

1958

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*Cleveland Bar Association*

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### Recommended Citation

Justice Delayed Is Injustice, 7 Clev.-Marshall L. Rev. 118 (1958)

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## *Justice Delayed Is Injustice*

*Wendell A. Falsgraf\**

**A**LMOST 750 years ago the framers of Magna Carta recognized that delay of justice is tantamount to denial of justice, when they provided that: "To no one will we sell, to no one will we refuse or delay right or justice." The twenty-five Barons who affixed their seals to the Great Charter had in mind deliberate delay. But, whatever the cause, what does it avail a person to obtain a just determination of a claim in our courts, if it comes too late!

The problem of the law's delays is not simple, and the solutions are not easily apparent. There is no panacea. In truth there is too much misinformation and too little valid data available on the subject. This is why, recently, the Cleveland Bar Association created a committee of lawyers and laymen to study the problem objectively and to make recommendations, both interim and permanent in character, aimed at reaching an eventual solution.

Such a study must determine first what the extent of the delay in litigation is—the number of months elapsing between the filing of a case and its adjudication. Second, what the goal is—the number of months which properly should elapse. Third, why litigation is delayed beyond a reasonable time. Fourth, what can be done immediately and over a period of time in order to correct these conditions and make it possible to have cases tried within a proper period.

### **Period of Gestation for Litigation**

Personal injury cases now being tried in the Common Pleas Court of Cuyahoga County (Cleveland) Ohio were filed 30 to 32 months ago. This is the best index of the delay, and is accepted by the trial lawyers as the actual situation. Whether this is better or worse than other jurisdictions, who makes what charges as to the causes, and who is to blame, are not truly relevant to this problem. The fact is that there is an unreasonable delay, which, in the interest of justice must be reduced.

A questionnaire distributed to the members of the Cleveland

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Bar Association showed that the majority of the lawyers answering believed that uncontested divorce cases should be tried within four months; that contested divorce and contract cases should be tried within eight months; and that personal injury cases should be tried within eleven months.

Some delay, therefore, is not harmful, but on the contrary is considered beneficial. Generally speaking, delay in litigation beyond a year is harmful, and delay for a period of almost three years is deplorable, and eventually will lead to a breakdown of our judicial system.

### Suggested Causes of Delay

The increase in the number of automobiles on our roads, plus the constant increase in their horse power, plus traffic congestion, plus irresponsible drivers, in addition to a great increase in population, have brought about a phenomenal increase in tort cases. The number of judges has not increased proportionately. However, more than an increase in the number of judges is required in order to bring about a permanent solution.

A large segment of the trial bar believes that entirely too many cases are tried to juries, and point to the fact that, commencing with an experimental period during World War I, the British have generally abandoned the use of juries in civil cases. It appears to be the consensus of the British bar that as a result justice has been improved, delay in reaching cases for trial has been eliminated, and substantial economies have been effected.

In England the average time required to try a simple personal injury case in the county or high court is five hours. These would be cases of either motor accidents, or under the Factory Acts, where no interpretation of law is involved and where the medical reports have been agreed upon. If there is a disputed point of law or disputed medical reports, about seven and a half hours are required to try the case. A case of considerable complexity might be expected to take ten and at the most fifteen hours. The time required to try cases on circuit, otherwise known as "assizes," is about 35% less.

It is interesting to note that in England, where a minimum of cases are tried by jury and where the judiciary is appointed, contested cases involving personal injury may be tried between six to nine months after the commencement of the action. I have been advised by London barristers that whenever the barristers in a case are ready any case may be tried six months after filing.

In divorce actions uncontested cases may be tried in six weeks after the filing of the petition, and on an average are tried in from three to six months. In contested cases the trial takes place within from six months to a year after the filing of the petition.

The federal courts have provided an opportunity to compare the time consumed in the trial of a case before a jury and before a judge without a jury.

All claims under the Federal Tort Claims Act are tried before a judge. There is, therefore, no determination by counsel on either side as to whether or not a jury shall be waived. The average number of hours consumed in court for trial under the Federal Tort Claims Act is 3.9, and the average time in chambers is 2.3, making a total of 6.2 hours average per case.

In personal injury cases tried before a jury, the average number of hours consumed in court is 9.6, and in chambers 2.8, making a total of 12.4 hours per case. The average number of hours consumed in a personal injury case in which a jury has been waived is 5.4 in court, and 2.4 in chambers, making a total of 7.8 hours. Where all of the cases are tried without a jury, just half the time is required by the trial judge for the disposition of the cases as against the time required for cases tried to a jury.

It is safe to assume that jury trials in Ohio's Common Pleas Court on the average take more than twice as long to try as non-jury cases.

Approximately 10% of the personal injury cases filed in Cuyahoga County (Cleveland) Ohio go to trial. If 10,000 such cases are filed each year, there are about 1000 trials. A saving of six hours for each trial would double the number of cases tried by each judge, bring cases to trial earlier, and accelerate the settlement of the 90% of the cases which will be settled.

### **Lawyers' Responsibility for Delay**

Modern trial techniques employed by trial lawyers have materially lengthened the time required to try cases, particularly in personal injury cases. Not only is more time consumed on direct and cross-examination, particularly of expert witnesses, but frequently special apparatus is constructed in order to assist in explaining counsel's contentions. It is also generally admitted that more time is now being consumed in the voir dire than was customary in the past.

Some law offices are inadequately staffed to handle their

volume of cases. This means that cases are either passed or are placed upon the engaged-counsel list for protracted periods. The Common Pleas Court of Cuyahoga County (Cleveland) Ohio has sought to alleviate this situation by requiring that a law office have at least one trial lawyer for every 300 cases pending. The inadequately staffed offices maintain that it is impossible to correct the situation by hiring other trial lawyers, because their clients have selected the office expecting a particular trial lawyer to handle the cases. However, many large offices with numerous trial lawyers deny the validity of this contention.

The number of divorce cases has increased materially, and the number of these cases which are being contested also has increased. This is largely due to the fact that a long period of prosperity has increased the income and the assets of the husbands, so that controversies over division of property and the payment of alimony involve sums large enough to warrant the parties contesting the case. Most divorces are contested as the result of a dispute over property settlements rather than because of the desire of one of the parties to defeat the divorce.

The number of judges has not increased sufficiently to take care of the normal increase in litigation due to the increase in population and a more complex society, to say nothing of the increase in litigation due to tort cases and divorce actions.

The first part of the Cleveland Bar Committee Project, therefore, is to determine the extent of the increased volume of cases in each category and the effect of this increased volume on the congested docket. Increased volume alone is not always the answer. For example, the records will disclose that a very large number of cases were handled by the courts in Cuyahoga County (Cleveland) Ohio during the 1930's, but that a large part of the volume consisted of foreclosure actions which did not require much of the judges' time since they were handled principally by a referee and his staff.

### **Suggested Solutions**

Almost every lawyer, most newspapers and many laymen have views as to possible solutions. The most frequently mentioned are these:

Judges should open court promptly at 9:00 A. M.; should confine the morning and afternoon recesses to ten minutes; should confine the lunch period to one hour; should adjourn court at 4:30 P. M.; should work five and one-half days a week; and

should not take more than one month accumulated vacation. It also is argued that cases should be tried twelve months of the year.

It is easy and popular to say that if the judges worked diligently, there would be no congested docket. The facts do not bear this out. Indiligent judges constitute a very small minority of the bench, and their deficiencies are more than made up by the many conscientious judges who not only put in a full day in their court room but take their work home and give up their leisure hours.

The judges should be appointed by the governor under one of several plans for an appointed judiciary. The Ohio Bar Association is actively engaged in promoting an amendment to the Ohio Constitution to enable the adoption of the Missouri Plan.

The chief justice of the Ohio Common Pleas Court should either be appointed or elected as such, and should be given considerable power and authority over the judges and docket of the court.

The answers to the Cleveland Bar Association questionnaire showed that the trial lawyers favored pretrial 167 to 37; 177 against 49 thought that pretrial should be scheduled as soon as issues were made up; and 191 against 37 felt that after pretrial and immediately before trial, there should be a further attempt to settle.

There has been considerable confusion as to the purpose of pretrial. As originally conceived, pretrial was meant to obtain a clarification of the issues and a stipulation of as many pertinent facts as possible, thus reducing the number of witnesses and the time required to examine witnesses. However, many judges felt that pretrial was a settlement conference, and for that reason pretrials were scheduled shortly prior to the trial.

At the present time, the Cuyahoga County (Cleveland) Ohio Common Pleas Court attempts to schedule pretrial as closely as possible to the trial date. In the questionnaire distributed by the Cleveland Bar Association, 177 lawyers favored scheduling of pretrials sooner; perhaps, as soon as issues are made up. Only 49 voted against this proposal.

There are a number of lawyers who believe that a settlement conference should be scheduled as soon as issues are joined, in the belief that many cases will be settled then because they

have all of the elements for a quick settlement. These lawyers contend that little can be accomplished with a pretrial at this time, because neither side wishes to make stipulations that far ahead of the trial. By scheduling pretrial a month before trial, there is sufficient time to take depositions and to make final preparation in the event that certain matters are not stipulated.

It also has been suggested that there be a settlement conference immediately before the trial. When the lawyers and parties know that the trial is imminent, they are more inclined to make concessions. It appears to be the consensus of the trial lawyers that after a case has gone into a room for trial, the judge should not attempt to settle it. This procedure causes litigants and witnesses to wait around the court house, and it is not fair to them.

The Court should strictly enforce its rules limiting continuances (three are permitted in Ohio) by requiring that then the case be tried or dismissed. This would discourage a lawyer from filing an action in the hope of obtaining a nuisance settlement, and to a great extent would eliminate dilatory tactics on the part of some lawyers.

When the new Municipal Court Act for Cuyahoga County (Cleveland) Ohio went into effect on January 1, 1958, there was a total of 25 municipal judges in the County. The monetary jurisdictional limit of these courts now is \$5,000, with certain limited equity actions. The docket of the Municipal Court of Cleveland is up to date, and this court, without being overworked could handle a greater volume of cases. For many reasons, some of which are valid and many of which are invalid, lawyers often refuse to file actions in the Municipal Court. With the consolidation of all the Municipal Courts into the Common Pleas Court we would gain an additional 25 judges without any increase to the taxpayers in the cost of judicial administration.

This, of course, will require legislation by the state legislature, and for some reason a unified county court has been so bitterly opposed that it has received little legislative support. We can only surmise that the reason for this opposition is that some of the municipal judges prefer to run on a local basis rather than a county-wide one.

Another suggestion for interim relief has been that elderly lawyers should be appointed as referees. In this way, at a minimum cost to the taxpayers, a large number of cases could be heard by referees with, of course, the right of the parties to

appeal to a judge if dissatisfied with the referee's finding. When the congestion of the docket has been alleviated, the referee system is to cease. There are many elderly lawyers, with years of experience, who are semi-retired and who would be willing and glad to spend a part of a year hearing cases.

The congestion of our docket is not a condition which occurred last month or last year. It has been developing over a period of a quarter of a century, and has been becoming increasingly serious for that period of time. The wheels of justice move slowly, and the wheels of judicial reform move even more slowly. The public, the courts, and the lawyers are finally aroused, so that it is now possible to study this situation objectively, and to put into effect reforms in our judicial system which are long overdue. We anticipate that the Cleveland Bar Association Committee will, within the next six months, give us a program for judicial reform which will—in the not too distant future—insure timely justice.