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In a compact and commercial jurisdiction such as that of the Isle of Man, trial by jury of long, and/or complex fraud trials is neither conducive to justice, nor to the Island's international reputation : a consideration.

George Johnson Prize Trust Essay Winners: 2008

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George Johnson Essay 2008

In a compact and commercial jurisdiction such as that of the Isle of Man, trial by jury of long, and/or complex fraud trials is neither conducive to justice, nor to the Island's international reputation

A consideration by Advocate C M Brooks (2002)

Athene: This case is too deep for a man.
 Nor should I let the law, like an axe,
 Fall mechanically on a murderer.
 Especially since you came to my temple
 As a suppliant
 Fully cleansed of your crime.
 But your accusers have to be heard.
And if their case fails – what happens to their anger?
 It whirls up in the air, it blackens heaven,
 It falls like a plague on Athens.
 Falls as a curse on Athens.
 How am I to deal with the dilemma?
 Let me select a jury of the wisest
 Among the citizens of this city.
Let them be the first of a permanent court
 Passing judgement on murder.
 They shall be sworn in
 To integrity and truth.
 They shall have the full use of my wisdom.

Aeschylus

The Oresteia :The Eumenides tr T Hughes

Juries have been around in one form or another for a very long time indeed. But if Lord Roskill was correct when he said in 1986 that *“the most complex of fraud cases will exceed the limits of comprehension of members of a jury”* then surely we should seek to find an alternative system to trial by judge and jury as a matter of urgency?

This essay examines whether there is indeed a need to move to a new system for complex fraud trials by discussing the strengths and weaknesses of jury trial, the alternatives and possible reforms of the jury trial procedure itself and ultimately considers what, if anything, should be done.

There is much jurisprudence already on the question of jury suitability in England and Wales but this essay also needs to address whether the Isle of Man really does have needs which other jurisdictions do not and if so what those are. Do these needs affect the chosen answer to the question of how should serious commercial crime be tried?

The special requirements of the Isle of Man

The Isle of Man is definitely a compact and commercial jurisdiction which relies heavily on financial services and finance for its revenue and well being and in that regard its international commercial reputation is extremely important.

Foreign businesses which wish to do business here are attracted not only by the low rates of taxation and the Island's offshore status but also by the excellent system of regulation in force. The Edward's report in 1998, the Financial Stability Forum's report of 2000 and the IMF's report in 2002 have confirmed that the Island is well regulated and far from being regarded as a tax haven with harmful taxation practises, the Island has a deservedly clean international standing.

For this reason, it is of particular importance that the Island has a first rate legal system capable of dealing with complex civil and criminal commercial cases, the absence of which may cause investors to look elsewhere. The Island is well regulated and thankfully long and/or complex fraud trials are rare but the machinery of criminal justice does need to exist and be finely tuned so as to be capable of dealing with persons accused of white collar crime on those occasions that do arise.

However it is important not to get carried away and regard the Isle of Man as unique in requiring a fair system of trial in financial crime matters. Indeed the 1986 report of the Fraud Trials Committee chaired by Lord Roskill ("the Roskill Committee") noted¹ that:

"There was "a general feeling" that the perceived inadequacies in the investigation and prosecution arrangements were serving to encourage the growth of fraud with potentially harmful consequences not only for the unfortunate victims of fraud, but also for the reputation of the nation, and in particular the City of London as one of the world's great financial centres".

Further it is said² that in about eighty percent of cases before the commercial court in England that there *"is at least one foreign claim to a defendant and in about one half of cases at least one claimant and one defendant come from outside the jurisdiction"*. Although those statistics obviously relate to civil matters, it is a graphic illustration of the importance of international commerce to England as well.

So bearing in mind the similarities in current Manx criminal procedure to the English model and also the importance which the UK itself places on finding an appropriate way of dealing with fraud cases, it is clearly a most useful starting point to consider the current debates which are taking place in the adjacent Islands.

Moreover, whilst the Island's "international reputation" is clearly important, what is far more important is that justice is done in each individual case. Insofar as there is a conflict between the Island's reputation and the demands of justice (and there may not be) the latter must prevail. For that reason it is important to investigate what are the advantages and disadvantages of the current system are before going on to consider what possible alternatives there might be.

Whilst this essay is primarily concerned with fraud, it does not make sense to consider such cases in a vacuum and therefore much of what follows is equally of importance to all criminal trials. Fraud trials are, after all, just particularly complicated criminal cases and as such they have much in common with non-fraud cases. What does mark them out however is that whilst an ordinary person may be well able to understand issues relating to violent crime or theft, they may be far less adept at dealing with the complex financial structures that commercial crimes frequently involve.

The status quo – why do we have juries?

(a) The historical development of the England and Wales system and its perception today

¹ Quoted in "The trial of serious and complex frauds: further reforms"; Company Lawyer 2002; G Scanlan.

² Complex litigation: the commercial court; Civil Justice Quarterly 2007; R Franston.

One of the main barriers to change is the public perception of jury trial as defenders of the innocent. One might say “the grand bulwark” in favour of a subject’s liberty. That quote itself is from Blackstone’s Commentaries³ evidencing that as far back as the eighteenth century the jury was seen as a hallowed institution preserving the rights of the individual against the power of the state. Several centuries later it is fair to say that the same view persists. Any proposal to remove the right to trial by jury would politically be very difficult and is likely to be deeply unpopular with members of the public and members of the profession alike.

Further, there is a widespread belief that the right to jury trial dates back to Magna Carta in 1215. Many people probably believe that there is no constitution or bill of rights in the UK (and Isle of Man) but are aware of this ‘right’ dating back to Magna Carta. The ‘right’ has thus achieved an importance which it would otherwise not have if there were a bill of rights as such. The difficulty and importance of overcoming this public perception cannot be underestimated. It is a fair guess that many people on the Isle of Man are also influenced by this English view.

In actual fact the historical situation regarding Magna Carta is much more complex. Magna Carta provided that no free man should be punished except “*by lawful judgment of his peers or by the law of the land*”⁴. Prior to the end of the twelfth century there were two main modes of criminal trial. Trial by judicial combat and trial by ordeal and it is perhaps to those respective ways of determining disputes that Magna Carta might have referred. However the decision of the Catholic Lateran council in 1215 that trial by ordeal was not an acceptable way of establishing guilt or otherwise created a vacuum for the criminal justice system of the day. The important thing is that it was not until the fourteenth century that the jury clearly emerged as an independent entity of persons with no knowledge of the incident in question and there were many years of uncertainty before that. Moreover, the charter only applied to the barons anyway and certainly not to all men. Jury trial cannot therefore have directly sprung from Magna Carta.

Whilst it may well be true that there is strictly no statutory entitlement to trial by jury dating back to 1215, it is undoubtedly the case that trial by jury has been the norm for a very long period indeed and it has come to be thought of as a fundamental freedom. Even if Magna Carta did not directly lead to the creation of juries in 1215, its underlying *raison d’être* was to make a stand against the crown and prevent arbitrary punishments. It is easy to see how the charter subsequently gave rise to the interpretation that it guaranteed jury trial in practice and perhaps it is that later life which it enjoyed in public perception which is more important than the strict meaning of the words in 1215.

Jury trials have however changed markedly over the centuries. There was no absolute right to legal representation until 1836⁵ and it has been said that: “*A trial for felony could rarely, in any period, have taken more than half an hour*”⁶. On the other hand, rates of conviction were low. In earlier ages, it is therefore easy to see that jury service did not overly inconvenience jurors. There were also social qualifications required before a man could serve on a jury which may have raised the standards as to who could serve.

In contrast today, with increasing standards of evidential and procedural fairness, the introduction of legal representation and the advent of the photocopier, trials are far longer. The average length of a serious fraud case in the UK is six months⁷. Further, it is common for there to be many exclusions to jury service (both statutory and discretionary) which serve to exclude large sections of the population and perhaps a disproportionate number of those who have most to offer the jury – as such persons tend to be the most in need of exclusion. Put in this context one can easily see that what might have been acceptable in previous centuries with different standards might not be acceptable today.

(b) Historical development: Isle of Man

The Criminal Law Act of 1736 provides:

³ IV [1776] page 347.

⁴ Article 39

⁵ Trial for Felony Act (1836) 6 and 7 Will IV c.114.

⁶ Professor Baker: An Introduction to English Legal History Third Ed p582.

⁷ Why (some) fraud prosecutions fail: Journal of Financial Crime (2006) R White

“Secondly, And be it further declared, ordained, and enacted by the Authority aforesaid, That no Court, Judge, or magistrate within this Isle whatsoever shall have Power or Authority for the future to impose or inflict any Fines or Punishments upon any Person or Persons within the said Isle, for or on Account of any criminal Cause whatsoever, untill he, she, or they be first convicted by the Verdict or Presentment of four, six, or more Men, as the Case shall require, upon some Statute Law in force in the said Island, nor to imprison any Person or Persons arbitrarily before a proper Complaint is made and lodged, and Affidavit made to the Truth thereof”;

It further appears that *“by customary law, treasons and felonies were tried before a twelve member jury in the Court of General Gaol Delivery”*⁸. However the composition of the court was somewhat complicated as, aside from the jury, the Governor of the Island sat as sole Judge assisted by the Deemsters as assessors of law. The Keys and the Council were also present in the court before 1824 when a Privy Council decision ruled that their presence was unnecessary⁹. The Keys presence was perhaps to put pressure on juries not to return a perverse verdict.

It can therefore be seen that, just like the United Kingdom, the Manx reliance on jury trial in some form is likewise longstanding.

Advantages and disadvantages of the current system

Lord Justice Auld was tasked in December 1999 with reviewing the workings of the criminal court. Part of this remit was concerned with the question of whether the jury trials were still appropriate in the modern age. At paragraph 181 of chapter 5 of the resultant report Lord Justice Auld sets out a summary of the arguments for and against retaining the status quo as follows:

“The arguments for and against the present form of jury trial in cases of serious and complex fraud have been canvassed many times.

Arguments for, include:

- *jury trial is a hallowed democratic institution and a citizen’s right in all serious cases which necessarily include serious and complex frauds;*
- *the random nature of selection of juries ensures their fairness and independence;*
- *mostly the question is one of dishonesty, which is essentially a matter for a jury who, by reason of their number and mix, are as well as, or better equipped than, a smaller tribunal, however professional, to assess the reliability and credibility of witnesses;*
- *there is no evidence, for example in the form of jury research, that juries cannot cope with long and complex cases or that their decisions in them are contrary to the evidence; on the contrary, most judges and legal practitioners’ assessment, based on their trial experience, is that their verdicts are in the main ‘correct’; and*
- *there is an openness and public intelligibility in the parties having to accommodate the jury’s newness to the subject matter by presenting their respective case in a simple and easily digestible form, and that there is scope for improvements in such presentation.*

Arguments against, include:

- *if jurors are truly to be regarded as the defendant’s peers, they should be experienced in the professional or commercial discipline in which the alleged offence occurred;*
- *although the issue of dishonesty is essentially a matter for a jury, the volume and complexities of the issues and the evidence, especially in specialist market frauds, may*

⁸ PW Edge Manx Public Law p.205. The usual modern number of jurors is now 7 (see below)

⁹ Kelly [1824] L.P.

be too difficult for them to understand or analyse so as to enable them to determine whether there has been dishonesty;

- *the length of such trials, sometimes of several months, is an unreasonable intrusion on jurors' personal and, where they are in employment, working lives, going way beyond the conventional requirement for such duty of about two weeks' service;*
- *that has the effect of making juries even less representative of the community than they are already, since the court excuses many who would otherwise be able and willing to make short-term arrangements to do their civic duty;*
- *such long trials are also a great personal strain and burden on everyone else involved, not least the defendant, the victim and witnesses;*
- *judges, with their legal and forensic experience, and/or specialist assessors would be better equipped to deal justly and more expeditiously with such cases;*
- *that would also have the benefit of greater openness, since there would then be a publicly reasoned and appealable decision instead of the present inscrutable and largely unappealable verdict of the jury; and*
- *the length of jury trials in fraud cases is very costly to the public and also, because of limited judicial and court resources, unduly delays the efficient disposal of other cases waiting for trial".*

Whilst all of these are accepted as valid considerations, it is argued that the two overriding factors have to be:

- (a) Whether the process of jury trial as we now know it results in fair outcomes; and
- (b) Whether the whole process is fair on the jurors themselves.

(a) Fairness to defendants/victims

Fairness itself is clearly not just an objective concept. In order to analyse it, we need to break it down. The following issues must be considered:

1. Which person or body can best deal with the complexity of the factual situation?
2. If juries are used as arbiters of fact are they influenced by non-relevant considerations?
3. Is it beneficial to justice that juries sometimes reach a perverse or clement verdict?
4. Should the arbiters of fact have special expertise in the field in question?
5. Is the length of jury trial itself such as to be unfair to the defendant?

(i) Complexity

It is said that there is no evidence that juries are unable to cope with the mass of detail implicit in a modern commercial trial. One of the difficulties of obtaining evidence is of course the prohibition on discussing with jurors the detail of their deliberations after or during a trial¹⁰. However there are a handful of surveys which are of interest and which will be referred to in this essay.

One such is a review of judicial perspectives on the conduct of serious fraud trials in England and Wales¹¹. In this survey, nine judges who had recently tried a serious fraud case or been nominated by the presiding justice of England and Wales Thomas LJ to take part, were interviewed in spring 2007 as to their opinions about serious fraud trials.

¹⁰ Section 8 Contempt of Court Act 1981 (UK).

¹¹ Judicial perspectives on the conduct of serious fraud trials: Criminal Law Review 2007 RF Julian

The article reported that:

"All nine judges expressed strong support for juries, voicing both a high level of agreement with jury verdicts, and a firm belief that juries have the capacity to understand properly litigated complex fraud cases. Each judge interviewed also voiced his principal belief that trial by jury should continue in all serious fraud cases. Many of the judges expressed significant concerns about the actual and perceived fairness of judge only trials".

That and other studies¹² have argued that the key to a jury understanding the issues in the case is the advocacy at court and in the manner in which the evidence is presented. As one judge put it in the Julian survey, *"the problem is the competence of the prosecution in cases where juries do not understand, not the competence of the jury"*.¹³

Proponents of the continuation of the jury system frequently refer to the need to properly induct and brief jurors at the outset, the need for evidence to be given in an easy to understand way, for the use of legal terms to be avoided or properly explained, for the greater use of visual aids, maps diagrams or schedules and (if possible) for the restriction of repetitive evidence. A survey by the Home Office¹⁴ found that the greatest impediment to juror understanding was the use of unexplained legal terminology.

Notwithstanding this, a strong theme running through the research is that jurors, by and large, enjoy their experience. Furthermore, 43% leave jury service in England and Wales with a higher level of confidence in the court system than they had before their service with only approximately 20% leaving with a lower level of confidence.¹⁵

In a major study based on the Jubilee Line case (described in detail below) we discover that *"all the jurors were adamant that the jury had a very good understanding of the evidence, some commenting that it was not all that difficult"*.¹⁶

However there is the potential element of over-confidence here. On a closer examination of the statistics resulting from the Jubilee Line study it can be seen that at least four out of the eleven jurors interviewed acknowledged some difficulties with comprehension. The author of that study argued that the skills deficits in some jurors were made up for by the ease with which other jurors were able to comprehend the proceedings. But is that a sufficient answer? How can we guarantee that a satisfactory majority of persons on the jury do actually comprehend?

It is submitted that it would be easy for jurors to think that they had comprehended the issues in a case without being alive to the nuances in a case which the lawyers or judge might be aware of. The Julian survey of judicial opinion also found that there was a *"strong consensus"* of judicial opinion that jurors were able to comprehend even the most complex of cases. But the individual comments of the judges do give some cause for concern. For example, from three different judges:

- *"in fraud trials the verdicts are frequently a mixed bag, the jury finding on some indictments and not on those. I am a strong supporter of juries in complex fraud cases. Generally I agree with juries in other cases. Over the years (12 years experience on the bench) I can count on one hand the number of cases in which I think the jury got it wrong;*
- *I agree with the jury 70% of the time or even more in complex cases;*

¹² Jurors perceptions, understanding, confidence, and satisfaction in the jury system – a study in six courts; Home Office outline report number 05/04 (2004) R Matthews, L Hancock and D Briggs

¹³ Crim. L.R. 759

¹⁴ R Matthews supra

¹⁵ R Matthews supra

¹⁶ The Jubilee Line jurors: does their experience strengthen the argument for judge only trial in long and complex fraud cases? Criminal Law Review 2007 S Lloyd Bostock.

- *I trust the jury system. I agree with jury verdicts most of the time, but there are surprises”.*

At first sight this appears rosy but are these statistics being presented in a way which is designed to support the jury system? Both the writers of the survey and the judges themselves were clearly of the view that the jury system was worth retaining. Turning the statistics around, one might be somewhat concerned to note that in at least a quarter of cases juries reach a different conclusion to what an impartial and highly trained lawyer would reach. Further, it begs the question that if the impartial and experienced judge is able to see that juries are missing the point or not reaching the same conclusion that he would, why not dispense with the jury and just use the judge?

Although it can be argued that juries are well suited to determining whether somebody is honest or dishonest, it is submitted that it stands to reason that juries cannot ever hope to match the ability to deal with complex issues and evidence which a judge would have. It is therefore submitted that, were this the only consideration, serious thought should be given to trial by judge in all criminal cases and especially those in relation to complex issues such as fraud.

This is where there may be a possible diversion between ordinary criminal cases and commercial crime cases. In the former it might be a relatively simple exercise for a jury to determine whether for example Mr A hit Mr B and whether he intended to do so but it is clearly a different question to ask a jury to understand complex financial structures and the reason for their use.

(ii) Irrelevant considerations

If all jurors do not always understand all of the issues in a case what factors do they have regard to in determining guilt or otherwise?

Research by the New Zealand Law Commission¹⁷ investigated the way juries behaved in complex and high profile cases. This research is discussed in a 2002 article by Jenny McKewan¹⁸. She opined that:

“Although individual jurors in nineteen out of the forty eight trials said that they themselves or other jurors were influenced by feelings of sympathy or prejudice, such feelings only infrequently influenced the decision making process or the eventual verdict. In fact, the outcome of the trial was only affected by such feeling in six cases: three of these resulted in a hung jury, one resulted in a perverse verdict, and two resulted in a verdict which was justifiable on the evidence but was arrived at by dubious reasoning. In some of the other thirteen cases, jurors made a conscious effort to put their feelings aside, but more often those who brought their emotions with them to the deliberation process were persuaded by other jurors to take a different view. Therefore there is evidence that individual emotions are often overridden by the process of collective decision making indicating that the jury is performing in the way it was designed to”.

She concludes:

“Juries endeavour to understand and apply the law to the facts fairly and impartially, and there is little evidence to support the view that jurors attempt to replace the law with their own brand of justice”.

But that overlooks the fact that, turning the statistics around, in six out of forty eight cases at the very least, a form of incorrect verdict was arrived at. Is that really fair to the accused or

¹⁷ Juries in criminal trials: part 2 preliminary paper number 37 [1999].

¹⁸ Evidence, jury trials and witness protection – the Auld review of the English criminal courts; International Journal of Evidence and Proof 2002 J McKewan.

the prosecution or victim? Is it sufficient that juries should get it right approximately 87.5% of the time? Is there a better way?

(iii) Perversity/Clemency

The ability of jurors to take into account irrelevant factors deliberately is sometimes seized upon as being a good thing in that it defends the rights of the defendant against the power of the state.

This can either be that, for irrelevant reasons and despite it being objectively clear that the prosecution has made out its case, the jury acquit anyway (an example of perversity) or merely that the jury think the prosecution has probably made out its case but feel sufficient sympathy for the defendant that they do not convict (an example of clemency)

Thus for instance, if Parliament enacted a certain law that either was felt to contravene Human Rights or was just very unpopular with large sections of the population then one could imagine (and indeed probably find examples of) this happening today.

For example, juries might take the law into their own hands in connection with the destruction of GM crops, breaches of the Official Secrets Act, or, if triable on indictment, a jury might decide not to convict on charges of hunting with hounds. These might be perverse verdicts as they may impliedly stretch the terms of any defence beyond what any judge would do. Alternatively or further, where a householder is tried with assaulting a housebreaker on the premises and self defence is run as a defence, the jury might be more willing to depart from the strict test of the judge as to what amounts to self defence and grant clemency to the defendant by finding him not guilty. These can all be classified as examples of perversity or clemency.

In earlier times too, juries entered perverse or clement verdicts where they considered the capital penalty resulting from a felony conviction was too harsh in the circumstances. This was either by way of outright acquittal or by way of entering a partial verdict i.e. finding the defendant guilty of a lesser offence. In one Georgian case¹⁹ a jury valued the sum of 23 guineas (i.e. over £24) as being worth less than £2 thus converting the indicted offence of grand larceny into one of petty larceny which was only a misdemeanour and therefore punishable by whipping rather than death.

A judge is unlikely to have reached the same conclusion. Lord Mansfield in 1784²⁰ thought it intolerable that "*the law should be in every particular case what any 12 men...shall be inclined to think*". There are also numerous examples of juries being punished for returning an erroneous verdict.²¹ But as Professor Baker has argued²²:

"It is clear that the power of the jury to mitigate the law served a vital role during periods when the criminal law itself was too harsh or too unsophisticated to take account of the variety of circumstances affecting culpability".

It may well be that such times are long gone. Civil libertarians would respond by saying that one cannot necessarily assume that the current liberal democratic regime would persist forever and arguing further that even in this day and age the jury system provides a way in which ordinary people can send a strong message to government if they dislike sufficiently a particular piece of legislation.

On the other hand the danger of a perverse verdict could be the other way. The return of a perverse verdict could be at the expense of the defendant and not in favour of him – if

¹⁹ Radzinowicz History of English Criminal Law Vol I p 95

²⁰ R v Shipley [1784] 21 State TR.847 at 1040

²¹ See PW Edge supra at p259 et seq

²² Supra at p 591

perhaps they were motivated by prejudice in a way that a judge would not be. This is something perhaps that civil libertarians perhaps fail to acknowledge.

However, on balance and considering that a judge always has power to withdraw the case from the jury on a no case to answer basis, it is argued that the ability of the jury to return a perverse verdict is beneficial to the system as a whole, though it must clearly be very sparingly used. Its relevance to commercial crime cases however seems far less than its possible relevance to cases of commercial neglect or to non-commercial crimes.

(iv) Special Expertise

As soon as the jury is removed from the equation, whether trial become trial by one judge, two or more judges or by a tribunal, a key change occurs in the nature of the process in that no longer is the defendant being tried by a selection of members of the public who have likely no experience of the field in question but instead the defendant is being tried by persons who are likely to have a high degree of knowledge. This is particularly the case on the Isle of Man where it is likely that the same Deemsters who would determine matters of fact in a judge only system or a Fraud Trial Tribunal would routinely deal with civil commercial matters as well and so be well aware of the frequently occurring financial structures in place and what constitutes accepted practice on the Isle of Man. This might not be as much the case in England where commercial court judges are unlikely to try serious fraud criminal matters. To dispose of the jury would therefore be a very substantial change.

In contrast, in one recent case concerning the alleged neglect of certain employees of a licensed corporate service provider in connection with a commercial crime alleged to have been intended by others,²³ the prosecution took completely the opposite approach and produced a jury questionnaire which specifically sought to exclude not only those who knew or had dealt with the defendants in question or their employer but also anyone with any current or previous experience of working in the corporate service provider sector. The result clearly necessitated both sides starting from scratch in their assumptions as to what the arbiter of fact knew of the environment in which the defendants worked.

Whilst it may be thought that someone with no previous experience might be out of their depth or unable to comprehend the strange financial world in which they suddenly find themselves, on the other hand there might be a feeling that Deemsters or industry experts might be overly enthusiastic in the albeit legitimate desire to protect the reputation of the Isle of Man, interpret the regulatory requirements strictly and thus be less likely to give defendants the benefit of the doubt in difficult cases.

And it is in difficult cases of neglect and not fraud that the real problems arise. On an island which relies so heavily on the corporate service provider industry, a charge of fraud against one person may well involve subsidiary charges of neglect against others. Thus if the system is changed in respect of serious fraud cases then this is also likely to have a knock on effect for those merely charged with neglect. It is not clear that the same standard of care is or should be applicable to both civil cases (such as disqualifications) and criminal cases (with their more far reaching consequences) and a jury-less trial might too easily equate the two. It is argued that such cases of neglect are preferably still best left to juries.

Where neglect is not an issue and the main issue is whether there has been dishonesty then perhaps this consideration does not arise in quite the same way. Although some of the judicial respondents to the Julian study²⁴ noted the possible unfairness and dangers inherent in a judge becoming case hardened, it is argued that on balance it must be an advantage to have financial structures being ruled upon by persons capable of understanding them.

(v) Length of trial

²³ *A G v Apelbe Brands Supply Limited* [2007]

²⁴ Supra Crim. L.R. 763

Jury trials by their very nature are longer than bench trials because the jury need things to be explained to them in full. The consequent length of jury trials has been noted to have negative impacts on the health of defendants themselves²⁵. Such trials take a long time to reach court in the first place and are then often long drawn out affairs. It may therefore be in the interests of defendants to find a speedier way of dealing with allegations of fraud.

There is also the problem that length of trial may cause juries to lose interest and cease following what is going on. For example the Jubilee Line jurors (whose experiences are described in more detail below) are reported to have found the pace of the trial “*extremely slow*”²⁶. And in fact “*three [of the 11 surveyed] said they found it difficult to sustain interest and enthusiasm towards the end of the trial, although the others said this was not a problem*”.

A study for the Roskill Committee found that in respect of a mock trial, jurors could remember relatively little of a one and a half hour summing-up and found difficulty in concentrating for even half an hour.²⁷

(b) Fairness to jurors

The description above of the changing nature of jury trial in England and Wales graphically illustrates the difference in the demands which were placed upon jurors formerly to the demands which are placed on jurors today.

Nowhere is this more apparent than in the arena of white collar crime. An example of this cataclysmic change is the *R v Rayment and Others* which involved charges of “corruption and conspiracy to defraud in relation to contracts for major construction work extending London Underground’s Jubilee Line in the 1990s (‘the Jubilee Line trial’). In that case the trial collapsed in March 2005 after it had been running for some twenty one months. There was still further defence evidence to come but the prosecution decided to withdraw the indictment. This is a far cry from the days where felony cases took 30 minutes at most. Although the case is exceptional, the strains it must have placed the jurors under were immense.

In fact Ms Lloyd-Bostock’s survey²⁸ of eleven of the jurors in question indicated that several months after the trial had collapsed:

“One juror had been made redundant, one was in an employment dispute, one had missed a definite and much desired promotion and was required to undertake extensive retraining, and one had been signed off by his doctor as suffering from stress as a result of his work situation. A further three said they were back with their employers but reported serious setbacks due to their prolonged absence. They were young people with few formal qualifications, who had worked at the company for some years and had progressed through experience. They described how, when they returned they found their responsibilities reduced, that they had missed promotion opportunities, and that their prospects and status within their organisations had been harmed”.

The survey found that there was a feeling that they should receive more acknowledgement or some financial recompense for the loss that they had suffered or opportunities that they had given up or lost. It also found a considerable degree of frustration at the slow pace of the trial and the lack of communication to them about what was happening.

However somewhat surprisingly we are told that “*All but one juror still firmly supported jury service... considerable concern was expressed about the possible removal of the right to jury trial for long or complex trials*”.

²⁵ supra R Wright J.F.C. 179

²⁶ S Lloyd Bostock supra

²⁷ referred to in Juror Competence in serious frauds since Roskill: a research based assessment Journal of Financial Crime 2003 T Honess M Levi & E Charman

²⁸ Supra

Notwithstanding this admirable dedication by those unfortunate eleven and the fact that a case lasting so long is almost beyond exceptional, the sufferings of juror members even in trials lasting just a month or so should not be overlooked. It is unfortunate that the length of modern trials and the resultant high number of applications for excusal from educated and professional people excludes those who are likely to have most to offer in a way in which in earlier times it did not.

Some, such as Auld LJ, have argued for a reduction of the numbers of people who are able to obtain blanket excusal from jury service as a way of obtaining better juries. But it is not clear that this adequately respects the difficulties that many of the most successful and educated members of society would have in committing to long jury trials.

It is argued that the time has come for there to be an upper limit of estimated time beyond which jurors will not be required to serve.

Alternatives to Jury Trial

The problem with dispensing with jury trial is the need to replace it with something else. The following options are most often suggested:

1. Trial by judge alone;

Trial by judge alone would be perfectly possible. Judges frequently rule on complex matters of fact and law in civil matters both here and in the UK. They do not experience difficulty in doing this and it is quite standard. Academically this would be a perfectly acceptable solution. The Diplock Courts in Northern Ireland were originally very controversial but have attained a significant degree of respect, as time has passed, for their fairness.

Moreover, section 43 of the (UK) Criminal Justice Act 2003 allows the prosecution to apply for a judge only trial. The trial judge can accede to the request with the consent of the Lord Chief Justice where the complexity or length of the trial is such that the trial is likely to be “*so burdensome to the members of a jury hearing the trial*” after having regard to those measures which could be taken to reduce the complexity or length.

However, in terms of public perception, there are still difficulties. The judge may be thought of as a state servant however inaccurate this is. To say of someone that he has acted as “judge and jury” is to accuse that person of impartiality in popular parlance. It is highly significant that the government has not yet had the courage of conviction to bring section 43 above into force.

Further some of those judges who responded to the Julian study thought it, in the words of one, an “*intolerable burden*” and another expressed a concern that the civil approach of getting to the key questions quickly was not appropriate to the criminal process.²⁹ Reference was also made to the practical problem of ruling on the non-admissibility of evidence pre-trial and that potentially colouring one’s mind in the trial itself.

Auld LJ made light of these concerns saying that it was a judicial luxury not to have to deal with matters of fact in criminal cases.³⁰ He was however not fully persuaded and finally decided that a Fraud Trials Tribunal would be preferable.

It is submitted that there is no logical reason why a judge only system could not work in respect of serious fraud but that from a public perception perspective it might be unacceptable and that other options thus be explored.

2. Trial by a panel of judges;

²⁹ Supra Crim.L.R. 762-764

³⁰ Auld Review Chapter 5 para 188

Auld LJ noted no support for this as a possibility and, like the Roskill Committee, referred to the extra expense that such a system would entail. It would also be particularly difficult on the Isle of Man owing to the small number of deemsters. If it were enacted then a lot of acting deemsters would be required.

3. A Fraud Trials Tribunal (i.e. judge and panel of two lay experts)

This was the proposal suggested by Lord Roskill and Auld LJ. The Auld review itself recommended that as an alternative to trial by jury *“in serious and complex fraud cases the nominated trial judge should be empowered to direct trial by himself sitting with lay members or, where the defendant has opted for trial by judge alone by himself alone”*³¹.

The judge would rule on the law and both he and the other members would rule on issues of fact. A majority verdict would suffice. The advantage is that business acumen and understanding can be brought to the bench. All members of the decision making body would be well equipped to understand the case and this would greatly assist with reducing the length of trial and producing a fair outcome.

On the Island, it might perhaps mean that a Deemster would be assisted by a member from an panel of persons nominated by the FSC or IPA for example and another person from a panel nominated by the Association of Corporate Service Providers (or possibly other local professional organisations depending on the type of crime alleged).

Such a proposal may well cause considerable disquiet however within the business community. On such a small island it may be difficult to find any expert who the defendant has not come across personally and then there is the possibility of commercial rivalries playing a part or the possibility of the defendant's reputation being a factor. The difficulty with having experts sitting in judgment over defendants is also that they may bring their own expertise to the bench in a way which diminishes the role of each side's expert witnesses. Since they are not open to cross-examination, this would not appear to be appropriate.

Another concern is whether co-defendants are charged not with fraud but with neglect. The academic literature is mainly concerned with fraud trials – hence the proposed name of the tribunal. It would be easy to imagine a situation where a corporate service provider employee was charged with neglecting his or her duties with the result that a commercial crime was perpetrated. This is particularly likely to happen on the Isle of Man as has already been discussed above.

Such persons may prefer to be tried by jury. It is quite possible that such persons would benefit from a jury's sympathy. It is argued that in line with the defence of jury clemency set out above, this is legitimate. The difficulty with a non-jury determination of guilt in neglect cases is that professionals may be too willing to impose a too high standard of care. Such cases may frequently involve ordinary people from the corporate service provider sector who have not benefited personally and have just been doing their job. Through relatively little or no fault of their own, they suddenly find themselves landed in the middle of a large commercial fraud trial.

It is therefore argued that ideally cases of neglect would not be left to a professional only tribunal. Such cases are fundamentally more suited to trial by jury, the ability of the jury to apply a common sense view of the law and the ability to ultimately determine what is the appropriate standard of care.

The Fraud Trials Tribunal appears to have promise but the objections above as to its composition and the extent of its remit are sound. It is therefore argued that the former objection could be overcome if the Tribunal was actually composed of a Deemster sitting with two advocates or two justices. These persons would be used to dealing with legal issues and yet also be seen to be impartial. They would give the decision a greater degree of legitimacy

³¹ Auld Review Chapter 5 para 206

than if the Deemster made the ruling alone. The latter objection could be dealt with if the remit of the Tribunal were ideally limited to matters involving fraud.

Possible changes to jury trial

It is often argued that minor changes to the jury trial system itself are all that is needed to make it more effective. Can these measures themselves obviate the need for a more fundamental change in the system?

The following three options are also occasionally mooted as major structural changes within the existing system:

1. Trial by a special jury i.e. juries experienced in the field in question;

One possibility would be to have a special jury. Such a jury would be composed of persons with particular qualifications. As the Auld review points out, these qualifications could be a *"wide experience of business and finance"* or alternatively, where appropriate, *"familiarity with medical and/or other scientific disciplines"*.³²

However both the Roskill committee and the Auld review rejected this as a possibility on the grounds that it would be difficult to empanel a jury of twelve such experts. That might not necessarily be such a problem on the Isle of Man where it is currently standard for there to be ordinarily seven jury members although it is frequently more in practice (up to a limit of twelve) in complex cases so as to guard against the potential loss of jurors mid-trial³³. Even so, the island is comparatively smaller and so it would be difficult to empanel a jury of persons with special expertise and one would run up against the same objections which would apply to the Fraud Trials Tribunal about these persons bringing their own expertise to the courtroom in a way which is not capable of being cross-examined. It is therefore submitted that special juries are not the answer.

2. Better presentation of the evidence

In those cases still tried by judge and jury Auld LJ refers to the importance of presenting the evidence in a structured way. This is very important. Juries should be given more of a lead in to what the case is all about before they are tasked with hearing oral evidence from witnesses. They clearly need to be aware of what nuances they are supposed to be looking out for at the outset. Otherwise it is as an American judge apparently once said³⁴ it is like *"telling jurors to watch a baseball game and decide who won without telling them what the rules are until the end of the game"*.

Auld LJ recommends that:

"the time has come for the judge to give the jury at the start of all cases a fuller introduction to their task as jurors than is presently conventional, including: the structure and practical features of a trial as it may affect them, a word or two about their own manner of working, for example note taking, early selection of the foreman and his role, asking questions, time and manner of deliberation etc. He should also given them an objective summary of the case and they questions that they are there to decide, supported with a written aid memoir. I have referred to this in chapter 10 as a "case and issues summary". The parties' advocates should prepare and agree the summary in draft before the trial (and be paid for doing so) for the judge's approval and used by him, them and the jury throughout the trial".

It is submitted that this would be of assistance to juries in their task.

³² Auld review Chapter 5 paragraph 185

³³ Section 24 Jury Act 1980

³⁴ Auld review chapter 11 paragraph 18

3. Reform of the summing up/verdict procedure at the end of trial.

Further the Auld review recommends:

*“The judge should no longer direct the jury on the law or sum up evidence in the detail that he now does...as to directions of law our present system is to burden the jury with often highly technical and detailed propositions of law – lots of them. Many are prolix and complicated, often subject to qualifications and in some instances barely comprehensible to criminal practitioners never mind those who may never have heard them before”.*³⁵

The New Zealand study showed that *“fundamental misunderstandings of the law emerged at the deliberation stage in 35 out of the 48 trials”*.³⁶ This is a staggering statistic and shows the present system is simply not working.

Both the Auld review and the Runciman Royal Commission argued that the judge should always give the jury a summary but not in the way that it is done now. It is submitted that this makes sense and that what would assist the jury more than anything is the Auld review's proposed introduction of a set of questions determined by the judge which the jury should work through in reaching their verdict. This would give their job a far greater degree of focus than is currently the case. It should help to reduce the number of irrelevant considerations that the jury take into account.

A flowchart of questions to be answered could be the end of the matter and juries could still continue to give a general verdict as they do now.

Alternatively juries could be required to present back to the court with answers to all of the questions. This is what was once known as a “Special Verdict”. The result of this would be that it would be perhaps harder (but not impossible) for a jury to return a perverse verdict. It would provide a publicly reasoned verdict so that the defendant could see what issues had been addressed in deciding whether to convict or acquit him and it would assist in criminal appeals because it would be possible to determine, to some degree, what factors had influenced the jury.

It is submitted that the question as to whether the jury is to return with a special or general verdict could well be left to the trial judge to determine. Whether the jury gives a special verdict or a general verdict, the following does appear clear:

*“...it would significantly reduce the scope for time consuming appeals to the court of appeal which routinely include complaints, rightly or wrongly, that the trial judge has summed up the evidence unfairly or commented on it in a manner unduly prejudicial to the defendant”*³⁷.

Recommendations

Although many commentators, anxious to persevere with the jury system, represent that juries understand the issues in any given case most of the time, it can also be deduced from the (albeit limited) evidence available that jurors frequently do not or cannot understand the case – certainly at quite the same level as a lawyer or expert would. This is quite understandable and stands to reason. Why should we expect a person who has no previous experience of financial matters and who may not in their everyday life be accustomed to working with their mind at all to be able to understand a complex fraud case to quite the same degree as a judge, lawyer or justice of the peace? If the sole

³⁵ Auld review chapter 11 paragraphs 44 et seq

³⁶ McEwan supra E&P 173

³⁷ Auld review chapter 11 paragraph 47

object is to apply the law to the facts then it is argued that the judge is the best person to be able to do this.

The fundamental change however between using a jury and using some other system which involves a judge alone or a judge sitting with justices, lawyers or experts in the field is that the arbiter of fact no longer comes to the matter with no background knowledge but comes armed with at least some understanding of financial structures. This has the benefit that less explanation is required. This may very well make trials shorter. The downside however is that the arbiter may become case hardened or take into account things which were not strictly given in evidence.

On balance though, it seems somewhat inappropriate, given the complexity of modern day commerce, to expect somebody with no knowledge whatsoever to be flung immediately into the fray of a commercial trial and be expected to understand the significance of what witnesses are saying virtually from day one – even with an introduction and the benefit of a case summary. There is a limit to the extent to which better case management and a more ordered presentation of evidence can overcome these problems.

It is therefore submitted that the advantages of removing complex trials from the hands of a jury are clear. Of the three main possibilities canvassed (trial by judge alone, trial by panel of judges, trial by a variety of constituted Fraud Trials Tribunals) the latter would seem to be most appropriate. However it is not believed that a Fraud Trials Tribunal with specialists in a particular field is appropriate for the Isle of Man given that the Island is such a small jurisdiction and it would be virtually impossible to select experts in the same field as the accused to serve on the tribunal who did not know the accused or had had dealings with him. Secondly the danger with appointing anyone remotely an expert is that they are likely to instinctively apply their own knowledge to the facts at hand rather than seek to adjudge the expert evidence given at trial.

It is therefore suggested that the preferable course would be for a Deemster to sit with two justices drawn from a list of justices willing to sit on potentially long cases or for Deemster to sit with the assistance of advocates. In either of these situations Deemster would continue to make all rulings of law but the two additional members of the tribunal would be able to contribute to the discussions on the facts.

Not all cases involving some kind of fraud will necessarily merit determination in this way. Many cases involve dishonesty and that, per se, does not necessarily make them too complex for a jury.

Conversely, it is suggested that there should be an upper limit on estimated length of trials beyond which trial by jury should not ordinarily be ordered. This upper limit should be of application to all cases and not just fraud cases because it is founded not upon the idea that long cases are too complicated for juries to understand but on the proposition that it is unfair on jurors to require attendance for such a long period of time. There are also concerns over the ability of juries to sustain interest over long periods. The exact period of time beyond which trial by jury should not be ordered is a matter for debate but one could envisage it being around two to four months. All such cases should be tried by judge and either two justices or two advocates. It is therefore suggested that the terminology of a "Fraud Trials Tribunal" be unnecessary in this jurisdiction and that this system of judge and assessors be merely incorporated into the general scheme of the Court of General Gaol Delivery.

It is therefore recommended that *all* criminal cases be subjected to an early determination as to whether they are suitable for jury trial or not. This determination could be carried out on committal by the High Bailiff's Court or by the trial Deemster himself very early in the life of the case in the Court of General Gaol Delivery. The latter route will of course have to be chosen where an Attorney General's Certificate is lodged indicating that the Attorney believes there is a case to answer pursuant to Section 2 of the Criminal Jurisdiction Act 1991.

Such determination would take into account the range of factors including the probable length of the trial, the representations of the parties, whether there are co-defendants charged who are only accused of neglect, whether any measures can reduce the length of the trial, whether the case can be severed against some defendants and the complexity of the issues involved.

For fraud cases, the fact that trial had an estimated length of longer than say³⁸, four weeks would be a factor in favour of trial by judge and assessors. The judge would however have regard to the other factors outlined above. This shorter period is justifiable by the fact that other factors militate towards non-jury trial in fraud cases and so it would be that only simple fraud cases would be heard by judge and jury.

Where trial by jury remains, its character should be changed: the trial judge should take control at a pre-hearing review with a view to obtaining a case and issue summary, a list of issues for determination by the jury and a timetable for calling of witnesses. The intention should be to introduce the case to the jury at the outset so that before any evidence is heard at all the jury should be made aware of what the case is about and what the points of issue between the two parties are. The trial judge should strongly encourage the prosecution and defence to agree issues and witnesses if at all possible.

During the trial, charts, tables, plans and diagrams should be used where possible in order to explain the point which either side wish to make. The trial judge should explain what is going on to the jury regularly and, perhaps, what it is that either side is trying to show.

At the conclusion of the case the trial judge will not sum up as he traditionally does but will instead seek to present the jury with a list of finally determined questions for answer (based on the list agreed pre-trial) and guidance on their answers to each question. The judge will also explain what each of these questions mean.

He will then either invite them to go through each of the questions in their reasoning process and produce a general verdict or alternatively invite them to return with a special verdict giving answers to the questions set out. This latter option could be used where the jury is still unsure what is the appropriate verdict after having gone through the questions.

It is submitted that this approach would give the jury more of a structured thought process and diminish the number of occasions on which the jury reaches the incorrect verdict through lack of comprehension.

Conclusion

Juries have a part to play in modern criminal justice. Their ability to see beyond the law and be sympathetic in appropriate cases is an ability which no judge or professional tribunal could ever hope to match. It is submitted that in general terms this ability is one which is beneficial and which is of long standing. It should continue in the modern world.

However it is also clear that juries are not necessarily able to understand the most complex cases. It is also unfair to require them to serve for long periods of time. For that reason, in commercial cases in particular, but also in other long cases it is submitted that the time has come for their replacement by a system of trial by judge and two assessors whether they be justices or advocates as set out above.

³⁸ The exact figures would need to be considered following consultation