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Court Calendar Congestion Causes and Cures

Aaron Jacobson*

“**E**XCESSIVE DELAY MAY RESULT in the denial of reparation for wrongs. It may force parties into unjust settlements. It involves the risk that some witnesses may die or become otherwise unavailable and the virtual certainty that the memories of others will become dim before the legal rights which are dependent upon their testimony can be resolved. *Prolonged and unjustified delay is the major weakness of our judicial systems of today.*”¹

Attention focused on court calendar delay² has reached its highest concentration in the history of the American judiciary. While delays are hardly new,³ lawyers today pale at the spectacle of jurisdictions laboring under multi-thousand case loads⁴ and delays measured in years.

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[*Editors' Note:* The author recently conducted a series of studies of court congestion in Cleveland, New York, Detroit and other cities, on which he wrote a notable series of articles in *The Cleveland News*. Those studies formed the basis for this blunt critique.]

¹ Proceedings of the (Ohio) Attorney General's Conference on Court Congestion and Delay in Litigation (1956) (Emphasis added).

² Delay, in the legal sense, is the interval between the time when a civil suit is started and the time of its disposition by the court. Because the judiciary had become acutely conscious of the statistical appearance of dockets from the standpoint of delay, some variations in the manner of measuring intervals may be noted. Where a court does not accept a lawsuit until the issues are joined, as in New York and New Jersey, the delay is measured from “at issue” to disposition, and a statistical advantage lies therein. All Federal District Courts and many state courts must accept the lawsuit when the plaintiff's petition is filed. Thereafter, while motions and/or demurrers are argued and determined, before the issues are made up, these courts are charged with it as a pending case. Hence the spread between filing and final disposition is longer and a statistical disadvantage is incurred. Still another method of measurement is found in the Circuit Courts of Wayne County (Detroit), Mich. While a plaintiff's petition may be started, it is given no numerical cognizance by the court until a note of issue is filed by the counsel going forward, and delay is measured from the note of issue date.

³ Vanderbilt, *Improving the Administration of Justice*, 26 *Univ. of Cinc. L. R.* 155 (1957).

⁴ Pending cases derive from actions in negligence, primarily, since virtually all jurisdictions troubled with delays lay the onus on the influx of the so-called personal injury litigation. These suits in tort make up three-quarters of the total civil work load of a court located in a metropolitan area today.

Criticisms comparable to the one quoted above are being directed not only to lawyers but also to the public.⁵ Terms such as *docket congestion*, *backlogs*, *logjams*, *slow justice* and the like have come into familiar general usage. Their popularization reflects the growing public awareness of—and concern with—the condition of many of our courts.⁶

The statement of the Attorney General's Conference (above) is a telling one from the standpoint of the litigant. His position is made entirely clear. Not so clear, however, are the positions of the bench and the bar. The issues may be laid down, as to them, in the form of two questions:

If delays are threats to the proper administration of justice, is it a fair statement that the very fact of congestion itself demonstrates a court's own shortcomings and its failure to keep the trust charged to it by the public?⁷

Furthermore, how much of the fault, if any, should be attributed to attorneys, viewed collectively through their bar associations?

To the first contention there are several rebuttals, such as these:

Undermanned courts.

Legislative penuriousness and, because of it, insufficiency of personnel.

Population growth and a commensurate rise in litigation.

Technological advance; the motorized community and higher incidence of accidents.

Stultifying procedural law.

Inflation, and through it, higher money standards, higher verdicts and public conditioning to them.

⁵ The Cleveland (O.) News, May 6, 1957. "Slow justice is the chronic ailment of the county's Common Pleas Courts today. Citizens seeking justice, particularly in our civil courts, must wait nearly three years for trial and up to five years from the time of their grievance."

⁶ As a further indication of this, a counting process has been developed by the Institute of Judicial Administration, which reports regularly on the status of delay in some 98 cooperating jurisdictions. In a public release dated Sept. 15, 1957, the Institute placed Chicago's Cook County Courts at the head of the list with 54 months delay between the at-issue stage and a jury verdict.

⁷ No deliberate intention is necessarily meant. Courts have inherited the traditional snail's pace, the inertia, the framework of adherence to precedent and *status quo*, which are factors that may help explain the resistance of courts to change and reform.

Statistical studies are of little use to a court that is attempting to explain away its calendar delays. Such studies actually would show that there has *not* been an appreciable rise in litigation over say, a 25-year period; that accidents have not increased commensurately with population growth; that technological advance usually carries with it a marked improvement in safety programming, such as traffic control devices, railroad grade separations, limited access freeways, and anti-accident requirements in jobs graded through state industrial commissions. Hundreds more could be mentioned.

Let us follow the seeming logic of one such study:⁸

For the year 1931, the multiple-judge court under inspection received by way of new filings 20,886 cases. It disposed of 21,187 over the same period. Its working strength was 15 judges.

For the year 1956—25 years later—the court received 13,738 new filings. It disposed of 11,464. Its bench strength was the same.

Strikingly enough, while the work load was actually decreasing by more than a third, the delay in 1956 was 33 months, against 18 months for 1931.

At least four significant clues emerge from this study.

ONE—The time consumed in a jury trial of a negligence suit was a day and a half, on the average, in 1931, and three times as much in 1956.

TWO—The stakes involved were inordinately higher. Insurers of motorists in Ohio reported losses of \$5,638,000 during 1933 as compensation for personal injury claims.⁹ The carriers reported a total of \$39,968,000 for 1955 as losses paid out in the same area of coverage. The increase is 700 per cent.¹⁰

THREE—Contributing directly to the high stakes are the higher limits of public liability insurance carried by motorists

⁸ Results of the study appeared in detail in *The Cleveland News* beginning May 6, 1957. It concerned the Cuyahoga County Common Pleas Court that serves a community of 1,600,000 persons. Delay in this court is 33 months, on the average, from filing to trial.

⁹ Annual reports, Ohio Department of Insurance, 1933 and 1955.

¹⁰ This eightfold increase is not accounted for by inflation alone. According to U. S. Department of Labor reports, the cost of living index for 1932 in the Cleveland area was 55.8. At the beginning of 1957, it was 120. The increase, inflation-wise, is hardly more than two-fold.

today, when compared to what was commonly carried in the early thirties.¹¹

FOUR—A new “breed” of lawyer tries negligence cases today.

The study demonstrated that many alleged influences external to the court had virtually no effect on the court’s calendar situation;¹² rather, the changes affecting calendar status were those occurring within the courtrooms themselves.

Among the lawyers, new types of specialists had evolved, both claimants’ counsel and counsel for insurance companies. Courtrooms became the arena for “big money” contests, each often involving tens and sometimes hundreds of thousands of dollars. The lawyer-specialists were painstakingly selective on *voir dire*, commonly introduced demonstrative evidence and new technics in presentation, used experts in all professions as witnesses, and were being confronted by them in cross-examination. Trials grew longer and more complex.

In this respect, certainly, the law was undergoing a marked evolution. Were the courts keeping pace with changes that were being demonstrated daily in the courtrooms? If not, cannot a significant part of calendar delay be traced directly to the failure of courts to do so?

There are numerous jurisdictions that *have* kept pace, and they bear a curious resemblance to each other, despite differences in statutory makeup; if for no other reason than that they *were* doing what was necessary in order to properly serve their respective communities.

One such characteristic is strong and able leadership in a chief judge. Even where no provision is made for a chief judge, the judges not infrequently delegate to one of their number powers of administration, discipline, rule-making and calendar control.

¹¹ The Ohio State Bureau of Motor Vehicles estimates that some 90 per cent of auto owners now carry so-called public liability insurance coverage, as against 40 per cent in the 1930’s. The amount of such coverage popularly carried 20 to 25 years ago was \$5,000 maximum for a single injury or death, and \$10,000 maximum for two or more injured or killed in a single accident. Today, the popular limits of coverage are \$20,000—\$40,000 and \$50,000—\$100,000. In addition, commercial and industrial firms commonly carry as much as one-and-three-million-dollar liability coverages on agents and servants who drive within the scope of their employment. Such policy limits have set up the “high stakes.”

¹² In the city of Cleveland, for example, while the number of persons injured in vehicular accidents was increasing only 36 per cent in comparing the years 1934 and 1955, the number of family units was rising 53 per cent and the number of vehicles on the roads was going up 117 per cent.

Such is the story of the Wayne County, Michigan, Circuit Courts, where 18 judges serve the metropolitan area of Detroit and an excess of 2,500,000 persons.¹³ For 29 consecutive years, that court enjoyed the leadership and guidance of Judge Ira W. Jayne, now retired. His tenure as executive judge was renewed each year by his colleagues and not by elective mandate or statutory authority. To insure self-discipline, the court uses a "house detective" system, under which the jurists submit themselves to attendance checks during the working day and, in addition, submit to the executive judge daily reports on work completed and time spent.¹⁴ Judge Jayne is credited with first introducing modern pre-trial methods in his court in 1949. Implementing this is an early discovery and admission conference, which takes place shortly after counsel files the note of issue. The court obtains control and speeds the lawsuit toward preparation for trial, with the interval between the early and the later pre-trial used by counsel in preparation of the suit.¹⁵

The Ohio cities of Toledo, Youngstown and Cincinnati, all faced with intense problems of calendar delay, have instituted the separate trial calendar system and are reporting notable success through it.¹⁶ The system pinpoints responsibility; it eliminates the time-wasting procedures of one judge hearing motions, a second conducting the pre-trial, and a third trying the lawsuit.

In New Jersey the revolt against undue delay in antiquated courts resulted in the widely-reported revolution in judicial administration under the aegis of the late Chief Justice Arthur T. Vanderbilt.

In New York, some of whose courts were once called the worst clogged in the country,¹⁷ the importance of administrative

¹³ Last year, 19,400 new cases of all kinds were started in this Circuit Court. Total dispositions were 19,697. The average work-performance was 1,094 cases per judge. Longest delay, in the jury law docket, is 15 to 17 months, on the average. The separate chancery docket is current, as is the non-jury law docket.

¹⁴ A similar system is now in use in the Supreme Courts of New York, Manhattan Department, and is administered by the Calendar Judge.

¹⁵ In 1956, 486 jury cases and 286 non-jury cases were settled and dismissed before the cases were three months old, as a result of the admission and discovery conference. The later pre-trial accounted for 1,179 jury cases and 3,468 non-jury cases, including contested divorce suits.

¹⁶ This system assigns all new cases, in rotation, to the sitting judges, as soon as they are filed. Each judge has his own calendar and the responsibility for disposition of it. He hears all intermediary proceedings, conducts his own pretrial and tries his own cases.

¹⁷ Bar Bulletin, New York County Lawyers Association, March, 1954, pg. 209.

assistance to the courts is being effectively demonstrated through the Judicial Conference.¹⁸ Reforms recommended by the Conference have brought about an almost spectacular change in the Supreme Courts of Manhattan, where calendar delay two years ago reached 45 months. It has been cut to 23 months at this writing.

Jurists, especially those carrying elective mandates, too often are uneasy when confronted with reform that increases their exposure. It is the experience of this writer that some judges privately fret over changes that invoke discipline upon the lawyers practicing in their courts. They have good reason for such anxiety, as will be shown shortly. Invariably, when a court sets out to abolish delays, one of the first and critical targets are the practices of counsel in the court.¹⁹

The role of the bar in this regard was once characterized by Chief Justice Vanderbilt in these terms:

“By this time it was obvious beyond any doubt that if court revision were to come in New Jersey, it would come not as a result of any assistance from the bench or bar but because the people willed it. True, two or three judges did help within the limits that their judicial office permitted. True, a dozen or so patriotic lawyers furnished necessary leadership. But by and large the movement for constitutional revision in New Jersey was a grass-roots movement. *Neither the state nor the county bar associations rendered any aid, but on the contrary most of them were in opposition.* Even among the delegates to the Constitutional Convention a majority of those who were judges and lawyers were opposed to the Judiciary Article . . . Yet when the Constitution was submitted to the people in 1947, it was adopted by a vote of three and a half to one.”²⁰

The anxiety of jurists over lawyer-discipline was mentioned earlier. Here is an actual instance of it.

In Cleveland, Ohio, while its Cleveland Bar Association takes cognizance of undue delay in the courts by the appointment of a special committee to investigate and to propose reforms, the

¹⁸ See the 3d Annual Report, The Judicial Conference of New York.

¹⁹ See, for example, New York's controversial “preference” rule, its “statement of readiness” rule, and its “impartial medical panel.” See, also, Detroit's rule on the passing of cases, and its “note of issue” rule. The separate trial calendar system (above) aims at ending procrastination of attorneys who fail to bring suits to issue, who pass them from one room to another, who may not settle at pre-trial because that judge will not try the law suit, etc.

²⁰ See footnote 17, above, pg. 210 (Emphasis added).

same bar group is now—and has been for many years—conducting its annual poll among members, who are asked for their opinions of incumbent judges seeking re-election and of new candidates for judicial posts.

To obtain bar indorsement, the candidate or judge must obtain an 80 per cent approval of the voting lawyers. Once approved, the candidate receives important support prior to elections. The poll results are publicized and featured prominently in the daily newspapers. The bar also advertises its approved candidates.

Thus, a judge or candidate who fails to obtain the indorsement is publicly disgraced. Among the poll questions are such as deal with the judges' honesty or integrity, his judicial ability and his judicial temperament.

The weight of this and similar polls on the judiciary cannot be over-estimated. Judicial objectivity, including the making of reforms governing lawyers' practices in the courts, and a feckless poll that inbreeds subjective and often petty considerations and whose net effect is a staying hand upon the courts, are hardly congruent in their directions.

Judicial reform comes easily to a court that ceases leaning on negative rationales in order to explain its delays, and turns rather to the impress of its public charge. As some courts have recognized, it ill becomes a court to provide an antiquated arena in which the most modern expressions of the law are to be demonstrated. The special problem of personal injury litigation, its high stakes and advanced technics must give rise to special solutions. Such solutions are available. Nor is experimentation with reform any seriously inhibiting kind of an evil when compared to the gravity of the public trust. If a court cannot turn to the bar for support, it should find support in other areas of the community. Certainly the growing awareness of the public of its problems is bound to provide part of that support. That it should not come generously and unselfishly from the bar is a disappointing and cynical commentary, charged as the bar is "To aid in and improve the administration of justice, civil and criminal, as an officer of the court and a minister of the law."²¹

²¹ "A Lawyer's Obligation," The Florida Bar, 1957.