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CHAPTER 13: JURY MAJORITY, SIZE AND VERDICTS

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13.1 Introduction

As Duff's contribution to a collection of comparative essays on jury systems worldwide expresses it, the Scottish criminal jury is "a very peculiar institution":¹

...it embodies several unique characteristics which may seem very peculiar to those familiar with other versions of the institution. In particular, it comprises fifteen persons; its verdicts may be reached on the basis of a bare eight-seven majority; and it has a choice between three different verdicts—guilty, not guilty, and not proven—which even many Scots regard as illogical and unprincipled.

The simple majority verdict, in particular, has long been regarded with suspicion by comparativists. The first systematic study of miscarriages of justice in the English-speaking world identified the Scottish rule of verdicts by simple majority as a problematic rule which might increase the risk of wrongful conviction.² More recently, international commentators have doubted whether the simple majority verdict can be reconciled with the requirement of proof beyond reasonable doubt, but have suggested that the (equally, if not more, distinctive) requirement of corroboration can justify Scotland's divergence from the practice elsewhere.³

How did these distinctive features of the Scottish criminal jury develop? Ian Willock, in his history of the Scottish jury, notes that "[t]he number of persons forming the Scottish criminal jury fluctuated considerably before stabilising itself at fifteen".⁴ Early records demonstrate a clear preference for odd numbers of jurors, something which itself demonstrates a rejection of the English rule of unanimous verdicts in favour of verdict by a majority.⁵ The precise number of fifteen, however, was probably "never a matter of conscious innovation".⁶ As Willock explains:⁷

...when the central government grew stronger and a more or less permanent supreme criminal court was established, the tidy administrative mind sought first to lay down a rule and then to enforce it everywhere. The number itself was not important; fifteen was simply a not inconvenient choice, as being uneven and already commonly in use; what mattered was to lay down a rule and follow it.

¹ P Duff, "The Scottish criminal jury: a very peculiar institution", in N Vidmar (ed), *World Jury Systems* (2000) 250 at 250.

² E M Borchard, *Convicting the Innocent: Errors of Criminal Justice* (1932) 234 (discussing the Oscar Slater case, where nine jurors voted for conviction, five for a not proven verdict and one for not guilty).

³ C C Bingaman, "Criminal justice in Scotland" (1976) 62 *American Bar Association Journal* 881 at 885; J D Jackson and N P Kovalev, "Lay adjudication and human rights in Europe" (2006) 13 *Columbia Journal of European Law* 83 at 114; M P Scharf, "Terrorism on trial" (2000) 6 *ILSA Journal of International and Comparative Law* 355 at 358. See also T Drabasch, *Majority Jury Verdicts in Criminal Trials* (New South Wales Parliamentary Library Research Service Briefing Paper 15/05, 2005) 16; New South Wales Law Reform Commission, *Majority Verdicts* (Report No 111, 2005) paras 2.16-2.17.

⁴ I D Willock, *The Origins and Development of the Jury in Scotland* (Stair Society vol 23, 1966) 184.

⁵ At 187.

⁶ At 189, where it is noted that "there appears to be no recorded legislation on the matter".

⁷ At 190.

Willcock suggests that the Scottish majority verdict does not call for any “elaborate explanation”, and that it is the English rule of unanimity “that requires to be accounted for”.⁸ As he notes, however, the fact that a verdict was by a small majority was occasionally seen as relevant to sentencing or a plea for the death penalty to be commuted.⁹ There is some evidence that this practice continued into the 20th century.¹⁰

13.2 Previous reviews of the size of the Scottish jury and the majority requirement

The Thomson Committee recommended that the size of the Scottish jury be reduced to twelve, taking the view that a jury of this size would be “just as effective as a jury of fifteen”, and that it was important “that the administration of criminal justice does not take more people than necessary away from their normal work”.¹¹ This recommendation was not implemented. Alongside this, the Committee recommended that the simple majority verdict be maintained, with the consequence that a guilty verdict could be returned only if seven of twelve jurors agreed.¹² Gerald Gordon strongly dissented on this point, arguing that a 2:1 majority (i.e. eight of twelve jurors) should be required for conviction. The remainder of the Committee did not accept this proposal, considering it unnecessary given the existence of other safeguards (such as corroboration, which had featured significantly in the Committee’s discussion of the jury).¹³ The Committee recommended that, were Gerald Gordon’s proposal to be adopted, there should be no possibility of a retrial if the weighted majority required for conviction was not reached; instead, the accused should be acquitted in such cases.¹⁴

The composition of the Scottish jury was revisited in the Scottish Government’s 2008 consultation on *The Modern Scottish Jury in Criminal Trials*, which asked whether the number of jurors in criminal trials in Scotland should be reduced, noting the costs associated with the comparatively large Scottish jury.¹⁵ The consultation responses were summarised as follows:¹⁶

Twenty-five respondents (42%) addressed this question. Of these, a slight majority (54%) was in favour of retaining a jury size of 15. Forty per cent of those who responded argued for a reduction in the number of jurors, with the remaining one consultee providing commentary only. A recurring comment was that the topic should be addressed further by

⁸ At 226. He adds at 233 that the issue “is not in itself discussed by Hume or Alison: so much was it taken for granted by them”. This is inaccurate: as noted in ch 2.1, Hume recognised the difficulty of majority verdicts and sought to justify them by reference to the requirement of corroboration.

⁹ At 232-233.

¹⁰ A Brown, *The Juryman’s Handbook* (1951) 141 “...the proportion supporting the verdict is to some extent supposed to be taken into account by the Home Secretary [sic] in considering recommendation to mercy in the case of the death sentence. (From 1900-1948, 47% of those convicted of murder in Scotland, by unanimous verdict, were executed, but only 33% of those convicted by majority.)” (emphasis in original).

¹¹ *Criminal Procedure in Scotland (Second Report)* (Cmnd 6218: 1975) para 51.11.

¹² The Committee recommended that a verdict of acquittal should be recorded if the jury were evenly divided between conviction and acquittal: para 51.13.

¹³ Para 51.12. See also the Committee’s discussion of corroboration and the not proven verdict at para 51.05.

¹⁴ Para 51.12.

¹⁵ Scottish Government, *The Modern Scottish Jury in Criminal Trials* (2008) ch 7.

¹⁶ L Nicholson, *The Modern Scottish Jury in Criminal Trials: Analysis of Written Consultation Responses* (2009) 30.

expert reviewers. Another common theme was that the issue of jury size could not be considered separately from debate about majority verdicts and acquittal verdicts.

Although the 2008 consultation was expressly not concerned with the Scottish “three verdict” system,¹⁷ it did ask whether – if the size of the jury were reduced – what size it should be and what number of votes should be required to reach a verdict. Most consultees did not answer this question; of those that did, no two respondents offered the same answer. Support was expressed both for simple majority and weighted majority requirements, but no respondent argued that verdicts should be required to be unanimous.¹⁸ The 2008 consultation did not result in any change to the size of the Scottish jury or the number of votes required to reach a verdict.

The Carloway Review did not examine questions relating to the composition or verdict of the jury, considering such questions not to be “specifically within its remit”.¹⁹ It did, however, suggest that change to the simple majority verdict was unnecessary and undesirable because of the possibility of a retrial if the jury failed to agree.²⁰ Following a further consultation exercise on additional safeguards,²¹ the Scottish Government proposed that a guilty verdict should be returned only if ten out of fifteen members agreed to it, with the accused being acquitted if the jury failed to reach that majority. A provision to that effect was included in the Criminal Justice (Scotland) Bill when it was introduced into Parliament.²² This approach, along with that proposed by Gerald Gordon to the Thomson Committee, falls short of the near-unanimous qualified majority verdict required throughout the common law world, and it is referred to here as a “weighted majority” rather than a “qualified majority”.

This chapter now proceeds to examine practice in major comparable jurisdictions. It does so by reference to the common law world, where useful comparisons may most easily be made. As will be seen, the common law world differs significantly from Scotland in starting from the presumption that jury verdicts should be reached by unanimity. Although some jurisdictions outwith the common law world contemplate the possibility of verdict by simple majority, they may counterbalance this by greater judicial supervision of the jury (e.g. through permitting an appeal on the facts, judicial involvement in the jury’s decision-making process, or allowing the trial judge or judges to overrule the jury in certain cases),²³ limiting the extent to which lessons can usefully be drawn for the relatively narrow issues which are considered here. It will in any event be seen later on that data on the rate of hung juries in England and Wales suggests that the practical consequences of operating a

¹⁷ A point strongly emphasised at para 7.10 of the consultation document.

¹⁸ Nicholson, *The Modern Scottish Jury in Criminal Trials: Analysis of Written Consultation Responses* (n 16) 32.

¹⁹ *The Carloway Review: Report and Recommendations* (2011) para 1.0.20; the statement is made in relation to majority verdicts in particular.

²⁰ *Ibid.*

²¹ Scottish Government, *Reforming Scots Criminal Law and Practice: Additional Safeguards following the Removal of the Requirement for Corroboration* (2012). The responses to the consultation were overwhelmingly in favour of a qualified majority being required for conviction in the absence of a corroboration requirement: see S Mulholland and J Fawcett, *Reforming Scots Criminal Law and Practice: Additional Safeguards following the Removal of the Requirement for Corroboration – Analysis of Consultation Responses* (2013) para 4.5.

²² Criminal Justice (Scotland) Bill s 70. This section proposes that if a jury has fewer than 15 members, guilty verdicts will require – where relevant – majorities of the following size: 10 of 14, 9 of 13, or 8 of 12.

²³ A broad review of jury systems in a wide variety of jurisdictions (28 in number) can be found in E J Leib, “A comparison of criminal jury decision rules in democratic countries” (2008) 5 *Ohio State J of Criminal Law* 629.

system of qualified majority verdicts rather than a simple majority one might in fact be very limited.²⁴

13.3 Unanimity: practice in major comparable jurisdictions

England and Wales

The requirement that a jury verdict be reached by unanimity is centuries old, frequently dated back to a 1367 decision.²⁵ Just as English law led the way in creating a rule adopted throughout the common law world, it led the way also in removing it, with the Criminal Justice Act 1967 permitting verdicts of 10:2 or 11:1 following at least two hours' deliberation. A contemporary article explained the rationale for this change in the following terms:²⁶

In an age of highly organised crime there is evidence of bribery and intimidation ("nobbling") of jurors in important cases involving professional criminals ("the big fish"), leading to disagreements. Complaints have been made by judges and barristers. For the protection of society and the vindication of justice the guilty cannot be allowed to escape conviction. Any step which increases the likelihood of convicting the guilty will improve police morale. Naturally detection of nobbling is not easy, but a number of cases have been known to the police in recent years. The juror who has been approached may be unwilling to give evidence in proceedings against the nobbler, so sanctions cannot readily be applied. He may well fear for his family. Under a 10:2 system it is unlikely that three jurors can be successfully nobbled.

The current law is set out in the Juries Act 1974, which permits a verdict to be returned by ten of eleven or twelve jurors, or nine of ten.²⁷ No such verdict shall be accepted "unless it appears to the court that the jury have had such period of time for deliberation as the court thinks reasonable having regard to the nature and complexity of the case", and this period must always be at least two hours.²⁸

A different rule applies in courts martial, which comprise a judge advocate and three to seven lay members.²⁹ Decisions of the court martial are taken by a majority of the votes of the members of the court (with the judge advocate having no vote). In the case of an equality of votes on the finding, the court must acquit the defendant.³⁰ In *R v Twaite*,³¹ the Court Martial Appeal Court rejected an argument that simple majority verdicts were contrary to the right to a fair trial under the ECHR. The court noted that majority verdicts were not, strictly speaking, confined in English law to courts martial (being possible also in the magistrates' court or appeals to the Crown Court against decisions by justices). It noted that a number of cases concerning the compatibility of courts martial with

²⁴ See ch 13.4.

²⁵ See e.g. J Abramson, *We the Jury: The Jury System and the Ideal of Democracy*, rev edn (2000) 179; S Lloyd-Bostock and C Thomas, "The continuing decline of the English jury", in Vidmar (ed), *World Jury Systems* (n 1) 53 at 55.

²⁶ A Samuels, "Criminal Justice Act" (1968) 31 MLR 16 at 24.

²⁷ Juries Act 1974 s 17.

²⁸ s 17(4).

²⁹ Armed Forces Act 2006 s 155.

³⁰ Armed Forces Act 2006 s 160(3). In the case of an equality of votes on sentence, the judge advocate has the casting vote: s 160(4).

³¹ [2010] EWCA Crim 2973.

article 6 had been heard both in the domestic courts and Strasbourg, and that the compatibility of majority verdicts with article 6 had never been called into question in any of these cases.

The decision in *Twaite* is important, but the reasoning employed by the court is unsatisfactory. The court offers no explanation for its conclusion that simple majority verdicts are compatible with article 6 beyond the point not having been raised in previous cases.³² Even if that conclusion is correct, the case does not in any way illuminate the question of whether a majority verdict system is desirable as a matter of principle. In the more recent case of *R v Blackman*,³³ the court followed *Twaite*, observing in addition that there were “good reasons why, in a system of military justice, it is necessary to avoid a ‘hung jury’ for the ordinary run of offences”,³⁴ and that the variety of different jury systems worldwide indicated that there could not be said to be anything objectionable about simple majority verdicts.³⁵

Although the *Twaite* court stressed that the use of majority verdicts in courts martial was long-standing,³⁶ it did not note that this had been a matter of some controversy. Shortly after the Second World War, the government had established separate committees to review army and air-force courts martial (the Lewis Committee) and naval courts martial (the Pilcher Committee). The Lewis Committee recommended that unanimity should be required in courts martial.³⁷ The Pilcher Committee noted that recommendation, but a majority of the committee argued that (a) the members of a court martial (“experienced senior officers... well fitted to form a reasoned and independent view”) were not akin to jurymen (who “necessarily vary widely in education, knowledge of the world, judgment and character”)³⁸ and that (b) the possibility of retrials would present serious practical difficulties, particularly in the service context, while being unfair to those who would otherwise be acquitted by a majority vote.³⁹ Accordingly, it concluded that majority verdicts should remain. Two of the committee’s six members strongly dissented from this part of its report, endorsing the view of the Lewis Committee.⁴⁰ The government was later to reject the recommendation of the Lewis Committee, but without giving reasons for so doing.⁴¹ More recently, the Judge Advocate General has questioned whether majority verdicts should continue, arguing that

³² The issue of majority verdicts was raised in *R v Martin* [1998] AC 917, but was addressed by reference to the doctrine of abuse of process rather than Convention rights. It appears that prior to a policy introduced by the Judge Advocate General in November 2009, it was not the practice to record whether verdicts of courts martial were unanimous or by a majority, and the *Twaite* court recommended that this policy should be revoked: paras 30-35.

³³ [2014] EWCA Crim 1029.

³⁴ Para 22.

³⁵ Para 23, citing Leib (n 23).

³⁶ *Twaite* at para 22.

³⁷ *Report of the Army and Air Force Courts Martial Committee 1946* (Cmd 7608: 1949) para 123 (“We have heard no convincing argument as to why the salutary rule that the verdicts of juries must be unanimous, should not be applied in the case of courts-martial.”).

³⁸ *First Report of the Committee Appointed to Consider the Administration of Justice under the Naval Discipline Act 1950* (Cmd 8094: 1950) para 120. The dissenting minority shared this view but argued that this “is not in our opinion an argument against unanimity but for it. It is less justifiable in view of the character of the officers to disregard the opinion of any of them” (page 49).

³⁹ Paras 121-128.

⁴⁰ R E Manningham-Buller (later Viscount Dilhorne, Lord Chancellor) and A L Ungood-Thomas (later Ungood-Thomas J).

⁴¹ *Courts-Martial Procedure and Administration of Justice in the Armed Forces* (Cmd 8141: 1951) 15.

they appear unfair compared to the civilian courts, and noting that New Zealand has recently reformed its military justice system, requiring all verdicts to be unanimous.⁴²

Ireland

In Ireland,⁴³ majority verdicts have been permitted since the Criminal Justice Act 1984, section 25 of which provides as follows:

- (1) The verdict of a jury in criminal proceedings need not be unanimous in a case where there are not fewer than eleven jurors if ten of them agree on the verdict.
- (2) The court shall not accept a verdict of guilty unless the foreman of the jury has stated in open court whether the verdict is unanimous or is by a majority in accordance with subsection (1) and, in the latter event, the number of jurors who agreed to the verdict.
- (3) The court shall not accept a verdict by virtue of subsection (1) unless it appears to the court that the jury have had such period of time for deliberation as the court thinks reasonable having regard to the nature and complexity of the case; and the court shall not in any event accept such a verdict unless it appears to the court that the jury have had at least two hours for deliberation.
- (4) The court shall cause the verdict of the jury to be taken in such a way that, where the verdict is one of not guilty, it shall not be indicated whether the verdict was unanimous or by a majority.
- (5) This section shall not affect the trial of any offence for which the court is required, upon the conviction of the accused, to sentence him to death or any trial commenced before the commencement of this section.

The rationale for introducing majority jury verdicts into Irish law was explained by the Minister for Justice (Michael Noonan) as follows:⁴⁴

We propose... to introduce majority jury verdicts at criminal trials. There has been an increasing number of jury disagreements in recent times with more than a suspicion in some cases that there was an element of intimidation present. This particular reform will avoid the need for a retrial in a case in which not more than two of the 12 jurors disagree.

Section 24 contains the details of the provision. It proposes that a jury will have to have at least two hours for deliberation before a majority verdict can be accepted. Majority verdicts are being allowed both to convict and to acquit, but we think it is only fair that if a verdict of

⁴² J Rozenberg, "Military judge raises court-martial concerns" BBC News Online, 25 June 2013. On the New Zealand reform, see C Griggs, "A new military justice system for New Zealand" (2006) 6 *New Zealand Armed Forces Law Review* 63 at 84, who also summarises the Lewis-Pilcher debate at 83-84.

⁴³ Official consideration of the jury system in Ireland has been limited and has not involved an "overarching review of the operation of the jury system": T Daly, "An endangered species? The future of the Irish criminal jury system in light of *Taxquet v Belgium*" (2010) 1 *New Journal of European Criminal Law* 153 at 154. A general account of the Irish jury system can be found in J D Jackson, K Quinn and T O'Malley, "The jury system in contemporary Ireland: in the shadow of a troubled past", in Vidmar (ed), *World Jury Systems* (n 1) 283.

⁴⁴ 345 *Dáil Debates* 1269 (Second Stage, 2 November 1983). The Dáil debates suggest that the desirability of this change was broadly accepted.

acquittal is by majority that fact should not be disclosed. Majority verdicts have long been the law in England and Scotland.

The distinction which is drawn between capital and non-capital cases, whereby majority verdicts are barred in the former but permitted in the latter, is interesting insofar as it indicates an unwillingness to accept majority verdicts in the most serious of cases. It is no longer of practical importance following the abolition of the death penalty in Ireland in 1990.⁴⁵ The constitutionality of majority verdicts was upheld by the Supreme Court in 1993, although the court suggested that there were limits to the extent to which majority verdicts could constitutionally be permitted: “a decision might lose its character of being a decision of the jury if the majority requirement was substantially lowered”.⁴⁶

Australia

The English common law rule requiring that jury verdicts be unanimous was maintained in Australia, but has been significantly eroded over time.⁴⁷ Unanimous verdicts remain essential in the Australian Capital Territory,⁴⁸ while the High Court of Australia held in *Cheatle v R*⁴⁹ that any trials for offences against the Commonwealth must be determined by majority verdict in order to comply with the Constitution.⁵⁰ In *Cheatle*, the court reached that conclusion on the basis of the accepted understanding of jury trial at the time the Constitution was framed, but noted a number of “considerations of principle” which supported its decision. The court expressed these as follows:⁵¹

The requirement of a unanimous verdict ensures that the representative character and the collective nature of the jury are carried forward into any ultimate verdict. A majority verdict, on the other hand, is analogous to an electoral process in that jurors cast their votes relying on their individual convictions. The necessity of a consensus of all jurors, which flows from the requirement of unanimity, promotes deliberation and provides some insurance that the opinions of each of the jurors will be heard and discussed. Thereby, it reduces the danger of “hasty and unjust verdicts”. In contrast, and though a minimum time might be required to have elapsed before a majority verdict may be returned, such a verdict dispenses with consensus and involves the overriding of the views of the dissenting minority... Moreover, the common law’s insistence upon unanimity reflects a fundamental thesis of our criminal law, namely, that a person accused of a crime should be given the benefit of any reasonable doubt.

⁴⁵ Criminal Justice Act 1990 s 1. The death penalty is now constitutionally prohibited in Ireland: Constitution of Ireland art 15.5.2. This change (the twenty-first amendment of the Constitution) took effect in 2002, following a referendum in 2001.

⁴⁶ *O’Callaghan v Attorney General* [1993] 2 IR 17 at 26 per O’Flaherty J (quoting from the earlier decision of Blayney J in the High Court).

⁴⁷ See generally M Chesterman, “Criminal trial juries in Australia: from penal colonies to a federal democracy”, in Vidmar (ed), *World Jury Systems* (n 1) 127 at 153-155.

⁴⁸ Juries Act 1967 s 38 (ACT).

⁴⁹ [1993] HCA 44.

⁵⁰ Commonwealth of Australia Constitution Act s 80.

⁵¹ *Cheatle* at paras 7-8, citations omitted.

These considerations notwithstanding, the majority of Australian jurisdictions have legislated to permit majority verdicts in cases other than trials for offences against the Commonwealth. The following table sets out the current legal position in the relevant jurisdictions.

New South Wales	<p>A majority verdict is permitted where the jurors have deliberated for not less than eight hours and the court is satisfied that the jury is unlikely to reach a unanimous verdict after further deliberation.</p> <p>A majority verdict is one to which eleven jurors (where the jury consists of twelve members) or ten jurors (where the jury consists of eleven members) agree. Where a jury consists of fewer than eleven members, its verdict must be unanimous.</p>	Jury Act 1977 s 55F
Northern Territory	<p>A majority verdict is permitted where not less than six hours have elapsed since the jury retired and the jurors are not unanimously agreed.</p> <p>A majority verdict is one to which ten jurors agree, except where a jury consists of only ten members. In such cases, a majority verdict is one to which nine of the jurors agree.</p>	Criminal Code s 368
Queensland	<p>A judge may ask the jury to reach a majority verdict if the jury has deliberated for eight hours and the judge is satisfied that the jury is unlikely to reach a unanimous verdict after further deliberation.</p> <p>A majority verdict is one to which all but one of the jurors agree, except where a jury consists of only ten members. In such cases, the verdict must be unanimous. Majority verdicts are not permitted in respect of murder or an offence under s 54A(1) of the Criminal Code (demands with menaces upon agencies of government) where the offender would be liable to imprisonment for life.</p>	Jury Act 1995 ss 59-59A
South Australia	<p>A majority verdict is permissible where a jury has deliberated for at least four hours and a unanimous verdict has not been reached.</p> <p>A majority verdict is one to which ten or eleven members agree (where the jury consists of twelve members). Where the jury consists of eleven members, ten must agree; where it consists of ten members, nine must agree. No verdict that a person is guilty of murder or treason can be returned by a majority.</p>	Juries Act 1927 s 57
Tasmania	<p>A majority verdict is permissible where a jury has deliberated for at least two hours and a unanimous verdict has not been reached. The rule differs in trials relating to treason or murder, where a majority verdict of not guilty is permissible after six hours deliberation, but any verdict of guilty must always be unanimous.</p>	Juries Act 2003 s 43
Victoria	<p>Where a jury has deliberated for at least six hours and has not reached a unanimous verdict, the court may discharge the jury or take a majority verdict.</p>	Juries Act 2000 s 46

	A majority verdict is one to which all but one of the jurors agree. Majority verdicts are not permitted in respect of murder, treason, or offences against ss 71 or 72 of the Drugs, Poisons and Controlled Substances Act 1981.	
Western Australia	Where a jury has deliberated for at least three hours and has not arrived at a unanimous verdict, the decision of ten or more of the jurors shall be taken as the verdict. Majority verdicts are not permissible on a charge of murder.	Criminal Procedure Act 2004 s 114

Canada

Canada, it has been said, is the “last remaining country requiring unanimity for the verdict of every criminal trial held within its borders”.⁵² The issue was examined by the Law Reform Commission of Canada in its 1980 working paper on *The Jury in Criminal Trials*,⁵³ when the Commission recommended that the rule be retained, rejecting arguments that had been offered against it. In particular, the Commission noted that hung juries were rare in Canada, amounting to about one per cent of all jury trials,⁵⁴ and suggested that a change to majority verdicts could be expected to make only a marginal difference to the number of cases where the jury were unable to reach a verdict.⁵⁵ It noted that while the English reforms had been based on the problem of the obstinate or corrupt juror, but with no evidence being presented other than “one or two highly publicized trials in which attempts to interfere with jurors was [sic] alleged”,⁵⁶ and with subsequent research having discounted this problem.⁵⁷

The Commission argued that a unanimity requirement was likely to produce a more accurate result, and one which would be more likely to command community confidence. The claim about accuracy was not simply one relating to the avoidance of wrongful conviction. As the Commission explained:⁵⁸

Empirical research relating to the jury’s deliberative process suggests: first, that minority views are more likely to be expressed and considered under the unanimity rule; and second, that the quality of discussion is superior. From these findings, the greater likelihood of an accurate decision under the unanimity rule can be inferred.

⁵² P Sankoff, “Majority jury verdicts and the *Charter of Rights and Freedoms*” (2006) 39 UBC LR 333 at 333. The Supreme Court of Canada has described unanimity as one of the “fundamental characteristics of criminal jury trials”: *R v Bain* [1992] 1 SCR 91 at para 145 (read with para 146) per Gonthier J (dissenting, but not on this point).

⁵³ Law Reform Commission of Canada, *The Jury in Criminal Trials* (Working Paper No 27, 1980).

⁵⁴ At 22. This compared to a rate of 3.5-4 per cent in England and Wales prior to the introduction of 10:2 majority verdicts in that jurisdiction: see *ibid*, citing HC Debs vol 738 col 56 (Dec 12, 1966).

⁵⁵ At 23.

⁵⁶ At 24.

⁵⁷ *Ibid*.

⁵⁸ At 29. The empirical research is not cited, but is most likely a reference to V P Hans, “The unanimity requirement: issues and evidence”, in Law Reform Commission of Canada, *Studies on the Jury* (1979) 141 and V P Hans, “The effects of the unanimity requirement on ratings of jury deliberations”, in *Studies on the Jury* 183.

New Zealand

As a result of the Juries Amendment Act 2008, juries in New Zealand can return majority verdicts, defined as a verdict “agreed to by all except one” of the jurors.⁵⁹ This will normally be an 11:1 verdict, but the statutory formulation accounts for cases where the trial has concluded with fewer than 12 jurors. In order for a majority verdict to be accepted, the jury must have deliberated for at least four hours, the foreperson must have stated in open court that there is no probability of a unanimous verdict being reached but that a majority verdict has been, and the court must consider that the jury has had a reasonable time for deliberation. This framework replaced the former requirement of unanimity for all verdicts, following a recommendation by the New Zealand Law Reform Commission in its work on *Juries in Criminal Trials*.⁶⁰

The Commission noted four arguments for retaining the unanimity rule: it reflects the requirement of proof beyond reasonable doubt; it encourages discussion and each juror participating and being listened to; it ensures that the representative character of the jury is represented in the verdict; and it increases community confidence in the verdict and the criminal justice system.⁶¹

At the same time, it identified five arguments in favour of majority verdicts: that a unanimity requirement “provides an incentive to intimidate, corrupt or otherwise improperly persuade jurors”; that a unanimity requirement is often met by attrition, meaning that it may simply delay the inevitable; that it is undemocratic; that it is costly; and that it gives rise to compromise verdicts or hung juries.⁶²

Not all of these arguments seem to have been considered persuasive by the Commission – it noted that prosecutors considered that “the risk of [jury tampering] is not great”,⁶³ and doubted whether the cost argument was relevant at all,⁶⁴ but it was particularly concerned about hung jury rates of around eight per cent and the possibility of rogue jurors: “in a randomly chosen group of twelve it is possible that at least one will be simply unreasonable and unwilling to participate properly or at all”.⁶⁵ That latter claim was not purely hypothetical, but was supported by research on jury decision-making accompanying the Commission’s work.⁶⁶ The importance of the “rogue juror” to the Commission’s thinking became clear when, in recommending majority verdicts, it expressed its preference for an 11:1 requirement rather than 10:2.⁶⁷

We consider that the primary reason why majority verdicts are justifiable is that there is sometimes one member of the group who is simply unreasonable or unwilling to properly take into account the views of the others – the rogue juror. It is to eliminate the influence of

⁵⁹ Juries Act 1981 s 29C, as inserted by the 2008 Act.

⁶⁰ New Zealand Law Reform Commission, *Juries in Criminal Trials* (Report 69, 2001) ch 13.

⁶¹ Para 414.

⁶² Para 415.

⁶³ Para 416.

⁶⁴ Para 415.

⁶⁵ Para 420.

⁶⁶ See W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings* (NZLRC Preliminary Paper 37 Vol 2, 1999) paras 9.12-9.13 (five juries in 48 trials were hung; in two cases this was due to “a single ‘rogue’ juror who refused to consider a ‘guilty’ verdict but made little attempt to participate in deliberations, and was unable or unwilling to articulate any rational argument in favour of a ‘not guilty’ verdict”, while in three “the minority jurors provided a clearly articulated and reasoned basis for their dissent”).

⁶⁷ Para 435.

these people that majority verdicts are arguably required. If two jurors are opposed to the views, of the majority, there is a greater chance that their views are not simply unreasonable but reflect some genuine basis for doubt which should be debated rather than ignored. For this reason, we recommend a majority of 11:1.

In its report, the Commission noted the most recent available figures for the rate of hung juries in New Zealand (for the twelve months to October 2000) showed a hung jury rate of 8.7 per cent (7.8 per cent in the District Court and 13.1 per cent in the High Court). The Commission noted that this included all cases where the jury was hung on a charge, regardless of whether verdicts were reached on others, and therefore the rate at which retrials took place would be somewhat lower.⁶⁸

United States of America

In *Apodaca v Oregon*,⁶⁹ the Supreme Court held that jury unanimity is not constitutionally required, and that verdicts of 11-1 or 10-2 were constitutionally valid. Noting its earlier statement that “the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen”,⁷⁰ the Court continued:⁷¹

A requirement of unanimity, however, does not materially contribute to the exercise of this commonsense judgment... a jury will come to such a judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant’s guilt. In terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served.

However, despite the decision in *Apodaca*, jury unanimity remains a near-universal rule across the United States.⁷² Very few states permit non-unanimous verdicts, particularly in felony trials.⁷³

Analysis

As the above analysis demonstrates, there is a clear consensus across the common law world (courts martial aside) that jury verdicts should be reached by unanimity. This is regarded as a consequence of the requirement of proof beyond reasonable doubt, the presumption of innocence, and the view that a jury verdict is a collective decision. The verdict is one of the jury as a whole, not simply the result of counting votes in a ballot. Over time, this rule has been qualified in most – not all – jurisdictions to permit juries to return verdicts by qualified majority. Qualified majority rules exist

⁶⁸ Para 417.

⁶⁹ 406 US 404 (1972)

⁷⁰ *Williams v Florida*, 399 US 78, 100 (1970).

⁷¹ *Apodaca* at 410-411 (White J).

⁷² W R LaFave and others, *Criminal Procedure*, 5th edn (2009) 1075.

⁷³ See R Malega and T H Cohen, *Special Report: State Court Organisation, 2011* (US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2011) 10.

because of a recognition that in some cases an individual juror, or perhaps two jurors, may not participate properly in the process, because they have been intimidated or have taken an unreasonable or perverse approach to their task. The acceptance of a qualified majority, therefore, does not undermine the principle that the verdict should be one of the jury as a whole. Instead, it recognises that an individual juror or jurors may not be willing or able properly to participate in the collective decision-making process.

Scots law, by contrast, stands entirely apart from this consensus. There is no clear basis on which the simple majority verdict can be reconciled with the requirement of proof beyond reasonable doubt, the presumption of innocence, or the concept of the jury as a body which takes collective decisions. The Scottish approach has consistently been justified on the basis that Scotland applies a unique set of practices in jury trials – corroboration, three verdicts and simple majority verdicts – which, taken together, represent a proper approach to the criminal justice system’s key goal of acquitting the innocent and convicting the guilty. Corroboration’s removal, however, means that this justification no longer holds, and so the other two distinctive features of the Scottish jury require reconsideration.

13.4 What practical effect does a unanimity or qualified majority rule have?

The foregoing review of developments in other jurisdictions has provided some data on the rate at which juries failed to reach unanimous verdicts in certain jurisdictions. Such data is of limited value in the Scottish context given that it is both historic in nature and concerned with rather different criminal justice systems. It is also of limited relevance given that it is unlikely that Scotland will make the radical move from a system requiring a simple majority verdict to one requiring complete unanimity. This is not because removing corroboration is not itself radical – it clearly is, given the extent to which the Scottish criminal justice system has been constructed around that requirement. However, the broad consensus in favour of permitting qualified majority verdicts means that it is unlikely that any response to the abolition of the requirement for corroboration would go so far as to propose a requirement of complete unanimity, much less that the Scottish Government or Parliament would accept such a proposal.

The discussion here therefore focuses on the likely effect of a qualified majority rule. In order to assess this, it is most useful to look to the experience of England and Wales, as both the most proximate and directly comparable jurisdiction and one where comprehensive data is available.

In England and Wales the percentage of convictions reached by unanimity rather than a majority has been remarkably consistent over time: either 81 per cent or 82 per cent in every year from 2007 until 2013.⁷⁴ The regularly published statistics do not indicate how often juries fail to reach a verdict,⁷⁵ doubtless because this is rare. In 2010, based on data from 2006-2008, Thomas reported that hung juries accounted for 0.6 per cent of all cases where juries deliberated and 0.08 per cent of all charges in the Crown Court,⁷⁶ and “in most cases these [were] juries that [had] reached verdicts on at least some charges put to them”.⁷⁷ While hung juries were more common in respect of sexual

⁷⁴ Ministry of Justice, *Court Statistics Quarterly: January to March 2014* (2014) table 3.17.

⁷⁵ See *ibid* table 3.15, which appears to exclude such outcomes from the overall statistics of defendants “dealt with in trial cases”.

⁷⁶ C Thomas, *Are Juries Fair?* (Ministry of Justice Research Series 1/10, 2010) 27.

⁷⁷ *Ibid* 46.

offences, the rate of hung juries remained below one per cent of all sexual offence cases heard by juries in Thomas's data.⁷⁸

Majority verdicts in England and Wales can be reached with either one or two dissenting jurors. Again, a consistent pattern is seen over time: between 2007 and 2013 the percentage of convictions by majority verdict reached with two dissenters rather than one ranged from 59 per cent to 61 per cent.⁷⁹ This does not mean that around 40 per cent of majority verdicts would have resulted in a hung jury had English law only permitted a single dissenter. A proportion of two-dissenter juries would have moved to a single dissent or unanimity after further deliberation, but it is impossible to know in how many cases this would have happened.

In 1994, the Scottish Office estimated that if the possibility of a hung jury were to be introduced into Scots law, in line with English practice, the number of retrials which would take place annually could be expected to be in single figures.⁸⁰ That remains correct, assuming the English experience were replicated north of the Border. In 2013-14, Crown Office data recorded 359 High Court trials and 1,210 sheriff and jury trials.⁸¹ If juries in both instances hung in 0.06 per cent of cases, that would suggest two hung juries annually in the High Court and seven in the Sheriff Court, a maximum of nine retrials. In some of these cases, particularly those where verdicts had been reached on some but not all of the charges, a retrial would not be in the public interest and would not take place.

13.5 Is the unanimity / majority rule linked to jury size?

Qualified majority rules do not exist because of some sort of numerical calculation. They do not represent a view that a certain percentage of votes for conviction (or acquittal) amounts to proof beyond reasonable doubt. Instead, systems which operate qualified majority rules start from the principle that jury verdicts should be reached by unanimity, but that it is legitimate to modify that rule in order to account for individual jurors whose participation is tainted in some way, perhaps because they are unwilling properly to participate in the deliberations or because they have been intimidated. Such jurors are exceptional, as is reflected by the fact that jury verdicts are likely to be unanimous even where majority verdicts are permitted. They are not a group who might be expected to appear with numerical regularity in each and every jury. It does not, therefore, follow that if a criminal justice system with a jury of twelve members which permitted 10:2 verdicts were to increase the size of its jury, it should also increase the number of dissenting voices which could be overridden by a qualified majority verdict. That is an observation which is of some significance given the current size of the Scottish jury.

⁷⁸ This figure is not Thomas's but has been calculated based on data at pages 27-28 of her report, as follows. There were 423 hung juries in Thomas's sample, which indicates 186 hung juries in sexual offence cases (44% of hung juries). There were 68,874 verdicts by deliberation (including hung juries), which indicates 21,351 verdicts in sexual offence cases (31% of verdicts). 186 as a percentage of 21,351 is 0.87%.

⁷⁹ See Ministry of Justice, *Court Statistics Quarterly: January to March 2014* (2014) table 3.17.

⁸⁰ Scottish Office, *Juries and Verdicts* (1994) para 6.5.

⁸¹ COPFS, *Statistics on Case Processing Last Five Years 2009-14* (2014), available at <http://www.copfs.gov.uk/publications/statistics>.

13.6 Jury size: practice in major comparable jurisdictions

England and Wales

The English jury has traditionally been comprised of twelve members. There is no clear rationale for this number, and such explanations as have been offered have been described as “fanciful”⁸² or “romantic”.⁸³ Devlin suggests that “doubtless the reason for having twelve instead of ten, eleven or thirteen was much the same as gives twelve pennies to the shilling and which exhibits an early English abhorrence of the decimal system”.⁸⁴ The English choice of twelve members as the appropriate size for the jury set the tone for the rest of the common law world, although when the jury system was implemented in the English colonies in the eighteenth and nineteenth centuries, a composition of twelve members was not considered an essential feature and the size frequently varied.⁸⁵ A 1942 survey of Commonwealth practice (in “colonies, dependencies, protectorates and other territories under the jurisdiction of the Crown”,⁸⁶ but not Dominions) reported jury sizes ranging from seven to twelve members. In particular, it was common for juries to consist of seven members but twelve in capital cases; or for the use of juries to be restricted to capital cases, where they would comprise seven members.⁸⁷

Ireland

In Irish law, the size of a jury “is not provided for by legislation but traditionally there are 12 members”.⁸⁸

Australia

Twelve is the “standard number of jurors in a criminal trial” in all Australian jurisdictions.⁸⁹

Canada

The Canadian criminal jury is comprised of twelve members.⁹⁰ In *The Jury in Criminal Trials*, the Law Reform Commission of Canada considered whether the size of the Canadian jury should be reduced from twelve. It concluded that smaller juries “would not significantly reduce the cost or increase the administrative efficiency of the jury system”.⁹¹ It noted the argument (bearing some similarities to that made by the Thomson Committee several years earlier)⁹² that a reduction in jury size would reduce the overall hardship inflicted on jury members, but argued that this was “of no consequence

⁸² C L Wells, “The origins of the petty jury” (1911) 27 LQR 347 at 357.

⁸³ P Devlin, *Trial by Jury* (1965) 8. See also A Samuels, “Criminal Justice Act” (1968) 31 MLR 16 at 24 (“Twelve is a number wrapped in mythology, not logic”).

⁸⁴ Devlin, *Trial by Jury* (n 83) 8.

⁸⁵ N Vidmar, “The jury elsewhere in the world”, in Vidmar (ed), *World Jury Systems* (n 1) 421.

⁸⁶ A Brown, *The Juryman’s Handbook* (1951) 110.

⁸⁷ At 150-152, surveying 37 jurisdictions.

⁸⁸ V Conway, Y Daly and J Schweppe, *Irish Criminal Justice: Theory, Process and Procedure* (2010) para 8-11.

⁸⁹ Chesterman (n 47) at 135.

⁹⁰ See R Schuller and N Vidmar, “The Canadian criminal jury” (2011) 86 Chicago-Kent LR 497 at 502.

⁹¹ Law Reform Commission of Canada, *The Jury in Criminal Trials* (n 53) 33.

⁹² See ch 13.2.

to any individual juror”, and that the Commission’s survey of jurors demonstrated that very few of them actually found jury service to be a hardship.⁹³ Most importantly, it concluded that:⁹⁴

...a twelve-member jury is more likely to lead to accurate fact-finding than a six-member jury. There is some evidence to suggest that first, a twelve-member jury will be more productive than a six-member jury since there will be a higher probability that someone in the jury will remember essential pieces of information; also the jury have available a wider range of experience and judgment with which to evaluate evidence and correct errors. Second, a twelve-member jury is less likely to be influenced by an “oddball” juror than a six-member jury. Third, members of twelve-member juries are likely to have more robust and searching discussions and to explore more factual issues than six-member juries.

While this might seem like an argument for ever-larger juries, the Commission suggested that a jury larger than twelve – or perhaps fifteen – could be “cumbersome”.⁹⁵

Despite the reference here to “some evidence” (what is unclear) and an earlier reference to “increased knowledge about the psychology of small groups”⁹⁶ (again without any citation of relevant evidence) the Commission’s preference for a twelve member jury seems to have had no particular factual basis. It admitted as much in its closing statement: “[t]he twelve-member jury evinces familiar feasibility from which there is no good reason to depart”.⁹⁷

New Zealand

The New Zealand jury comprises twelve members.⁹⁸ The jury system in New Zealand was recently the subject of an extensive review by the New Zealand Law Reform Commission. However, the Commission’s report does not consider the issue of jury size, except for the possibility of empanelling larger juries in lengthy or complex cases so as to avoid such cases failing because jurors have to be discharged during the course of the trial.⁹⁹

United States of America

In the United States, the Supreme Court held in *Williams v Florida* that a jury of twelve members “cannot be regarded as an indispensable component of the Sixth Amendment” right to jury trial.¹⁰⁰

⁹³ Law Reform Commission of Canada, *The Jury in Criminal Trials* (n 53) 34. In fact, the Commission argued (at 35) that jury service provided an important educational function: about five per cent of the Canadian population had served on a jury and a further 29 per cent knew someone who had, while persons who had served on a jury were more likely to be in favour of the institution. “Thus, if the jury were reduced to six members, it would affect fewer people and would be less successful in educating the public and increasing confidence in the criminal justice system.”

⁹⁴ At 35.

⁹⁵ At 36.

⁹⁶ At 33.

⁹⁷ At 36.

⁹⁸ Juries Act 1981 s 19.

⁹⁹ New Zealand Law Reform Commission, *Juries in Criminal Trials* (Report 69, 2001) paras 277-278. The Commission rejected this possibility, having made recommendations which would permit such cases to be tried by a judge sitting alone.

¹⁰⁰ *Williams v Florida* 399 US 78, 98 (1970).

In *Ballew v Georgia*,¹⁰¹ however, it was held that a five-member jury was not compatible with the right to jury trial. While previous case law had upheld the constitutionality of six-member juries, Justice Blackmun noted various concerns to which that case law had given rise including, in particular, “recent empirical data suggest[ing] that progressively smaller juries are less likely to foster effective group deliberation”¹⁰² and “doubts about the accuracy of the results achieved by smaller and smaller panels”.¹⁰³ After reviewing various studies, he concluded:¹⁰⁴

While we adhere to, and reaffirm our holding in *Williams v Florida*, these studies, most of which have been made since *Williams* was decided in 1970, lead us to conclude that the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members. We readily admit that we do not pretend to discern a clear line between six members and five. But the assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six. Because of the fundamental importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance.

While rules on jury size differ from jurisdiction to jurisdiction in the United States, juries of twelve members are consistently required in felony cases, but smaller juries than this are often permitted to try misdemeanours.¹⁰⁵

13.7 What practical effect does jury size have?

As the above review of practice in the common law world demonstrates, twelve has consistently been regarded as the appropriate size of a jury in criminal cases, even though it is difficult to identify an explanation for that size beyond tradition and historical continuity. That does not mean that the widespread preference for twelve members should be dismissed as arbitrary or accidental; the fact that it was fixed “after centuries of trial and error” is at least a plausible reason to suggest, as Zeisel puts it, that twelve might “be the number that optimizes the jury’s two conflicting goals – to represent the community and to remain manageable”.¹⁰⁶

Leaving Scotland’s preference for fifteen members aside, it is only in the United States that the traditional common law rule has been significantly challenged. Even there, the Supreme Court’s green light to juries of as small as six has not led to widespread adoption of smaller juries in criminal cases, particularly serious ones, and so modern commentators frequently address the issue of jury size only in passing.¹⁰⁷

The decision in *Williams v Florida* did give rise to a significant body of empirical research comparing the six and the twelve-member jury (and occasionally other sizes smaller than twelve). Such research

¹⁰¹ 435 US 223 (1978).

¹⁰² At 232.

¹⁰³ At 234.

¹⁰⁴ At 241.

¹⁰⁵ See Malega and Cohen, *Special Report: State Court Organisation, 2011* (n 73) 10.

¹⁰⁶ H Zeisel, “...And then there were none: the diminution of the federal jury” (1971) 38 *University of Chicago LR* 710 at 712.

¹⁰⁷ See e.g. Abramson, *We the Jury* (n 25) 180-181.

has provided convincing reasons to prefer the larger of the two options, suggesting that a smaller jury is less likely to be properly representative of the community, by being more likely not to contain members of minority groups; is likely to deliberate for less time (at the expense of better deliberation); and is likely to recall evidence less accurately.¹⁰⁸ Such research, of course, has not considered jury size in the context of the simple majority verdict, that being a peculiarly Scottish rule.

Given that it seems unlikely any reduction in the size of the Scottish jury below twelve would receive serious consideration, this research is not particularly helpful in the present context, except perhaps to dissuade anyone who might wish to make such a suggestion. The research does not tell us whether a jury of fifteen is advantageous or disadvantageous compared to a jury of twelve.

More general research on group decision-making, however, suggests that group decisions on complex matters are best achieved by finite and relatively small groups;¹⁰⁹ “there is evidence suggesting that no more than about eight or ten persons can be directly responsive to one another in a group discussion setting, and that mutual responsiveness becomes difficult even before that size is reached”.¹¹⁰ Elsewhere, twelve members has been suggested as a possible limit for meaningful reciprocal interaction between the members of a group.¹¹¹ While such research might suggest that the size of the Scottish jury should be viewed with some caution, it would be unwise to draw firm conclusions about precise questions of size on the basis of research dealing with decision making in very different contexts to that of the jury room. For example, one study of groups of fifteen to twenty-two members observed that the groups felt it necessary to split into sub-groups in order to operate effectively, but that was concerned with student groups working intermittently over a fifteen week period, which is very different to the task performed by a jury.¹¹²

None of this would provide any convincing basis for arguing that the Scottish jury should be reduced in size to twelve members (or some other number) if no other changes were in contemplation. It should be borne in mind, however, that we have a considerable amount of experience and data for other jurisdictions available on the operation of the twelve person jury. In particular, the experience of other jurisdictions with the operation of qualified majority verdicts is based upon a jury of twelve members. We do not know whether applying qualified majority rules in the context of a jury of fifteen members would have significantly different consequences to that experienced in (for example) England and Wales. If Scots law were to adopt a qualified majority rule consistent with international practice in this area, there would therefore be a considerable attraction in aligning the size of our jury with these other systems, rather than needlessly to embark on an experiment as to how qualified majority rules work in the context of a fifteen person jury.

¹⁰⁸ See M J Saks and M W Marti, “A meta-analysis of the effects of jury size” (1997) 21 *Law and Human Behavior* 451. See also V P Hans and N Vidmar, *Judging the Jury* (1986) ch 11; A Smith and M J Saks, “The case for overturning *Williams v Florida* and the six-person jury: history, law and empirical evidence” (2008) 60 *Florida LR* 441.

¹⁰⁹ See e.g. A B Kao and I D Couzin, “Decision accuracy in complex environments is often maximised by small group sizes” (2014) 281 *Proceedings of the Royal Society B* 2013305.

¹¹⁰ I D Steiner, *Group Process and Productivity* (1971) 101.

¹¹¹ G C Homans, *The Human Group* (1950) 103 (“It is significant how often a group of between eight and a dozen persons crops up under the supervision of a single leader in organizations of many different kinds.”); see also Steiner, *Group Process and Productivity* (n 110) 102.

¹¹² G A Theodorson, “Elements in the progressive development of small groups” (1953) 31 *Social Forces* 311.

It will be noted that the Thomson Committee proposed that the Scottish jury be reduced in size to twelve members,¹¹³ while the *Modern Scottish Jury in Criminal Trials* consultation exercise revealed that consultees were almost evenly split on whether the Scottish jury should be reduced from fifteen members, with at least some of those who favoured retention of a fifteen person jury appearing to hold this view on the basis that it would be wrong to reduce the jury's size without at the same time considering the issue of majority verdicts.¹¹⁴ Despite the longstanding practice of Scottish juries consisting of fifteen members, this does not appear to be seen as a crucial feature of the system, nor one which is worth retaining in and of itself.

13.8 The not proven verdict: why does Scots law have three verdicts in criminal trials?

Scots law, uniquely, has two verdicts of acquittal – not guilty and not proven. Both have the same effect in law, and the standard text on Scottish criminal procedure contains the following remarkable statement:¹¹⁵

The jury should not be told the meaning of the not proven verdict; they need not even be told that it is a verdict of acquittal.

Why does Scots law operate this unique system? As Gerry Maher has explained:¹¹⁶

...the historical origins of the verdict are to be found in a period in the history of Scottish criminal procedure when juries did not return (or were not trusted to return) general verdicts of guilty and not guilty, but instead were asked whether they found facts or whole series of facts libelled in indictments proven or not proven. The verdict of not proven was simply one type of special, rather than general, verdict and its retention once juries had readopted the practice of giving general verdicts was mainly a matter of historical accident.

The fact that Scots law has developed three verdicts largely by accident does not mean that such a system is devoid of benefit. Over time, Scottish courts and commentators have periodically sought to construct a rationale for the not proven verdict. Hume suggested that juries might use the not proven verdict “to mark a deficiency only of lawful evidence to convict” the accused and not guilty “to convey the jury’s opinion of his innocence of the charge”.¹¹⁷ In more recent times, this has been directly linked to the corroboration requirement, and it has been suggested that not proven is appropriate and likely to be used for cases where corroboration is absent.¹¹⁸ That rationalisation, however, is less plausible now that such cases should be prevented from reaching the jury by a

¹¹³ See ch 13.2.

¹¹⁴ See Nicholson, *The Modern Scottish Jury in Criminal Trials: Analysis of Written Consultation Responses* (n 16) 3: “A slight majority (54%) of those who provided a view was in favour of retaining a jury size of 15. A recurring comment was that the issue of jury size should be addressed further by expert reviewers. Many agreed that the issue of jury size could not be considered separately from debate about majority verdicts and acquittal verdicts.”

¹¹⁵ G H Gordon, *Renton and Brown: Criminal Procedure according to the Law of Scotland*, 6th edn (1996) para 18-79.41.

¹¹⁶ G Maher, “Jury verdicts and the presumption of innocence” (1983) 3 LS 146 at 148-149, summarising the analysis of Willock, *Origins and the Development of the Jury* (n 4) 218-222.

¹¹⁷ D Hume, *Commentaries on the Law of Scotland, Respecting Crimes*, 4th edn by B R Bell (1844) ii 440.

¹¹⁸ See e.g. T B Smith, *A Short Commentary on the Law of Scotland* (1962) 227 (cases “where in England the accused would probably be convicted”). See also *Criminal Procedure in Scotland (Second Report)* (Cmnd 6218: 1975) para 51.05.

successful no case to answer submission. In theory, juries could reserve the verdict for cases where there was a legal sufficiency of evidence but they did not accept the evidence of a particular witness, but it is utterly implausible to suggest that jurors would consistently adopt this technical rationale without specific judicial direction. Instead, the more likely rationale is that the not proven verdict is particularly appropriate for cases where jurors are in a state of marginal uncertainty, around the threshold of “reasonable doubt”, regarding the guilt of the accused. The existence of the “not proven” verdict reinforces the requirement of proof beyond reasonable doubt by emphasising to jurors the possibility of an acquittal in such cases. This was the rationale suggested by Lord Justice-General Clyde in *McNicol v HM Advocate*,¹¹⁹ and it is supported by recent empirical research to which this report now turns.

13.9 What effect does the not proven verdict have in practice?

As a matter of strict logic, the availability of the not proven verdict should have no effect on the rate at which accused persons are convicted or acquitted. Jurors must ask whether the case against the accused has been proven beyond a reasonable doubt; it is only if that question is answered in the negative that they will proceed to the question of which of the two verdicts of acquittal would be appropriate. Theoretically, the fact that two verdicts of acquittal are available to them, rather than merely “not guilty”, should not affect whether they choose to convict or acquit.¹²⁰

In reality, however, changes to the context in which such decisions are taken may affect the decision reached, and so the availability of a third verdict may have significant practical effects. There appears to be only a single research paper which aims to quantify these effects, and so it merits careful consideration. That is a 2008 paper, based on two studies, where Hope and others identified the importance of context and verdict choices to outcome, and carried out two studies which aimed to establish whether and how the availability of the not proven verdict affected the conclusions reached by simulated juries (comprised of Scottish undergraduate students in study 1, and of local volunteers from the Aberdeen area in study 2).¹²¹

In Study 1, the mock jurors were provided with a summary of a sexual assault trial and jury directions based on those used in actual cases. The jurors were randomly assigned to consider the case on the basis either of two or three verdicts, reflected in the directions which they were provided. The jurors considered the case individually rather than deliberating.¹²² The acquittal rate was higher where three verdicts rather than two were available (49 per cent rather than 39 per cent), although the difference was not statistically significant. 35 per cent of the jurors who had considered the case on the basis of three verdicts believed that a not proven verdict permitted the retrial of the accused at a later date, despite the written directions which had been provided to them expressly stating that this was not the case.

¹¹⁹ 1964 JC 25 at 27.

¹²⁰ A similar argument was put to the jury by the trial judge (Lord Cameron) in *McNicol v HM Advocate* 1964 JC 25, and strongly criticised by the appeal court.

¹²¹ L Hope and others, “A third verdict option: exploring the impact of the not proven verdict on mock juror decision making” (2008) 32 *Law and Human Behaviour* 241.

¹²² This is an important difference from the practical operation of the jury system which limits the use which can be made of the results (cf ch 9.2), but “Study 2”, noted immediately below, was not conducted on this basis.

In Study 2, the mock jurors were provided with a summary of a (non-sexual) assault trial and jury directions, again based on those used in actual cases. Three different versions of the trial summary, with the strength of the prosecution evidence varying (strong, moderate or weak) were used, while jurors were again randomly assigned to consider the case on the basis of either two or three verdicts. In combination, this meant that there were a possible six conditions under which the mock jurors could participate. Jurors considered the cases in groups of four to eight members, and were asked to reach a unanimous verdict if possible, and to record the verdict of the majority if not. There were fourteen juries who considered the case with reference to two possible verdicts, and another fourteen who considered the case with reference to three possible verdicts.

Overall (including all variations as to the strength of the evidence presented), the conviction rate in Study 2 was higher where two verdicts rather than three were available (35 per cent rather than 22 per cent), a difference which was marginally statistically significant. Further analysis indicated that there was an association between the verdict options available and the outcomes reached only where the “moderate” version of the case was presented. 37 per cent of the jurors who had considered the case on the basis of three verdicts believed that a not proven verdict permitted the retrial of the accused at a later date, again despite the written instructions which they had received. The researchers suggested that the availability of a third verdict reduced the likelihood of a hung jury, with 50% of two-verdict juries reaching unanimous decisions against 71 per cent of three-verdict juries.¹²³

For present purposes, a number of tentative conclusions may be drawn from this work:

- Jurors do not use the “not proven” verdict in the manner which the structure of the three verdicts available to Scottish jurors suggests that they, in theory, should.
- The not proven verdict may help to prevent wrongful convictions, because it was in the cases of “moderately strong” evidence – those where most caution would seem to be required – that it appeared to be particularly attractive to jurors.¹²⁴
- The extent to which jurors wrongly believe that a not proven verdict permits a subsequent retrial, despite having received direct instructions to the contrary, is particularly concerning.
- The not proven verdict may inhibit thorough deliberation by jurors; the authors noted in Study 2 how deliberations appeared to “dry-up” once the possibility of a not proven verdict was raised.

The possibility of public misconception about the consequences of a not proven verdict had previously been raised by a BBC opinion poll, commissioned to accompany a 1993 documentary, which had found that 48 per cent of those questioned believed that such a verdict permitted a later retrial if fresh evidence emerged.¹²⁵ The findings of the research by Hope and others, however, are

¹²³ However, it should be remembered that the number of juries was small, and that the size of the juries varied from four to eight (no detail of the pattern of variation is provided). The percentage figures offered by the researchers indicate that seven of fourteen two-verdict juries were unanimous as compared to ten of fourteen three-verdict juries; such a difference might be a chance occurrence and/or a consequence of variation in jury size.

¹²⁴ Hope and others (n 121) at 250 put this point differently, suggesting that “it could be argued that a Not Proven verdict actually promotes more accurate juror decisions”. This seems, however, to go further than the evidence permits: a stronger tendency to acquit rather than convict is not the same thing as increased accuracy.

¹²⁵ See P Duff, “The not proven verdict: jury mythology and ‘moral panics’” 1996 JR 1 at 9.

rather more concerning given that they suggest this misconception to be prevalent even amongst those who have received direct instruction on the verdict's consequences.

Such a misconception may, however, be less surprising than it might appear at first glance. If a criminal justice system employs two different verdicts of acquittal, it is rational to assume that there is some meaningful difference between them, whether in meaning, effect, or both. The notion that there is no meaningful difference – or, at least, none which can be safely spelt out – is at first sight so irrational that it is plausible that a juror may fail properly to understand a direction to that effect. Despite this, the *Jury Manual* advises – quite rightly, given the existing case law – that it is “dangerous to attempt to explain any difference between the not proven and not guilty verdicts”,¹²⁶ and suggests the following direction on the verdicts available to a Scottish jury:¹²⁷

There are three verdicts you can return, not guilty, or not proven, or guilty. Not guilty and not proven have the same effect, acquittal. An accused acquitted of a charge can't be prosecuted again on it.

13.10 Analysis

Based on the discussion above, the following points may be highlighted:

- The simple majority jury verdict is an anomaly out of step with the common law world, difficult to reconcile with the presumption of innocence and the requirement of proof beyond reasonable doubt.
- It has previously been suggested that the simple majority verdict may, exceptionally, be justified because of Scots law's equally exceptional requirement of corroboration.
- The simple majority verdict may also be viewed as something of a trade-off against the not proven verdict, although the practical consequences of either rule cannot meaningfully be quantified.
- Other common law jury systems have started from the principle that jury verdicts ought to be returned unanimously, but most have qualified this over time to allow a verdict to be returned despite one or (in some cases) two jurors dissenting.
- Such rules have been adopted principally to account for the possibility of one or more “rogue” or intimidated jurors undermining the jury's function, rather than because of any numerical calculation as to what amounts to proof beyond reasonable doubt.
- Twelve has been accepted as the appropriate size for the jury throughout the common law world, and there is convincing empirical evidence cautioning against any significant reduction in size below this.
- There is an absence of direct evidence as to the quality of decision making by larger juries, although the more general literature on group decision-making might tentatively be taken to suggest that juries of larger than twelve are unlikely to be any better at performing their function than the twelve-person jury, and may even be worse.
- If changes are made to the Scottish jury such as removing the not proven verdict or requiring verdicts by near-unanimity, we can be reasonably confident as to how such rules would

¹²⁶ Judicial Institute, *Jury Manual: Some Notes for the Guidance of the Judiciary* (January 2014) section 61.2, citing *Fay v HM Advocate* 1989 JC 129 and *McDonald v HM Advocate* 1995 SLT 723.

¹²⁷ Para 18.2.

operate in the context of a twelve-person jury given experience elsewhere, but we have no evidence as to how such rules would operate in the context of a fifteen-person jury. This may itself be a persuasive reason for adopting the twelve-person jury if other changes are made.

- The not proven verdict offers a degree of protection against wrongful conviction by rendering juries less likely to convict in marginal cases.
- It does so, however, at a cost: jurors may misunderstand the consequences of the verdict, its availability as a compromise verdict may inhibit deliberation, and it is undesirable in principle to have two different verdicts of acquittal when the difference between them cannot properly be articulated.

The requirement of corroboration, the simple majority verdict, and the three verdict system comprise a package of anomalous features which are closely interlinked. If corroboration is removed, it is difficult to see how the other two can be retained. There appears to be no means of quantifying the effect of any one of these features in isolation, and while we may have a degree of confidence based on experience in the system as it currently stands, there is no clear basis for confidence if one limb of the structure is removed without surgery elsewhere.

If corroboration is to be removed as anomalous, it may be that the not proven verdict should simply disappear at the same time. The question of majority verdicts is a more difficult one, at least in terms of what rule should be introduced. It has long been recognised that simple majority verdicts are difficult to reconcile with the presumption of innocence, and the abolition of corroboration removes the principal defence of the simple majority verdict. It is also clear that there has been significant concern about the introduction of the possibility of a hung jury into Scots law. It is not clear, however, whether it has been appreciated that a qualified majority rule could be expected to result in very few hung juries. Serious consideration should therefore be given to the introduction of a qualified majority rule into Scots law.¹²⁸

However, the relative rarity of hung juries is not conclusive. As a matter of principle, it is not clear why symmetrical rules should govern jury verdicts of conviction and acquittal.¹²⁹ If the state has not succeeded in convincing a qualified majority of the accused's guilt, why should it be entitled to a second attempt? An alternative approach would, therefore, be to regard any failure to reach the qualified majority required for conviction as an acquittal.¹³⁰

In light of these proposals, the size of the jury might be reduced to twelve, in line with practice elsewhere. If the simple majority verdict were abolished, there would no longer be any need to maintain a jury comprising of an odd number, while the current size of the Scottish jury, significantly higher than practice elsewhere, places demands on those called to serve, along with financial and

¹²⁸ As noted in ch 13.2, this chapter uses "qualified majority" to refer to rules requiring near-unanimity, as opposed to the "weighted majority" (of 10:5) suggested in section 70 of the Criminal Justice (Scotland) Bill.

¹²⁹ See Maher (n 116).

¹³⁰ A third approach would be to operate asymmetrical rules for conviction and acquittal, but leave room between those options for a failure to reach a verdict: e.g. allow a verdict of not guilty by a simple majority (seven of twelve jurors) and conviction by a qualified majority (ten of twelve jurors), with anything between these options permitting a retrial. This has some superficial attraction, but would mean that, in any case where a jury failed to reach a verdict, it would be a matter of public record that at least half of the jurors believed the accused to be guilty. That is itself difficult to reconcile with the presumption of innocence and would risk unfairness in any retrial.

administrative burdens on the State, which offer no clearly identifiable advantage and may even present some disadvantage given what is known about decision-making in larger groups. Moreover, if the changes canvassed above are made, there is considerable evidence as to their practical effect in the context of a twelve-person jury, but none as to how they would operate in the context of a fifteen-person one.

Finally, if qualified majority verdicts and a reduction in the jury's size to twelve are proposed, the Review should consider how they should operate in cases where the size of the jury is reduced below twelve over the course of the trial. There is no international consensus on the proper approach here, which might take one of three forms, assuming both a normal requirement of ten out of twelve jurors for a verdict and that the jury may not continue with fewer than ten members:¹³¹

- (a) The number of potential dissenters remains constant, and a valid verdict is one to which all but two of the jurors agree (i.e. nine of eleven jurors, or eight of ten).
- (b) The number required for a verdict remains constant, and so unanimity may be required where the jury has reduced in size (i.e. ten of eleven jurors, or ten of ten).
- (c) A hybrid system, whereby complete unanimity is never required (e.g. nine (or ten) of eleven jurors, or nine of ten).

Because the qualified majority system addresses the problem of the potential "rogue" juror, who may well remain in a jury which has been reduced in size, option (b) seems undesirable in principle. Either option (a) or (c) is a valid one, and there is limited reason clearly to prefer one over the other. If Scots law were to rule out the possibility of a hung jury and require acquittal in all cases where the jury reached a verdict, then it might be desirable to avoid setting too high a threshold for a guilty verdict to be returned, suggesting option (a).

13.11 Issues for consideration

It is suggested that the Review should consider whether:

- (a) the not proven verdict should be abolished;
- (b) the size of the jury should be reduced to twelve members;
- (c) the jury should be required to reach a verdict by a qualified majority, which might take one of the following forms:
 - (i) ten of twelve votes required for a verdict of either guilty or not guilty, with a failure to reach a verdict resulting in a hung jury and the possibility of a retrial;
 - (ii) ten of twelve votes required for a verdict of guilty, with anything short of this resulting in an acquittal and no possibility of a retrial (unless the provisions of the Double Jeopardy (Scotland) Act 2011 applied).

There may be room for modification of these numbers. In option (ii), consideration could perhaps be given to permitting conviction by nine of twelve jurors, but this

¹³¹ The current Scottish rule is that if the number of jurors drops (from fifteen) below twelve, the trial cannot continue: Criminal Procedure (Scotland) Act 1995 s 90.

might itself be thought difficult to reconcile with the presumption of innocence and proof beyond reasonable doubt.

- (d) how any qualified majority rule should operate in the context of a jury which has reduced in size over the course of the trial, with regard to the options set out at 13.10 above.

It is suggested that the Review should invite submissions as to how, if the not proven verdict is to be retained, it should be defined so as to allow for proper direction to be given to juries.