

Judgment Delayed is Justice Denied (2017)

(Keynote speech to the conference of the *Caribbean Association of Judicial Officers*, by Denys Barrow, 28 September 2017; Willemstad, Curacao)

1. The familiar pronouncement that justice is not a cloistered virtue, and so is not above criticism, was made in a contempt of court appeal by a Trinidad newspaper which had dared to criticize sentencing disparities in two similar cases. In that 1936 decision Lord Atkin said:¹

“... no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith ... the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.” (emphasis added)

2. Today, in some common law jurisdictions in the region, the freedom with which the judiciary is criticized would shock an observer from an earlier age. Instead of respectful, criticism is now bold and unforgiving. Ironically, some of these less-than-respectful criticisms can come from the most respectable of sources, including Bar Associations and members of the judiciary. This gives a gravity to such criticisms that makes it imperative that we, as judicial officers, address them.
3. It is that imperative which drives the choice, in making this presentation, to address the very unpleasant problem of excessive delay in delivering judgments, instead of seeking to deliver an inspiring address that leaves us feeling good about the truly valuable work we do and the undoubted sacrifices we make. It is that imperative which makes us grieve that earlier

¹ *Ambard v AG for Trinidad and Tobago* [1936] 1 All ER 704 at 709

this month one Bar Association saw fit to publicly declare their loss of confidence in their Chief Justice for failing to deliver judgments that were outstanding for between 2 and 5 years. This, we know, is not the first instance of a Chief Justice or judge in the region coming under threat of removal or pressure to resign for failure to deliver judgments.

4. As a gathering of judges, we are likely to see more deeply the other factors to be considered in assessing delay and look beyond the simple statistics of how many and for how long judgments have been outstanding. Especially in the case of a head of judiciary, factors such as the time and energy he has dedicated to hearing cases, to administrative matters, to system reforms, and to other initiatives and improvements will attract our greater attention and understanding. Delay is often more complex than the simple fact that it has taken too long for a judge to deliver. The resolution of a Bar Association will speak only to the delay, since that will be the sole focus of their meeting, but it must be understood that there is often a broader view.
5. Criticisms of delays made by the judiciary itself have been more measured but that restraint makes the problem of delays no less a problem. Recently, an experienced judge was quoted in a newspaper² as saying to an august gathering that the judiciary is inefficient. In his speech, the judge³ said:
“I think this is well known throughout ... [this country] that we have an inefficient judiciary. This is debated almost daily. The highest courts for our land [Caribbean Court of Justice] have criticized us repeatedly. I am not saying this as a criticism of our judiciary but as a realization that, for whatever reason it is inefficient ...”
6. The Caribbean Court of Justice, as that judge said, has often criticized delays in processing cases and delivering judgment in a number of countries; not just one or two. It is widely known that delay occurs at all stages of litigation; between filing and trial, between trial and judgment, between judgment and appeal and, starting all over again at the appellate

² *Barbados Today* 31st August 2017

³ Justice Carlisle Greaves

level, between filing, hearing and judgment. Purely as a reminder of how depressingly familiar is the syndrome of judicial delay, consider the very recent decision by the CCJ in **Smith v Selby** [2017] CCJ 13 (AJ)

7. The proceedings in this case, concerning whether the unmarried, “live wid” woman had succession rights, had started nine years earlier, on 16th April 2008 and interim orders limited to the burial of the deceased were made the following day. On 3rd July 2008, the contesting parties each having applied for administration of the estate of the deceased, the trial judge heard the parties on a preliminary point of law to determine whether the woman, Katrina, could be entitled to a grant of administration as spouse. More than two years later, the trial judge delivered his ruling, on 6th August 2010, declaring that Katrina was regarded by the relevant legislation as the spouse of the deceased. The brother of the deceased appealed against the ruling that Katrina could be regarded as the spouse. More than five years later, the Court of Appeal heard the appeal, on 14th January 2016. Just over one year later, it delivered Judgment, on 14th February 2017, reversing the decision that Katrina is the spouse of the deceased. Less than 6 months after Katrina appealed to the CCJ, on 1st September 2017, the CCJ gave its decision in her favour.
8. The almost-nine years it took to reach the stage of a judgment by the Court of Appeal, on a preliminary point of law, included three years of delay in the delivery of the two judgments. While still distressing, such delay is no longer shocking and certainly no longer surprising because we are aware of greater delays.

Causes

9. In *Justice Delayed is Justice Denied: Jamaica’s Duty to Deliver Timely Reserved Judgments and Written Reasons for Judgment*⁴ Professor Sha-Shana Crichton took a comprehensive look at the problem in the context of Jamaica, where some judgments have not been delivered for more than 10

⁴ Syracuse Journal of International Law and Commerce Volume 44:1 Fall 2016

years.⁵ That paper focused on delays in Jamaica but it clearly emerged that the problem of excessively delayed reserved judgments is familiar across common-law countries – well beyond the Caribbean. This reality, that they have company, may ease the misery of those jurisdictions in the region who have borne the brunt of the criticism, but that, of course, makes delay no less a misery. The shared misery, however, does enable the sharing of lessons learned and solutions that have worked elsewhere.

10. Crichton discusses the causes of delay in delivering judgments and they are well-known to this gathering and so need only brief mention, for context. Among the causes are inadequate financial resources, too few judges/overburdened judges, ineffective records management, voluminous documents filed by attorneys, complexity of cases, attorney delay, lack of specific time allocated for judges to write judgments, absence of judicial codes to provide guidance to judges on roles and duties, failure to discipline or remove judges, and judicial attitudes.

11. This summary of the causes of delay enables their separation into three types; the resources problems (financial, personnel and time), the systemic problems (how lawyers practice), and the performance problems (judges' delays). There is another problem that is revealed from comparing what takes place with judgment writing in civil law jurisdictions and in common law countries. As the Honourable Justice Wit of the CCJ has been known to ask: why do common law judges think they must write a judgment the length of a treatise? Speaking as a matter of impression and not scientific measurement, typically a first-instance common law judgment would run to between 10 to 20 pages; in contrast, a first-instance judgment in a Dutch court would run 5 to 10 pages. It is said that French judgments are even shorter, and those in the Court de Cassation are notoriously short.

12. It will take an extended conversation across Caribbean common law jurisdictions to change our conception of the 'natural' length of a judgment,

⁵ Id p 3

because that ‘feel’ for length is inherent, but it is a conversation that we must begin because the benefits of such a change are so obvious, and would be so far reaching. Consider how much more quickly a judge would both start and finish writing a judgment that he or she knows will be more like a memorandum than a chapter in a textbook. As a delay reduction mechanism, it may be that we need to institutionalize short judgments.

Solutions

13. In terms of tried and proved solutions, Professor Crichton identifies leadership and oversight by Chief Justices as a significant measure that has been used to combat delays in the production of judgments. She wrote:⁶

“Leadership by the Chief Justice is essential to an efficient judiciary. As head of the judiciary, the Chief Justice is empowered to implement policies and procedures to ensure that reserved judgments and written reasons for judgments are delivered within a reasonable time.”

14. Crichton referred to Canada, Zimbabwe and New Zealand as three common law countries where substantial elimination of backlog was achieved because of action by the respective Chief Justices. According to Crichton, two common factors were brought to bear in those jurisdictions. One was the encouragement of a judicial attitude of expediency, efficiency and the importance of timely delivery of reserved judgment to the pursuit of justice; and the other was increased leadership and supervision.

New Zealand

15. In New Zealand, to combat excessive delays with reserved judgments, Chief Justice Jan-Marie Doogue implemented several measures to increase performance and productivity, after the Minister of Justice refused to appoint additional judges. The measures included increased supervision, increased training, resort to technology to allow for more efficient allocation of sitting dates, and peer review.

⁶ Sha-Shana Crichton, *Justice Delayed is Justice Denied: Jamaica’s Duty to Deliver Timely Reserved Judgments and Written Reasons for Judgment*, (2016) 44 (1) Syracuse Journal of International Law and Commerce, 42

Zimbabwe

16. In Zimbabwe, Chief Justice Godfrey Chidyausiku publicly addressed the shortcomings of the judiciary by criticizing the judges who failed to deliver timely reserved judgments and threatening constitutional action against the under performers. Within six months of the public chiding, there were improvements in performance.

Canada

17. In Canada, Supreme Court Chief Justice Brian Dickson eliminated the 'chronic' delays in delivering reserved judgments after his appointment. The Chief Justice increased the sitting time of judges by 25% and implemented measures such as reports which tracked each judge's productivity, their reserved judgments and the length of time said judgments were under reserve and whether there were any reasons identified for the delay.

Jamaica

In the case of Jamaica, Crichton noted the efforts being made by Chief Justice Zaila McCalla and President of the Court of Appeal, Dennis Morrison, to reduce the number of delayed reserved judgments and to improve efficiency and performance within the courts. Some of the measures included ensuring judges had adequate time for judgment writing, encouraging greater use of ex tempore oral judgments, and keeping an inventory of outstanding judgments and regularly reviewing the inventory.

Eastern Caribbean Supreme Court

18. In the common law Caribbean, the device of keeping an inventory of outstanding judgments as a measure to combat judgment delays began in the Eastern Caribbean Supreme Court with its then Chief Justice, Sir Dennis Byron, around the turn of the century. The introduction of Information Technology and case management software to that court enabled the electronic production of a list of outstanding judgments by the Registrars and Chief Registrar for both the High Court and Court of Appeal. The list

included the names of the cases, the hearing date and the judge assigned to write the judgment. This provided additional pressure on judges to deliver their judgments and, as one study found, it had significant impact as the average time it took to deliver the reserved judgments of the Court of Appeal in the period under review did not exceed four months.⁷

19. It will be seen that in all instances, delay reduction or elimination started with the reforming judiciary being made statistically and, therefore, inescapably aware of the outstanding judgments and the length of the delays. In many instances, it is thought, unawareness of delay is a significant contributor to delay. It is our shared experience that judges who are under intense pressure to get through a mountain of cases, have little time to keep track of outstanding judgments.

Legislative solution

20. There is a demonstration provided by Guyana of the reality that legislation, even as fundamental as a constitutional amendment, is not sufficient in itself to eliminate delay. In a 2009 paper entitled *Judgment Delayed is Justice Denied: Delays in Delivering Judgments in the Eastern Caribbean*⁸ the present speaker anticipated the passage in Guyana of the **Time Limit for Judicial Decisions Act No 9 of 2009** which amended the Constitution to provide that a judge could be removed from office “*for misbehaviour or for persistently not writing decisions or for continuously failing to give decisions and reasons therefor within such time as may be specified by Parliament ...*” As every judge knows, this was a nuclear option because the security of tenure of a judge and his virtual complete immunity from removal from office are part of the bedrock of our constitutional democracies.

⁷ Denys Barrow *Judgment Delayed is Justice Denied Delays in Delivering Judgments in the Eastern Caribbean* 35 (3) Commonwealth Law Bulletin 429 at 439

⁸ Denys Barrow 35 (3) Commonwealth Law Bulletin 429

21. Sections 4 and 5 of the Act prescribe the time limits for decisions in civil cases and appeals. In civil cases, judges are urged to give a written or oral decision and reasons for the decision, at the conclusion of the hearing of the case or as soon as possible, but not later than one hundred and twenty days from the date of conclusion of the hearing. For appeal cases, judges must not deliver decisions later than 30 days after the conclusion of the appeal. Failure to comply with the prescribed time limits could result in a judge being removed from office in accordance with Article 197(3) of the Constitution of Guyana.
22. According to one source, this radical initiative came to nothing. An article by a former Attorney General published in the *Guyana Chronicle* of June 8, 2010 notes *“The Bill was assented to since August 2009; but unfortunately, it does not appear that this law is being complied with by the judiciary. Indeed, I am unaware of the existence of a mechanism to ensure its compliance.”*
23. One must question the accuracy of the impression that this grand initiative came to nothing. It is an impressionistic assessment which does not purport to be a study. The search online for further mention of the legislation was unsuccessful but it is such an interesting attempt at coping with a common problem that it is hoped some study will emanate from Guyana for our general benefit.
24. There is anecdotal material from Guyana that stimulates discussion. One story is that lawyers in Guyana decided it was unwise to report the delays of a sitting judge before whom the ‘complaining’ lawyers would have to continue appearing. The course of self-preservation seems the natural response. It is obvious that a lawyer who reports a judge for delay is laying a complaint against a sitting judge of misbehaviour in office.
25. Another story is that while the Act has not achieved perfect success, it is the law and judges are fully aware they must comply with it. The well-

regarded efforts of the Chancellor and the Chief Justice to eliminate backlog have been strengthened by the force of the Act and, as has been related, it is hoped that its effect will be increased when supported by other measures (including training).

Monitoring of delay

26. This glimpse at the effect of the Guyana Time Limit Act confirms the need, implicit in the legislation, for monitoring the performance of the judiciary. It will be interesting to learn from our Guyanese colleagues whether there is any fully organized system of keeping an inventory of outstanding judgments, for monitoring judges' performance and for triggering sanctions. As the experience in the Eastern Caribbean and now in Jamaica shows, a judiciary can well monitor and manage itself.

27. The material from Crichton indicates that delay reduction has worked when a head of judiciary takes it on himself or herself to conduct an enduring campaign to eliminate delay. But a deeper inquiry reveals that better than having a Chief Justice take on management of delay, is to have the members of the judiciary themselves take on that management. The story behind the introduction in the ECSC of the practice of producing an inventory of outstanding judgments is a tribute to self-monitoring. As the story goes, in the discussion leading up to the introduction of the practice, the judges were considering adopting time limits for delivery of judgments and consideration turned to ensuring compliance with the agreed three months' limit. Sir Dennis recounts it was the collective of judges themselves who proposed the keeping of a list, so that the judges themselves could monitor their own performances and slippage. Happily, there was no autocratic imposition of a time limit and policing of compliance by the Chief Justice: rather, there was a determination, made by the judges themselves, of what was an appropriate time limit and that they, the judges, would monitor their own compliance.

Personal commitment

28. In the end, timely delivery of judgments is a marker of judicial efficiency and part of a court's case management obligation. It is a basic strategy, adopted at the CCJ for example, to premise that case management begins on the day a case is filed and this aggressive approach to case management enables a court very early to set a timeline for hearing a case and for delivery of judgment. Thus, it is distinctly a case management function that the court should generate and monitor a list of pending cases, which includes outstanding judgments. In any court, this list can promote self-monitoring, peer review and periodic discussion.

29. It has been demonstrated that excessive delays in delivering judgments can be eliminated or avoided largely by the efforts of judges themselves. This has been demonstrated to be the fact, and we must celebrate this reality. We must also celebrate the reality that it is not every jurisdiction that has a problem of excessive delay in delivering judgments and, further, celebrate the fact that, even in those jurisdictions where the problem exists, it is not every judge who is delinquent, or even most judges. The good judges must not be painted with the same brush as the delinquents.

30. There can be no minimizing the effect of the other problems that cause judicial delays but it is fair to focus on the effect that the personal commitment of a judge can have. Many of you gathered here are exemplars of that commitment. And no doubt you know colleagues who exemplify the commitment. The good example that you and some of your colleagues provide, affirms the fact that delay or despatch can be so very much a personal matter. And that leaves us with the simple concluding thought: that one person – one judge -- can make a difference.

31. Those of you who have chosen to make a difference – we salute you.