

Beyond Doubt: The Case against 'Not Proven'
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The existence of the not proven verdict in Scots law is a historical accident. "Not proven" was introduced in the early 17th century when juries were for a period asked to discharge a different function from that was expected of them before or today, stating whether individual facts were proven or not proven. After that system of "special verdicts" ended – with the jury's right to return a general verdict of "not guilty" being reasserted in 1728 – the language of "not proven" persisted and jurors continued to use it as one of two possible verdicts of acquittal alongside not guilty. In modern practice, juries are simply told that there are two acquittal verdicts open to them which have the same effect and are not given a definition of either verdict or guidance as to how they might distinguish them.

The debate over the not proven verdict

The case against permitting not proven verdicts (the debate has run since at least 1846) has consistently been a combination of three arguments: that the verdict is incompatible with the presumption of innocence, encourages jurors to avoid the proper discharge of their functions, and casts an unwarranted stigma on the accused.

The case for permitting not proven verdicts has taken two forms: either that while Scots law might not design a three verdict system if starting today from a blank slate, it *has* adopted such a system and the case for changing the *status quo* has not been demonstrated; or, more positively, that the verdict benefits the accused by reducing the risk of wrongful conviction and also by allowing the jury positively to declare innocence in appropriate cases.

In more recent years, the debate has shifted in two key ways: (a) emphasising the interconnection of the verdict with other distinctive aspects of the Scottish criminal justice system and (b) the emergence of specific concerns about the use of the verdict in sexual offence trials. In this respect, it has been suggested (in the verdict's favour) that it allows jurors to signal to a complainer that they were not in fact disbelieved; it has also been suggested (against the verdict) that it is particularly distressing for complainers in such cases.

Rebutting the arguments in favour of the not proven verdict

New empirical evidence from the *Scottish Jury Research* project allows us to undertake a fuller and more informed analysis of the arguments for and against the not proven verdict than previously possible.

While mock jurors believe that they are sending a particular message through their choice of the not proven verdict, the meaning of that message is variable and is not always received as intended. In sexual offence cases in particular, there is a mismatch between what jurors believe they are communicating to complainers and the message which is actually heard. In terms of communication to the wider community, the lack of any clear and settled meaning for the verdict, and differing juror understandings as to what it signifies and when it should be used, undermines any potential communicative function and makes it difficult for criminal justice professionals to explain to complainers how they should best interpret the jury's verdict.

Evidence from the *Scottish Jury Research* suggests that the not proven verdict may reduce the propensity of jurors to convict. However, this does not itself demonstrate that it operates as a safeguard against wrongful conviction. It may equally result in the acquittal of the factually guilty. The use of the verdict is particularly prevalent, but particularly problematic, in sexual offences, where it may enable juries to give weight to myths and stereotypes in avoiding verdicts of conviction. And while there is no clear evidence that the verdict does in fact safeguard against wrongful conviction, its existence has been used to justify Scots law not introducing other measures which would, meaning that it may in fact be actively harmful in this regard.

Arguments against the retention of the not proven verdict

This serves to rebut the core arguments in favour of the not proven verdict. In addition, we would note two strong arguments against its retention in the Scottish criminal justice system.

The first is in terms of the stigma that attaches to the verdict – in the *Scottish Jury Research*, jurors regarded it as a lesser acquittal than not guilty ("you walk away innocent, but everybody knows"). We do not know to what extent stigma is in fact experienced by those acquitted via not proven, but regardless, there is a normative argument that an acquittal verdict should not be stigmatising, and that in itself is a powerful argument against its retention.

The second argument is that it risks a loss of public confidence in the criminal justice system, as it allows jurors to use it as a compromise verdict to bring deliberations to an end, rather than engaging in more rigorous discussions. There is empirical evidence from the *Scottish Jury Research* that the verdict operates in precisely this way, with participants using it to bring deliberations to a premature end. There was also evidence that this use was 'read into' the verdict outcome by sexual offence complainers, undermining their belief that jurors discharged the weighty responsibility placed upon them with appropriate diligence.