THE PROVENANCE OF WHAT IS PROVEN: EXPLORING (MOCK) JURY DELIBERATION IN SCOTTISH RAPE TRIALS

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Abstract

In this paper, we report some of the emerging findings of a major mock jury experiment that involved a rape trial (as one of two trial simulations). The project was funded by the Scottish Government and was conducted by the researchers with Ipsos MORI Scotland. It was the largest mock jury experiment ever conducted in the UK, involving a total of 64 mock juries with either 15 or 12 members, and the first of its kind in Scotland. It took extensive steps to recreate – as far as is possible – the experience of sitting on a real trial.

Analysis of the mock jury deliberations found considerable evidence of jurors expressing false assumptions about how 'real' rape victims react, both during and after a rape. The belief was frequently expressed that a lack of physical resistance on the part of the complainer is indicative of consent. There was also a lack of clarity over the extent to which relatively neutral testimony from a medical expert, which did not exclude the possibility of alternative explanations for the complainer's injuries, could support the complainer's account. In addition, we found credence being given by many jurors to the idea that rape allegations are often unfounded and easy to make. At the same time, however, we found evidence of a greater willingness to challenge peers' attitudes than has been encountered in some previous mock jury research, a strong familiarity with the Rape Crisis Scotland 'I just froze' campaign and an appreciation of the complexities of delayed reporting in line with the trial judge's direction on this point.

1. Introduction

The beliefs and attitudes that jurors might take into the deliberation room in rape cases, and the ways in which they might impact their evaluation of evidence and determination of verdict, is an issue that has attracted much attention. Producing robust evidence from which reliable conclusions can be drawn is not an easy task. Asking jurors about their attitudes towards rape complainers[1] is fraught with difficulties. Restrictions under section 8 of the Contempt of Court Act 1981 in Scotland (and section 20D of the Juries Act 1974 in England and Wales) specifically preclude asking jurors about "statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations". Further, asking people in more abstract terms about their general attitudes (what has often been referred to in the literature as their degree of 'rape myth acceptance') risks generating responses affected by 'social desirability', the tendency to offer – consciously or

[1] A complainer is the technical legal term used in Scotland for a person who, in criminal proceedings, claims to have been the victim of an offence.

subconsciously – an answer which the respondent considers more socially acceptable, or otherwise more desirable to the researcher, than their actual beliefs. Aside from this, the fact that jurors reject stereotypical views in the abstract may tell us relatively little that is reliable about whether they will invoke them in the process of constructing a narrative about a given case, or about how they will be influenced by the reliance of other jurors on such views in the course of a verdict deliberation. Previous research has shown that even people who display low levels of 'rape myth acceptance' can rely on problematic views, grounded in those same stereotypes, in the process of engaging in deliberations.[2]

In the context of these constraints, researchers have often relied on simulation methods, the most methodologically rigorous of which to date have involved exposing mock jurors to realistic trial reconstructions, conducted under experimental conditions in order to isolate relevant variables, and then requiring them to deliberate in jury groups towards a verdict in accordance with the appropriate legal tests. This method is also not without limitations that have to be borne in mind, as we discuss further below. Nonetheless, it has the potential to assist in gaining a better understanding of what happens behind the closed doors of the jury room. In this paper, we discuss key findings from a project, funded by the Scottish Government and conducted by the researchers with Ipsos MORI Scotland, that relied on two trial simulations involving an assault and a rape scenario. The primary aim of the study was to explore the impact on deliberations of various unique features of the Scottish jury system. However, it also generated important insights about the substantive attitudes and approaches taken by participants to the trial scenarios; and in this paper, we report on the preliminary results of our analysis of jurors' approach to evaluating evidence, assessing credibility and determining verdicts in the rape case. It is not the first project that has sought to explore these issues using a similar mock jury method.[3] It is, however, the most extensive project of this type undertaken in the

[2] 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 at 790.

[3] See, in particular, three projects undertaken by Munro and colleagues. The first is reported in E Finch and V Munro, "The demon drink and the demonized woman: socio-sexual stereotypes and responsibility attribution in rape trials involving intoxicants" (2005) 16 Social and Legal Studies 591; E Finch and V Munro, "Breaking boundaries? Sexual consent in the jury room" (2006) 26 Legal Studies 303. The second is reported in a number of papers, including "A stranger in the bushes" (n 1 above) and 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, "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

UK to date, and the first to be undertaken in Scotland, which not only has a unique jury system in terms of size and majority required, but has a third "not proven" verdict, and retains a corroboration requirement, all of which interact in complicated ways with the substantive attitudes we uncovered.

As we will go on to report, the research found considerable evidence of jurors expressing false assumptions about how 'real' rape victims react, both during and after a rape. The belief was frequently expressed that a lack of physical resistance on the part of the complainer is indicative of consent. There was also a lack of clarity over the extent to which relatively neutral testimony from a medical expert, which did not exclude the possibility of alternative explanations for the complainer's injuries, could support the complainer's account. In addition, jurors also gave credence to the idea that rape allegations are often unfounded and easy to make. There was, however, a greater willingness to challenge peers' attitudes than has been encountered in some previous mock jury research, a strong familiarity with the Rape Crisis Scotland 'I just froze' campaign and often a more sophisticated appreciation of the complexities of delayed reporting, in line with a judicial direction they were given on that issue.

2. The wider research project

In October 2019, the final report of our programme of research into the jury system was published by the Scottish Government.[4] The main component of this research was a substantial mock jury study aimed at investigating (a) the difference that the three unique features of the Scottish criminal jury (three verdicts, 15 members and the ability to return a verdict by a simple majority) may make to juror verdict preferences and (b) the way in which jurors understand and apply the not proven verdict in particular.

In the study, 64 mock juries watched a filmed rape or assault trial and then deliberated for up to 90 minutes (filmed, but without a researcher present) in an

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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. The third is also reported in a number of papers – see e.g. 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; L Ellison and V Munro, "Telling tales: exploring narratives of life and law within the (mock) jury room" (2015) 35 Legal Studies 201.

[4] R Ormston, J Chalmers, F Leverick, V Munro and L Murray, Scottish Jury Research: Findings from a Large Scale Mock Jury Study (Scottish Government, 2019).

attempt to reach a verdict. Because of the nature of the research project, which was designed to examine the impact of the key features of the Scottish jury system, 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'. Of the 32 rape juries, four returned a verdict of guilty, 24 returned a verdict of acquittal (either not guilty or – in those juries where it was available – not proven) and four were hung juries.[5]

Mock jury studies are sometimes criticised for their lack of realism. However, we took as many steps as we possibly could to replicate the real trial experience. Our filmed trials involved professional actors in the roles of witnesses and advocates. A senior judge (Lord Bonomy) gave legal directions, adapted from the Judicial Institute's *Jury Manual*,[6] to replicate the directions juries would hear in a real trial. The trials were filmed in a real courtroom and experienced legal practitioners advised on realism, both in relation to the content and the actors' delivery of the trial scripts. A summary of the trial scenario is included here in an Appendix – although it should be borne in mind that this is very much a summary. The issues were explored in depth via examination and cross-examination of the witnesses in the case.[7]

The 864 jurors 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 already have been directed on key issues (including, for our purposes, the not proven verdict) which might have affected the way in which they responded

[5] This pattern of verdicts is not representative of the actual pattern of acquittals returned in Scottish courts. The trial simulation was deliberately finely balanced in order to encourage debate and discussion of the not proven verdict.

[6] Available at: http://www.scotland-judiciary.org.uk/Upload/Documents/Export_Jury_Manual_2019104_1809_1.pdf

[7] An except from the rape trial can be viewed at https://youtu.be/kDAGaSedje8. An extract from the judge's opening and closing directions can be viewed at https://youtu.be/ecemRns-gDk.

to the case they then viewed as part of the research.[8] They would also already have been exposed to judicial directions and to the deliberation process. This might have been a particularly important limitation if they had sat on a sexual offence trial, especially one which took place shortly before the experiment. If a juror expressed prejudicial attitudes during deliberations – or heard other jurors express them – and these were challenged, this might discourage them from expressing such views in the subsequent mock jury deliberations but they might still, unknown to the researchers and other jurors, base their verdict choice on them.

Recruitment was undertaken by a team of specialist recruiters on behalf of Ipsos MORI Scotland, 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 work 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".[9]

The rape trial was just over an hour long – so admittedly shorter than most real trials – but it included all the key evidential components of real trials, including examination-in-chief, cross-examination and re-examination of the three key witnesses (the complainer, the accused and a forensic expert who had medically examined the complainer).

In this paper, we focus on emerging findings regarding jurors' approach to rape cases specifically, which was not something covered in detail in the final project report.

3. Examining juror attitudes towards rape complainers

Previous research has documented a belief on the part of jurors that genuine victims of rape will physically resist an attack, displaying injuries themselves or inflicting defensive injuries upon an assailant.[10] This has persisted despite the fact that the legal requirements of the offence have changed over time to remove the need to

[8] 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 directed on the not proven verdict, which they would have been if they had previously sat on a trial. Recruiters screened out any potential participants who had undertaken jury service within the previous year.
[9] C Thomas with N Balmer, Diversity and Fairness in the Jury System (Ministry of Justice Research Series 2/07, 2007) at 198. This research was undertaken in England and Wales, but there is no reason to suppose that Scottish juries are significantly less representative.
[10] See, in particular, the sources cited in n 2 above.

establish that a will has been overborne,[11] and there have also been advances in psychological understandings of trauma showing that individual reactions vary and may involve a 'freeze' response.

There are also a wealth of studies demonstrating that mock jurors, presented with exactly the same trial scenario, reach different views about what the verdict should be depending on their score on so-called 'rape-myth scales' – instruments designed to measure the extent to which people hold mistaken beliefs about rape perpetrators and victims.[12]

We wanted to see how these themes played out in our juries as well as looking at other attitudes, such as the jurors' views on the prevalence of false rape allegations, and the factors that might be seen as indicating that an allegation is probably false.

To do that, we reviewed the transcripts of all 32 rape trial deliberations (involving 431 individual jurors).[13] We looked for evidence of a number of different attitudes:

- A lack of physical resistance may indicate consent
- A victim of rape may 'freeze' in response to the attack
- A lack of calling for assistance may indicate consent
- False allegations are routine (beyond a bare acknowledgment that they happen)
- A delay in reporting is indicative of a false allegation

We quantified the extent to which these views were expressed and challenged, and looked in more detail at the content of the discussion and its impact on the subsequent tone and direction of deliberations.

4. Some possible limitations of our study

This was, as we have already outlined, a large-scale study in which we took as many steps as we could to make the trial experience as realistic as possible. That said, there are certain limitations that need to be borne in mind. First, our jurors were aware that they were not deliberating in a real trial and that their verdict would not

[11] See the Sexual Offences (Scotland) Act 2009 section 1(1).

[12] F Leverick, What Do We Know About Rape Myths and Juror Decision Making? An Evidence Review (Scottish Jury Research Working Paper 1, 2019).

[13] The figure is 431 rather than 432 due to a single juror who became unwell and left immediately before deliberations commenced.

have real consequences. Still, however, the vast majority of them took their task extremely seriously, engaging carefully in deliberations and remarking at the end on how stressful they had found the process. 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 a number of 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.

Secondly, the research involved a single rape trial scenario. We were not attempting in this study to test the effects of any particular features of the scenario itself – instead we needed to hold these constant to test for any effects of the three unique features of the Scottish jury system. Thus, while we can describe how our juries reacted, for example, to evidence that the complainer delayed in calling the police, we cannot say with complete confidence what *difference* that evidence made, since we did not also run separate experiments without such a delay.

Finally, we are restricted in our analysis of the deliberations to what jurors *said* and any observations we drew from their non-verbal cues. We do not know what jurors who did *not* express a view thought, nor the extent to which a discussion influenced them.[14]

The findings we set out below are preliminary and will be reported and reflected upon more fully in due course.

[14] The research project did involve jurors completing a brief pre-deliberation questionnaire (asking for an initial view on verdict) and a longer post-deliberation questionnaire (asking for – among other things – jurors' final views on what they thought the verdict should be, the factors that influenced this view and a number of questions relating to the not proven verdict). It did not, however, ask the jurors specific questions about their beliefs and attitudes towards rape complainers in general or about the particular rape complainer in the case.

5. Our findings

5.1 'A lack of physical resistance may indicate consent'

In 28 of the 32 rape juries, the view was expressed during deliberations that a complainer's failure to physically resist an attack might be indicative of her consent.

For some jurors, this translated into an expectation that a 'genuine' victim would have inflicted self-defensive injuries on the accused - 'surely if it was rape, you would expect scratch marks' (M01F);[15] similarly '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' (M01G), or 'in spite of being weaker and smaller, she could have tried to defend herself; you can always defend' (M01H).

For others, and despite expert testimony confirming that its absence was not uncommon in rape cases, it created an expectation of internal trauma to the complainer: 'Even though the doctor said that it doesn't necessarily have to be internal trauma, if it had been sort of a violent rape like she was making, like there was bruises on her body, there would have been internal trauma as well' (M01E).

While this is concerning, it should be noted that in 79% of the juries where such views were raised (n=22/28), they were challenged – for example, in the following exchanges:

M: At the end of the day she...if she had been in a situation where you would think if she had been raped, would she not have tried to fight back at all in any way? Never said anything about him having any scratches or bruising or anything at all.
M: There's fight, flight or freeze responses.
M: Sorry?
M: Like when you start panicking.
M: You've got three responses, flight, fright and freeze.
F: She is tiny as well. (M01E)

F: Not all women when they have been raped try to fight back.
M: No.
F: Some do.

[15] Each jury was given a unique code, which we use here to demonstrate that the views were expressed across a wide range of juries.

F: Yes, some do, but they don't all. (M01H)

In some cases, that rebuttal drew on jurors' personal experience. For example:

M: Well, going by the evidence she is actually saying that her evidence is her bruises on her wrists and everything else. Where is her physical evidence against him? Normally if it was a female in fear she would fight back like a cat. So, surely he would have some kind of defensive wounds on him. Why did she not scream? Why did she not shout for help?
F: I've been in a situation like that and if you have got a heavy man on top of you and he is holding your wrist, you're not going to be able to do anything. It's a physical penetration of your body and it's a shock, because you're not expecting it. (M03G)

In others, jurors pointed to other jurors' lack of personal experience to offer a rebuttal:

M: I would assume there would be a bit of shouting and screaming if she didn't want it, seriously.
F: Have a struggle.
M: Struggle, more bruises, he would need to use two hands if she was struggling against a man who is not that much bigger than her.
F: Have you seen anybody that has actually been raped? Has anybody been raped before?
M: I've never witnessed a rape, no, I've never witnessed one.
F: Well you can't say what a rape looks like if you have never witnessed one. (M04F)

But while such rebuttals were important, and may have influenced some jurors, others appeared unpersuaded. This is reflected, for example, in the following exchanges:

F: Well, personally, I would fight for my life, I would be scratching, punching, hitting him. The house, that would be wrecked running away.
F: Who knows?
M: Every woman reacts differently, every woman reacts differently.
F: That to me personally...
F: Who knows?
M: Freezing under sexual assault is a very common reaction to a sexual assault for a woman to completely freeze.
F: Sometimes freeze, she froze, but I did think she would have fought back more.

F: Uh-huh, I don't know. (M05G)

M: But, she has still got a free hand as well by the way, hasn't she?
M: Aye.
M: That's what I'm saying, she could have scratched him.
F: She could have scratched him or...
F: If you're wanting something off, somebody off you, you try hard.
F: I know, but then...
M: But, you can go into shock like the lassie said.
F: I know, into shock.
F: Yes, but I think you would still try and kick or bite or something.
F: Aye, bite or scratch. (M05H)

5.2 'A victim of rape may 'freeze' in response to the attack'

In seeking to rebut others' expectations of injury, many jurors relied on an awareness that people can react differently to traumatic events, and that freezing responses are common.

This was raised in 25 of the 32 juries, and comments often mirrored the language of Rape Crisis Scotland's national 'I just froze' campaign.[16] One juror said, 'everybody reacts totally differently' (M04F). Similarly, another noted 'a lot of women are scared, some people just think they can't fight back or do anything, they get scared, they freeze up' (M05E); and one juror observed that 'it's a normal reaction to trauma to go into complete shock and to do absolutely nothing, your body just shuts down' (M06F).

In line with existing research,[17] it was clear that, for some jurors, the feasibility of this freezing was more questionable in a non-stranger rape – as one put it, 'I could understand that if it was a stranger, maybe she would have frozen more, but she knew him' (M06H), whilst another noted 'there is no history of violence' in order to suggest that there would be a lesser level of fear in this case compared to a stranger rape (M04F).

Equally, however, there was a willingness amongst some jurors in the present study to reject the suggestion that freeze reactions would be confined to 'stranger rapes.

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

[17] See the sources in n 2 above.

This resistance was and at a level that, we would suggest, went beyond that seen in the previous research noted above. That was reflected in the following exchanges:

M: You're more likely to be frozen in fear if it is a complete stranger, an attack in the street, you can see that more so.
M: Rather than somebody you have already had a relationship with as well.
F: I don't agree with that. (M03E)

F: That's what I think. I think if it was a stranger that had raped her and you're terrified and you might not be able to react and scream and fight back. But, I think if you have lived with somebody and you know them, I think you would fight back and scream at them.
F: Yes.
F: Could you not go the opposite way and say this is someone that you have loved and you've trusted, they are never going to hurt you? (M04E)

F: Maybe she didn't freeze because if it was a stranger I think you're more likely to freeze.
M: I don't think you can make that distinction.
F: I don't think you could until it happened to you.
F: What would you would do and what you wouldn't do.
M: I think you would be more shocked if it had been somebody you knew for that long and they had never ever shown any emotion like that at all. (M05H)

5.3 'A lack of calling for assistance may indicate consent'

This appreciation of the possibility of a freezing response still often co-existed, however, alongside an expectation from jurors that genuine victims would call out for some sort of assistance during the assault. Indeed, this view was expressed in half of our 32 juries. As one juror put it, for example, 'if you were getting held down and raped you would be screaming your lungs out' (M02E), whilst another insisted that 'if you're getting raped, you're going to shout, you're going to scream' (M02E). In contrast to the higher rate of rebuttal in respect of physical resistance, this view was only challenged by peers in 44% of cases (n=7/16).

5.4 On resistance, injury, and corroboration

The expression of these views about the complainer's injury, resistance, and calling out for assistance often occurred within deliberations in the context of jurors'

discussions about how to apply the requirements of corroboration and proof beyond reasonable doubt.

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).[18] Mock jurors were directed on this requirement, based on the guidance used by judges in directing juries in real criminal trials. All jurors were told:

> 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.

It is not the case that, under Scots law, the corroborating evidence has 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.[19]

In our trial scenario, the prosecution case consisted principally of evidence from the complainer along with evidence from a forensic examiner who spoke to external injuries which were consistent with rape but for which alternative explanations could not be ruled out. In 23 of our 32 juries, however, the view was expressed that the evidence provided was inadequate for conviction. Jurors spoke variously of the medical evidence being '50/50' (M03E), as 'not helping' (M01F), 'not having huge value' (M01F), not being 'very strong' (M02E) and not being 'valid as a categoric way of convicting' (M01H).

For some jurors, this led to the conclusion that there was a lack of corroboration and so an acquittal had to follow. As one put it:

> ...it's only facts that can be corroborated that should be taken into account. For me, the only person that could corroborate was the doctor, and the doctor was

[18] Smith v Lees 1997 JC 73.

[19] Fox v HM Advocate 1998 JC 94 at 103-107 per Lord Justice-General Rodger.

> not able to state that these injuries were sustained as a result of rape, therefore she couldn't corroborate the evidence. (M04G)

Another striking example of this came from one juror who said: 'that's it, there is no corroborating evidence, the injuries have been dismissed by the doctor, full stop' (M05H).

At the same time, however, it is worth noting that in 74% of the cases (n=17/23) where the sufficiency of the evidence was questioned, other jurors put forward a contrary view. This was sometimes done by suggesting that an impossible standard was being applied, such as the juror who said:

> I would be amazed if there is a crime that happens anywhere in the world, that physical evidence is provided for, that the defence can't turn round and say, "but could something else not have caused that injury?" I don't think there's any injury that you can't say that for. (M01G)

Similarly, this challenge was often made rhetorically by asking what else could have been offered, such as by questioning 'how are rape cases proven then?' and 'how is anybody going to prove a rape case?' (M05H)

Of course, what we did not do in this study is test for the effect of corroboration, so it is impossible to know how jurors' deliberations would have differed if they had been asked to assess the evidence without this requirement in mind. That said, it is worth noting that, for many jurors in our study, the relationship between corroboration and the need to be sure of guilt beyond reasonable doubt was a very close one; and their ambivalence about the medical evidence translated more broadly to a lack of adequate proof and a sense that the doctor's evidence was not sufficiently 'definitive'. As discussed below, this interacted in complicated ways for some jurors with the choice available between acquittal verdicts.

5.5 'False allegations are routine'

It is important to point out that jurors who expressed these concerns about corroboration and the standard of proof did not do so, necessarily, to allege that the complaint was false.

On the contrary, for many jurors, these concerns were used instead to justify their choice of a not proven verdict which was sometimes seen as signalling a level of belief in the complainer's account. As one juror described the not proven verdict:[20]

> it's practically the same as not guilty, but obviously if we say not guilty in this case we would be implying that we think, for example, that [the complainer] is not a credible witness, that she is lying. We might feel more comfortable saying not proven because we don't want to make that implication. (M03F)

Still, the suggestion that false allegations of rape are routine did feature in 19 of our 32 juries (59%).

Amongst the various explanations afforded by jurors for why the complainer might have made a false complaint were because 'she wants her man to come back' (M01H), was 'obsessed' with the accused (M04F), might be a 'psycho bunny', out for revenge (M07F); or simply because 'women can be vindictive' (M04G), 'bad' or 'mad' (M06H).

Jurors who sought to bolster the feasibility of a false allegation also often highlighted the fact that the complainer's injuries could have been self-inflicted. As one put it, 'pressing yourself very hard to make yourself bruised, you can do it' (M01H); while another suggested it was 'fairly easy to scratch yourself if you really want to' (M07G).

5.6 'A delay in reporting is indicative of a false allegation'

The fact that the complainer had delayed reporting to the police – albeit by only 40 minutes – was also seen by some jurors as rendering her complaint suspicious. As one put it, 'the time delay factor when she reported to the police for me was a bit sketchy' (M02G). This is despite the fact that the jurors received a direction from the trial judge that there can be good reasons why a person against whom a sexual offence is committed might delay in reporting it and that this does not necessarily indicate that the allegation is false.[21]

The 40-minute delay in reporting the offence was raised as a concern in 13 of our 32 juries. Importantly, however, it was also challenged in 77% of those (n=10/13),

[20] For more detail about how jurors understood the not proven verdict, see chapter 5 of R Ormston, J Chalmers, F Leverick, V Munro and L Murray, Scottish Jury Research: Findings from a Large Scale Mock Jury Study (Scottish Government, 2019).

[21] See Criminal Procedure (Scotland) Act 1995 s 288DA, as inserted by the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 s 6.

sometimes with direct reference to judicial instructions on delay. As one juror put it, for example, the judge 'said something about in the rape cases the time not being an issue … he said don't be swayed by that' (M01H).

Attempts were also made across the juries to rebut the suggestion that false allegations are common. This claim was challenged in 74% of the juries (n=14/19) where it was made. In some cases, this was done via a flat rejection of the claim. For example: 'it's very rare for a woman or anyone to make an accusation of rape to the police like that if it's not true' (M08E), while in others jurors pointed to the difficult process involved in making a complaint: 'it's a 'big step to take, for women to take, unless it happened' (M05E).

Despite this, it was clear that, for some jurors, the prospect of false allegations still loomed large. As one concluded, 'some women do just use it as a tool' and 'you can always say why would they lie but people do' (M05E). Meanwhile, others maintained 'there is hundreds of cases coming out where women have lied about rape' (M06H) or suggested that support for victims making an allegation can increase this risk – 'there are now organisations that encourage women to go forwards when they have been raped' (M05H).

6. Conclusion

In conclusion, then, while this paper has obviously only provided a brief sketch of some of the emerging findings, we hope it provides useful insight into what may be going on in the jury room in Scottish rape cases. In line with research elsewhere, we found considerable evidence of jurors expressing false assumptions about how 'real' rape victims react, both during and after a rape. The belief was frequently expressed that a lack of physical resistance on the part of the complainer is indicative of consent. There was also a lack of clarity over the extent to which relatively neutral testimony from a medical expert, which did not exclude the possibility of alternative explanations for the complainer's injuries, could support the complainer's account. In addition, we found credence being given by many jurors to the idea that rape allegations are often unfounded and easy to make. At the same time, however, we found evidence of a greater willingness to challenge peers' attitudes than has been encountered in some previous mock jury research, a strong familiarity with the Rape Crisis Scotland 'I just froze' campaign and often a more sophisticated appreciation of the complexities of delayed reporting following from judicial direction on this point.

Ultimately, we do not know how persuaded people were by the discussions in which false assumptions about what rape looks like, and what genuine victims would do,

were aired, defended or challenged. The translation from attitudes to verdicts is a complicated one in which a wide range of additional factors – related to the trial scenario, parties, and dynamics of the jury discussion – come into play. As we noted at the outset, however, simply asking people (whether or not they have previously served on a jury) in the abstract about the attitudes that they hold is unlikely to be a reliable *jury* research method.

None of this is to suggest that the jury is an inappropriate body to determine criminal cases. On the contrary, the seriousness with which our jurors engaged in their deliberations gives some cause for optimism. In addition, jurors sometimes brought their own life experience and understanding to the table, to help other members of the jury assess the plausibility of the prosecution or defence case, in a way that a professional judge might have found more difficult. However, there is no doubt that prejudicial beliefs about rape and rape victims played a part in the deliberations and that these may have affected the verdicts juries returned. This indicates the need to do more to assist jurors in evaluating the evidence and applying the legal tests in better informed and fairer ways.

One way forward might be to further explore the potential for judicial directions. There is some (albeit limited) evidence from previous research which suggests that these can be effective in challenging beliefs.[22] In our study, jurors were directed – as is now mandatory in Scotland[23] – that a delayed report is not necessarily an indication of a false allegation and, as we noted earlier, some jurors did refer to this direction to challenge the views of others.

The same legislation also provides for mandatory directions aimed at countering the inappropriate assumption that an absence of physical force is indicative of a false allegation. We did not include this direction in our study, though jurors were of course directed that the offence of rape under Scots law is defined around the complainer's lack of consent (rather than the accused's use of force).[24] This reflects

[22] For a summary of the available evidence, see F Leverick, What Do We Know About Rape Myths and Juror Decision Making? An Evidence Review (Scottish Jury Research Paper 1, 2019); 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.

[23] Criminal Procedure (Scotland) Act 1995 s 288DA.

[24] Sexual Offences (Scotland) Act 2009 s 1. The jurors were told by the trial judge that: "The complainer's lack of consent is a central element in this crime. In the context of sexual activity, consent involves free agreement. That means willing, freely chosen, active, cooperative participation by both parties. If a person does not say or do anything to indicate

the legal position in Scotland, where the further direction is mandatory only in cases where evidence is given "which suggests that the sexual activity took place *without the accused using physical force* to overcome the will of the person against whom the offence is alleged to have been committed".[25] Ours was not such a case, since the complainer had a level of bruising consistent with the application of force – albeit that she did not have any internal injuries. That jurors in our study continued to focus so much on the existence of injury might suggest a need to re-think the ambit of the legislation and give a direction in cases where there is some use of force, as well as cases where there is not. Of course, whether such a direction would have been effective remains to be tested: past research has found that some attitudes about rape are more resistant to challenge than others, especially around injury and resistance.[26]

To end on a brighter note, it was interesting to see so many of our jurors use the language of Rape Crisis Scotland's public awareness campaign "I just froze", which targets the misconception that there is a right or wrong way for people to react during or after a rape. Though sustained evaluation of the success of such campaigns is difficult, our findings might suggest that this too represents a way forward in effectively challenging false beliefs.

Appendix: Rape trial synopsis

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

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free agreement at the time when the sexual act takes place, that is an indication that the act took place without that person's free agreement."

[25] Criminal Procedure (Scotland) Act 1995, s 288DB(4)(a), emphasis added.

[26] 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 at 376.

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 traumitised. She initially 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.