Three Distinctive Features, but What is the Difference? Key Findings from the Scottish Jury Project[1]

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Introduction

In this paper, we present key findings from a major study into jury decision-making commissioned by the Scottish Government and undertaken in Scotland between 2017 and 2019.[5] The main element of the research was a mock jury study involving 64 mock juries and 863 deliberating jurors.[6] The research was commissioned to inform a lengthy law reform process that can be traced back to Lord Carloway's review of criminal procedure post-*Cadder*,[7] where he recommended the abolition of the longstanding requirement for corroboration in Scottish criminal cases.[8] This led, in turn, to a second review – the 'Post-Corroboration Safeguards Review' – of the safeguards against wrongful conviction necessary in the absence of a corroboration requirement. Given that some of those safeguards might relate to specific and unique features of the Scottish jury system, the 'Post-Corroboration Safeguards Review' recommended – amongst other things – a programme of research into jury decision making to ensure that change was made on a "fully informed basis".[9]

As discussed below, Scottish juries differ from the traditional common law jury in three key ways. They reach decisions by simple majority (as opposed to unanimity or near unanimity), have three verdicts available (guilty, not guilty and not proven) and have 15 members. The use of the mock jury method allowed us to test the impact of each of these features on verdict choices, while holding other aspects of the trial constant. In the remainder of the paper, we look at why this research was necessary and summarise its key findings in four areas: juror verdict preferences; jury dynamics; understandings of the not proven verdict; and memory and understanding of legal tests. Given that one of the two trial scenarios involved a rape allegation, we also report briefly on the attitudes expressed by jurors in that specific context.

Our overarching finding was that juror verdict choice was affected by how the jury system is constructed: the number of jurors, the number of verdicts available, and the size of majority

[1] The research reported in this paper was funded by the Scottish Government. We would like to thank them, as well as everyone who helped in the setting up and conducting of the fieldwork for this project, including in particular the participants.
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[5] R. Ormston et al, *Scottish Jury Research: Findings from a Large Scale Mock Jury Study* (Edinburgh: Scottish Government, 2019). In parts, this paper draws on the text of the final project report.
[6] It also involved two evidence reviews, published separately: J. Chalmers and F. Leverick, *Methods of Conveying Information to Juries: An Evidence Review* (Edinburgh: Scottish Government, 2018); V. Munro, *The Impact of the Use of Pre-Recorded Evidence on Juror Decision-Making: An Evidence Review* (Edinburgh: Scottish Government, 2018).
[7] *Cadder v HM Advocate* [2010] UKSC 43 led to the introduction of a right to legal assistance for detained suspects in Scotland.
[8] The Carloway Review, *Report and Recommendations* (2011), p.286.
[9] *Post-Corroboration Safeguards Review: Final Report* (2015), para. 12.24.

required **all** had an effect. Juries asked to reach unanimity deliberated for longer than juries who could return a simple majority verdict, but the quality of those deliberations was not necessarily higher. Juries of 15 did not deliberate for longer than juries of 12, but jurors were more likely to struggle to participate in the larger juries. We found inconsistent – although rarely incorrect – understandings of the not proven verdict, and, more generally, that jurors did not always recall and apply legal tests accurately and were sometimes confused about their meaning. Finally, we found considerable evidence of prejudicial and false beliefs – about rape and rape complainers – being expressed during deliberations.[10]

The Scottish jury and the not proven verdict

The Scottish jury has 15 members; chooses between three verdicts (guilty, not guilty and not proven); and is only required to reach a simple majority (eight out of 15 jurors) to return a verdict. Unlike the traditional common law jury, a Scottish jury cannot hang (i.e. fail to reach a verdict), because 15 jurors cannot split in a way that allows this.[11] By contrast, the traditional common law jury found in most major English language jurisdictions typically has 12 members, a choice of two verdicts (guilty or not guilty) and is required to reach either a unanimous verdict or a verdict from which only a very small minority of jurors dissent.[12]

Of the three unique features of the Scottish jury, it is perhaps the not proven verdict that has attracted most attention. It is not defined in statute or case law. It is simply one of two acquittal verdicts available to the fact finder.[13] The legal consequences of a not proven and not guilty verdict are exactly the same – the accused is cleared of the charges and cannot normally be re-prosecuted for the same offence.[14] Beyond this, juries should not be told anything further about the not proven verdict's meaning.[15]

[10] The findings that we present here are reported more fully in the final report for the project: R. Ormston et al, *Scottish Jury Research: Findings from a Large Scale Mock Jury Study* (Edinburgh: Scottish Government, 2019) and J. Chalmers, F. Leverick and V.E. Munro, "The Provenance of What is Proven: Exploring (Mock) Jury Deliberation in Scottish Rape Trials" (2021), under review at the *Journal of Law and Society*.

[11] While the three possible verdicts open to the jury mean that there may be no verdict which commands the support of eight or more jurors, such cases will always be regarded as an acquittal because – as noted below – not guilty and not proven have the same effect in law. Where jurors are split between the two acquittal verdicts, the rules differ depending on whether the jury deliberated with its full 15 members or not. Where the jury had 15 members, the verdict will be recorded as one of not guilty or not proven where there is a majority for that verdict amongst the jurors voting for acquittal, but an equal split between acquittal verdicts will be recorded as not proven: *Kerr v HM Advocate* 1992 S.L.T. 1031. Where the jury had an even number of members (if one or more of the initial 15 were unable to continue e.g. due to illness), such a jury, if split evenly between conviction and acquittal, is deemed to have returned a verdict of not guilty: Criminal Procedure (Scotland) Act 1995 s.90(2).

[12] See J. Chalmers, "Jury majority, size and verdicts", in J. Chalmers et al (eds), *Post-Corroboration Safeguards Review: Report of the Academic Expert Group* (2014) 140, pp.143-151.

[13] Although our focus here is on its use by juries, it is available in all Scottish criminal trials, including those presided over by sheriffs (legally qualified judges) and lay justices (who sit in the Justice of the Peace Court, which deals with the least serious criminal offences).

[14] The position on re-prosecution is considered in more detail below.

[15] G.H. Gordon, *Renton and Brown: Criminal Procedure according to the Law of Scotland,* 6th edn (1996) para. 18-79.41.

The not proven verdict's existence has been described as a "historical accident".[16] There were no set forms of verdict used by early Scottish juries: their role was simply to decide on guilt or innocence.[17] The role of the jury was altered in the early 17th century by a change in procedure whereby juries ceased to declare accused persons guilty or innocent, and instead returned 'special verdicts' considering whether individual factual allegations were proven or not proven. The decision on the guilt or innocence of the accused was then taken by the presiding judge.[18] In 1728, the landmark case of Carnegie of Finhaven re-established the jury's right to return a verdict of not guilty, rather than leaving that decision to the judge.[19] By the 19th century, lawyers had come to view the old 'special verdicts' as irrelevant. 'Not proven', however, had become something of a legal fixture, and juries continued to use it alongside 'guilty' and 'not guilty'. This was not in its original meaning, where 'not proven' referred to a failure to prove individual facts, but as one of two acquittal verdicts that both meant a failure to prove guilt.[20]

The need for research

There was, prior to our study, sparse evidence on what (if any) difference the distinctive features of the Scottish system make to the jury's operation compared to the traditional common law jury. Hope et al found that jurors were significantly less likely to favour conviction when given the choice between three verdicts (guilty, not guilty and not proven), compared to when they were only given two verdicts (guilty and not guilty) to choose from.[21] In contrast, Curley et al found no significant difference in conviction rates when comparing a group of jurors who had two verdicts available to a group that had three.[22] Both studies, however, were relatively small scale and were limited in the extent to which they replicated the real trial experience – neither used an audio-visual trial re-enactment (Curley et al used an audio vignette, Hope et al a trial transcript) and Curley's study did not include an element of deliberation. As we discuss shortly, this limits the extent to which their findings can be reliably generalised beyond the experimental setting.

Research on the effect of a 15-person jury and a simple majority verdict was even rarer. No existing research has specifically assessed the impact of having 15 jurors. There is an abundant body of literature that has examined the impact of reducing the traditional common law 12-person jury to a smaller size (usually six).[23] This indicates that 12-person juries are preferable to smaller juries, on the basis that a smaller jury is less likely to be properly representative of the community, more likely not to contain members of minority groups, more likely to deliberate for a shorter time (at the expense of better deliberation), and possibly less likely to recall evidence

[16] I. Willock, *The Origins and Development of the Jury in Scotland* (Edinburgh: Stair Society, 1966), p.217 ("Willock").
[17] Willock, p.217.
[18] Willock, p.219.
[19] Willock, p.220.
[20] Willock, p.220. For further discussion of the history of the not proven verdict, see J. Chalmers, F. Leverick and V.E. Munro, "A Modern History of the Not Proven Verdict", in preparation.
[21] L. Hope et al, "A Third Verdict Option: Exploring the Impact of the Not Proven Verdict on Mock Juror Decision Making" (2008) 32 *Law and Human Behaviour* 241, 248.
[22] L.J. Curley et al, "The Bastard Verdict and its Influence on Jurors" (2019) 59 *Medicine, Science and the Law* 26, 32.
[23] This research arose out of decisions of the US Supreme Court which concluded that the size of a jury could not be reduced below six members without violating an accused's Sixth Amendment right to jury trial: *Williams v Florida* 399 U.S. 78 (1970); *Ballew v Georgia* 435 U.S. 223 (1978).

accurately.[24] These findings do not, however, imply that increasing the size of the jury beyond 12 would have positive effects. Rather, research into group decision making more generally suggests that effectiveness might reduce as group size increases.[25]

There is no prior research that has directly considered the impact of the simple majority rule, although researchers have examined the effect of requiring different majorities for a verdict. For example, Hastie, Penrod and Pennington's extensive *Inside the Jury* research compared three different decision rules: one requiring all 12 jurors to agree unanimously, one requiring 10 votes out of 12 for a verdict, and one requiring eight votes out of 12.[26] This found, unsurprisingly, that juries are more likely to hang when all jurors are required to agree unanimously compared with requiring a majority short of unanimity.[27] There is also some evidence to suggest that requiring jurors to reach a unanimous verdict may be associated with better quality deliberation.[28]

It was against this background that our study aimed to address two key research questions: (1) What effects do the unique features of the Scottish jury system have on jury reasoning and jury decision-making? And (2) What are jurors' understandings of the not proven verdict and why might they choose this verdict over another verdict?

The significance of the study is, however, much broader than this. Although there is a large existing body of mock jury research, it is relatively unusual for such studies to record and analyse jury deliberations.[29] As described below, our 64 juries deliberated for up to 90 minutes without the presence of a researcher and their discussions were video recorded and transcribed. This provided us with a pool of data that sheds light on a number of important issues, including juror memory for and understanding of legal tests and the nature of jury deliberations in rape cases, both of which we discuss here.

Research methods

Mock jury studies are sometimes criticised for their lack of realism. For understandable reasons of cost or convenience, they have sometimes relied on unrepresentative student samples, on written stimuli rather than live re-enactments or videos, and have not included deliberation as part of the research design. The nature of our project and the funding we received from the Scottish Government meant that we could take a number of steps to address issues such as these and replicate the real trial experience as far as possible.

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[24] M.J. Saks and M.W. Marti, "A Meta-Analysis of the Effects of Jury Size" (1997) 21 *Law and Human Behavior* 451.

[25] J. Chalmers, "Jury Majority, Size and Verdicts", in J. Chalmers et al (eds), *Post-Corroboration Safeguards Review: Report of the Academic Expert Group* (2014) 140, p.156.

[26] R. Hastie et al, *Inside the Jury* (Cambridge, Massachusetts: Harvard University Press, 1983), p.60.

[27] R. Hastie et al, *Inside the Jury* (Cambridge, Massachusetts: Harvard University Press, 1983), p.60.

[28] B.H. Bornstein and E. Greene, "Jury Decision Making: Implications for and from Psychology" (2011) 20 *Current Directions in Psychological Science* 63, 65.

[29] The research undertaken by Munro and co-authors on jury deliberations in rape trials is a notable exception: see e.g. E. Finch and V. Munro, "Breaking Boundaries? Sexual Consent in the Jury Room" (2006) 26 *Legal Studies* 303; L. Ellison and V. Munro, "Of 'Normal Sex' and 'Real Rape': Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation" (2009) 18 *Social and Legal Studies* 291; L. Ellison and V. Munro, "Better the Devil You Know: Real Rape Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations" (2013) 17 *International Journal of Evidence and Proof* 299.

In our study, 64 mock juries composed of either 12 or 15 members watched a realistic but fictional filmed rape or assault trial. The key issue in the rape trial was whether or not the complainer consented to sexual intercourse. In the assault trial, it was whether or not the accused acted in self-defence. A summary of each trial scenario is included in Appendices 1 and 2.

After watching the trial video, jurors deliberated for up to 90 minutes (filmed, but without a researcher present) in an attempt to reach a verdict. Half of the juries were asked to reach unanimity and half were able to reach a verdict on the basis of a simple majority. Half deliberated with a choice of three verdicts (guilty, not guilty and not proven) and half with two (guilty and not guilty). Half were juries with 15 members, half were juries of 12. If a jury deliberating under the unanimity condition failed to reach a verdict after 70 minutes, they were played a supplementary direction by the judge informing them that a near unanimous verdict (either 10 out of 12 or 13 out of 15) would be acceptable. If the jury was still unable to reach a verdict by the end of 90 minutes, the jury was recorded as 'hung'.

All jurors completed a very brief pre-deliberation questionnaire recording their initial views on the verdict, and a longer post-deliberation questionnaire covering their beliefs about the not proven verdict and views about the deliberation process, as well as their final views on the verdict. The mock juries took place between May and September 2018, in venues in central Glasgow and Edinburgh.

The 863 jurors[30] who sat on the juries were recruited from the general public. This was a deliberate choice. One option might have been to recruit jurors who had recently finished jury service at court, but that would not have been appropriate here. Those jurors would have been directed shortly before the experiment on key issues (including, for our purposes, the not proven verdict) which might have affected the way in which they responded to the case they then viewed as part of the research.[31]

Recruitment was undertaken by a team of Ipsos MORI Scotland specialist recruiters, using a mixture of on-street and door-to-door recruiting. They worked to quotas to ensure that our juries were representative of the Scottish population in terms of age, gender, education level and working status. By doing so, we were able to replicate the make-up of real juries which, research has shown, are "remarkably representative of the local population".[32]

Our filmed trials were approximately one hour long and included all the components of a real trial – judge's opening directions, examination-in-chief, cross-examination and re-examination, closing

[30] One jury ran with 11 members instead of 12 after one participant withdrew through illness after watching the trial video but before deliberating.

[31] It was especially important for our study that jurors who would only have two verdicts available to them in the study (guilty and not guilty) had not been recently directed on the not proven verdict, which they would have been if they had just sat on a trial. Such jurors might also have previously discussed the meaning and consequences of the not proven verdict in deliberations which would be most problematic for the jurors in the two-verdict conditions, but might also have affected the discussions of those in the three-verdict conditions.

[32] C. Thomas with N. Balmer, *Diversity and Fairness in the Jury System* (London: Ministry of Justice Research Series 2/07, 2007), p.198. This research was undertaken in England and Wales, but there is no reason to suppose that Scottish juries are any less representative.

speeches and judicial directions.[33] They were produced by a professional film company[34] and were filmed in the High Court in Edinburgh with actors in the roles of witnesses and advocates.

Experienced legal practitioners advised on realism, both in relation to the content and the actors' delivery of the trial scripts. A senior judge (Lord Bonomy) gave legal directions, adapted from the Judicial Institute's *Jury Manual*[35] to replicate the directions juries would hear in a real trial. Short clips from the two trials are available to watch online.[36]

Study limitations

This was a large-scale study and we took as many steps as we could to make the trial experience as realistic as possible. That said, there are three limitations that need to be borne in mind.

The artificial setting

First, our jurors were aware that they were not deliberating in a real trial and that their verdict would not have real consequences. However, we took steps to maximise the solemnity of proceedings, including asking jurors to take the standard juror affirmation that they would "well and truly try the accused and give a true verdict according to the evidence".

In line with other mock jury studies,[37] we found that jurors did go about their task extremely diligently, with very few overt references to the artificial nature of the proceedings. A number of the juries deliberating in the simple majority condition took an early vote that indicated that they were already in a position to return a verdict (often by a very clear majority), but in none of those juries did they do so immediately. Instead, they all took the time to discuss the evidence before coming to their final decision. There were also several juries in which jurors holding a minority position could have changed their view simply to facilitate a verdict, but where instead they held out and a hung jury resulted.

Jurors spent a considerable time discussing the demeanour of the accused and the complainer, and in the vast majority of those discussions it was clear that they had suspended disbelief so as to forget that the roles were in fact being played by actors. Indeed, some jurors underscored this by referring, for example, to the consequences of a conviction for this accused, or the likely effect of a verdict of acquittal on this complainer.

The specific trials

Secondly, the findings we report here are based on jurors' responses to two specific trials. These trials were deliberately finely balanced to prompt debate between verdicts, in order to test whether, all else being equal, particular features (number of verdicts, etc.) influenced jurors in one

[33] There are no opening speeches by counsel in Scottish criminal trials.
[34] Thanks are due to Michael Welsh and Penny Cobham and their colleagues at Heehaw for producing the films of the trial simulations.
[35] Judicial Institute for Scotland, *Jury Manual*, available at http://www.scotland-judiciary.org.uk/60/0/Judicial-Institute-Publications
[36] Assault trial: https://youtu.be/gxeU-sFzOxQ; Rape trial: https://youtu.be/kDAGaSedje8; Judge's opening and closing directions: https://youtu.be/ecemRns-gDk
[37] See e.g. L. Ellison and V. Munro, "Telling Tales: Exploring Narratives of Life and Law Within the (Mock) Jury Room" (2015) 35 *Legal Studies* 201, 206.

direction or another, and to encourage discussion of the not proven verdict. However, the exact pattern of verdicts returned is unlikely to reflect the pattern of verdicts that would be returned by juries in a wider range of differently balanced cases. Thus, while we can reach informed conclusions from this study on, for example, whether a change in the majority required would incline more jurors towards or away from a specific verdict, we cannot estimate the likely scale of those impacts across a larger number of differently balanced trials.

Sample size

Thirdly, sample size is a common issue in jury research and although the study was substantial, the total number of juries (64) was still relatively small. As such, anything other than large differences in verdict patterns between juries would not be flagged up as significant.[38] However, the fact that we had data on individual juror preferences for a large sample of jurors (863) meant that we were more likely to identify significant differences at juror level. Though translation from juror- to jury-level findings is not straightforward, these findings do provide an indication of the likelihood of particular features tilting juries in one direction or another.

Findings on verdict choice

Of our 64 juries, seven returned a guilty verdict, 26 returned not guilty, 24 returned not proven, and seven failed to reach a verdict within the 90 minutes allowed for deliberation and were thus recorded as hung. The general pattern of verdicts was very similar across the rape and assault trial.[39] This does not reflect the pattern of verdicts that would be found across the population of real cases.[40] As noted above, the trials were deliberately finely balanced and the pattern of verdicts returned reflects this.

As expected, given the sample size, there were no statistically significant differences in the number of guilty versus acquittal verdicts returned between 12 and 15-person juries, two-verdict and three-verdict juries, or between juries asked to reach a simple majority and those asked to reach a unanimous verdict. There were, however, a number of significant differences in the verdicts favoured by individual jurors.

In short, we found that the number of jurors, the number of verdicts available, and the size of majority required all had an effect on verdict choice. In other words, jurors' verdict preferences are not simply a reflection of their assessment of the evidence presented, but are also influenced by features of the jury system within which this evidence is considered. The manner in which each of jury size, the size of the majority required and the availability of the not proven verdict affected juror verdict choices is outlined below.

[38] Statistical significance refers to tests that produced P-values of <=0.05. This means that the probability of such a difference occurring in our sample when there is no actual difference in reality is less than 5%.
[39] In the rape trial, the spread was four guilty, 12 not guilty, 12 not proven and seven hung. In the assault trial, it was three guilty, 14 not guilty, 12 not proven and three hung.
[40] In Scottish criminal cases in 2017-18, only 17% of all acquittal verdicts in the Scottish courts were not proven verdicts. However, the proportion of not proven verdicts returned was higher in more serious cases: for example, not proven accounted for 26% of all acquittals in homicide cases and 35% of all acquittals in rape and attempted rape cases: Scottish Government, *Criminal Proceedings in Scotland, 2017-18* (2019), p.53. Figures on the use of the not proven verdict in all cases prosecuted as assault (the other trial type used in this research) are difficult to discern as assault is included in three different categories used in the data.

What difference does the size of the jury make?

Unsurprisingly (since they had yet to discuss the trial with each other), jury size did not have any impact on the verdicts favoured by individual jurors before deliberating. However, after deliberating as a group, jurors in 12-person juries were significantly less likely to think the verdict should be guilty than were jurors in 15-person juries (21% vs 30%). This is a result of jurors in 12-person juries being more likely to shift towards acquittal during deliberation than those in 15-person juries.[41] However, this does not necessarily indicate that 15-person juries would be more likely to return guilty verdicts across a larger number of differently balanced trials. Rather, it may reflect the fact that, where a 15-person jury is split, on average more people would need to shift their position to change the outcome. In 15-person juries, there may therefore be less motivation for those in a substantial minority (which, in this study, was usually those who favoured guilty) to change their individual position in order to bring deliberations to a close.

What difference does the size of the majority required make?

The majority required did not have any impact on the verdicts preferred by individual jurors prior to deliberating. Again, this is unsurprising, since at that point jurors were unaware of how close or far away their jury might be from reaching the majority required to return a verdict. However, jurors who were asked to reach a simple majority were significantly more likely (after deliberation) to favour a guilty verdict than jurors asked to reach a unanimous verdict (32% vs 20%). There are two potential factors at work here. This finding might simply reflect a greater tendency for jurors in unanimity juries to change from agreeing with the minority view to agreeing with the majority view (in 51 out of our 64 juries, the majority wanted to acquit the accused at the start of deliberations). However, there is some evidence to suggest that jurors who are in the minority at the start of deliberations may be less willing to shift their view towards a majority preference for guilty than they would towards a majority preference for acquittal.[42] This is supported by the fact that five of the six unanimity juries that started with a majority for guilty could *not* reach a unanimous decision and ended up hanging, compared with only one of the 25 unanimity juries that started with a majority for acquittal.

What difference does the not proven verdict make?

Where the not proven verdict was available, acquitting juries tended to choose not proven rather than not guilty as the means to acquit the accused. In our study, 26 out of 32 juries where not proven was available returned acquittals and, of those 26, 24 returned not proven verdicts and only two returned not guilty verdicts. This suggests that, in finely balanced trials, juries have a preference for acquitting via not proven rather than not guilty (where that verdict is available).

We also found that individual jurors were significantly less likely to favour a guilty verdict when the not proven verdict was available. This difference was apparent both before and after

[41] In 12-person juries, 69% of jurors favoured acquittal pre-deliberation, compared to 79% post-deliberation (a shift towards acquittal of ten percentage points). In 15-person juries 66% of jurors favoured acquittal pre-deliberation compared to 70% post-deliberation (a shift of only four percentage points).

[42] See e.g. the meta-analysis in R.J. MacCoun and N.L. Kerr, "Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency" (1988) 54 *Journal of Personality and Social Psychology* 21.

deliberating, indicating that the availability of the not proven verdict has an effect on individual verdict preferences independent of any impact of group deliberation.

How do the three features interact?

Table 1 shows differences in the proportions of jurors favouring a guilty verdict before and after deliberating, within each of the eight possible combinations of the three features. Condition F in Table 1 is the jury system presently used in Scotland (15-person, simple majority, three verdicts) and condition B is the jury system used in England and Wales (12-person, (near) unanimity, two verdicts).

Table 1 – Proportion of jurors favouring a guilty verdict pre- and post-deliberation (in ascending order of percentage of guilty verdicts post-deliberation)

Condition	Size (15 or 12)	Majority required (simple majority or unanimous)	Number of verdicts (3 or 2)	Pre-deliberation % guilty	Post-deliberation % guilty	*Base (jurors)*
A	12	U	3	23%	3%	*95*
B	12	U	2	39%	21%	*96*
C	15	U	3	30%	23%	*120*
D	12	SM	3	29%	27%	*96*
E	15	U	2	41%	29%	*120*
F	15	SM	3	28%	30%	*120*
G	12	SM	2	34%	34%	*96*
H	15	SM	2	38%	37%	*120*

Of the three features, the majority required had the biggest impact on the likelihood of individual jurors shifting towards acquittal – jurors were most likely to change from guilty to acquittal when required to reach a unanimous verdict. Jurors were less likely to think the verdict should be guilty before deliberating when the not proven verdict was available. However, the impact of the number of verdicts available was moderated during deliberations by the majority required. Regardless of the number of verdicts available, if the jury had to reach a unanimous verdict, jurors were more likely to shift to support acquittal.

The combination of features most likely to result in individual jurors favouring a guilty verdict after deliberating was 15-jurors, simple majority, and two verdicts (condition H in Table 1, where 37% favoured a guilty verdict). The combination least likely to result in individual jurors favouring a guilty verdict after deliberating was 12-jurors, unanimity, and three verdicts (condition A in Table 1, where just 3% favoured a guilty verdict). It should again be emphasised that these figures are based on two deliberately finely balanced trials which are not representative of the full range of cases which come before the courts. Neither of these combinations represents the jury system currently used in Scotland or in England and Wales, although condition H would be the system in Scotland if the not proven verdict were removed with no other changes being made.

Findings on the process of deliberation

For each jury, we recorded the time taken to reach a verdict and various measures of juror participation in deliberations, including how often individual jurors were observed wanting to

contribute but being unable to do so and the number of 'dominant'[43] and 'minimally contributing'[44] jurors.

There were no statistically significant differences in the length of time taken to reach a verdict between juries asked to choose between two and three verdicts, or between 12 and 15-person juries. This sits at odds with a meta-analysis of existing jury research, which suggests that, in general, larger juries tend to deliberate for longer,[45] but only two studies noted data on this point, neither of which looked at a jury size greater than 12.

We did find that juries asked to reach a unanimous verdict took significantly longer over deliberations than those required to reach a simple majority. However, this did not mean that unanimity juries had more wide-ranging discussions, at least in terms of the number of issues discussed. Each jury's deliberations were coded to record whether or not there was discussion of different aspects of the evidence.[46] There was no statistically significant difference in the mean number of evidential issues raised between unanimity juries and simple majority juries.

In terms of juror participation, the only significant differences we found were in relation to jury size. In the 15-person juries, jurors were significantly more likely to be observed wanting to contribute, but being unable to do so. This is consistent with the findings from the post-deliberation questionnaire, where jurors in 15-person juries were significantly more likely to agree that "some members of the jury talked too much" (41% of jurors in 15-person juries, compared with 28% in 12-person juries). There were also, on average, more dominant jurors and more minimally contributing jurors in 15-person juries compared to 12-person juries and, when asked to rate their influence on a scale from 1 (none at all) to 7 (a great deal), jurors in 15-person juries had an average rating of 4.1, compared with 4.5 among those in 12-person juries.

The fact that 15-person juries contain more dominant and minimally contributing jurors might be expected simply by virtue of the larger group size. However, in combination, these findings suggest that bigger juries may be associated with more jurors struggling to participate fully, and consequently with jurors feeling they have less influence on the final decision. It is also worth noting that in the 15-person juries, it was common to observe side conversations running concurrently within discussions and high levels of interruption and speaking over one another, leading to a decreased sense of order within the deliberations overall.

Findings on understanding of the not proven verdict

Of the 64 mock juries in our study, half (32) had two verdicts open to them (that is, they could only return a verdict of guilty or not guilty) and half were able to choose between three verdicts (guilty, not guilty or not proven). Jurors in two-verdict juries were directed simply that there were two

[43] Defined as any juror who contributed very obviously more substantially than most other jurors.
[44] Defined as any juror who made fewer than three contributions, excluding non-verbal contributions (e.g. nodding), simple agreement (e.g. "yes, I agree" with no expansion), or very short contributions made only as part of 'going around the table' to establish each juror's view on what verdict they should return.
[45] M.J. Saks and M.W. Marti, "A Meta-Analysis of the Effects of Jury Size" (1997) 21 *Law and Human Behavior* 451, 458-459.
[46] For further details of the methods used, see R. Ormston et al, *Scottish Jury Research: Findings from a Large Scale Mock Jury Study* (Edinburgh: Scottish Government, 2019), Annex G.

verdicts open to them – guilty and not guilty. In three-verdict juries, jurors were given additional direction on the not proven verdict as follows:[47]

> Finally, I need to tell you that there are three verdicts you can return on this charge: not guilty, not proven, or guilty. Not guilty and not proven have the same effect, acquittal, which means that the accused cannot be tried again for the same offence.

Aside from this direction, jurors were – in line with practice in real Scottish criminal trials – told nothing about the not proven verdict. If jurors did ask questions about it, the researchers told them that they were unable to provide any further guidance.

The not proven verdict was not mentioned at all in the questionnaire that jurors completed prior to deliberating, except that jurors were asked to state what they thought the verdict should be (so jurors in three-verdict juries had the option of choosing not proven). After deliberating, however, jurors in both two-verdict and three-verdict juries were asked a number of questions about their understanding of the not proven verdict. Our analysis draws both on this post-deliberation questionnaire and on the recorded jury deliberations.

The first point of note is that across the 32 mock juries that had the option of returning a not proven verdict, the meaning and consequences of that verdict were rarely discussed at any length during deliberations, even in juries where that verdict was returned. Where the not proven verdict was discussed, there was evidence of jurors holding inconsistent understandings of what the verdict meant, along with some confusion over its effect. In particular, jurors expressed uncertainty during the deliberations as to how it differed (if at all) from a not guilty verdict.

It should be stressed, however, that while there was some uncertainty over the meaning of the not proven verdict, jurors relatively rarely expressed beliefs about the verdict that were definitively incorrect. This is unsurprising – the proven verdict does not have a specific definition beyond it being one of two verdicts of acquittal, which leaves room for a number of different understandings of its meaning and purpose.

The one exception to this was in relation to the possibility of retrial. As noted above, jurors in the three-verdict juries were told by the judge that "not guilty and not proven have the same effect, acquittal, which means that the accused cannot be tried again for the same offence". Jurors in the two-verdict juries did not receive this direction. In fact, the legal position in Scots law – as in England and Wales – regarding retrial following an acquittal verdict is more complex than this direction implies. Since the Double Jeopardy (Scotland) Act 2011 came into force, the prosecution can apply for permission to re-prosecute following an acquittal, although only in limited circumstances (primarily where either the acquitted person has subsequently admitted to committing the offence or, in serious cases, where fresh evidence has arisen that substantially strengthens the case against them).[48] Analysis of the deliberations indicated that a small number of jurors were aware of these provisions. The important point, however, is that such an application

[47] The direction – as was the case for all of the legal directions used in the study – was adapted from the Judicial Institute for Scotland's *Jury Manual,* available at http://www.scotland-judiciary.org.uk/60/0/Judicial-Institute-Publications. The standard direction has recently changed to say that an acquitted accused cannot be tried again "save in exceptional circumstances".

[48] Double Jeopardy (Scotland) Act 2011 ss.3-4.

for re-prosecution can be made *regardless* of whether the verdict is not guilty or not proven. There is no difference between the two acquittal verdicts in relation to the possibility of retrial.

This was not appreciated by all of the jurors in our study, who were much more likely to think that a retrial was possible after a not proven verdict than after a not guilty one. Across the study, 41% of jurors thought it was definitely or probably true that "the accused can be tried again" after a not proven verdict compared with 23% who thought the same applied after a not guilty verdict.

Legal direction did, however, appear to improve jurors' understanding of this issue. Jurors in two-verdict juries (who were not directed on this point by the judge) were significantly more likely than those in three-verdict juries (who were directed) to think that the position on retrial was different for each acquittal verdict. This is consistent with Hope et al's study, where jurors who had been directed on the not proven verdict were significantly less likely to believe that the accused could be retried for the same offence following a not proven verdict.[49] However, even in three-verdict juries, jurors were still more likely to say someone can be retried after a not proven verdict (26%) than after a not guilty verdict (20%). Some confusion about the possibility of a retrial with each verdict did, therefore, persist.

Aside from our findings in relation to the possibility of retrial, there were four general themes that arose in relation to how jurors understood the not proven verdict. The first was that it was the verdict to be used if jurors suspect the accused is guilty, but feel that this has not been proved beyond reasonable doubt. This was the most prominent theme in both the deliberations and questionnaire responses. In the post-deliberation questionnaire, a majority (70%) of respondents thought that if a jury thinks the accused is guilty, but do not think the evidence proves it beyond reasonable doubt, they should return a verdict of not proven. Just 7% said that it does not matter which of not proven or not guilty is returned, and 12% that the jury should return a verdict of not guilty. The view that not proven should be used when the jury thinks the accused is guilty but that the evidence does not meet the required standard of proof was also voiced during deliberations – 31 such statements were made across 14 of the 32 three-verdict juries.

The second theme that arose was that the not proven verdict was seen as a compromise verdict, to be used when jurors could not agree: when asked via the post-deliberation questionnaire which verdict should be used "when the jurors need to compromise to decide on a verdict" significantly more jurors selected not proven than not guilty (31% compared to 17%). The notion of not proven as a compromise verdict also arose during deliberations, with statements to this effect made in five of the three-verdict juries, all of which ultimately returned a not proven verdict. This was usually linked with an expression of relief that the verdict was available as a way of ending deliberations.

The third theme that arose was that the not proven verdict should be used when the accused has not 'proved his innocence'. This was not an issue that was examined via the post-deliberation questionnaire, but it arose in 10 of the 32 three-verdict juries, with 15 statements made to this effect. There is, of course, no requirement to 'prove' innocence in legal proceedings, and all of our juries were directed on this by the trial judge as follows:[50]

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[49] L. Hope et al, "A Third Verdict Option: Exploring the Impact of the Not Proven Verdict on Mock Juror Decision Making" (2008) 32 *Law and Human Behaviour* 241, 249.

[50] Judicial Institute for Scotland, *Jury Manual*, 5.15, available at http://www.scotland-judiciary.org.uk/60/0/Judicial-Institute-Publications

> I now deal with some fundamental principles of law that apply in every case. The first is this. Throughout the trial every accused is presumed innocent unless proved guilty. The accused is not required to prove his innocence. Secondly, it's for the Crown to prove the guilt of the accused on the charge he faces. If that's not done an acquittal must result. The Crown have the burden of proving guilt. Thirdly, the Crown must establish guilt beyond reasonable doubt.

Nonetheless, it was apparent that some jurors felt not proven should be used when innocence has not been 'proved' and jurors sometimes distinguished between the not proven and not guilty verdicts in precisely these terms (that is, that not guilty indicates that the accused has proven their innocence, whereas not proven indicates that they have not).

The final theme that arose was the perception that there is an element of stigma attached to a not proven verdict. Seven statements were made to this effect across six of the 32 three-verdict juries. It was suggested that a not proven verdict means "you've got a black mark against you", or that "doubt" would exist in people's minds about whether the accused was guilty. In all these cases, it was clear that jurors understood the legal position (that a verdict of not proven is a verdict of acquittal), but that despite this, they felt there would be a lingering stigma attached to such a verdict.[51]

Findings on juror memory and understanding of legal tests

Prior to our study there was already a substantial body of research that suggested jurors – especially those who are not given written directions or other memory aids – struggle to remember and understand legal directions.[52] It has sometimes been suggested that this can be remedied by the deliberation process.[53] The jury, by collectively pooling the individual memories of its members, may fill in any gaps in individual memory of the evidence and directions, and any errors in individuals' understanding will be corrected by other members of the group. Research into juror memory and understanding that has included deliberation as part of the research design is limited. The research that does exist, however, suggests that while deliberation may be effective at improving collective memory of the evidence led in a trial,[54] it is less effective at improving memory for and understanding of legal directions.[55]

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[51] These findings will be discussed in more detail in J. Chalmers, F. Leverick and V.E. Munro, "Why it is Time to Consign the Not Proven Verdict to History", in preparation. The experiences of complainers whose cases have ended in a not proven verdict are discussed in V.E. Munro, *Piecing Together Puzzles: Complainers' Experiences of a Not Proven Verdict* (Rape Crisis Scotland, 2020).

[52] For a summary, see J. Chalmers and F. Leverick, *Methods of Conveying Information to Juries: An Evidence Review* (Edinburgh: Scottish Government, 2018), section 1.2.

[53] W. Young et al, *Juries in Criminal Trials Part 2: A Summary of the Research Findings* (Wellington: New Zealand Law Commission Preliminary Paper 37, 1999), para. 7.25.

[54] P. Ellsworth, "Are Twelve Heads Better Than One?" (1989) 52 *Law and Contemporary Problems* 205, 219; M.B. Dann et al, *Testing the Effects of Selected Jury Trial Innovations on Juror Comprehension of Contested mtDNA Evidence: Final Technical Report* (Washington: US Department of Justice, 2004), p.67 (table 6.3); V.P. Hans et al, "Science in the Jury Box: Jurors' Comprehension of Mitochondrial DNA Evidence" (2011) 35 *Law and Human Behavior* 60, 68.

[55] P. Ellsworth, "Are Twelve Heads Better Than One?" (1989) 52 *Law and Contemporary Problems* 205, 217; S.S. Diamond et al, "The 'Kettleful of Law' in Real Jury Deliberations: Successes, Failures and Next Steps" (2012) 106 Northwestern University L.R. 1537, 1558 (table 2).

The deliberations of our juries were analysed in order to identify the extent to which – and the accuracy with which – jurors made reference to the relevant legal tests. There were some legal issues that were common to both of our trials – such as the burden and standard of proof and the corroboration requirement. Others were trial specific (such as the three-part test for self-defence that arose in the assault trial). Jurors were directed on these matters by the trial judge and were permitted to take notes if they wished. No other aids to memory or understanding were provided, as is standard in a Scottish criminal trial.[56]

The burden and standard of proof

In 14 of the 64 juries, jurors expressed the belief that the accused was required to prove his innocence. This directly contradicted the judge's directions, which stated, "throughout the trial every accused is presumed innocent unless proved guilty. The accused is not required to prove his innocence." It was challenged, with varying degrees of effectiveness, in eight of these.

None of our jurors referred directly to the definition of "beyond reasonable doubt" provided by the judge as follows:[57]

> …the Crown must establish guilt beyond reasonable doubt. That's a doubt, arising from the evidence, based on reason, not on sympathy or prejudice, or on some fanciful doubt or theoretical speculation. It's the sort of doubt that would make you pause or hesitate before taking an important decision in the practical conduct of your own lives. Proof beyond reasonable doubt is less than certainty, but it's more than a suspicion of guilt, and more than a probability of guilt. This doesn't mean that every fact has to be proved beyond reasonable doubt. What it means is that, looking at the evidence as a whole, you've to be satisfied of the guilt of the accused beyond reasonable doubt.

While there were occasional references to the idea that proof beyond reasonable doubt is something less than complete certainty, there were repeated examples of other jurors referring to the perceived need to be "100%" confident or similar, which runs contrary to the judge's direction that proof beyond reasonable doubt "is less than certainty".

The corroboration requirement

In Scots law, the corroboration rule dictates that, in a criminal case, there must be two sources of evidence in respect of each "crucial fact" (the identity of the perpetrator and key elements of the offence).[58] Mock jurors were directed on this by the trial judge:

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[56] In this respect, practice in Scotland lags behind other jurisdictions. In England and Wales, for example, the Criminal Practice Directions have stated since April 2016 that a trial judge should provide a written route to verdict "save where the case is so straightforward that it would be superfluous to do so" (CPD VI 26K.11, as inserted by the Criminal Practice Directions 2015 Amendment No 1 [2016] EWCA Crim 97). Sample routes to verdict are provided in the Crown Court Compendium. For a comprehensive survey of practice in other jurisdictions, see J. Chalmers and F. Leverick, *Methods of Conveying Information to Jurors: An Evidence Review* (Edinburgh: Scottish Government, 2018), ch.3.

[57] This is far more complex guidance than that provided for juries in England and Wales, who are simply told that they should be "sure" of the defendant's guilt (see Crown Court Compendium Part 1, July 2019, section 5.1).

[58] *Smith v Lees* 1997 J.C. 73.

> I must tell you about corroboration. The law lays down that nobody can be convicted on the evidence of one witness alone, no matter how strong that evidence may be. There must be evidence from at least two separate sources which you accept and which taken together point to the guilt of the accused. There are two essential matters that must be proved by corroborated evidence. These are that the crime charged was committed, and that the accused was responsible for committing it.

They were then told which facts needed to be proved by corroborated evidence (which varied between the two trials – assault and rape).

In the assault trial, jurors appeared to have fewer difficulties understanding the corroboration requirement than the standard of proof. However, in 23 of the 32 rape trial juries, the belief was expressed that forensic evidence provided by a doctor would have to unequivocally indicate rape before the jury could convict. This is incorrect. Corroborating evidence does not have to be unequivocal – it does not matter if there is a possible explanation for the potentially corroborating evidence that is inconsistent with guilt, as long as the jury, taking the evidence as a whole, is persuaded beyond reasonable doubt of the guilt of the accused.[59] The view that the doctor's evidence had to be unequivocal was challenged by other jurors in 17 of the rape trial juries. This was most commonly done obliquely, by suggesting it was unrealistic to demand such a high standard of evidence.

The legal test for self-defence

In 14 of the 32 assault trial juries, the belief was expressed that self-defence does not operate as a defence to assault (that is, that the accused in the assault trial was automatically guilty simply because he had stabbed the complainer). This erroneous belief was challenged by other jurors on 10 of these occasions.

The legal test for self-defence is a three-part one, and all three elements need to be present in order to ground the defence (namely reasonable belief in imminent danger of attack, violence as a last resort, and use of no more than reasonable force to stop an attack).[60] However, these were not always mentioned – of the 32 assault trial juries, 13 did not reference all three of them. Even when they were referenced, jurors often struggled to recollect each element clearly. There were very few juries where a juror was able to correctly recall the wording of all three elements of the test. Where this did happen, it was because one of the jurors had made written notes while the trial judge was speaking, but this was highly unusual.

Findings on jury deliberations in rape cases

Prior to our study there was already a substantial body of research demonstrating that jurors hold false and prejudicial beliefs about rape complainers. Our focus here is not so much on the extent to which the jury eligible population holds such prejudicial attitudes – although this has been

[59] *Fox v HM Advocate* 1998 J.C. 94 at pp.103-107 per Lord Justice-General Rodger.
[60] *HM Advocate v Doherty* 1954 J.C. 1.

amply demonstrated[61] – but on the way in which these attitudes might affect juror decision making. This is not an issue that can be easily researched using jurors who have deliberated in real cases, as there are legal restrictions in most jurisdictions on asking jurors about their verdict choices or the content of their deliberations. Thus, studies have utilised mock juries. These have varied in terms of their realism, but some have used highly realistic trial reconstructions, involving representative samples of jurors drawn from the community, live trial reconstructions, evidence in chief and cross-examination, accurate legal directions and deliberation in groups.

There are, broadly speaking, two types of study: quantitative and qualitative. Quantitative studies correlate participants' scores on a scale designed to measure their attitudes towards rape victims in the abstract – so-called rape myth acceptance (RMA) scales – with a dependent variable in a concrete case. There is overwhelming evidence from these studies that scores on RMA scales are significantly related to verdict choices.[62] Quantitative studies, however, only present a partial picture, as even jurors who do not score highly on RMA scales may rely on problematic attitudes during deliberations.[63]

Qualitative studies – such as ours – examine the way in which prejudicial attitudes towards rape victims arise in jury deliberations. Previous research has shown that jurors frequently express such attitudes including the belief that 'genuine victims' of rape would always physically resist an attack and would always report an attack to the police quickly, and that women commonly make false rape allegations that are difficult for men to refute.[64]

In our study, we coded the transcripts of the 32 rape trial deliberations to analyse their substantive content and observed the videos to explore discussion dynamics. In line previous research, we found considerable evidence of false and prejudicial beliefs. Space precludes a full discussion, so we focus here on our findings in two respects: beliefs about physical resistance and false allegations. These were not, however, the only areas of concern. Problematic attitudes were also expressed, for example, in terms of the (very short) delay in reporting the incident to the police and other aspects of the complainer's behaviour before and after the event that might indicate consent or have led the accused to form a mistaken but genuine belief in her consent.[65]

Physical resistance

An extensive body of psychological literature establishes that individual reactions to traumatic events vary significantly. Victims may freeze or dis-associate themselves from what they are

[61] For a summary, see S. Dinos et al, "A Systematic Review of Juries' Assessment of Rape Victims: Do Rape Myths Impact on Juror Decision-Making?" (2015) 43 *International Journal of Law, Crime and Justice* 36, 37-38.
[62] For a summary of the evidence, see F. Leverick, "What Do We Know About Rape Myths and Juror Decision Making?" (2020) 24 *International Journal of Evidence and Proof* 255.
[63] See e.g. L. Ellison and V. Munro, "A Stranger in the Bushes or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study" (2010) 13 *New Criminal Law Review* 781, 790-791.
[64] See e.g. L. Ellison and V. Munro, "Reacting to Rape: Exploring Mock Jurors Assessments of Complainant Credibility" (2009) 49 *British Journal of Criminology* 202; L. Ellison and V. Munro, "Telling Tales: Exploring Narratives of Life and Law Within the (Mock) Jury Room" (2015) 35 *Legal Studies* 201.
[65] For a detailed discussion of our findings, see J. Chalmers, F. Leverick and V.E. Munro, "The Provenance of What is Proven: Exploring (Mock) Jury Deliberation in Scottish Rape Trials" (2021), under review at the *Journal of Law and Society*.

experiencing, or may make a more calculated decision not to physically resist in the hope of avoiding additional violence.[66] In 28 of the 32 juries, however, the view was expressed by one or more jurors – often repeatedly and as part of lengthy discursive contributions – that a failure to physically resist an attack is indicative of consent. In our scenario, the complainer did have bruising and scratching to her thighs and upper body,[67] but acquittal verdicts were frequently justified with reference to the absence of more serious or extensive injuries. There was a particular focus on the absence of internal injuries, despite a medical expert testifying that this was not uncommon in rape cases. Meanwhile, other jurors expressed the view that a genuine victim would have injured the accused, despite the obvious difference in the size and strength of the two parties. Female jurors sometimes asserted that if they had been in the complainer's position, they would have struggled more forcefully, expressing confidence that they would have been able to do this even where the assailant was stronger them themselves. One, for example, commented that "if you're being attacked … then to me you would scratch, you would scream, you would try and do anything possible to get him off"; another contended that "in spite of being weaker and smaller, she could have tried to defend herself; you can always defend".

In a similar vein, in half of the 32 juries, the belief was expressed by one or more jurors that a 'real' rape victim would always shout for assistance. In our scenario, the complainer testified that she told the accused to stop, but did not scream for help. This was regarded suspiciously by some, despite the fact that it may well have been futile, given that the attack took place in the complainer's flat.

Jurors did sometimes challenge those views by arguing that women facing sexual assault may freeze and be too fearful or shocked to fight back physically. In doing so, they often invoked directly or echoed the language of a national campaign by Rape Crisis Scotland.[68] This did not, however, appear to cause others to revise their opinion. While those jurors seemed prepared to believe a freeze reaction might happen in a 'stranger-rape' context, they seemed less willing to accept it in the context of an acquaintance rape.

False allegations

Research suggests that false allegations of rape, while not unknown, are comparatively rare.[69] Notwithstanding, assertions that false allegations of rape are common were made by one or more jurors in 19 of our 32 juries,[70] with one juror asserting that "there [are] hundreds of cases coming out where women have lied about rape". In support of this hypothesis, some jurors constructed a narrative whereby the complainer was angry that the accused did not wish to resume their previous relationship and made a false rape allegation out of a desire for revenge.

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[66] See e.g. M. Schauer and T. Elbert, "Dissociation Following Traumatic Stress: Etiology and Treatment" (2010) 218 *Zeitschrift Für Psychologie/Journal of Psychology* 109; B.P. Marx et al, "Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivors" (2008) 15 *Clinical Psychology: Science and Practice* 74.

[67] For a summary of the evidence in the case, see Appendix 1.

[68] https://www.rapecrisisscotland.org.uk/i-just-froze/

[69] L. Kelly, "The (In)credible Words of Women: False Allegations in European Rape Research" (2010) 16 *Violence Against Women* 1345; D. Lisak et al, "False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases" (2010) 16 *Violence Against Women* 1318; P. Rumney, "False Allegations of Rape" (2006) 65 *Cambridge Law Journal* 128.

[70] Bare acknowledgments of the existence of false allegations were excluded from this analysis – only statements that false allegations were e.g. 'routine' or 'common' were counted.

This did not go entirely unchallenged. Some jurors questioned how realistic it was that a woman would put herself through the stress of a criminal investigation and trial simply to gain revenge. Nonetheless, others countered this by suggesting that "some women do just use [the criminal courts] as a tool" or that "women can be vindictive", and some asserted that it would be easy for a complainer to self-inflict bruises and scratches in order to lend credibility to a false allegation.

Conclusion

In this paper, we aimed to set out some of the key findings of a major study of mock jury decision making undertaken in Scotland. Our overarching finding was that juror verdict choice was affected by how the jury system is constructed: the number of jurors, the number of verdicts available, and the size of majority required all had an effect. In other words, jurors' verdict preferences were not simply a reflection of their assessment of the evidence presented, but were also affected by features of the jury system within which this evidence was considered. The availability of the not proven verdict inclined more jurors towards acquittal (both before and after deliberation). Jurors in unanimity and 12-person juries were also more inclined towards acquittal, but here the difference was only after deliberation and stemmed from these jurors being more likely than those in simple majority and 15-person juries to change their initial view about what the verdict should be.

We found that juries asked to reach unanimity deliberated for longer than juries who could return a simple majority verdict, but the quality of those deliberations was not necessarily higher. By contrast, juries of 15 did not deliberate for longer than juries of 12, but on various measures of juror participation, jurors in 15-person juries scored lower than those in 12-person juries.

Juror understanding of the not proven verdict was inconsistent, although rarely incorrect, which was unsurprising given that the verdict has no legal meaning other than it simply being one of two verdicts of acquittal. The one exception was that some jurors thought – incorrectly – that the difference between the not proven and not guilty verdict was that an acquitted person could only be re-prosecuted after the former. This perception was less common among jurors in the 15-person juries who had been directed on the not proven verdict, but it did still persist to some extent. The most common understanding of the not proven verdict was that it was a verdict that should be used when the accused was probably guilty, but this had not been proven beyond reasonable doubt.

We found that jurors did not always recall and apply legal tests accurately and were sometimes confused about their meaning. This was particularly notable among jurors in the assault trial, where they were directed on the three-part legal test for self-defence, but across both trials, a number of jurors appeared to believe that it was for the accused to prove his innocence. This does, however, have to be placed in context of the Scottish practice of only directing jurors orally. In other jurisdictions, England and Wales included, the use of written routes to verdict has become standard practice and our research certainly supports the case for introducing them in Scotland.[71]

Finally, we found considerable evidence of prejudicial and false beliefs about rape and rape complainers being expressed during deliberations. This included the belief that a 'real' rape victim

[71] As does the contribution in this issue of C Maxwell and G Byrne, "Making Trials Work for Juries: Pathways to Simplification" [2020] Crim LR **000**.

would have extensive external and internal injuries and would resist attack by inflicting injuries on her attacker and shouting for help. It also extended to the belief that false allegations of rape are common and easy for women to make. These were sometimes challenged by other jurors, but we saw little evidence that this resulted in changed views. Changing false beliefs is a challenge – it is not as easy as simply telling jurors that they are wrong and expecting them automatically to change their views. There is some evidence, however, that judicial direction can be effective[72] and so too – this study suggests – public education efforts, such as Rape Crisis Scotland's "I Just Froze" campaign.

As a final point, it is worth stressing that – routes to verdict aside – our research did not make any policy or reform recommendations. It was never intended to do so. The aim of the project was to generate a robust evidence base to inform subsequent policy decisions in the Scottish context. The Scottish Government has committed to consulting on changes that might be made to the jury system following from the research, which may include changes to all three of the unique features of the system,[73] and an ongoing review of the handling of rape allegations within the criminal trial process is being undertaken by Lady Dorian.[74] A programme of engagement events for the former commenced but, at the time of writing, had been placed on hold due to the COVID-19 pandemic. The policy decisions that will eventually follow from those consultations are not easy ones. It is, after all, important to consider the individual features of the jury system not in isolation, but as an inter-related system; and it is worth recalling that removing the not proven verdict, without changing either of the other two features of the Scottish jury, would produce a combination that this study suggests is likely to yield the highest proportion of jurors favouring conviction post-deliberation.

Appendix: 1: Rape trial synopsis[75]

The complainer (C) and accused (A) had been in an eight-month relationship, which ended approximately two months before the alleged offence took place. Both parties agreed that the break-up was cordial and that, in the intervening period, the complainer had made two short telephone calls to the accused to ask if he would like to go for a drink with her and her friends (which he declined). There had been no other contact between them during the period between the break-up and the events of the night in question.

On the night in question, the accused called at the complainer's home (which they previously shared) to collect some possessions. He and the complainer each drank a glass of wine and some coffee as they chatted. A few hours later, as the accused made to leave, the two kissed. It was the prosecution's case that the accused then tried to initiate sexual intercourse with the complainer, touching her on the breast and thigh, and that the complainer made it clear that she did not consent to this by telling the accused to stop and pushing away his hands. The prosecution alleged that the accused ignored these protestations and went on to rape the complainer. The complainer testified that after the accused left her flat, she was shocked and traumatised. She initially

[72] See e.g. L. Ellison and V. Munro, "Turning Mirrors into Windows: Assessing the Impact of (Mock) Juror Education in Rape Trials" (2009) 49 *British Journal of Criminology* 363.
[73] Jury research launch event: Speech by Cabinet Secretary for Justice, 9 October 2019.
[74] SCTS News, "Improving the management of sexual offence cases", 20 March 2019.
[75] Though modified as appropriate to the Scottish context, some elements of the rape trial simulation drew on scripts prepared for previous ESRC research projects carried out by Vanessa Munro and Louise Ellison [RES 000-22-2374 and RES 000-22-4277].

telephoned her sister, but got no answer. After 40 minutes, she telephoned the police to report the rape.

When the accused was questioned by the police, he admitted that he had had sexual intercourse with the complainer, but maintained that all contact was consensual, and this was the approach taken by the defence. The accused testified that after he had consensual sexual intercourse with the complainer, he did not want to resume a relationship with her, but felt awkward about this and left the flat without speaking further to her.

A forensic examiner (W) testified that the complainer had suffered bruising to her inner thighs and chest and scratches to her breasts that were consistent with the application of considerable force, but that – as was not uncommon in cases of rape – she had sustained no internal bruising. The forensic examiner advised that the evidence available following her examination of the complainer was consistent with rape, but that she could not rule out alternative explanations for the injuries.

Sections of Video: Judicial Introduction to Jury; Prosecution Evidence (examination-in-chief of C; cross-examination of C by defence; and re-examination of C; plus examination-in-chief of W; cross-examination of W by defence); Defence Evidence (examination-in-chief of A; cross-examination of A by prosecution; and re-examination of A); Closing Speeches by Prosecution and Defence; Judicial Summing Up and Instructions to the Jury.

Appendix 2: Assault trial synopsis

The complainer (C) and accused (A) had both been drinking in a bar in which they were regulars. They knew each other by sight. On the night in question, both had been drinking for several hours. The accused attended the bar with three friends. The complainer was with his partner (W). The accused left the bar to smoke outside. There was no-one else present. The complainer left the bar to go home with his partner, but she stopped to speak to a work colleague, meaning that he exited before her. Once outside, he collided with the accused, spilling the accused's drink.

What happened afterwards is unclear. The complainer's account (and the prosecution case) is that the accused took a knife from his pocket, lunged at the complainer and stabbed him in his left shoulder. The accused's case is that it was the complainer who produced the knife, which he managed to grab from the complainer during the course of a struggle and which he then used on the complainer in self-defence. The complainer's partner testified that she saw the accused push the complainer to the ground, but on cross-examination admitted that she could not have seen this as she had not left the bar at that point. She was adamant, however, that she saw the accused produce the knife.

It was agreed in evidence that both sets of fingerprints were found on the knife, which the complainer explained by testifying that he had picked up the knife after the accused had fled the scene. It was also agreed that the complainer sustained a knife wound to his left shoulder that required surgery, leaving a permanent scar of 10cm in length and permanently impairing the movement of his arm.

Sections of Video: Judicial Introduction to Jury; Prosecution Evidence (examination-in-chief of C; cross-examination of C by defence; and re-examination of C; plus examination-in-chief of W and cross-examination of W by defence); Defence Evidence (examination-in-chief of A; cross-

examination of A by prosecution; and re-examination of A); Closing Speeches by Prosecution and Defence; Judicial Summing Up and Instructions to the Jury.