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Notes and Comments

Shimon Shetreet*

Time Standards for Justice

I. *Introduction*

The machinery of justice is under great pressures both popular and professional to expedite justice. While the attainment of expeditious justice is a generally accepted goal, the meaning of expeditious justice is unsettled and ambiguous. The struggle for expediting justice may have a limited significance if the goal is expressed in ambiguous and general terms. Hence it is important to go beyond the words, to establish standards for expeditious justice and as far as practicable, to express them in numerical terms.

The purpose of this paper is to examine the possible reference points for measuring court delay and to discuss the numerical standards of expeditious justice.

II. *Measuring delay: For whom the clock ticks*

Expeditious justice is the antonym of delayed justice; when justice is not delayed it is expeditious. But how do we measure delay? At what point does the meter of delay start to tick? Whose delay is it? Or to put it metaphorically, for whom does the clock tick?

There are several reference points which may be used for accurate measurement of the duration of judicial proceedings for determining court delay. First, the event precipitating the court action; second, the filing of the action; third, the date of readiness of all parties to the proceedings to proceed to trial; fourth, the trial; fifth, the date of final disposition of the case, *i.e.*, the judgement. One can add a sixth reference point which truly reflects the final disposition from the litigants' point of view: the date of execution of the judgement.

As might be expected, there is some controversy over how to count delay in court and from which of these points we should

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begin.¹ While it is generally agreed that delay should not be measured from the date of occurrence of the precipitating event, it is not a wholly irrelevant point of reference. As Lord Justice Edmund Davies said in *Kerr v. National Carriers* (1974), it might become legally relevant.

It is the duty of parties to present their cases with reasonable promptness, and it is by no means to be regarded as irrelevant in every case that a claimant has let a substantial time pass before initiating proceedings. If he does, he runs the risk of having that delay taken into consideration against him if he later seeks indulgence from the court even though his proceedings were initiated strictly within the statutory period (of limitation).²

The date of filing of the pleadings is widely used as the starting point for measuring delay. This is based on the assumption that such filing indicates the litigants' readiness to proceed. However, this date may be misleading since the parties may not be ready for trial until discovery is complete and all preliminary matters and motions are determined. Here it is important to distinguish between two different meanings of the term "delay" in the context of court proceedings. "One refers to the waiting time exacted of litigants who are ready and eager to go ahead when the court is not because other cases have priority. That is court-system delay. The other kind is the delay which the lawyers create through their own unreadiness or unwillingness to proceed. This is a lawyer-caused delay."³

While it is recognized that the lapse of time between filing and readiness for trial is due to lawyers or other factors unrelated to the Court system, the Courts are not altogether relieved from their responsibility for delay at this stage of the proceedings. Court statistics normally take filing of pleadings as a point from which delay is measured; court rules expect the courts to strike out actions for want of prosecution after a certain period.⁴ Indeed, judicial

assistance which I received in the course of my research from many judges and court officers across Canada and from my colleagues at the Faculty of Law, University of Manitoba. The responsibility, however, is exclusively mine.

1. See generally Ziesel, Kalven and Buchultz, *Delay in the Courts* (1959) at ch. 4; E. Friesen et al., *Managing the Courts* (Indianapolis: Bobb-Merrill, 1971)

2. *Kerr v. National Carriers Ltd.*, [1974] 1 Lloyd's L. Repts. 365 at 366 (C.A.)

3. M. Rosenberg, "Court Congestion: Status, Causes and Proposed Remedies" in H. Jones, ed., *The Courts, the Public and the Law Explosion* (Englewood Cliffs, N.J.: Prentice-Hall, 1965) at 29 and 32. See also *Report on Administration of Ontario Courts* (Ontario Law Reform Commission, 1973) Part 1 at 274

4. Rule 284 of the Manitoba Queen's Bench Rules; Rule 28.11 of the Nova Scotia Civil Procedure Rules

decisions have long recognized the supervising duty of the courts to scrutinize cases and exercise control over lawyer- (or litigants-) caused delay between filing and readiness, for example, by strict rulings on requests for adjournments, by dismissal of actions for want of prosecution, or by resorting to the doctrine of abuse of process.⁵

It is beyond dispute that the court is responsible for delays from the point the parties are ready to proceed to trial as reflected by the filing of a certificate of readiness and possibly by a notice to set down for trial. From that point on to trial and later to the final determination of the case, the delay falls within the court's responsibility, even though it is sometimes caused by factors which are beyond its control.

If we apply this general approach to the criminal process the following picture will emerge as to the responsibility for delay between the various reference points.⁶ The delay between the commission of an offence and its reporting cannot be attributed to any public agency; the public, in general, bears the responsibility. The elapsed time from the reporting of the crime to the arrest of the suspect is the responsibility of the Police. From arrest to filing of the criminal charge into the court, the delay should be attributed to the Police, the prosecution and witnesses. Only from the point that the charge is filed does the court begin to share or bear full responsibility for delay. From filing of the charge to trial, the delay may be caused by the Court, by the crown attorney, by defence counsel, witnesses, and the Police, if it is responsible for the custody of the accused. When the trial is completed, the court bears the full responsibility for delay between the end of the trial and the judgement.

III. *Numerical standards for expeditious justice*

We have indicated when the meter of delay should start to tick, but we still have to determine when the duration of court proceedings becomes unacceptable and exceeds the reasonable limit. Unacceptable delay can be defined as an abnormal or extraordinary amount of

5. See, e.g., *Davis v. Wright* (1914), 24 Man. R. 205 (C.A.); *Russell v. Glassman* (1959), 66 Man. R. 464 (C.A.); *Shura v. Silver* (1963), 43 W.W.R. 272 (Man. C.A.); *Kerr v. National Carriers Ltd.*, [1974] 1 Lloyd's L. Repts. 365 (C.A.); *Dutton v. Spink*, [1977] 1 All E.R. 287 (C.A.); *R. v. Rourke* (1977), 35 C.C.C. 129 (S.C.C.); *R. v. Bjorklund* (1977), 39 C.R.N.S. 346 (B.C.S.C.)

6. Cf. H. More, *Criminal Justice Management* (St. Paul, Minn.: West Publishing Co., 1977) at 182

elapsed time between the relevant reference points: filing and trial, readiness and trial, filing and final disposition, readiness and final disposition. The real issue lies in defining normal time or reasonable time for criminal or civil trials.

Generally, normal time depends on the circumstances in each court and in each case, and cannot be stated in numerical terms which will be appropriate for each court and all cases.⁷ This is the underlying assumption reflected in judicial decisions dealing with delay both in criminal and civil proceedings.⁸ Indeed, this appears clearly from the wide disparity between the duration of proceedings in large urban centres and in the sparsely populated rural areas.

The practical difficulties of divising a uniform time limit are not accepted as sufficient excuse for not quantifying the normal time for judicial proceedings. The proponents of a uniform time limit dismiss the assumption that diversity of circumstances in each court should affect the justice that a litigant should be entitled to expect. As the Report on Administration of Ontario Courts said, "a litigant at one trial centre should not have to wait significantly longer time for a trial date than a litigant at another centre".⁹ Moreover, with respect to criminal process, legislatures in many jurisdictions consider it necessary to express their perception of expeditious justice in numerical terms applicable to all courts. The statutory time limits are established in relation to certain reference points in the criminal process.

The Canadian *Criminal Code* prescribes a directory time limit in relation to the period from arrest to trial. From Section 459 of the *Code*, it appears that Parliament considers it desirable that the accused who is in custody should be brought to trial within 90 days in case of indictable offences and within 30 days in case of summary convictions. This standard, however, is not effectively enforced. The mechanism to promote compliance with this time limit is judicial review of the custody. The result is that the 90- or 30-day time limit is a compulsory period between arrest and a hearing on the possible release of the accused; the trial itself may be held at a later date subject to no time limit. This appears to be the interpretation supported by the courts as illustrated by *R. v. Dass*.¹⁰

7. *A.B.A. Standards Relating to Speedy Trial* (1968) at 14

8. See the American speedy trial cases, *e.g.*, *United States v. Marion* (1971), 92 S.Ct. 455. Also see cases cited in note 5, *supra*, and note 19, *infra*

9. *Ontario Report, supra*, note 3, Part 1 at 278

10. [1978] 2 W.W.R. 274 (Man. C.A.). For the statutory provisions see *Criminal*

In Canada then, we do not know in definite terms what is the legislative judgment on the numerical standards for expeditious criminal justice.

In other jurisdictions, legislatures have expressed the perception of expeditious criminal process in more compelling terms. In the United States, the prescribed time limits for the period from date of arrest to date of trial range from 75 days in California to 6 months in Pennsylvania.¹¹ In the Federal Courts, the Speedy Trial Act 1974 provides for a goal of a maximum period of 100 days to bring a defendant to trial after arrest.¹² This goal is to be achieved in graduate process; longer time limits are provided for in the interim period. The American judiciary found the final goal of 100 days almost unattainable and have called for increasing the period to 180 days.¹³ The Israeli Criminal Procedure Law prescribes the time limit, in cases where the accused is in custody, in relation to the first arrest and filing of charge, which is set at 90 days, the filing of the charge and commencement of trial, which is set at 60 days, and the first arrest and the judgment in the case, for which a time limit of one year is set.¹⁴

The sanctions for enforcing the time limits vary; dismissal of the charge with or without prejudice as in the American Speedy Trial Act¹⁵, automatic release from custody on reasonable conditions set by the court, as in New York¹⁶ or a requirement of special permission from a judge of the highest court of the jurisdiction to allow the continuance in custody of the accused after the expiry of the time limit, as is the practice in Israel.¹⁷ It should be noted that even jurisdictions which provide for mandatory time limits and extreme sanctions such as dismissal of the charge, allow for justifiable delays.¹⁸

We are seeking expeditious justice, not speedy justice; the

Code, R.S.C. 1970 (2nd Supp.), c.2, s.5. See s.459(1) (a) for indictable offences and s.459 (1) (b) for summary conviction offences

11. Ca. Penal Code 1382 (West 1970); Pa. Stat. Ann. tit. 19, 781 (1964). For other references see More, *supra*, note 6 at 178

12. The Speedy Trial Act of 1974, (Feb. 1975) 18 U.S.C.A. 5.3161

13. See the resolution of the Federal Judicial Conference, (1977), 63 A.B.A.J. 1643

14. See Yadin, ed., *The Israeli Criminal Procedure Law* (1967) at pp. 24-25, secs. 46-48

15. 18 U.S.C.A. s.3. 162

16. McKinney's N.Y. Criminal Code, s. 303(2)

17. Yadin, *supra*, note 14 at p. 25, s. 49

18. 18 U.S.C.A. s.3.161(h)

essential ingredient of timely disposition, as the United States Supreme Court put it, is "orderly expedition, not mere speed."¹⁹ This general guideline applies both to criminal and civil proceedings. Time limits are more common in criminal matters, but we can find expressions in numerical terms of expeditious justice in civil matters as well. The Ontario Law Reform Commission Report on Administration of Ontario Courts proposed a standard of 6 months waiting time from filing to trials in the High Court.²⁰ The Report also recommends that the disposition of the case, from filing of the action to judgement, should be complete within one year.²¹ The American Bar Association Standards for Trial Courts²² provide for a standard of 6 months from filing to trial with shorter time limits for cases of child custody, support of dependents, or commitment to an institution, in which 45 days from filing are recommended as the time standard.

An expression of the perception on the numerical standards for expeditious justice can be found in the Court Rules of Some provinces. Rule 284 of the Queen's Bench Rules of Manitoba provides that if the action is at issue 2 months before the commencement of any sitting of the Court for which the plaintiff might give notice of trial and he fails to do so, the action may be dismissed for want of prosecution. Under Rule 97, the action becomes at issue when the last pleading is filed.

In Nova Scotia, pursuant to Civil Procedure Rule 28.11, a general list is maintained of all those cases where defences have been filed for more than 6 months and procedures have been established to ensure that such cases are brought to hearing without the Solicitors requesting that those cases be set down for trial. Rule 28.11 (4) of the Nova Scotia Civil Procedure Rules provides for 2 years as the maximum period for a case to be on the General List.

Rule 323 of the Ontario Rules of Practice establishes that an action to be tried without a jury at Toronto must be set down for trial by the plaintiff within 6 weeks after the pleadings are closed. If the plaintiff does not do so and does not proceed to trial, according to the Practice Rules the action may be dismissed for want of prosecution. In all other actions, the plaintiff must give notice and

19. *Smith v. United States* (1959), 360 U.S. 1 at 10 (U.S.C.A. 5th Circ.); *Barker v. Wingo* (1972), 407 U.S. 514 (U.S.C.A. 6th Circ.)

20. *Ontario Report, supra*, note 3, Part 1 at 279

21. *Id.* at 13

22. A.B.A. Standards, *Trial Courts* (1976) at p. 93, s. 2.52

enter the action for trial if the pleadings are closed 6 weeks before the commencement of any sittings for which he might enter the action. If the plaintiff does not comply with these limits, then by Rule 324 (1), the action may be dismissed for want of prosecution.

There are also time limits for rendering decisions on matters under judicial submission. The Quebec Code of Civil Procedure and Ontario Rules of Practice provide that if a judgment is not rendered within a period of 6 months, the Chief Justice may order a retrial or a rehearing.²³ This implicitly sets the standard of 6 months for the period from the date of end of hearing to the date of judgment. Six months is an excessively long time limit for delivery of judgement, although admittedly it is only the maximum period which will call for the extreme sanction of retrial of the case. An Amendment in 1973 of the Israeli Rule of Civil Procedure provides for a more restrictive time limit for delivery of judgement at the trial level. Rule 213 sets the time limit of 30 days from end of hearing to delivery of judgement, absent special reasons. In Sweden, the judges are expected to render judgement 14 days after trial and in Norway, after 3 days.²⁴ The ABA Standards recommend that a decision should be rendered no later than 30 days after submission.²⁵ Appellate courts should, of course, be allowed longer time to deliberate their decisions. The ABA Standards provide for an objective of 30 days, maximum time of 60 days in three judges panel and in larger panels for a time limit of 60-90 days depending on the complexity of the case.²⁶

IV. Conclusion

Time standards for disposition of cases in courts should be set in a careful process which will take into account the various and sometimes conflicting factors. They should therefore reflect a balancing process between the salient factors such as: "facilitating vigorous enforcement of the criminal law, protecting individuals from prolonged pre-trial detention, promptly resolving legal uncertainty in cases involving personal status, affording litigants adequate opportunity to reach a negotiated settlement, and allowing

23. Code of Civil Procedure, S.Q. 1965, Vol. 11, c.80, s.465; Ontario Rules of Practice, s. 401

24. Israel Report of Committee on Simplifying and Improving Procedure in Personal Injury Cases (1972) at ss.216, 217 — Berinson Report

25. A.B.A. Standards, *Trial Courts* (1976) at p. 94, s. 2.52

26. *Id.* at commentary p. 94, s.2.52

adequate opportunity for preparation for trial.” As different jurisdictions may attach different weight to the various factors, the time standards differ from one jurisdiction to the other. What matters is that some maximum time standards are laid down and that effective mechanism is established for their enforcement. However, the standards should not be set at unattainable levels, and they should allow for departure in carefully defined circumstances which call for extended time limits.

Furthermore, it must always be kept in mind that the time standards are not separate elements in the administration of justice. The rate or speed at which a case should be processed is only one element of a three-component equation; the other two are: the workload or the number of cases to be disposed of, and the physical and fiscal capacity of the court to do the work. Legislatures who set higher standards of timely disposition should also be prepared to expand the physical and fiscal ability of the courts, since the increase in caseload is not normally controllable.²⁷

27. J.F. Doyle, “Speedy Trial Legislation: The Happy Dilusion” (1978), 17 *Judges J.* 38