Concern about the Use of Juries in Fraud Trials

During the past decade, the jury has been subjected to serious critical attack, not only from sections of the judiciary but also from the increasingly politically articulate police (Denning, 1982; Mark, 1973; Thompson, 1980). It has been alleged that, particularly in London, the extension of the jury franchise to the entire electorate has led to the moral pollution of jury panels, which consequently tend to favour acquittal more than they ought to do and more than they were wont to do. The general arguments about the acquittal rates of professional criminals are not relevant here (see Levi, 1981, Ch. IX, XII; Baldwin & McConville, 1979, 1981). However, it is worthy of note that recent English studies show that working-class people are slightly more disapproving than middle-class ones of commercial credit frauds, whether committed against private individuals or against large corporations (Levi, 1982, 1982a; Sparks, Genn, and Dodd, 1977). Even jurors with criminal records for theft cannot be assumed automatically to favour fraud, if one pursues the line of argument that 'crime' is what other people do. The question remains open.

Indeed, in my submission, it is important to preserve a healthy scepticism regarding some of the claims that are made about defects in the separate constituent parts of any criminal justic system. Such claims are found all too often to be a method of displacing attention from defects in the complainant's own conduct. This is not the place for an extended discussion of problems in the prosecution process (see Leigh, 1982; Levi, 1981; and Rider, 1980). However, let us take the all-too-common mode of preparing a case for trial in England.

One or two police officers of relatively junior rank have worked painstakingly and conscientiously upon an investigation

for a long time, often unguided by an experienced lawyer as to the strict relevance of any particular line of examination. The invention of the photocopier has been a mixed blessing, for it permits the easy copying of a mass (some might say morass) of documentation which, when the officers believe there is enough evidence to justify a charge, is conveyed to counsel. Although there is a very rough-and-ready concentration of complex cases among the Old Bailey Treasury Counsel, they are not necessarily fraud specialists by expertise or by inclination, and to set time aside to work continuously on a fraud case for weeks brings insufficient enjoyment or remuneration. Consequently, the documentation is not weeded out at the early stage when it ought to be: the temptation is to leave it to the pre-trial practice directions or even to the trial itself. By the time the case reaches the pre-trial review, possibly in front of an inexpert judge who has had insufficient time to examine the documents or the authorities upon which opposing counsel rely (for judges too operate on the cab-rank system), it has taken on a life of its own. All the documents are neatly bundled and numbered - possibly including all twelve copies for the jury - and there is further disincentive to carry out a drastic pruning (see R. v. Landy and others, [1981] 1 All ER 1172). Under circumstances such as these, and they are by no means untypical, is it any surprise that a jury would have difficulty in sorting the wheat from the chaff? Many prominent counsel and judges have expressed the view to me that some of their eminent colleagues have failed either to understand the case at all or to understand it until it was almost complete. If this is the case (and what motive would they have for lying?) then it may seem churlish to blame the jury for defects that occur in the investigation and prosecution systems. The tendency towards scapegoating is one that should be avoided wherever possible.

It should not be thought that concern about the role of the jury in fraud trials is restricted to 'right-wingers' who are obsessed more with 'order' than with 'law'. The British section of the International Commission of Jurists, Justice, has been asked to help in several fraud cases where the accused have claimed injustice at the hands of juries. In the case of Reginald Marks, a solicitor convicted of conspiracy to defraud, it was argued (unsuccessfully) before the European Commission on Human Rights that the complexity of the in-house dealings and the sheer volume of the evidence had overwhelmed the defence. Conspiracy charges particularly tend to lead to this phenomenon. Some professional advisers such as lawyers and accountants believe that if the judge and jury are not familiar with their work practices and lay parties profess to have relied on them, they face an enormous battle first to explain their work practices adequately and second to show that they operated them honestly.

It has not been alleged that 'common juries', that is, juries which approximate to a representative sample of the non-disqualified electorate, are too prone to acquit business criminals because they share their mores. Rather, objections to trial of frauds by common juries fall under four principal heads: corruptability, competence, cost, and length. It is arguable that these are inter-related. Jury trial may be lengthy and expensive because juries are incompetent. However, a priori, it is equally plausible that such trials may be lengthy and expensive because the prosecution preparation has been inadequate, because the trial judge has failed to narrow down the issues to be decided at the trial, or because (where Legal Aid exists), dilatory defence counsel have a financial interest in stringing out cases to the maximum. In order to permit consideration of these alternative explanations, an attempt will be made here to keep the four principal objections as separate analytically as possible.

Jury-tampering in fraud trials

There is nothing new about jury-tampering in England. Suspicions about the reasons for the acquittal of some prominent London villains precipitated the introduction of majority verdicts, despite complaints that this violated the principle of 'reasonable doubt'. One leading fraudster who worked with the Kray gang, Leslie Payne (1973) boasted in his autobiography about his well-developed techniques of jury-fixing, though somewhat intemperately, since soon afterwards, he was convicted by a jury of car-ringing charges. Recently, there appears to have been a boom in attempted corruption of jurors: between July 1981 and July 1982, no fewer than 12 trials at the London Central Criminal Court have been stopped because of jury-tampering or approaches to witnesses. This had led to a tightening-up of potential contact points between jurors and the public: jurors and witnesses often dined in the same court restaurant as defence lawyers and even defendants, if the latter were on bail! Moreover, juries are now out of sight of the public gallery, though this may make it harder for them to hear the evidence.

Since 1975, there have been four detected attempts to approach jurors in fraud trials in England. Three of these occurred towards the very end of the trial, after the defence had been apprised of the full strength of the prosecution case. In the first, a 55-day long-firm fraud trial which featured seven defendants represented by Queen's Counsel on legal aid, it was plain to those of us present that the principal defendants had a poor case. During the judge's summing up, the sister of one of the accused was observed speaking to one of the jurors, a fact that was relayed to the trial judge, who discharged the jury and ordered a re-trial (to be held in front of himself). In the second, a trial which had lasted 137 days and had cost £1,250,000

in legal fees was stopped when a juror was approached. In the third, two jurors in a tax fraud trial (this time at Croydon Crown Court in London) were offered independently £500 for "swinging it" for certain of the defendants while they were on their way home from court. (In view of the possibility of a 10-2 majority conviction, it is interesting to speculate about the possibility of a third offer.) To the best of my knowledge, none of these cases has resulted in a prosecution for attempting to pervert the course of justice. All of them led to equally expensive re-trials. Clearly, it is a matter for speculation whether there have been many successful attempts to 'fix' juries in fraud trials, but given the sums at stake, it would be naive to rule this out. It is alarming to note that an English TV Eye programme in November 1982 contained interviews with several members of a 'mock' jury who readily admitted that in certain types of cases, such as tax fraud, they would seriously consider, if not accept, an offer of £2,000 to bring in a "not guilty" verdict. When jurors go straight to a champagne reception after acquitting accused after a long fraud trial, suspicions may not be regarded as unreasonable. The expectation must be that such efforts will tend to increase rather than decrease in future.

In some cases, jurors may even be infected with the spirit of fraud. For instance, in 1981, two jurors who had been trying a fraud case were convicted of making false claims for separate travel to the court, when in fact they had travelled together!

The competence of juries in fraud cases

> "It is rare in a working life to undergo a dream sequence of exquisite fantasy, but such has been the experience of one barrister seeking - as a preliminary to more complicated matters - to explain the inwardness of a cumulating non-participating second preference share to a manifestly hostile inspector of sewers, a lady with a bag of knitting, and several others whose gaze of rapt attention would have been more encouraging had they found it easier to read the oath.
>
> I am not sure that in the present condition of things, where it is generally only the more gross and palpable frauds that are prosecuted, that the jury causes much injustice in the end.....by the end of the trial, and by dint of repetition, and of repetition of repetition, the bulk of the jury no doubt obtain some understanding of the facts they are supposed to be trying. What is involved is a most profligate expenditure of time and money on the paper, speeches, and explanations adduced in striving to convey a glimmer to the darkest intelligence present."
>
> Morris Finer, Q.C. (1966)

The competence of juries to try complicated frauds has never been the source of spirited defence. At the highest, the argument takes the form that juries are not all that bad because they generally decide the case in the way that the judge would have done. In this context, the late Judge Morris Finer's remarks are particularly interesting. (It should be noted that they occurred well before the extension of the jury franchise and before the expansion in the number and length of fraud trials)

There is, alas, little sophisticated information regarding the ability of jurors to understand fraud cases. Because of their length, they would be very expensive for the jury simulation exercises which have been a fruitful source of

data on the jury, though during the late 1970s, IBM lawyers hired a marketing professor to bring into the courtroom six ordinary people who heard the case just as a jury did. The aim of this was to give the lawyers feedback during the trial about what was getting through to the jury and also to help any argument on appeal to the effect that the case was too complex for a jury to understand. Although IBM did win this particular civil antitrust suit, on the direction of the judge, confidential sources state that the findings were not very complimentary to the jury.

Elsewhere, reliable information is hard to find. Cornish (1971, 198) tells of one accountant who had been a juror in a fraud trial. The accountant had had to open proceedings in the jury room by giving his own explanation of the sheets of figures that were produced in evidence. He considered that nine of his fellows had been unable to follow this crucial information in any adequate fashion. In the course of my research, I spoke to several jurors who had been on fraud cases lasting from twelve to fifty-five days. One of them was a student of mine, who stated that his fellow jurors had been mystified by what I held to be an only moderately complex case lasting twelve days. He stated that with some difficulty, he had been able to understand most but not all of the evidence. The jury acquitted, because they could not be sure of guilt beyond all reasonable doubt. (I should add that he later obtained an upper-second class degree!) A distinguished academic colleague made the following observations on his experiences:

> "I was on the jury of two of these, and the similarities were rather striking. In the first place, both were rather complex, and the presentation of the evidence was so poor that I don't think any of the jurors understood it. I cannot claim to have understood it myself, because important

> pieces of the evidence seemed to be missing, the right questions were not asked (in my opinion) of the witnesses, and the final outcome was that both the accusers and the accused seemed equally crooked, but for us on the jury it was impossible to discover just precisely what kind of fraud had been committed by whom, or on whom. The only possible verdict therefore was not guilty; we would have preferred 'not proven' but of course that was impossible.
>
> While I didn't understand all of the evidence, I did understand some of it, and that was a great deal more than my jury members did. I though that even if the case had been properly brought and explained, most of them would not have understood a word, and it seems quite clear to me that an average jury, with an average I.Q., would not be capable of understanding the evidence or coming to a reasonable conclusion.....My fellow members seemed to be concerned mainly with whether a given witness or accused person made a good impression, looked as if he were reliable or truthful, etc., all of which are judgements which are clearly irrelevant, and are known not to be very reliable."

His conclusion was that if such cases were to go to a jury at all, it should only be to a jury that was both highly intelligent and had some background knowledge of commerce and accounting.

Two other persons, from less exalted spheres, expressed the same view about the incomprehensibility of the trial. These data are not representative in the statistical sense, and should not go wholly unquestioned. One English judge, for instance, has stated that some juries do appear to follow the case, the indicator of which is that they ask pertinent questions in notes passed to him during the trial. It was his opinion that the problem was less in the lengthy than in the shorter fraud trials, because by the end of a very long case, jurors came to understand it. (However, whether this understanding applied to their

evaluation of the early evidence remains moot). Even here, he stated that the understanding depended largely on whether the case under discussion related to matters (such as conveyancing) which were within the normal jury's experience. On balance, these limited examples do provide independent confirmation of police and judicial rhetoric about jury inadequacies, at least under the current system of trial in England. However, proper research clearly is desirable, and it is a matter of regret to author that the Contempt of Court Act 1981 prohibits the interviewing of jurors for academic research.

Prima facie, the issues facing a jury in even the most complicated of fraud trials are similar to those involved in other types of property crime. After examining the evidence, they have to decide whether or not each accused was dishonest. This is a point that has been put to me by a number of leading members of the English Bar, whose opinions I requested in the course of preparing this report. The matter is put nicely in the important judgment of the Court of Appeal (Criminal Division) in R. v. Landy and others, [1981] 1 All ER 1172, where Lawton L. J. stated (at p. 1181):

> "What the Crown had to prove was a conspiracy to defraud which is an agreement dishonestly to do something which will or may cause loss or prejudice to another. The offence is one of dishonesty. This is the all-important ingredient which must be stressed by the judge in his directions to the jury and must not be minimised in any way. There is always the danger that a jury may think that proof of an irregularity followed by a loss is proof of dishonesty. The dishonesty to be proved must be in the minds and the intentions of the defendants. What the reasonable man or the jurors themselves would have believed or intended in the circumstances in which the defendants found themselves is not what the jury have to decide; but what a reasonable

> man or they themselves would have believed or intended in similar circumstances may help them to decide what in fact individual defendants believed or intended. An assertion by a defendant that throughout a transaction he acted honestly does not have to be accepted but has to be weighed like any other piece of evidence. If that was the defendant's state of mind, or may have been, he is entitled to be acquitted. But if the jury, applying their own notions of what is dishonest and what is not, conclude that he could not have believed that he was acting honestly, then the element of dishonesty will have been established. What a jury must not do is to say to themselves: 'If we had been in his place we would have known we were acting dishonestly, so he must have known he was.' What they can say is: 'We are sure he was acting dishonestly because we can see no reason why a man of his intelligence and experience would not have appreciated, as right-minded people would have done, that what he was doing was dishonest!."

The subjective test of dishonesty has now been approved by the Court of Appeal in R. v. Ghosh, [1982] 2 All ER 689 in relation both to conspiracy to defraud and to theft. The practical problems of inferring dishonesty, however, tend to be greater in fraud cases than in other types of dishonesty, for two reasons. First, the facts and conduct from which dishonesty are to be inferred are more complex. And second, more importantly, the ambience in which these facts and conduct are located is almost wholly alien to the routine or even indirect knowledge of most jurors.

In many jurisdictions, for example, 'recklessness' may be involved in allegations of fraud. In the leading case of R. v. Caldwell, [1981], 1 All ER 961, Lord Diplock observed (at p. 966) that recklessness has

> "a meaning which surely includes not only deciding to ignore a risk of harmful consequences resulting from one's acts that one recognised as existing, but also failing to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was..... If there were nothing in the circumstances that ought to have drawn the attention of the ordinary prudent individual to the possibility of that kind of harmful consequence, the accused would not be described as 'reckless' in the natural meaning of that word for failing to address his mind to the possibility; nor, if the risk of the harmful consequences was so slight that the ordinary prudent individual on due consideration of the risk would not be deterred from treating it as negligible, could the accused be described as 'reckless' in its ordinary sense if, having considered the risk, he decided to ignore it."

Clearly, both the prosecution and defence can adduce evidence on the sorts of matters referred to as indicators of recklessness, but it cannot be denied that this is a more difficult task in some kinds of fraud than it is in driving offences, the subject of Caldwell. All jurors are either drivers or road users, and this makes it easier for them to visualise the situation to which the legal arguments and the evidence are addressed than is common in frauds. There is a danger of treating fraud as a homogeneous category of offences. Matters of social security fraud fall within the province of acts which are readily placed in context by ordinary jurors. Mail-order, conveyancing, carbon-paper, and trade directory frauds, though more complicated, are generally understandable also. In R. v. Greenstein [1976] 1 All ER 1, the Court of Appeal asserted that jurors could easily comprehend the mechanics of 'stagging' on the Stock Exchange, and this may be true. However, accounting frauds and corporate deeds of the kind commonly featured in Department of Trade Inspectors' Reports are a different matter. It may not

take the nose of a connoisseur to smell bad fish, but labyrinthine transactions carried out over a period of years, involving masses of documentation and concepts that few lawyers comprehend are in a different realm of understanding. It is here that due process of law and trial by jury can most rationally be questioned.

Acquittals in fraud trials

There has been a regrettable tendency in some quarters to view the acquittal rate as an index of the extent to which the jury 'is not doing its job'. This represents a profound misunderstanding of the function of the jury or indeed any other judicial tribunal. This function is not to rubber-stamp prosecutorial (which often means police) decision-making but to subject it to critical examination. We must all sympathise with investigators (as we do prosecutors!) when a case is acquitted which appears to us to have been adequately made out. Hence, it is legitimate for us to be concerned about acquittals. However, to call the jury (or judge) to account is not the same as to suggest that the institution is malfunctioning because the acquittal rate is 'too high'. How high is 'too high'?

Nevertheless, it is instructive to examine the acquittal rate in fraud cases to see what it tells us about how juries decide. Certainly, if willingness to convict is our criterion for the competence of a judgement, these acquittal rates provide little apparent cause for alarm. In none of the Commonwealth countries who responded to the questionnaire in time for inclusion here did the acquittal rate exceed one fifth (though sometimes it was impossible to tell whether the proportion was that of persons prosecuted or of not guilty pleas). In many cases, particularly where trial was without jury, the proportion of acquittals was much lower. In Singapore, for example, it was around 4 per cent. In England and Australia, the acquittal rate is higher. My research for the Royal Commission on Criminal Procedure (some of which is summarised in Table 1) found that almost a quarter of these prosecuted were found not guilty by the jury or on judicial direction.

Table 1

All fraud trials committed to the Central Criminal Court, London in 1977

Number of fraud trials	72	
Number of fraud trials with more than one accused	35	
Total number of accused persons	242	
Number pleading guilty to all charges	61	
Number pleading guilty to some but not all charges (all such pleas were accepted and no further proceedings were instituted)	53	
Number pleading not guilty to all charges	128	(53%)
Number of persons acquitted by jury	35	
Number of persons acquitted on direction of judge	10	
Number of persons whose convictions were quashed by the Court of Appeal (Criminal Division)	12	
Persons not proceeded against after notguilty plea	5	
Split verdict trials (i.e. those in which defendents were acquitted of some but not all charges)	43	
Persons acquitted by jury as a percentage of all those pleading not guilty	27.3%	
Persons acquitted by jury and judge, or whose convictions were quashed, as a percentage of those pleading not guilty	44.5%	
Persons found not guilty as a percentage of all those against whom proceedings were taken	23.6%	

Some further insight can be gleaned from examining what sort of people do get acquitted in fraud trials. Unfortunately, information is rather sparse here, the only research being directed specifically at long-firm frauds (that is, businesses that obtain large quantities of goods on credit for which they do not intend to pay). One reason for concern is that the 'Mr. Bigs' might be acquitted while the minnows were convicted. My research showed that this was not disproportionately the case. At the Old Bailey, 21.9 per cent of the alleged principals - those accused of having played a major part in the organization of the fraud or in the disposal of the goods - were acquitted, compared with 22.9 per cent of the non-principals, as a proportion of those pleading not guilty. (They were roughly equally likely to plead not guilty). Moreover, those acquitted (almost invariably of conspiracy to defraud) tended to have lighter criminal records than those convicted: 60 per cent of those acquitted had no previous record, compared with 27 per cent of those convicted.

One of the most interesting periods for examination was 1962-1972, when there was extensive organized crime involvement in long-firm fraud, one effect of which was to inflate the prior criminal records of those charged. Out of the 43 people acquitted at the Old Bailey during this period, 14 had played a minor role in frauds for which others were convicted: only two of these had previous convictions, both for very trivial offences. All nine of those acquitted after accusations of having played moderately serious roles in long-firm frauds had spent over a year in prison previously. Eight of them had been employed in transporting goods to and from the fraud's warehouse: a role which is associated often with that of the 'minder' put in to look after the organiser's interests. One may hazard the guess that - in the absence of knowledge of their previous convictions

- the jury took the view that none of them had the requisite 'guilty knowledge' of the fraudulent purpose of the business. (This is a view which may reasonably be regarded with scepticism). Finally, 14 out of the 20 alleged major role-players who were acquitted had no previous convictions, and of the remaining six, only two had spent more than a year in prison prior to their present charges.

In brief, the prior criminal records of those acquitted of long-firm fraud at the Old Bailey reveal them to be a fairly 'non-criminal' group, if one takes prior convictions as an index of criminality. However, to infer from these data that many long-firm fraudsters do not evade conviction is wholly invalid. The acquittal rate can only be a meaningful base from which to evaluate the avoidance of conviction if

(a) the police know the identities of all criminals;
(b) the police know all about the activities of 'criminals';
and (c) all criminals are prosecuted for all their alleged criminal activities.

In so far as commercial frauds are concerned, none of these criteria apply. First, part of the skill of the fraudster is his or her ability to conceal the fraudulent nature of the loss. Thus, a marine fraudster will create the appearance of an ordinary, accidental loss at sea; a long-firm fraudster will 'massage' his accounts, often in leaque with the liquidator, so that his asset and liability position looks more favourable than it is; the counterfeiter will merge the phoney stock with the genuine. Even if the fraud is detected by the victim, it has a low chance of being reported to the authorities. Consequently, the police (and other regulatory agencies) know only a small proportion of the commercial criminal population.

Second, since the rules of privacy and the relatively low priority given to commercial crime make 'target surveillance' of most fraudsters impossible, the control agencies do not know about all the activities of those whom they believe to be fraudsters. And third, compared with the routine prosecution of 'ordinary' criminals by the police whenever there is *prima facie* evidence of guilt (as seen by them), very much more thought is given before sophisticated frauds are taken to court. The likely cost of the trial, the seriousness of the offence (relative to other frauds), the possible damage to the reputation of the accused if prosecuted incorrectly, extradition and other legal difficulties, and the staleness of the case all influence the decision to prosecute, at least in England. One may question the rightness of some of these criteria: staleness often is engineered by alleged offenders precisely in order to benefit from the policy, and more legal initiative could be put into some cases which are not prosecuted (Leigh, 1982; Levi,1981) However, the differential prosecution policies do exist, and for all the above reasons, it is very misleading to utilise acquittals as the sole basis for discussing the adequacy of the court or prosecution system.

The importance of looking carefully at the data on acquittals is that if it turns out that the more dramatic cases are not the result of jury deliberation but rather are the result of judicial rulings, the case for changing the jury is weakened. (Unless the judge is merely protecting the accused from what he believes will be an incomprehending jury verdict.) Although I have been unable to get comparable data for jury trials of fraud in the United States, it is noteworthy that the acquittal rate in cases where the accused opts for trial by judge alone is higher than that which obtains in most of the Commonwealth. We may also note that if the accused bribes the

police or witnesses so that a prosecution does not come up to scratch, that is not the fault of the jury.

Let us take as an example the case of Sigmund Sperber, (a.k.a. George Pratten), a man whose ability to cross-fire cheques fraudulently has cost European banks nearly £3 million in the past few years. In 1958 he was sentenced to two months imprisonment, and in 1959 he was given five years' imprisonment for fraud in Belgium. After jumping bail there, he was apprehended in Italy and acquitted for fraud. He was extradited and served his Belgian sentence, but in 1969 was convicted *in absentia* in France, whence he had disappeared. He then became involved in a series of frauds in Europe. Among these was his activities in purchasing jewelry. Sperber would obtain jewelry in London on 30-day approval against post-dated cheques on London accounts. When the moment of payment came, other cheques drawn on a Dutch bank would be substituted. Those would take time to clear and so extend the period of credit. The Metropolitan Police finally caught up with Mr. Sperber and arrested him. The jewelry firm lost £250,000. When he was prosecuted for frauds against a Dutch bank and for obtaining jewelry by deception in Autumn 1981, the trial judge dismissed both charges. Although one of the defendants had admitted that there was fraud, he ruled that the Dutch case was outside the jurisdiction of the British courts (though if one follows the logic of Lord Diplock in Treacy v. D.P.P., [1971]1 All E.R. at p. 123, the point is an arguable one). He ruled also that the deception count relating to jewelry must be dismissed, since Sperber had argued that the loss would have been accounted for had the police not stepped in and made their arrests, thus preventing international cheques from being met. The police were blamed for causing the loss to the jewelry firm! In 1982 he was convicted for a fraud in perfume and sentenced to five

years' imprisonment. Plainly, it would have been inappropriate to blame the jury system for these acquittals. What seems to be needed here is rather the reform of substantive and procedural law, particularly with respect to jurisdiction.

In other recent cases, judges have dismissed conspiracy charges because, for instance, it has become clear during the course of the trial that a co-defendant was the dupe of the principal rather than a true conspirator. In the highly complex insurance fraud charges against Messrs. Moran and Walker, the trial judge ordered the dropping of some counts after there was such a level of disagreement between the expert witnesses on very technical issues that he thought it unsafe to leave the matters to the jury. (It is of interest that despite their acquittal, Mr.Moran has been expelled from Lloyds for gross professional misconduct, and Mr.Walker has been censured.) In the London and County Securities case, the trial judge ruled that because of the state of custom and practice in the City of London at the time, it was unsafe to leave to the jury the task of assessing whether or not the defendants had been dishonest in their 'window-dressing' of accounts. Some of these cases are discussed later, but it is questionable whether these acquittals would not have been just as likely to occur with trial by judge as with trial by jury.

Of the cases committed to the London Central Criminal Court in 1979 and 1980, only 18 defendants were acquitted by the jury in cases lasting longer than three weeks. In one income-tax case lasting 42 days and costing the taxpayers £655,000, the jury acquitted all 12 defendants. In two other trials of 1980 committals, the jury acquitted one person after 58 days and another after 17 days. (The first trial cost £148, 845.) Of the 1979 committals, two people were acquitted after 49 days, one after 21 days, and another after 37 days. In all of these cases except the income tax one, the jury convicted co-defendants.

These findings confirm those of my earlier study of long-firm fraud trials, namely that juries do exercise some discrimination between defendants when reaching their verdicts. There are relatively few occasions on which juries acquit all the defendants in a fraud trial. Where all the defendants are acquitted, it generally is the trial judge rather than the jury who takes the decision that, in effect, no crime has been committed within the jurisdiction of the courts. Of course, this does not mean that juries come to 'the right decision' in all cases. If, by 'the right decision' one means the conviction of those persons who are 'truly' guilty, then those who are most devious will evade conviction. However, it may be that they would evade conviction even if trial were by judge alone. The conviction of such persons can be assured only if lower standards of proof and/or greater scepticism are introduced into the adjudication decision.

The length and cost of fraud trials

Many Commonwealth countries, ranging in size from Belize to Australia, have expressed their deep concern over the time taken to try frauds and the costs of doing so. Again, we must consider the role of the jury in this, but it should be remembered that it is in the nature of some frauds that intensive and extensive examination of persons and of documents are required. Consequently, it is not surprising that some countries that do not have jury trial do have lengthy fraud trials.

The data that I have been able to collect in England give ample cause for concern. Taking all cases committed to the Old Bailey in 1977 (and tried mainly in 1978 and 1979), we may observe that the average length of contested conspiracy to defraud cases was five and a half working weeks, and that even the relatively simple fraud prosecutions taken out under the Theft Act 1968 lasted an average of more than three weeks. Indeed, one in five contested fraud trials lasted over six working weeks. This, of course, would mean relatively little if defendants usually pleaded guilty. However, only 47 per cent of those accused pleaded guilty to some or all of their charges. (It should be borne in mind also that very few cases are filtered out at Magistrates' Court level in England or in their equivalent in Commonwealth countries that responded to my questionnaire.)

Of the 1978 committals, there were four trials whose taxed costs exceeded £160,000 (two of which lasted almost 200 days). Contested commercial fraud trials committed in 1979 averaged 33 days in length and £111,000 in taxed costs. Those committed for trial in 1980 averaged 24.5 days in length and £103,000 in taxed costs. Out of all cases committed for trial at the London Central Criminal Court between 1978 and 1981 inclusive, only three contested commercial fraud cases cost less than £30,000 to try. There are no comparable data for other offences that

I have had the opportunity to collect, but it seems from inspection that frauds predominate among the lengthy and expensive trials. Although London tends to attract most of the long trials, they are by no means confined there. In 1982 alone, Cardiff, Exeter, Preston, and Winchester have all experienced fraud trials that have lasted longer than five weeks. As in the 1977 cases, these figures are explicable in relation to the understandable reluctance of those accused of fraud to plead guilty. Only 30 per cent of those committed for trial for fraud in 1979 pleaded guilty to some or all of their charges. The equivalent figure for 1980 is 41 per cent, again at the Old Bailey. Of the fraud cases prosecuted by the Director of Public Prosecutions in various parts of the country, which ended in the first eight months of 1982, 41 per cent of those accused pleaded guilty to some or all of their charges. Whether prosecuted by the Director or not, almost all of those who offered to plead guilty to some fraud counts were not proceeded against on other charges.

One may question the extent to which these figures could be expected to change as a result of the abolition of jury trial. It seems likely that most high-status defendants would prefer to take their chances and to plead not guilty in any event, since their reputations and financial future are at stake. However, what is certain is that with jury trials, the length of the cases makes them 'accident-prone'. I refer not only to jury-tampering discussed earlier, but to other factors. In 1981, a trial which had lasted two weeks was abandoned when two ladies on the jury got drunk at lunch-time and one of them began to caress the thigh of a male juror during the afternoon sitting! This cost many thousands of pounds in legal fees. In 1979, a trial that had cost almost £1 million and had lasted over 100 days was abandoned because of a prejudicial newspaper report which revealed that some of the defendants had had previous problems with the courts. (I do not know whether or

not the trial judge ordered discreet enquiries regarding the jurors' reading or hearing about the report in The Guardian, but if no-one had read or heard about it, it might not have been necessary to have a re-trial. Under such circumstances, it would have been irrational for the Court of Appeal to have overturned any guilty verdict.) This trial, like those involving alleged jury-tampering, led to greatly expensive retrials.

Other difficulties arise. Clerks to the Court generally try to ascertain in advance whether or not anyone on the jury has booked their holidays within the estimated length of the trial, but since fraud trials have a habit of exceeding these estimates, this can create problems. If a juror falls ill in the early stages of a trial, the trial is often held up until he or she recovers, since who knows what other misfortunes will occur during the remainder of the case? (Jurors who are excused for some reason towards the end of a long trial often display distress at having dropped out at the last moment.) A multitude of domestic difficulties can crop up in the course of a long trial, all of which need sensitive handling by the Courts Administrator. There is no system of 'shadow' or 'alternate' jurors, as in the United States, who could take over the place of any juror who falls out. It is not suggested that these problems are the exclusive prerogative of fraud trials, but frauds do predominate among the sorts of alleged offences that lead to lengthy trials. (They are not confined to juries. I know of at least one case where the trial judge died towards the end of a very lengthy case.) In some instances, it has been alleged that the judge and prosecutor were influenced to accept a plea of guilty on a minor charge because of the prospective strain upon a jury of sitting for six months or so. The danger is that these strains will deter prosecutions that ought to be brought in the public interest.

An important contributory factor in the length of fraud trials is the inability to obtain substantial pre-trial agreement on legal principles or evidentiary matters. This is not a problem that is confined to England. It arises equally in, for example, Australia and Singapore. However, it is a problem that is particularly acute in England. Two examples will illustrate the issues. In both cases, pre-trial reviews were held, the aim of which is to give the opportunity for all parties and the trial judge to reach agreement as far as the counsel found this consistent with their responsibility to their clients.

(1) The allegation was that there was a conspiracy between a company and several individuals employed within that company to defraud customers throughout the world of monies estimated at £2½ million. There had been an extensive enquiry by Department of Trade Inspectors and, in the event, a prosecution was instituted. The case involved 60 prosecution witnesses, 34,000 pages of exhibits, and the defence were given all the statements of evidence and exhibits 18 months before the trial. Although two pre-trial reviews were held, the defence disclosed no information concerning the matters which related to them, when the summons to parties were issued.

When the trial commenced, over half the time spent in court was concerned with discussion and argument related to defence objections and submissions as to the admissibility of oral and documentary evidence, all of which submissions were made in court without prior notice to the prosecution. The following are examples of these:

(a) The defence objected to the calling of eight witnesses on the grounds that the evidence they were to give relating to the procedures adopted by the defendants in different

offices within the United Kingdom was *"so far removed from the charges as to render them inadmissible."* Many of the witnesses had travelled the length of England to give evidence. One had travelled from South-East Asia solely in order to give the above evidence. In each case, the defence objection was made as the witness stepped into the witness box. (The defence objections were upheld in two out of eight cases, but not in the Asian case).

(b) A week after the case had started, the defence objected to the generality of the conspiracy charges and asked for further and better particulars. These objections, reasonably enough in my view, led to the deletion of the names of five directors from the charge.

(c) The defence made dozens of exhibits the object of requests against admissibility. Each objection was made in court as the exhibit was about to be proved and without prior notice. The consequence was that about five per cent of the documentary evidence was excluded, which had a significant effect on the prosecution case. As each defence submission relating to documentary evidence was successful, those exhibits were removed from the bound copies in the possession of the jury. At an early stage, the defence were successful in procuring the removal of a particularly damning piece of evidence which was removed from the jury's copies. However, although the document had not been referred to in evidence, one alert member of the jury had spotted it, had realized its importance, and had noted its contents.

During the jury deliberations, this note was discussed by the jury who asked the judge if they could examine the exhibit. As a result of this, the judge ordered a re-trial, the first trial having cost approximately £125,000. Moreover, the procedure meant that at the end of each day on which objections were successful, numerous schedules had to be reconstituted, numbered, copied and rebound by the following morning, causing immense strain to those involved.

(2) The allegation related to a building fraud. There were 1,400 complainants. It was intended to call 243 witnesses. There were 1,189 exhibits and 2,000 pages of documents, all of which had to be copied in multiples for the jury. 12 witnesses had travelled already from the other end of England to give evidence. The defence had not replied to the request for agreement on admissions before the trial. On the second day of the trial, the accused pleaded guilty.

All of these (along with motions for severance of counts) were issues that ought to have been raised at pre-trial reviews. There was no question of there having been insufficient notice (at least in objective terms: the date that the papers actually were read by leading counsel is a different matter). Their effect was not only a massive inflation of costs, but also vast inconvenience to jurors, witnesses, and to officers in charge

of the case. Even had the failure of defence counsel to make evidentiary submissions at the pre-trial review not led to the inclusion of the offending evidence and thus to the re-trial, the procedure would have been objectionable.

The tendency has been for these matters to be responded to by exhortation rather than by structural reform. Like similar exhortations to judges to reduce their sentences, these have not been very effective. Lord Elwyn Jones, who was Lord Chancellor during the Labour Government of 1974-1979, has observed that despite his efforts to speed up and to simplify fraud trials, they increased in duration by ten per cent per annum during his period of office.

On May 17, 1980 Sir Michael Havers responded to concern about fraud cases by urging judges to keep their summings-up as 'short as possible' by recommending that courts should sit for the entire length of the day, and by suggesting that the number of defendants should be reduced so that only the 'real villains' in conspiracies to defraud should be charged. However, much as one may sympathise with the pragmatism behind those suggestions, they raise certain dangers for fraud prosecution policies.

Judges who give brief summings up may find that if they fail to give due weight to defence arguments, convictions will be

overturned by the Court of Appeal. (Though lengthy summings up also present that danger. What is needed is more penetrating thought given to this crucial stage of the trial process). If sittings are longer and unbroken, the primarily working-class, inexpert jurors may find even more difficulty in maintaining their concentration than they do at present. Those who are charged undoubtedly will seek to case the blame for the fraud upon those——allegedly on the margins——who are not charged. Defendants will claim that the apparently innocent driver is the real "Mr. Big" who had hoodwinked not only them, the poor naive unwitting agents of his schemes, but also the prosecution. The very fact that there is so little apparent connection between him and the company's misdeeds is proof of the depth of his cunning! This is a risky strategy, since it entails the prospect of a longer sentence from the judge if it does not bring an acquittal. However, the prospects of its use are clear. Still worse, the suggestion opens up all sorts of possibilities for police corruption in exchange for downplaying the apparent role in the crime of the particular individual. Finally, there is the ethical issue. Why should someone obtain *de facto* immunity from prosecution simply because he is a minor co-defendant rather than a minor criminal acting alone? Perhaps we ought not to prosecute any minor offenders, if the seriousness of the offence rather than the desire to save money is the *rationale* (though one could argue that the non-prosecution of co-defendants simplifies the task

facing the jury).

A further risk is that in attempting to shorten the proceedings, judge and counsel resort to a verbal 'shorthand' which is understandable to them and, possibly, to the police and the accused, but is too abstract for the jury. I have referred already to my colleague's deprecation of the quality of counsel's speeches. Those comments apply *a fortiori* to the reactions of his fellow jurors.

In brief, existing reforms of procedure in England may have preserved the ritual at the expense of disregarding the substance of justice. There is no reason to suppose that any of the difficulties that historically have been experienced will be diminished in the future. On the contrary, as substantive and jurisdictional laws are tightened, as investigatory expertise (including the Commonwealth Fraud Office) increases, more complicated fraud cases involving foreign documentation ought increasingly to come to court if the rights of victims are to be protected. Given the issues that I have outlined, I shall review the major options for reforms that are needed to cope with them.

The Problems with Fraud Trials in some other Commonwealth Countries

The dangers of over-generalisation are borne out by the replies to the questions on judicial process sent out by the Commonwealth Secretariat. Some illustrations will suffice to show the variations in what constitutes the satisfactoriness of a judicial system. All 21 persons prosecuted for fraud in Vanuatu in 1980 and 1981 pleaded guilty. Had they chosen otherwise, they would have been tried in the Supreme Court before a judge sitting with two assessors, but no dissatisfaction was expressed (at least by the Public Prosecutor) with the trial system. In the Solomon Islands, where 60-70 frauds have been tried over the past three years, about half the accused plead not guilty but only 2 per cent are acquitted. The report to the Secretariat states that "these trials average one week and are usually fairly protracted due to various languages used and the need for interpreters". By contrast, no dissatisfaction is expressed by the Republic of Seychelles, despite the fact that the 45 cases in the last three years lasted an average of 3 months. (There, 9 out of 10 defendants are convicted.) In Ghana, where a Public Tribunal has been set up by the present Government to deal with economic crimes against the State, fraud trials last from months to years depending on their complexity, and considerable dissatisfaction with court procedures exists. In Hong Kong, which has experienced a boom in fraud, and where all but a few currency counterfeiting cases are tried either by a District Court judge alone or by a magistrate, there is no great dissatisfaction with the court process. (In Hong Kong, hundreds are prosecuted annually for fraud, and the acquittal rate is about one fifth of those prosecuted.) In short, 'satisfactoriness' is a subjective rather than an objective concept.

Of course, it may be the case that some cases remain unprosecuted because it is anticipated that the courts will be unable to cope with them. As I have noted, a high conviction rate can mean three quite separate things, depending on the circumstances: excessive prosecutorial caution, judicial and jury competency, or too great a readiness on the part of the judiciary and/or jury to accept the view of the prosecution.

Australia

In both criminal and civil trials, the use of the jury is in decline in Australia. In civil cases, some States of Australia have never used juries or abolished their use early this century, though in New South Wales, it is still an option for defamation and civil fraud. The rise in summary criminal trials in Australia has not yet been applied to commercial frauds. However, in New South Wales, an attempt was made in 1979 to propose trial of certain corporate crimes before the Supreme Court sitting without a jury. This proposal was defeated, after causing a storm of controversy, particularly in the Bar Association. (See the Supreme Court Summary Jurisdiction Crimes [Amendment] Act, 1979 No. 96).

Cost and competence appear to be the criteria upon which concern has been raised. Two cases in Victoria illustrate these themes. In 1980, Mr. Justice Beach presided over a trial known colloquially as the Holiday City fraud. It involved the sale and lease back of caravans. A member of the public would purchase a caravan (or rather, pay for one) and lease it back to the vendor to enable it to be placed at a caravan park where it would then be rented by tourists or holiday-makers. The unfortunate purchasers were always told, if they asked, that their caravan was in another State. In the end, the public was defrauded of some $1 million. The trial extended over a period of 4½ months. Some 111 witnesses gave evidence, and the trial manuscript ran to over 7,000 pages. More than 1,000 exhibits were tendered in evidence. The trial judge had this to say in his sentencing speech (R. v. Reid, Krantz, Ouseley, and Waugh, unreported, 23rd September, 1980):

> "I am appalled by the fact that if my calculations are correct, the financial cost to the community of achieving that end of justice has been little short of the one million dollar loss suffered by the victims of the fraud itself. That fact forces me to ask the question, can the community continue to afford the luxury of jury trials in cases of this nature or should some acceptable alternative be sought? I venture to suggest that had this trial been presided over by a Judge sitting alone or by a Judge assisted by one or more assessors with accounting expertise, the length of the trial would have been halved, if not reduced further, with a consequent saving of expenditure and court time, and in my opinion without causing injustice to the accused.....In my view, it is asking too much of members of the community to require them to sit on juries for months at a time while such matters are dealt with. It is also unacceptable that the community should be burdened with the colossal expenditure involved in such procedures."

Another recent Victorian case which aroused some controversy was the unreported case of R. v. Smart (Court of Criminal Appeal, 12 February, 1982). Smart was charged with 63 counts of fraud and allied offences, in relation to his handling of the monies of the Co-operative Farmers and Graziers Direct Meat Supply Ltd. I will not trouble readers with the modus operandi of the alleged fraud, but the judge directed acquittal on seven counts, and, after a trial lasting 73 days, Smart was convicted on all remaining counts save one, and sentenced to ten years' imprisonment. On appeal, the Court of Criminal Appeal held that, inter alia, the Crown had acted unfairly in presenting the accused on so many counts, as this was bound to have confused the jury, particularly regarding the admissibility of evidence on some charges but not on others. The Court directed a re-trial and made some useful suggestions about how that should be organised. However, the re-trial is expected to last 3-4 months,

and each trial costs approximately $750,000. Although the Court of Criminal Appeal did not state this explicitly, it is clear that the nature of the jury influenced the view it took of the fairness of the proceedings. In January 1982, the Victorian government was reported to be considering reducing the use of juries in some corporate fraud cases. The magazine Age had this to say about the proposed review of jury trial:

> "The jury system has acquired such a mystique in British law that we tend to equate it with justice itself, despite the fact that other European cultures do perfectly well without it. A mystique should not blind us to the practical effects of having matters of guilt and innocence determined by people who have not understood the case - even after a protracted trial costing us $1 million. It would be far better to have allegations of corporate crime decided by a judge and two specialist auditors who would be able to recognise quickly the critical points at issue and determine the verdict on them alone. A trial under such a system would not only be more professional, less laborious, and less outrageously expensive. It would also be fairer to all concerned."

In brief, although there are strong countervailing forces, it is clear that there is some prestigious support for the notion of abolishing jury trials for corporate offences in Australia.

New Zealand

New Zealand has been the subject of views on fraud trials similar to those expressed in Australia. The New Zealand Court of Appeal made the following observations with regard to the difficulties faced both by trial and appellate courts in dealing with frauds, in the case of R. v. James Edward Jeffs et al. (Court of Appeal, New Zealand, 28 April, 1978, unreported):

> "This brings us to the end of a task which has demanded our exclusive attention for a period of three months. As a Court of three judges we have enjoyed many advantages which were not shared by members of the jury who tried the case in the Supreme Court. Unlike the jury we have had constant access to the transcript of the evidence.....which comprises nearly 1,800 pages. On hearing the appeals, in order to follow counsels' arguments we had constantly to compare passages in the notes of evidence with material in the exhibits and to study these and ask for clarifying questions. These exhibits actually copied for the purpose of the appeal were contained in some eleven volumes each of about 500 pages. Even with the advantages of being able to peruse the notes of evidence and ask counsel questions and with easier access to the exhibits than was enjoyed by the jury, we found this process as difficult as it was time consuming. The jury's problems would have been immeasurably greater and we are very conscious of that fact. We add that one of the matters currently under study by the Royal Commission on the Courts is whether trial by jury is an effective machinery for trying the sort of issues that arose in the present case. Our own difficulties have left us with no doubt that this is a question deserving of full consideration. It may be that some way can be found of permitting trial by judge alone, either at the election of an accused person or by special order of the Court.

Without fuller information from New Zealand, it is difficult to tell how often cases such as this occur, but they are unlikely to be frequent. What may be relevant here (as in the Australian examples) is how often cases such as this are not prosecuted because of predicted difficulties at the trial stage. However, the message from the Court of Appeal is clear: given the difficulties experienced by eminent Justices of Appeal, it seems inconceivable that the jury could have given proper consideration to the issues in question.

Fraud trials without common juries: the American experience

In recent years, there has been burgeoning concern in the United States regarding the viability and desirability of jury trial in complex civil litigation. Hitherto, advocates of jury abolition have restricted their arguments to civil cases, probably because constitutionally, the sixth amendment guarantee of the right to jury trial in criminal cases has more authority than the seventh amendment guarantee of the right to jury trial in civil cases. For example, the sixth amendment is binding upon the states, whereas the seventh is not. (See Duncan v. Louisiana, 391 U.S. 145 [1968]; Bloom v. Illinois, 391 U.S. 194 [1968]; Melancon v. McKeithen, 345 F. Supp. 1025 E.D. La. [1972]; Davis v. Edwards, 409 U.S. 1098 [1973].) However, although the specific constitutional issues raised in American cases need not concern us here, it is arguable that if the unsuitability of juries for complex civil litigation is sufficient to override major constitutional obstacles in the United States, this strengthens the case for reform in Commonwealth jurisdictions which can decide the case on its instant merits rather than upon inflexible rules.

The essence of the American cases has been that under special circumstances, jury trial for complex civil commercial suits violates the fifth amendment right to due process of law. In a $900 million antitrust suit, Memorex Corp. v. IBM, No. 73-2238 (N.D.Cal. 11 August, 1978) revolved around the allegation that IBM had monopolised various submarkets within the computer industry. Among the issues that faced the jurors were involved computer technology and business principles. 87 witnesses testified at the trial, many of them experts, and over 2,300 exhibits were admitted into evidence. The trial lasted 96 days, and after a 19-day deliberation, the jury were unable to agree on

a verdict. The court then ordered a retrial before judge alone, tantamount to a trial in equity because the legal remedy was inadequate. Questioning the jury after its discharge, it was plain to the trial judge that the issues had not been understood: most of the jurors agreed that such trials should not be undertaken by juries.

In 1979, the Ninth Circuit of Appeals was asked to review a district court order denying a jury trial in In Re United States Financial Securities Litigation (609 F.2d 411, 9th Cir. 1979). This was a case where 18 securities fraud (civil) cases had been consolidated for trial. It involved 150,000 pages of deposition transcripts, over 10,000 trial exhibits, and the production of more than five million documents through discovery proceedings. The estimate was that the trial would last over two years. While expressing a general faith in the jury system, the district court judge had concluded that a jury could not try this exceptional case in a fair manner (75 F.R.D. 702, S.D.Cal. 1977). The Ninth Circuit Appellate Court disagreed, observing that juries could handle any case and ruling that complexity provided no grounds for an exception to the seventh amendment right to jury trial. The ruling gave no justification for the competence of the jury: it merely asserted the constitutional position.

The other leading U.S. case arose from an antitrust allegation. The plaintiffs asserted a world-wide conspiracy, involving almost 100 firms and lasting over 30 years. Nine years of discovery had generated more than 100,000 pages of deposition transcripts and over 20 million documents, many of which required translation from Japanese into English. The trial was predicted to last over a year. The district court found that "by any yardstick, this case is at least as large and complex as others in which jury demands have been struck"

The Supreme Court has yet to pronounce upon these conflicting appellate rulings. However, Chief Justice Warren Burger has complained that "the jury actually selected (for a big case) is rarely a true cross section.....Overwhelmingly, a great many of the people best qualified to sit on juries are those most eager to escape jury duty." (Time, 3 September, 1979). It seems clear that supporters of jury trial in cases of this kind must rely upon constitutional safeguards rather than upon rational argument. As the trial judge, Judge Lacey, observed in Van Dyk Research Corp. v. Xerox Corp., No. 75-419 (D.N.J. 15 August, 1978):

> Working together we have tried in approximately a month a case which originally we had all predicted would take at least three months to try. That we had tried the matter without a jury was a proximate cause of this. While in most cases capable lawyers and even a capable judge can try a case to a jury in the same time that it could be tried non-jury, there is no question but that a complex anti-trust case, involving thousands of documents, numerous depositions, and technical testimony.....is tried much faster by a bench than a jury trial. Depositions need not be read into the record. Instead, they can be marked as exhibits and submitted to the court along with each side's narrative analysis. Lengthy exhibits can be submitted with counsel simply highlighting appropriate portions, accompanying their submissions with a digest of the exhibits. The testimony of numerous experts can be shortened by submitting as exhibits their written curriculum vitae and abbreviating their testimony by introducing only so much by way of facts and data as is necessary.
>
> These and other trial refinements, feasible in a non-jury trial, though not in a jury trial, enable the former to be tried in a much shorter time than the latter."

The superiority of trial by judge alone, on grounds of understanding as well as speed, was asserted also In Re Boise Cascade

(Zenith Radio Corp. v. Matsushita Elec. Indus. Corp., 478 F.Supp. 889, E.D.Pa.[1979].) However, it concluded that the complexity of a case is not in itself a sufficient constitutionally permissible basis for refusing a litigant's right to jury trial.

This reasoning was followed in part by the Third Circuit Court of Appeals in In Re Japanese Electrical Products Antitrust Litigation (631 F.2nd. 1069, 3rd Cir. 1980). The Court did not rely for authority upon a footnote in the Supreme Court judgement in Ross v. Bernhard (396 U.S. 538 n. 10, 1970), which observed that in determining whether an issue was of a legal (rather than equitable) nature, and therefore was jury-triable, courts should consider "the practical abilities and limitations of juries". It argued as follows (p. 1084):

> "The law presumes that a jury will decide rationally; it will resolve each disputed issue on the basis of a fair and reasonable application of relevant legal rules.....We conclude that due process precludes trial by jury when a jury is unable to perform this task with a reasonable understanding of the evidence and legal rules."

It then remanded the case for further findings with respect to the issue of complexity. In short, it appears that appeals to dispense with the right to jury trial in complex civil cases are to be decided on a case-by-case basis. In Jones v. Orenstein, 73 F.R.D. 604 (S.D.N.Y. 1977), for example, the court determined that a jury was quite capable of dealing with a class action alleging the false disclosure of information in violation of securities laws, since the trial was expected to last only six to eight weeks and did not entail massive documentation. (See also Radial Lip Machine Inc. v. International Carbide Corporation, 76 F.R.D. 224 (N.D.Ill. 1977), for a similar result based on different arguments).

Securities Litigation (420 F.Supp. 99, N.D.Wash. 1976).

The danger of these arguments, as this report stresses, is that matters of politics will be reduced merely to matters of administration. It could be countered that antitrust cases involve issues such as the desirability of concentrating economic power in large corporations, and that securities cases involve contemporary moral standards of honesty. These matters are discussed elsewhere in this report. The fact remains that despite major constitutional hurdles, some U.S. courts have been impelled to accept the need for trying complex civil frauds without juries, even where one of the litigants opts for jury trial.