

Recommendations

(1) The proposal to try frauds by special juries composed only of businesspeople and professionals should be rejected. There are two principal grounds for this:

(a) in the event of an acquittal, the public may feel (however unjustifiably) that the accused have been protected by their own group, against the weight of the evidence;

and (b) there is a danger of undue leniency where the customs and practices of cognate professions are more lax than the criminal law requires or, per contra, that professionals may be too severe and may judge the accused by the standards of their professional codes, which codes may be more rigorous than the law requires.

It should be noted that these objections do not apply to the presence of some professionals and businesspeople on juries: the issue is one of control.

(2) The trial of frauds should take place before a judge or a panel of judges where, in the opinion of the trial judge, the case is too complex or too specialised to be tried by an ordinary jury. The decision of the trial judge should be accompanied by a statement of reasons and should be subject to appeal by any defendant or by the prosecution. (The latter proposal should satisfy the public that there is no corrupt or partial relationship between the judge and the prosecution or the accused). By formulating the proposal in this way (for countries which presently have trial by jury), the aim is to ensure that only genuinely difficult frauds will be tried without jury. This is a recognition that 'fraud' is not a homogeneous category.

In cases where judicial trial occurs, it should be the right of any party to demand the presence of expert assessors to assist the judge in his decision, possibly subject to the proviso that if no such person is available, and the request is made during the trial, the judge may at his discretion continue the trial without an assessor. A panel of suitable assessors should be drawn up, with the assistance of recognised professional bodies in accountancy, banking, insurance, etcetera.

Ideally, since critical testing of beliefs is an aid to good decisionmaking, there should be a panel of three judges (or even two, with a unanimity requirement, as in the Court of Appeal). However, if this is not feasible, a single judge would suffice.

(3) The grounds on which fraud trials are held to be unsuitable for 'common jury' trial are that they are too difficult and alien to be readily understandable by such a jury. Therefore, unless there is to be a general move to grant defendants the right to trial by judge, it is recommended that this be possible only if the trial judge accepts that the particular case in question is not suitable for jury trial. Moreover, to ensure that the decision to elect for trial by judge without jury is made on grounds of principle rather than tactical expediency, the choice of forum should have to be made upon committal, before the particular trial judge's identity is known. It appears that the major virtue of the proposal to give defendants in fraud trials the right to elect trial by judge without jury is the fact that it is more in line with constitutional precedent. Whilst accepting that this is the case, the proposal should be looked at with care, lest it give rise to accusations of partiality among the judiciary. In principle, it appears that the judge should decide, not the accused, though this factor might be less significant if there

were greater judicial specialisation on the basis of expertise.

(4) Although legal and procedural complexities are by no means the exclusive prerogative of fraud trials, they crop up with distressing regularity in such trials. Therefore, it is desirable that there should be greater specialisation in the choice of judges for fraud trials than exists generally within the Queen's Bench Division, with a panel of judges whose principal task it is to try frauds. In Commonwealth countries and in geographical areas which do not have many complicated frauds to try, it would be impractical to set aside a judge exclusively for this purpose. However, the argument for specialisation still applies, as it does at all stages of the investigation and prosecution process in relation to fraud. Such specialisation should help to combat the tendency to generate a morass of unnecessary and irrelevant documentation. It is recognised that this may not be a popular move among the judiciary themselves, but the interests of optimal justice should be paramount. Given the importance of economic crimes and the cost of such trials, the temptation to entrust such cases to less experienced judges should be resisted. Arrangements presumably could be made for periodical rotation of primary responsibility for trying frauds, if judges find this too irksome.

(5) Irrespective of whether or not there is trial by jury, the trial judge should always conduct a pre-trial review to give practice directions in complex frauds. This is essential if the issues are to be narrowed down to make them triable. At these reviews, there should be a hearing of all disputes over the admissibility of evidence, and all cases that are to be cited by prosecution or defence counsel in relation to legal submissions must be disclosed. It may be too radical to bar the bringing during the trial of any legal arguments not

disclosed at the pre-trial review, but there must be sanctions for non-compliance. The best ways of achieving this are by financial penalties and, after the verdict, through judicial censure in open court. The latter invariably is found to be attractive to the media. There should be improved remuneration for adequate pre-trial preparation. These rewards and sanctions should apply equally to the defence and prosecution, for the latter are not always blameless in the generation of unnecessary delays. Where the defendant is not legally aided by the State, it should be possible to make him or her pay for prosecution costs that are caused by wilful delay. The move towards pre-trial clarification of issues heralded by Lord Donaldson MR in civil cases is a useful precedent for what might happen in criminal fraud trials, though I am less convinced of its suitability in other cases of a criminal nature.

(6) It is a truism to state that justice delayed is justice denied, but trial delay is too often used as a tactic by the defence in the hope that the case will be dropped altogether or what witness memories will become unreliable or that the sentence will be reduced because of the staleness of the prosecution. Sometimes, delays are caused by the obsession of the prosecution with complete and often unnecessary documentation. There should be some time limit imposed, perhaps one year from committal, within which trial must commence. If the counsel that is wanted cannot be available within that time, then another must be selected. It is difficult to decide what penalties are feasible or appropriate for non-compliance, but the increased importance of pre-trial reviews and the danger of having to select new counsel at very short notice should be a sufficient deterrent.

(7) All persons with previous convictions for fraud or for infringements of relevant regulatory legislation, for example under the Companies Acts, Bankruptcy Acts, and Fair Trading Acts, should be disqualified from serving on a jury in a fraud trial.

(8) The peremptory challenge should be abolished.

(9) The taking of notes by jurors should be encouraged in all cases.

(10) There should be strict time limits of, say, one working day, upon all closing speeches by counsel and, perhaps, of the Opening Speech by the prosecution also. Judicial summings-up should not be restricted as to time, though brevity should be encouraged.

(11) There should be reforms of the rules requiring strict oral proof of evidence except where agreed by the defence. For example, the rationale behind the requirement that Government or Company Registrars must testify in person that X is a company or a bank is obscure in the modern climate of record-keeping. Far greater use should be made of affidavit evidence. Since some nations forbid their officials from giving evidence abroad, any cross-examination that is necessary should be made on videotape and replayed before the trial judge and/or jury. Without diminishing the fairness of trials in any way, this facility could usefully be extended to other witnesses whose presence in court is difficult to arrange. If this were possible, then there would be fewer non-prosecutions and acquittals on purely technical grounds and more victims and witnesses would be willing to come forward. My interviews with victims and investigators indicate that prospective inconvenience and financial loss is an important influence upon the reporting and the pursuit of fraud. This is one area where modernisation and fairness are by no means

incompatible.

These proposed changes will not effect a 'cure' for white-collar crime on their own. They must be accompanied (a) by organisational and personnel improvements in the investigatory and prosecution processes; and (b) by a change in the approach of those with a duty to investigate and prosecute, so that fraud is not treated as if it were an act between consenting adults. However, it is my considered opinion that they will bring the trial of such crimes to a more rational footing without unduly prejudicing the civil liberties of accused persons. The care taken with the reputations and liberty of persons charged with white-collar crimes is indicated by the substantial number of judge-directed acquittals (even where there is jury trial), a fact whose importance is magnified by the reluctance of the authorities to prosecute without strong prima facie evidence.

If this attitude is as general as my surveys have suggested, I am reassured that the rights of those accused of commercial crime will not be violated by the modest suggestions that I have placed before this meeting. If these issues are not treated seriously, we run the risk that more radical critics will claim that the operative principle of the criminal law is not de minimis but de maximis non curat lex. The victims of fraud, including the State itself, deserve greater protection from fraud than they currently receive. For as Jonathan Swift observed in Gulliver's Travels

"Care and vigilance, with a very
common understanding may preserve a
man's goods from thieves, but
honesty hath no fence against
superior cunning."

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