CHAPTER V

DELAY IN LITIGATION

A. Introduction

The word 'delay' has not been defined anywhere in the Rules of the Supreme Court, 1957 or the Subordinate Court Rules, 1950 although it has often been mentioned in the above procedural rules. One may be prompted to examine the case law on this point.

In 1957, the New Zealand Court of Appeal made an attempt to define 'delay' in William Cable Limited v. Trainer (1). This case involved the interpretation of sub-section 7 of the Limitation Act, 1950 of New Zealand whereupon the Court may grant leave to institute an action even though the limitation period had expired if the Court was of the opinion that such delay was caused by mistake, by any other reasonable cause or that the intended defendant would not be materially prejudiced in his defence. Delay was interpreted as postponement of performance of some act or step beyond the point of time when the act or step should have been performed. To clarify this definition, the Court gave an illustration which involving the filing of a statement of defence within a prescribed time, say, seven days; such that no delay would arise if the statement of defence was filed within the prescribed seven days. If, however, the statement of defence was filed on the ninth day i.e. two days after the prescribed time then

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1 [1957] N.Z.L.R., 337, 345.

delay would have been caused.

While it is submitted that a particular point of time is an important criterion in determining whether any delay has been caused or not; for the purpose of the above procedural rules, it will be too confining to restrict the operation of the civil procedural rules to a particular fixed time. This is because the time element in the operation of the Rules of the Supreme Court 1957 and the Subordinate Court Rules, 1950 is a flexible requirement which gives scope for the Court to exercise its discretion to allow any adjournment when the circumstances of the case demand or when the Judge thhinks it expedient for the interests of justice to exercise this discretion.[2]

In this matter, it is interesting to note that Order 64 rule 7 gives the Court power to enlarge or abridge the time appointed by the procedural rules for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require and such extention of time as may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

Furthermore, any extension of the time for delivering, amending, or filing any pleading, answer, or other document may be made in writing by the consent of the parties involved.[3] This rule had been applied in Ambroise v. Evelyn[4] where the Court held that when the parties to an action

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[2] R.S.C. O.36 r. 29 and r. 34.

[3] R.S.C. O.64 r. 8.

[4] (1879) 11 Ch. D. 759.

had consented to an extension of time, the action cannot be dismissed for want of prosecution.

In the light of the above procedural rules, it is proposed that delay should connote postponement of performance of some act or step by the consent of the parties to an action or allowed by the Court and which consequently leads to unnecessary prolongation in the disposal of an action.

The prevailing situation of pending cases in the Ipoh Subordinate Courts is shown in Table B. There has been a backlog of cases in Ipoh as a result of delay in litigation which impede the Courts in their daily despatch of judicial business.[5] The pending cases shown in Table C refer to those cases which have been filed and fixed for mention but they have not been fully disposed of.

From 1972 to 1975, the number of pending cases was on the increase. In the Special Sessions Court alone, the increase in the number of pending cases was 137.17%; while in the Magistrates' Courts and the Sessions Court the percentage increase was 49.26% and 83.18% respectively.

Comparatively speaking, the Special Sessions Court has the most number of cases awaiting disposal. Perhaps, this may be due to the fact that there is only one Special President to adjudicate over an increasing workload as compared to three Magistrates to share the workload in the Magistrates' Courts.

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[5] See Appendix A p. 108-116.

TABLE B

RETURNS OF CIVIL CASES IN THE SUBORDINATE COURTS, IPOH

	MAGISTRATES' COURT				SESSIONS COURT				SPECIAL SESSIONS COURT			
YEAR	1972	1973	1974	1975	1972	1973	1974	1975	1972	1973	1974	1975
Cases Filed	1453	1305	1222	1231	319	433	346	359	335	395	443	531
Cases Heard	1406	1283	1118	1134	254	294	376	288	225	299	347	506
Cases Pending	477	499	610	712	214	353	323	392	304	400	496	721
Summons Served	185	198	233	325	99	148	106	181	133	159	212	348
Summons Unserved	292	301	377	387	115	205	217	211	171	241	284	373

Source: Drawn from statistical data compiled with the help of the clerical staff of the Subordinate Courts Registry, Ipoh.

The number of cases filed in the Ipoh Special Sessions Court had increased from 335 cases in 1972 to 531 cases in 1975; and the increase in the Sessions Court was from 319 cases in 1972 to 359 cases in 1975. On the other hand, the Ipoh Magistrates' Courts experienced a decrease in the number of cases filed in 1972 to 1975 i.e. 1452 cases filed which had decreased to 1231 cases respectively.

One may be inclined to think that more and more disputes are litigated on in the Special Sessions Court which provides a wider civil jurisdiction in relation to the monetary value of the subject matter in dispute. Perhaps, many civil claims now involve bigger monetary values which may be a consequence of the inflationary effects on the economy. In assessing the efficiency of the Courts in the despatch of judicial business, it is found that the rate of disposal of cases often lags behind the number of cases registered in the Courts.

The Ipoh High Court is not spared the problem. Table C shows the current situation in respect of the number of cases pending in Civil actions that include running-down cases, non-running down cases, bankruptcy cases, Civil Appeal cases and divorce cases. Between 1974 to 1975, the percentage increase in the number of cases pending was 37.22% for running-down actions; 28.17% for non-running down actions; 37.17% for bankruptcy actions; on the other hand, in Civil Appeal and divorce actions, the percentage decrease was 34.1% and 15.38% respectively. These figures show that the Ipoh High Court can only carry out an efficient despatch of judicial business in Civil Appeals and divorce actions.

TABLE C

RETURNS OF CIVIL TRIALS IN THE IPOH HIGH COURT

YEAR	RUNNING-DOWN		NON-RUNNING DOWN		BANKRUPTCY		CIVIL APPEAL		DIVORCE	
	1974	1975	1974	1975	1974	1975	1974	1975	1974	1975
Cases Filed	83	129	81	225	226	247	19	17	2	4
Cases Withdrawn	20	25	4	14	40	50	5	7	-	1
Cases Settled	3	3	1	6	-	-	-	-	-	-
Cases Heard	18	19	10	11	50	58	6	24	1	6
Judgement Reserved	3	-	6	2	2	-	-	1	-	1
Cases Pending	223	306	252	323	374	513	41	27	13	11

Source: Drawn from statistical data compiled with the help of the clerical staff of the High Court Registry, Ipoh.

Delay in litigation is not a problem peculiar to our litigation process only. In fact, many countries such as America, England, to name a few, are constantly confronted with such a problem although the legal systems followed in each of these countries are not of similar constructions and constitutions. The problem of delay, if left unchecked, will inevitably hinder the smooth administration of justice and if no corrective measures are taken to ameliorate the situation, the entire litigation system will fail to help resolve disputes or to enforce individual rights. Ultimately, the citizenry will tend to disrespect and disregard the law.

Many people are aware of the evil consequences which delay will bring about and as a result various reasons have been found to account for the prevalence of the problem.

Delay in disposition of civil actions is normally caused by the malfunctioning of the judicial system. In America, the judicial system is a multiplex organisation of 50 American State judicial systems and a Federal judicial system. Owing to the fact that there has been extreme decentralisation in the American judicial system, the lack of co-ordination tends to hinder an efficient despatch of Court business.[6] The Malaysian Judicial System is not devoid of such a problem of malfunctioning in the management of the Court structure.

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[6] See Chapter III, under Heading "D".

A large part of today's Courtroom time is often channelled in the adjudication of traffic offences which include parking violations and Civil claims for damages arising out of motor accidents. Uncertain insurance schemes coupled with the complicated, slow and expensive machinery of Civil litigation cause much dissatisfaction among the litigants due to the fact that much delays and injustices have been caused.[7] The Winn Committee[8] found that in Britain delay in personal injuries claims was due to the fact that the injured person did not take immediate remedial action to enforce their rights. The claims assessors took too long a time to settle a personal injuries claim. Meanwhile, the insurance companies tended to delay in meeting the claims of the injured so that they might hang on their money longer.[9]

Comparatively speaking, although our judicial system has not reached the stage where injustice in delayed litigation prevails to such an extent as is experienced in America, it is difficult to rule out the possibility that delay in litigation if left uncontrolled will cause similar injusties and hinderance in the administration of justice here. It is worthwhile to note that a percentage increase of 37.22% from 1974 to 1975 in the number of pending running-down actions in the Ipoh High Court alone is evidence enough that more running-down cases are likely to join the backlog every year.

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[7] Walter E. Meyer Research Institute of Law, "Dollar, Delay and the Automobile I & II (1968)".

[8] See The Report of the (Winn) Committee on Personal Injuries Litigation, 1968 Cmnd. 369 hereinafter known in the text as the Winn Committee Report.

[9] Ibid.

To remedy the situation, there has been suggestions being made in America in that tribunals or administrative bodies be formed to relieve the Court of simple motor accident claims which can be easily and efficiently handled.[10] Certain minor traffic offences can be made compoundable; and which will facilitate the speedy disposal of such offences. A good illustration for the above suggestion is found in the American Workmen's Compensation Boards which were formed to relieve the Court's burden in the adjudication of industrial claims by simple and more substantive procedural rules.[11]

Another factor that causes delay in litigation and congestion of the Court calendar is the ever increasing crime rate and social problems. In America, social problems like alcoholism, narcotics, addiction, vagrancy, etc. are rampant and the increase in the number of criminal proceedings will inevitably have an effect on the Court's ability to dispose of civil trials expeditiously. These social problems may be traced to the fact that the schools, the homes and the church have failed to teach citizenship and respect of the law.[12]

On the other hand, our country may not have such grave social problems; nevertheless, the rate of litigation has increased in recent years far beyond the capacity of our Courts to handle. The Malaysian

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[10] See example, "Traffic Court Reform", 4 Col. Journal of Law and Social Problems 255 (1968).

[11] Delmar Karlen, Judicial Administration - The American Experience, First Edition, Butterworths, London, 1970, p. 62.

[12] Ibid., p. 62.

public is more sophisticated and demanding than they were in the past. The rise in literacy rate consequently enables the people to be aware of their rights and to understand the effect of the laws. Meanwhile, there has been a steady increase of crime rate involving drug-trafficking, rape, theft and armed robbery.

Adjournments in the process of litigation are freely asked for and freely granted and actually in effect the disposal of cases is inevitably prolonged.[13] Postponement of trials are granted readily, perhaps, because the Courts want to ensure that 'Justice must not only be done, it must be seen to be done'; such that every fair opportunity is given to the parties to an action to present their case. Moreover, our Rules of the Supreme Court, 1957 and the Subordinate Court Rules, 1950 give wide discretionary powers to the Court to ensure that fairness and justice are done to the litigants when the circumstances demand. As a result, postponements have become part of the process of Civil litigation here.

It is interesting to note that in America, the litigation system itself encourages the rise in the rate of litigation and congestion in the Court calendar. The Indemnity Rule where costs must necessarily follow event is not practised in America; so that the party who loses in

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[13] Ibid., p. 72. This is illustrated in the trial of James Earl Ray for the assassination of Martin Luther King. Ray selected a lawyer of his own choice to prepare for his defence and he later dismissed him when the trial was about to begin. Subsequently, a new lawyer was selected and he applied for a postponement which prolonged the trial for a further four months.

a Civil action will not be penalised by having to bear the costs of the trial.[14] Uncertainty and unpredictability prevails in the trend of judicial decisions because in America the doctrine of 'stare decisis' rarely exert a strong influence in the judicial decision-making process.[15] Furthermore, the use of the jury system further delays the progress of a Civil trial. One former New York Judge David W. Peek estimated that a jury trial normally would take on the average about three times as much Courtroom time as a trial before a single Judge. It occurs frequently that new trials are ordered when the jury's decision turns out to be unsatisfactory.[16] Members of the jury are picked from the laymen who tend to succumb to the rule of common sense rather than the legal principles in arriving at a just result.[17]

Delay in litigation is partly a result of the contributions made by the personnel involved in litigation. The writer proposes to discuss their roles in the process of litigation below.

B. The Personnel Involved In Litigation

1. Judges:

The maximum judicial strength for the High Court of Malaya and the High Court of Borneo is fifteen Judges and eight Judges respectively; However, Parliament reserves the power to change the maximum number of Judges.[18]

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[15] Schaefer, "Precedent and Policy," 34 University of Chicago Law Review 3 (1966).

[16] "Jury Trial on Trial - A Symposium", 28 N.Y.S.B. Bulletin 322, 338 (1956).

[17] Skidmore v. Baltimore & O.R. Co., 167 F. 2d 54 (2nd Cir. 1948).

[18] Article 122A, Part IX, The Federal Constitution.

Since 1974, there are fourteen High Court Judges in West Malaysia and four Judges in Borneo. Out of the fourteen High Court Judges in West Malaysia, four are stationed in Kuala Lumpur; two in Ipoh and one Judge each for eight other State capitals. One may infer that the distribution of the number of Judges is made out according to the workload of the Courts and the population size.

It is submitted that the current judicial strength is not adequate to meet with the increasing workload of the Courts. This is evident from the fact that many Civil and criminal trials are still pending in the High Courts. For instance in Ipoh, at present there are only two Judges who rotate monthly to adjudicate all civil and criminal matters in the exercise of their original and appellate jurisdictions. They have to preside over judicial matters in Open Court and in chambers. While the judicial personnel available in Ipoh is limited, the population of the town has increased tremendously. Being one of the commercial centres in Malaysia, the increasing commercial and contractual disputes and an increasing rate of personal injuries claims congest the Courts calendars.

Moreover, Judges are frequently appointed to head Royal Commissions of Inquiries; which further burden the Judges with additional workload and thus the Court's capacity to cope with the pending cases is impeded.[19]

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[19] Tun Mohamed Suffian bin Hashim, "Administrative Problems in the working of Superior Courts of Justice in Malaysia," reported in INSAF, The Journal of the Bar Council, Volume VIII, No.1 (April 1975), p. 5.

It is submitted that an increase in the judicial strength is necessary to help ease the backlog of cases. In England, in 1969, the Beeching Committee Report advocated an increase in judicial appointments and a flexible deployment of Judge power as a solution to reduce the problem of delay and the backlog of cases.[20]

Appointment of Judges is governed by the Constitution[21] which provides that a person is qualified to be a Judge if he is a citizen and if he has at least 10 years experience as an Advocate or a member of the Judicial and Legal service of the Federation or of a State preceding the appointment of Judgeship. It is submitted that at the time of writing there are 100 practising lawyers with 10 years experience.[22] In addition to the numerous senior officers of ten years standing available among the staff of the Legal service, these practising lawyers provide a wide choice for the appointment of Judgeship to overcome the shortage of Judges. It may be argued that any increase in the judicial strength may affect the quality of Judges. This may not be so if the recruitment of Judges is done meticulously. Although a Judgeship will offer prestige, power and security of tenure, there is still the problem of attracting experienced lawyers to join the Bench because of the lucrativeness of private practice.

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[20] Report of the (Beeching) Royal Commission on Assizes and Quarter Sessions, 1969, Cmnd. 4153 para. 236, p. 82; hereinafter known in the text as The Beeching Committee Report.

[21] Article 122B, Part IX, The Federal Constitution.

[22] See "Marshall a lawyer of vast experience", reported in The New Straits Times, 10th July, 1976, p. 1 and 5 col. 2.

The Beeching Commission proposed the partime appointment of Judges from men of high professional standing. Such a proposal will not only help in the development of judicial potential, it will allow an element of flexibility to the Courts to cope up with a fluctuating workload. Although there is a danger that the partime Judges may not sit regularly because they have to attend to their private business affairs, nevertheless, this is a practicable proposal for the purpose of overcoming the shortage of Judges.[23]

At the present moment, only Parliament has the power to increase the number of Judges. Even if Parliament agreed to an increase in the judicial strength, the democratic process of amending the Constitution is a rather cumbersome and time-consuming procedure.

It is interesting to note that at the time of writing, The Constitution (Amendment) Bill 1976 which is being presented for approval in Parliament seeks to vest in the Yang DiPertuan Agong with the power to provide for any alteration in the number of Judges of the High Court instead of this being determined by Parliament.

The Bill further provides for the appointment of judicial Commissioners by the Yang DiPertuan Agong on the advice of the Lord President for specified periods. These judicial Commissioner are to perform the functions of a Judge and to enjoy any privileges inherent in a Judgeship.

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[23] Report of the (Beeching) Royal Commission on Assizes and Quarter Sessions 1969, Cmnd. 4153 para. 87 p. 41.

A further amendment clause provides that the Lord President and the Federal Court Judges are to be empowered to exercise all or any of the powers of a Judge of the High Court. Meanwhile, High Court Judges in Peninsular Malaya may exercise all or any of the powers of High Court Judges in Borneo and vice versa.[24]

The amendment enables an increase of judicial strength by means of a more convenient and less cumbersome process. This will help to economise Parliamentary time. The appointment of judicial commissioners and the extension of the functions of High Court Judges to the Federal Court Judges constitute a flexible approach towards the relief of back-log of cases in certain Courts. It is the writer's opinion that the amendment is timely made to help solve the problem of shortage of Judges. The present amendment also enables the flexible deployment of Judge power.

2. Magistrates/Presidents

The Magistrates or Presidents of the Sessions Court adjudicate disputes in the Subordinate Courts and their jurisdictions are limited.[25] They are given wide discretionary powers by the Subordinate Court Rules, 1950, which they are empowered to exercise when fairness and the circumstances of the case demand. It is within their discretion to grant postponements when the lawyers are unable to attend Court to represent

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[24] See, "51 clauses up for Amendment" reported in The New Straits Times, 3rd July 1976, p. 7 col. 1-5.

[25] Subordinate Courts Act, 1948 (Revised 1972) S. 65 provides for the jurisdictional powers of the Sessions Court; while S. 90 provides such powers for the First-Class Magistrate's Court.

their clients due to certain unavoidable circumstances. In practice, postponements are often granted if the Magistrate is satisfied with a fair and reasonable excuse. Usually, this discretion is exercised upon the faith of the lawyer's words or a doctor's medical certificate. On the other hand, some Magistrates are rather discreet in exercising the discretion to grant postponements unnecessarily so as to prevent the party to gain time at the expense of the others who may be adversely affected by the prolongation of the trial.

Postponements are one of the factors that contribute towards delay. It is necessary for every Magistrate to be efficient and discreet in the exercise of their judicial functions. Sometimes, inordinate delays may be caused by those Magistrates who tend to take too long a time to complete their appeal record which is necessary for appeal work.[26] On the other hand, the increasing workload may leave the Magistrate with little time to finish their work in time which may affect an efficient despatch of judicial business.

3. The Lawyers

Most lawyers, for one reason or the other, have prayed for postponements. One former Chief Justice,[27] who was horrified by the frequency of postponements, made an official complaint to the Bar Council, States of Malaya.

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[26] See, "Judge hits out at delay in Appeal Case", reported in The New Straits Times, 30th March, 1976, p. 22 col. 2.

[27] Tan Sri Ong Hock Thye.

The complaint is worded as follows:[28]

"I have been struck by the frequency of the members of the Bar - either by consent on the very date of hearing, or on some paltry excuse, or for no reason given at all - applying for and obtaining postponements. The result is a day, or the best part of the day, of the Court's time is wasted..... where postponements are unavoidable - and in most cases this fact is one of which the practitioner should be aware of long in advance - the application should be promptly made, so that other cases can be fixed instead of the cases taken out."

The application of postponements is a usual occurrence in the Courts and postponements are applied for owing to numerous reasons.

Some lawyers slog too hard to do their best for their clients, while there is a tendency for the lawyers to receive too many briefs which are beyond their personal capacity to handle efficiently. As a result, they may be simultaneously engaged in two different Courts at the same time. In such a circumstance, the Court in trying to do justice to all the parties will find it difficult to reject the application for postponements. In Fatimah v. Lam Fatt[29] an application for

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[28] See, Tan Sri Ong Hock Thye, "Postponements - Subordinate Courts", reported in the Malayan Law Journal, Volume 1, p. xi.

[29] Unreported Civil Action No. 208/74 of the Ipoh Sessions Court.

postponement was made in the midst of the trial because the lawyer concerned was engaged in a Preliminary Inquiry in Sungei Siput on the same trial date; and on this reason the application was granted.

Sometimes, a lawyer may not be able to prepare his case fully due to a lack of detail information. This is because some clients are not co-operative enough and they often provide the barest minimum of facts to their lawyer. As a result, postponements are resorted to to gain time and if possible the lawyer with the consent of his client will try to negotiate for a settlement out of Court. The Court seems to hold the attitude that if the extension of time is used to delay the trial then the Court will not grant the application for an extension of time unless the Court is satisfied that the applicant is in pursuit of a legal remedy.[30]

The change of lawyers during the course of litigation takes place rather frequently here. In fact, Order 7 rule 2[31] provides that any party suing or defending by a solicitor shall be at liberty to charge his Solicitor. The termination of a lawyer-client relationship may be due to the fact that the client is dissatisfied with the manner in which the lawyer handles the case.

Delay in litigation is also partly caused by the dilatory actions of the litigants and the lawyers. The files and documents of

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[30] Gnanasundram v Public Service Commission / 1966 / M.L.J. 157.

[31] R.S.C.

a case pass from one lawyer to another and thus a lot of confusion is caused to the next lawyer who takes the brief. In Foong Went Tat v Vu Siew Chin,[31] from the beginning of the trial to the end the change of Solicitors at the instance of the plaintiff and defendant occurred so frequently such that confusion was resulted.

On the other hand, in England, delay in litigation is partly due to the duplication of work done by the Solicitor and the Barrister. In England, the legal profession is divided such that the Solicitor normally meets the client and prepares the brief; while the Barrister specialises in Court work. In the preparation of a trial, when the Barrister and Solicitor fail to co-ordinate their approach in the preparatory work, they are likely to take a longer time than an American lawyer or a Malaysian lawyer takes. This is because in America and in Malaysia there is no division of the legal profession so that when a lawyer takes a case he will be in charge of both the preparation and the Court work.[32]

The manner in which the trial of a case is handled by the English Barristers is another cause that contributes towards delay. It appears that the cumbersome procedural rules provide ample opportunities for the Barristers to obstruct, delay and pervert the course of justice. The Courts indicated their dissatisfaction over the whole trial process in a case in 1966.[33]

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[31] Unreported High Court Civil Action No. 146 of 1972, Ipoh.

[32] Michael Zander, Lawyers And The Public Interest, First Edition, Weidenfeld and Nicolson, London, 1968.

[33] Boston v. W.S. Bagshaw and Sons [1966] 1 W.L.R. p. 1126.

> "This is an ordinary simple case of libel. It took 15 days to try: the summing-up lasted for a day: the jury returned 13 special verdicts. The notice of appeal sets out seven separate grounds why the appeal should be allowed and 10 more why a new trial should be granted, the latter being split up into over 40 sub-grounds. The respondent's notice contained 15 separate grounds. The costs must be enormous. Lawyers should be ashamed that they have allowed the law of defamation to have become bogged down in a mass of technicalities that this should be possible."

Our trial proceedings have not reached to such a cumbersome process. However, the lawyers here sometimes make technical procedural mistakes that can delay the process of litigation. In Gan Hay Chong v. Siow Kian Yuh[34], the Appellant's Solicitor delayed in filing the memorandum of Appeal until after the due date for filing. In his application for an extension of time, the Court refused to accept his ground for the delay which was submitted to be caused by the misinterpretation of the procedural law in relation to the prescribed time.

Sham defences and irrelevant counterclaim are often filed with the intention to delay or cause embarrassment to the fair trial of the original action. In K. Subramaniam v. Chan Miew Cheng,[35] here the

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[34] [1975] 2 M.L.J. 1.

[35] Unreported Civil Action of the Special Sessions Court, Ipoh.

Court rejected the counterclaim of the defendant, which was in the nature of libel rather than as a reply to the plaintiff's allegation of breach of promise to marry.

An action may be intentionally brought to defeat the course of justice in the hope that the execution of the judgement of an earlier action be delayed.[36]

4. Litigants

Delays is usually caused by dilatory litigants who have the tendency to prolong the trial. Some dilatory litigants become disinterested in an action, and thus virtually sit on the case without instructing their lawyers further on the matters. As a result many Civil claims have been pending for years and some Civil files already have a record of ten years or more. Many of the pending Civil cases have become defunct or have been settled unofficially or have become permanently abated.[37]

Some litigants have become disinterested or they may lack the financial means to proceed on with their cases. It does happen that in the course of litigation one of the parties may pass away due to old age or misfortune.[38] As a result the trial will have to be stayed to enable the administrator or the executor of the deceased's estate to apply for substitution of the deceased as a party to the trial.

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[36] Tractors Malaysia Bhd. v. Teo Chee Hing [1975] 2 M.L.J. p. 1.

[37] See Appendix B. p. 117-120.

[38] Poh Cheng Wee v. Partners of Wong Hup Hin Kongsi, Tambun, unreported High Court Civil Action No. 269/72, Ipoh.

5. The Process Server

A study of Table B will show that about 50% of the Summons are unserved in the Special Sessions Court, the Sessions Court and the Magistrates Court of Ipoh. Service of Summons is often carried out by the Court's process server. The shortage of process servers is often a problem when there is a heavy list of cases filed in the Courts for action. The Subordinate Court Rules, 1950 provides that service of a Summons can be effected by an officer of the Court or of any Court who includes any clerk, interpreter or any other officer of the Court charged with such a duty.[39]

The process server encounters many difficulties in trying to serve the Summons. He cannot trespass into the defendants' private compounds while fierce dogs and unruly defendants often obstruct the performance of his duty. On the other hand, the service must be personal which can be a difficult task if the defendants try to avoid a personal encounter with the process server. In addition, remote or unknown addresses given to the process servers make service difficult.

Sometimes, service of the Summons may be taken over by the plaintiff himself who can apply orally to the Court for an order to do so.[40] In practice, this is often done because the plaintiff can locate the defendant easily and the service can be conveniently carried out.

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[39] S.C.R. O. VIII r. 2(2).

[40] Ibid., O. XII r. 2(1).

6. The Interpreters

The interpreters play an important role in the trial process. They are required to interpret the questions and statements made to and by the Malaysian witnesses of varied racial and dialectical origins. It is an effort to interpret to the witnesses who are illiterate and scared and they make interpretation difficult by giving irrelevant answers. Sometimes, half a day's hearing may be taken up for the purpose of interpreting the lawyers' questions to the witnesses. This makes the trial process unnecessarily long-drawn.

It would be ideal if one single Court language can be used and which can be understood by all races. This may help to expedite the trial.

C. Priority is Given to Criminal Matters

A considerable amount of the Court's time is spent in disposing of criminal matters. This is because any delay in criminal trials will cause great hardships to an accused person. In the course of the trial, the accused will be remanded in custody until the committal proceedings are completed.[41] The accused will be subject to much embarrassment and inconveniences while the accused is committed to prison to await his trial. As long as his guilt has not been determined, there will be a likely infringement of his fundamental liberties if the trial is delayed.

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[41] R.M. Jackson, The Machinery of Justice in England, Sixth Edition, Brooke Crutchley, University Printer, Cambridge, 1972.

Instances of delays in criminal trials may be caused by an inefficient prosecution. Sometimes, the police may sit on their work.[42] Lawyers and prosecutors are sometimes unprepared to take their cases on the specified date of trial.[43] Delays in disposing of criminal matters leaves the Court with limited time for the Civil trials.

Moreover, the Courts here, like the former Assize Courts of England exercise concurrent jurisdictions over criminal and civil matters. When the Courts have a heavy list of criminal trials for the month, the Courts give priority to the disposal of the criminal trials and this is done at the expense of Civil trials which are then put aside for some time. Inevitably, the deferred Civil trials will add to the congestion of the Courts while delay in litigation and uncertainty prevail in the Courts.[44]

D. The Impact Of Delay In Litigation On Society[45]

The impact of delay in litigation often produces a chain of undesirable social and economical effects on society. When an aggrieved litigant finds that judicial redress can only be obtained after, say, a lapse of two to three years or even for a longer period, it is likely that he will disrespect and even resent the Court as an efficient means of adjudicating justice. Moreover, delay will give rise to the feeling of dissatisfaction over the litigation system and the loss of confidence

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[42] See, "Judge hits out at delay in Appeal Case", reported in The New Straits Times, 30th March, 1976, p. 22 col. 2.

[43] See, "Move to reduce the backlog of cases" reported in The New Straits Times, 15th July, 1976, p. 6 col. 3.

[44] Report of the (Beeching) Royal Commission on Assizes and Quarter Sessions, 1969, para 77 p. 37.

[45] See Appendix A. p. 108-116.

in our Courts. The aggrieved litigant will naturally sense a widening gap between the so-called 'justice' which is actually done and the 'justice' which he expects to be done.

Delays may affect the outcome of a case; and thus the quality of justice that is finally meted out. Witnesses involved in a Civil case which is delayed over a long period of time may not be able to recall past events accurately and this will naturally affect the quality of the oral evidence tendered during trial. There is also a probability that the witnesses, the defendent or the plaintiff may die even before the delayed trial comes up for hearing. Moreover, it is difficult to require witnesses who are professionals such as doctors and engineers to attend Court at short notices.[46]

Dissatisfied litigants may choose to withdraw or discontinue their actions in the Courts. They may resort to other methods of disposal which may be convenient but may not be lawful. Many people prefer to settle their dispute out of Court so that they can save time and expenses while business goodwill can be maintained.[47]

It is interesting to note here that in America where the problem of delay is also prevalent, various means of disposing cases have been devised. One of the methods used to overcome the congestion of cases in the Courts is plea bargaining whereby the defending lawyer

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[46] Report of the (Beeching) Royal Commission on Assizes and Quarter Sessions, 1969, para. 412 p. 131, and para. 77 p. 37.

[47] See Appendix A.p. 108-116.

and the prosecution officer agrees to charges of lesser offences than those offences originally charged. Once the plea of guilty has been made then the presiding judge will impose a lighter sentence as has been agreed upon by the parties. The average American Judge is often confronted with 30 or 40 cases for a single trial day and thus plea bargaining may serve as a convenient method of helping him to dispose of the workload speedily. This has a drastic effect on the law which will naturally lose its deterent function in view of the fact that the penalty inflicted is not commensurate with the seriousness of the crime committed.[48]

The justice so administered becomes 'assembly line justice.'[49] Such serious conditions that prevail in the American Courts are a result of congestion and delay. In 1958, the then Chief Justice of the United States, the Honourable Earl Warren had this to say:[50]

> 'Interminable and unjustifiable delays in our Courts are today compromising the basic legal rights of countless thousands of Americans and, imperceptibly, corroding the very foundations of Government in the United States. Today, because the legal remedies of many of our people can be realized only after they have sallowed with the passage of time, they are mere forms of justice.'

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[48] Delmar Karlen, Judicial Administration - The American Experience, First Edition, Butterworths, London, 1970, p. 70.

[49] President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, 127-129 (1967).

[50] Warren, "The Problem of Delay: Task for Bench and Bar Alike", 44 American Bar Association Journal 1043 (1958), address to the Assembly of the American Bar Association.

Plea bargaining is not practised here simply because a distinctive differnnce exists between our method of prosecution and those practised in the United States. Over there, before the accused is charged he has to be indicted first and this allows time for the defending counsel to strike a bargain with the prosecution officer who is in a position to influence the Judge's decision. Here, there is no need of such an indictment. The accused once charged will be remanded for custody for at least the first 24 hours before he has the opportunity to contact a lawyer of his choice.

Delays also causes hardships and misery to those litigants who are adversely affected. Insurance Companies normally take advantage of delays in the trial of personal injuries cases so as to tempt the insured to agree to a lesser amount of compensation. The Winn Committee found that there is this tendency on the part of the Insurance Companies to hang on to their money. The insured being weary of waiting for the Court's decision may fall into an unjust settlement of the claim. In cases which involve the breadwinner's loss of capacity to earn, any delay would result in financial hardships being caused to the family concerned.

Delays give rise to further delays. Many lawyers' precious time have been wasted while waiting for a definite trial date of their cases. Inevitably, they are driven to concentrate on other gainful work which brings better and speedy monetary rewards.[51]

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[51] See Appendix A p. 108-116.

Protracted trials give rise to additional costs, expenses and they take a long time to be resolved. It has been observed that such delay can be exploited particularly in disputes over mining rights. Normally, such a dispute comes within the jurisdictions of the Mining Courts. However, the parties to the dispute may apply to have the case tried by the High Courts. In practice, this is often done and a lot of time has been taken up to process the application for the transfer of the case.[52] It is possible that before the case can be heard by the High Court, the land may be completely worked out. In this way, delay in litigation can become a financial burden to the aggrieved miners.

In order to obtain a speedy solution to a problem, some litigants may request the intervention of politicians. If the tendency of the litigants to seek political help is allowed to develop, this may reflect on the unreliability of our litigation system in solving disputes. Some opportunist politicians may make use of such opportunities to advance their political ends; thus what may be a problem soluble by the judicial process will be turned into a political issue.

It is submitted that delay should be discouraged in order to maintain an efficient litigation system.

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[52] Ibid.