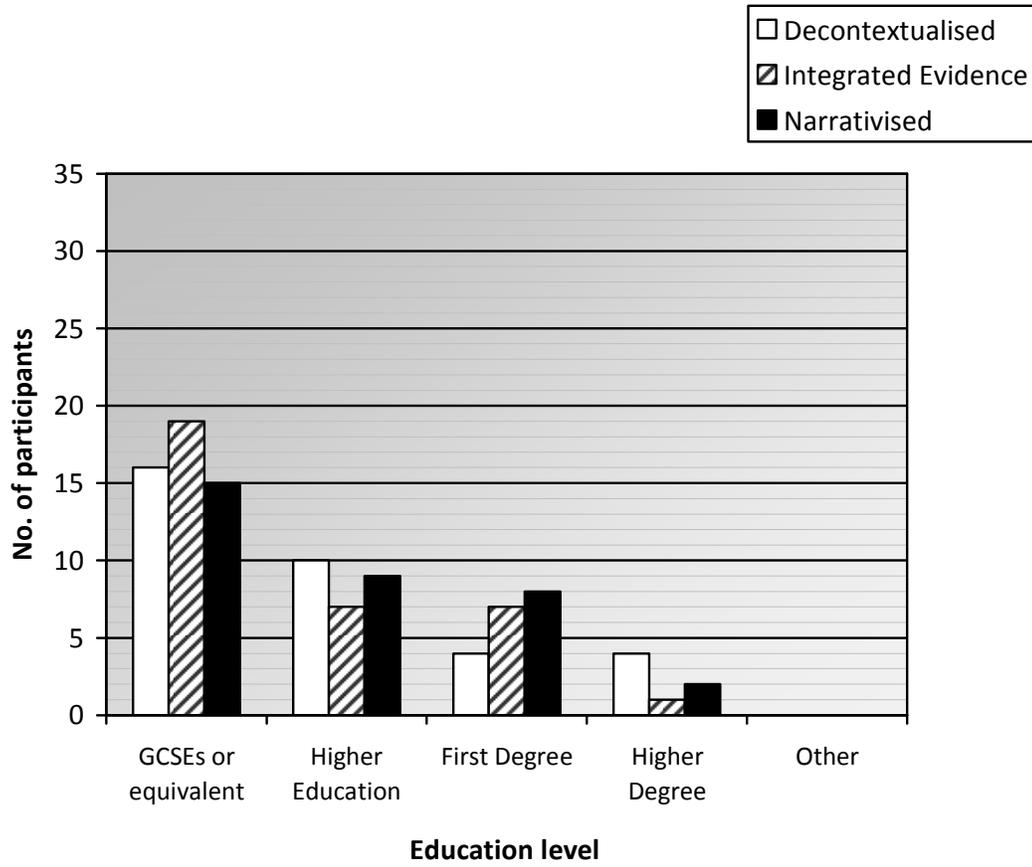
Have you served on a jury in the past five years?

Yes No

Education: GCSEs, O-levels, CSE or equivalent
 Higher Education (e.g. A-levels or equivalent)
 First Degree (e.g. Bachelors, LLB, DipHE etc.)
 Higher Degree (e.g. Masters, PhD, PGCert etc.)
 Other (please specify) _____

Specify your experience of legal procedures (from education, job, films etc.)

Appendix 3.2: Bar graph showing distribution of jurors' education level by condition.



Appendix 3.3:

Performance for each condition (%) as a function of direction and task

Task 1 – Novel-scenario task (Application Test)
 Task 2 – Paraphrase task (Recall Test)
 Task 3 – Multiple-choice questions (Recognition Test)

		Condition 1	Condition 2	Condition 3
		Decontextualised Instructions	Integrated Evidence Instructions	Narrativised + Integrated Evidence Instructions
Jury's role	Task 1	55.9	58.8	73.5
	Task 2	35.3	20.6	50.0
	Task 3	88.2	85.3	70.6
Judge's role	Task 1	70.6	100.0	76.5
	Task 2	55.9	64.7	70.6
	Task 3	52.9	47.1	55.9
Judge's opinion	Task 1	70.6	91.2	73.5
	Task 2	55.9	76.5	73.5
	Task 3	61.8	50.0	64.7
Burden of proof	Task 1	85.3	73.5	94.1
	Task 2	29.4	23.5	76.5
	Task 3	76.5	70.6	97.1
Standard of proof	Task 1	70.6	70.6	88.2
	Task 2	58.8	64.7	88.2
	Task 3	29.4	32.4	70.6
3 elements of rape	Task 1	58.8	41.2	55.9
	Task 2	26.5	17.6	47.1
	Task 3	38.2	50.0	70.6
Reasonable element of rape	Task 1	50.0	64.7	47.1
	Task 2	17.6	32.4	50.0
	Task 3	52.9	79.4	55.9
Circumstantial evidence	Task 1	73.5	88.2	76.5
	Task 2	61.8	70.6	61.8
	Task 3	44.1	64.7	79.4
How to consider evidence	Task 1	47.1	76.5	61.8
	Task 2	14.7	38.2	41.2
	Task 3	35.3	64.7	85.3
Unanimity of verdict	Task 1	61.8	35.3	58.8
	Task 2	58.8	29.4	61.8
	Task 3	64.7	35.3	58.8
Availability of exhibits	Task 1	70.6	61.8	82.4
	Task 2	50.0	55.9	70.6
	Task 3	85.3	100.0	97.1
Mean (Standard Deviation)		54.7 (18.6)	58.6 (11.3)	69.3 (14.3)

