DELAYS IN THE JUSTICE SYSTEM
CIVIL JURISDICTION

INTRODUCTION

That I have been asked to do a talk on this subject is due, I suspect, more to an unhappy series of coincidences than to any particular experience of mine with delay resolution or for that matter creation.

When asked by Dr. Barnett to sit on a Bar Sub-Committee I attended and spoke up rather loudly. This resulted in my being asked to represent Dr. Barnett on the **"Sub-Committee of the Justice Co-ordinating Council to Identify Clogs in the Justice System"** which incidentally is chaired by the Hon. Minister of Legal Affairs.

I cannot therefore claim full paternity for all the ideas in this paper and express indebtedness to those who sit on the said committees as well as those instrumental in the preparation of the following studies:

1. FINAL REPORT OF THE SUB-COMMITTEE OF THE CONSULTATIVE COMMITTEE OF BENCH AND BAR ON THE CRIMINAL JUSTICE SYSTEM (hereafter the Carey Report 1986).
2. REPORT OF THE REVIEW TEAM APPOINTED BY CABINET TO ADVISE ON SYSTEMS TO REDUCE ADMINISTRATIVE DELAYS IN THE ADMINISTRATION OF JUSTICE, June 1992 (Trinidad & Tobago). [hereafter T & T Report].
3. JAMAICAN COURT EFFICIENCY STUDY USAID/GOJ CARIBBEAN JUSTICE IMPROVEMENT PROJECT (1992)_ [hereafter USAID/GOJ Study]

4. **REPORT OF SPECIAL SUB-COMMITTEE OF JAMAICAN BAR ASSOCIATION TO CONSIDER THE PROBLEMS OF BACKLOG AND DELAY IN THE CIVIL JURISDICTION OF THE SUPREME COURT OF JUDICATURE OF JAMAICA (1994).** [hereafter Bar Report].

Before discussing the causes let alone the solution of Delay it would be useful to understand exactly what we are talking about. Those of us who practice at the Civil Bar know that matters take forever to make it to the trial list. Trials then take some time to be completed and the Backlog of cases is horrendous. In the Resident Magistrate's Court one gets the same impression.

Sometimes experience does not accord with statistics. The Economic and Social Survey 1992 tells us the following:

	Civil Mag.		
	1991	1992	(No figures for Supreme
Listed	25,691	22,927	Court Civil)
Disposed of	26,331	22,210	

The Statistical Year Book 1992 has similar figures for the Magistrate's Court and none for the Supreme Court. In the Appeal Court for 1990, 352 cases were filed, 90 disposed of and 245 of 430 settled.

The GOJ/USAID study considered this problem and stated:

> **"With the exception of the Trevor Hamilton Facilities Report, available studies on the Jamaican Court System provided little data to support their findings. For example, many people familiar with the courts cited delay**

as a significant problem in the courts, but no-one was able to provide anything more than anecdotal information on the extent to which delay actually exists." [p. 2].

The project team for that study therefore reviewed the rate of disposition of Civil cases in the Supreme Court over a particular period and concluded:

"The median or 50th percentile age from placement on the cause list to expected disposition date (the middle of the term) is 16 months; the 75th percentile was 21.6 months. These data suggest a level of delay that may begin to affect public perception of the timeliness of court operations.

"More alarming is the age of the pending caseload from the time the case is filed, rather than the time from placement on the cause list to expected disposition. The 50th percentile time from filing to expected disposition is 33.5 months, while the 75th percentile is 57.5 months. These data show that one quarter of all cases placed on the cause list take more than four and one-half years to be scheduled for trial. At the 75th percentile, attorneys are taking three years to ready the case and place it on the cause list (the difference between the 57.5 months from filing to trial and the 21.6 months from placement on the cause list to trial). Actual disposition times may be considerably longer, as it is reported that a large percentage of those cases

scheduled are not reached during the term." [p. 78].

CAUSES OF DELAY:

What therefore are the reasons for the long lapse in time between filing of action and determination of matter.

In the Court of Appeal the chief source of delay is the preparation of the Record of Appeal. It has been my experience that once the Record is settled a reasonably early date is obtained and thereafter it is disposed of reasonably, if not at all, too quickly. The Record is often late in being ready because Notes of Evidence and Judgment from the court below take a long time in preparation. If it is an Appeal from the Resident Magistrate's Court, it takes years to obtain the Magistrate's notes of evidence and judgment.

In the Supreme Court the causes may be itemised as follows:-

a) The Backlog of cases because any new case has to join the list. (Of course, the backlog itself will have resulted from the slow disposal of matters).

b) The fact that the present system of filing pleadings, Summons for Directions, placing on Cause List, is operated in a manner which gives no incentive to anyone to agree what can be agreed or to settle matters and therefore clear the list or otherwise shorten proceedings.

c) Administrative difficulties are also a factor. Chief among those is the operation of the Registry. Files cannot be located. It takes forever to obtain dates. Information is difficult to access. Letters are either not answered or

responses are late in coming. Formal Orders and Judgments in default take months to be executed.

d) The Attitude of Counsel is an important cause of delay. It seems that many of us at the Civil Bar do not see ourselves firstly as officers of the court and hence with a vested interest in getting the business of the court done. We have more important and perhaps lucrative things on our minds which involve chamber work back at the office. Three (3) days in court is therefore anathema and an adjournment is the best news we can receive.

Therefore many of us don't give matters the consideration they require before entering that court room. Documents are not agreed, pre-trial discovery not utilised sufficiently, witnesses are not prepared or contacted and the court is not given the type of assistance which could lead to a smoother flow of cases. It may be that the fusion of the profession has contributed to this attitude as the business of the court is not given the sort of focus it requires.

e) The judges are also to be blamed. In the civil court it is true that parties control the proceedings in the sense that if both agree to adjourn there is very little that can be done however a judicial attitude can make a world of difference. One need only cite the rather extreme example of a certain judge at the Revenue Court.

As far as the Resident Magistrate's Court is concerned the following causes may be identified:

a) Inadequate physical plant and staff over the years the Jurisdictional limit has been increased with no appreciable increase in complement or facility. The 1975 Economic and Social Survey tells us that in that year the magistrates were given power to try cases of robbery with aggravation, robbery with violence and offences under the Forgeries Act. In some parishes whenever the Circuit Court sits the magistrate has no place to preside or has to retire as in Annotto Bay up until recently to the police cafeteria.

b) Out of date methods of date fixing and listing.

c) Administrative problems in that the system of records and filing was designed for a previous era.

d) Late arrival of magistrates and staff.

e) Attitude of counsel and magistrate. This is particularly evident in some rural jurisdictions.

Sometimes the same magistrate does criminal and civil lists. The latter lists are not given priority so that adjournments are the order of the day. Civil trials are rare and it is more a battle of attrition to see which litigant will stop coming to court first. It is noteworthy however that a certain judicial attitude can make a difference, again we cite an extreme example at a certain court on East Street, Kingston.

SOLUTIONS:

Unfortunately, there is no magic wand. The approach to work of counsel, judicial staff and judge is itself a function of the conditions of work and the century old system we work in. And so, delay creates backlog which leads to negative attitudes and frustration which leads to further delay. A break in this chain needs to be made now as we simultaneously seek to dispose rapidly of new matters coming in while through a process of elimination we clear up in one way or another those pending matters in which litigants have lost interest.

1. IMPROVEMENT IN PLANT AND INFRASTRUCTURE:

The physical surrounding in which court and staff are expected to work is poor. Many magistrates have no working toilet facilities or running water in their chambers. There is no encouragement for staff or magistrate to turn up for work at 8:30 a.m. The condition of court rooms have much to be desired, heat, noise, inadequate seating applies to every court except possibly the Court of Appeal which I believe still has a functioning air conditioning unit. The Jamaican Court Efficiency Study (USAID/GOJ 1992) recommended the introduction of public address systems, typewriters, photocopy machines, ventilation, lighting, temperature control, facsimile machines and noise reduction in both to the Magistrate's and Supreme Court. All courts need more telephone lines. The Trinidad and Tobago Cabinet Review Team suggested that magistrates be assigned chauffeurs to enhance security and reduce

tedium. The 1986 Carey Report recommended better emoluments and conditions of service at all levels.

I will not spend much time on this aspect of the solution which really is a matter of money. We need better and more court rooms, better offices for staff, better facilities, more amenities and tools of the trade.

The money to do this on a scale which will impact on the problem is, I suspect, not shortly to be found and I will therefore turn to other aspects of the solution which may be tackled at this time.

2. AMENDMENT OF CIVIL PROCEDURE CODE AND CURRENT SYSTEM:

I believe far better use could be made of the Summons for Directions and appropriate amendments to our Rules may encourage this use. At the stage when pleadings are closed the Master should be able to identify the real issue between the parties and do one or all of the following:

a) Invite the agreement of documents and reports;

b) Invite exchange of documents and reports;

c) Invite negotiation towards settlement;

d) Refer the matter to a judge in Chambers if the matter turns upon a dispute of law;

e) Adjourn the Summons from day to day until those things are done.

The Master at this stage becomes a facilitator for settlement or speedy disposal of matters. A matter in which expert reports are agreed is that much shorter than one where they are not.

Properly read, I believe Sections 272 to 300 of the Code already give the Master those options.

With these considerations in mind, the Special Sub-Committee of the Jamaican Bar Association made the following recommendations:

1. That the Rules be amended to provide that on the hearing of the Summons for Directions, an Order must be made unless sufficient cause is shown for dispensing with such Orders:
   a) that each party file and deliver a List or Affidavit of Documents;
   b) that there be an exchange of the experts reports, diagrams, plans, etc. on which each party intends to rely;
   c) that documents at (a) be produced for inspection.
2. That as the Rules of the Code provide, the Master must consider all matters required to be considered with adjournments from time to time to enable compliance.
3. A practice direction should be issued to the effect that a Certificate of Readiness ought not to be filed by the attorney-at-law unless:
   a) all the Orders made on the Summons for Directions have been complied with by all parties or leave to proceed despite non-compliance is obtained;
   b) the party he represents is ready to proceed and he has so advised all other parties. A new form of

Certificate of Readiness is suggested and a copy is annexed hereto.

4. The creation of another post of Master so as to give additional or enhanced power to the master in dealing with the Summons for Directions so as to:

   a) Adjourn Summons for stated periods to compel parties to agree such directions, reports or facts as is possible. (See Sections 272A, 272C) CPC.

   b) To refer a matter to a judge in Chambers in the event one or other is being unreasonable on the question of such agreements or settlements or if there is some issue of law standing in the way of such settlement.

   c) To call for and examine such documentation and reports and to institute the process of Discovery and Interrogatories.

5. Prior to placing the matter on the Trial List, the party taking steps to proceed should file a Judge's Bundle and Bundle of Agreed Documents.

The introduction of the above should ensure that when a matter is on the trial list it is indeed ready for trial and that whatever may have been agreed is agreed and the issue for the court to determine is truly narrowed.

The Sub-Committee has also recommended the following further changes:

a) There be judicial specialisation utilising a panel of 4-5 Civil judges for two 2 terms out of 3.

b) Abolition or reduction of the Legal Vacation.

c) Matters before the Master be fixed by appointment for stated times in the day.

d) It is felt that the current system of mini-date fixing sessions cause hardship on Counsel and expert witnesses who have to reserve a three (3) week period for one matter. It is preferable if at the commencement of a term, a matter is fixed for a particular week.

e) Judicial Review process on the Model of the U.K. Ordor 53 be introduced as well as provision for hearing the civil matters by a single judge rather than the Full Court of three (3).

I should add as a footnote on this aspect that the idea of Alternate Dispute Resolution involving Mediation rather than Litigation is becoming popular in the U.S. and in England and the time may come when the Master is given power to refer a matter to an agency for Mediation.

3. <u>THE BACKLOG AND CASES IN THE PIPELINE:</u>

The suggestions at 2 will apply only to matters not yet on the Trial/Term List. The effect, if any, will therefore not be immediate.

It is my view that in order to obtain an immediate impact, steps need to be taken to ensure that except in rare cases a matter fixed for trial **NOW** is dealt with in one of four (4) ways only:-

a) Struck out

b) Removed from Cause List

c) Heard

d) Settled

To achieve this a practice Direction should be issued to the effect that if a matter comes on for trial within six (6) months of the Certificate of Readiness being filed an application for an adjournment will not be considered on the date of trial except for good and compelling reasons.

Further that a party issuing a Certificate of Readiness or a party served with a Certificate of Readiness who finds themselves unable to proceed should apply by Summons in Chambers or by Motion prior to the trial date, for leave to adjourn.

I believe also that fewer matters should be listed before a judge and therefore parties and Counsel will be less at risk of having cases they have prepared adjourned Not Reached.

No case should be adjourned not reached on Monday and the Registrar should instead advise the parties on Tuesday to which court a matter not reached by one judge has been re-assigned.

The Special Sub-Committee has recommended that the Registrar exercise her powers under Section 344(b) and start serving Notices and taking steps to remove from the list matters not brought on by attorneys. Perhaps a task force for this proposal can be formed.

4. ADMINISTRATIVE IMPROVEMENTS:

The USAID/GOJ study identified the present system of filing as a major cause for concern. It was felt that the total reliance on a single file which was required whenever any aspect of a matter was to be dealt with was impractical.

Computerisation was the ideal, but was felt to be not feasible for the Magistrate's Court as a short or medium term solution. A proper Card Indexing System along with an improved filing system was appropriate for both Resident Magistrate and Supreme Court. Thus, searches and queries could be dealt with without resort to the file or single Judgment Book. A colour code for files in the Supreme Court would also be an improvement. I understand that computerisation is presently underway in the Supreme Court and should be completed in another 2-3 months.

This study also recommended that trials be commenced earlier in the Supreme Court.

In the Resident Magistrate's court the recommendations were that:

a) The daily trial list be reduced and only firm trial dates fixed.

b) Pre-trial settlement conferences be introduced before the Magistrate. (Actually, the Resident Magistrate's Court Rules provide for something similar but is not often utilised).

c) Dates be set without appearances in court in the 8:30 a.m. to 10:00 a.m. period.

I believe such administrative changes will lead to greater despatch of matters. Additionally, we may consider as was recommended in the Trinidad & Tobago that:

a) Non-contested Divorces be done on Affidavit in Chambers by the Registrar without Judicial intervention.

b) Increasing the rate of interest on judgments so a debtor has less incentive to delay proceedings.

c) The abolition of the stage of Summons to Proceed and the assignment of the date for Assessment of Damages at the same time Judgment is entered.

d) In Chamber matters a short list be introduced for matters to be dealt with by Consent or for adjournments. (That is those matters are taken first).

e) As far as Appeals from the Court of Appeal are concerned the Carey Committee Report 1986 recommended that the Clerk of the Court be required to notify the Registrar of the Court of Appeal immediately an Appeal was filed. Improved typewriters and more typists were recommended. Both the Carey Report and the USAID/GOJ study recommended the appointment of Administrative officers and this has recently been done.

5. CHANGE OF ATTITUDE:

It is hoped that if the recommendations at 1 to 3 are implemented, a new and businesslike approach to the matter of Justice will be fostered. Nevertheless and whether or not they are implemented, I believe that if those of us who practice and preside

in the Civil courts resolve to turn over a new leaf, a dent may be made in the problem of delay.

CONCLUSION:

Clients do not necessarily want a battle in court. Tney seek a solution to their problems. If the system upon which we depend for a living does not provide that solution, they will go elsewhere to find it. Unlike the Criminal Court, there is nothing compelling about the methodology of solving civil disputes.

A client recently remarked - **"Mr. Batts, when this matter started I was 38 years old, I am now 43, by the time I get my money I will have grey hairs."** She was not complaining, just making an observation.

It brought home to me the real meaning of **DELAY**. Let us therefore as individuals and as a group improve the service we offer and the system we serve and make every effort not just to bring matters onto the Cause List, but to resolve matters by settlement, summary proceedings and only if necessary, by Trial, and then, to do so expeditiously.

DAVID BATTS
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