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Recommended Citation

Jeffrey O'Connell & Craig A. Stanton, *Justice Delayed Is ... Delay Ignored: The Indifference of Judges and Law Professors to Legal Lassitude*, 49 DePaul L. Rev. 489 (1999)

Available at: <https://via.library.depaul.edu/law-review/vol49/iss2/14>

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JUSTICE DELAYED IS . . . DELAY IGNORED: THE INDIFFERENCE OF JUDGES AND LAW PROFESSORS TO LEGAL LASSITUDE

Jeffrey O'Connell & Craig A. Stanton***

It has long been recognized that one of the greatest weaknesses in traditional tort compensation stems from the length of delays involved in the typical litigation process. Parties must commonly face a delay of years before they can even get to court, forcing needy, seriously injured, and especially low-income claimants to settle for much less than the expected value of their claim.¹ This, however, could be just the beginning. If a claim reaches the appellate level, parties involved could well face delay of up to ten years before any decision is ultimately granted. Even worse, that ultimate decision may well be an order for a new trial.

Such huge delays, in fact, are not at all uncommon. Tracing the length of time between incident and appellate opinion, a delay of over six years is typical. To illustrate this simple truth, one need not perform any costly or sophisticated research. Any popular tort casebook will do. We have largely focused on four such casebooks, written by Daniel Dobbs and Paul Hayden,² Richard Epstein,³ Marc Franklin and Robert Rabin,⁴ and James Henderson Jr., Richard Pearson and

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1. See the American Law Institute's massive review of personal injury tort law. "Perhaps the main weaknesses in tort compensation stem from the time lag involved The prospect of years-long delays before the parties can get to court forces the most seriously injured victims to settle out of court for much less than the expected value of the claim." *Enterprise Responsibility for Personal Injury*, 1 A.L.I. 263, 265 (1991) [hereinafter ALI]. "As to the timeliness of compensation, U.S. and Canadian studies disclose considerable delays in the payment of third-party benefits, particularly to claimants with serious injuries involving higher pecuniary losses and a greater likelihood of litigation and attorney involvement." *Id.* at 367 (citing *Report on Motor Vehicle Accident Compensation*, 1973 ONTARIO L. REFORM COMMISSION 56-63).

2. DANIEL B. DOBBS & PAUL HAYDEN, *TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY* (1997).

3. RICHARD A. EPSTEIN, *CASES AND MATERIALS IN TORTS* (1995).

4. MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* (1996).

John Siliciano.⁵ Within this universe, a striking number of cases exist where the delay is between six and ten years, and in certain instances between ten and thirteen years.⁶

In order to allow for possible historical differences (such as changes in the Federal Rules of Civil Procedure), which could have affected the amount of time involved in the payment of claims, we have limited ourselves to cases since 1950. Areas such as emotional harm, where the law varies drastically from state to state, and where it has been exceptionally vague are not included. In addition, certain product liability/chemical exposure cases, and nuisance cases where no cause in fact can be traced back to a specific date, have also been eliminated. Below is a sample of our findings, sorted by appellate opinion dates. Within the parameters indicated, we have included every case that we could find with a period of four or more years between incident and appellate opinion. The key point is that we have found no instance when either the original opinion or the casebook editors found the delay worth mentioning, no matter how lengthy.

The table below contains seven categories. Column one accounts for the name of the case. Column two indicates the incident date, or the date on which the accident occurred. Column three indicates the date on which the appellate opinion was finalized. Column four indicates the number of years between the incident date and the appellate opinion. Column five indicates the final disposition of the case at the time the appellate opinion was finalized (i.e., whether a new trial was ordered, whether the lower level opinion was affirmed, if the case was dismissed, etc.). Column six indicates the type of case involved. Finally, the last column indicates casebooks from which the cases were taken. We have divided the cases into four main categories defined as follows:

- (1) **PRODUCT LIABILITY** - cases specifically involving a negligently produced or otherwise defective product, where the claimant is an injured consumer.
- (2) **MEDICAL MALPRACTICE** - negligence cases specifically stemming from the health care provider/patient relationship.
- (3) **PRIVATE INTENTIONAL TORT** - non-product or medical malpractice assault cases.
- (4) **OTHER** - all other non-product or medical malpractice tort cases.

Our universe of cases is drastically limited by the fact that incident dates are routinely left out of opinions. Less than half of the opinions

5. JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* (1994).

6. See tables contained in subsequent pages of text.

in any given casebook actually list incident dates, an omission which itself speaks volumes about how seriously delays are taken.⁷ Therefore, this study is drawn only from those cases for which dates could be found, either in federal reporters, state reporters, or casebooks. To reemphasize the point, in none of the following cases did the court—nor the casebook editors—even deign to notice, or provide any information regarding the length of delay.⁸

NAME OF CASE	INCIDENT DATE	APPELLATE OPINION DATE	DELAY IN YEARS	FINAL DISPOSITION	TYPE OF CASE	CASEBOOK
Carter v. Kinney	2/3/90	1995	5	Affirmed	Other	Franklin
Talbott v. C.R. Bard, Inc.	1988	1995	7	Dismissed	Prod. Liab.	Franklin
Harper v. Herman	8/9/86	1993	7	Reversed	Other	Franklin
Pavia v. State Farm Insurance Co.	4/85	1993	8	Dismissed	Other	Franklin
Shanks v. The Upjohn Co.	8/29/84	1992	8	New Trial	Prod. Liab.	Dobbs; Epstein
Ramirez v. Plough	3/86	1992	6	New Trial	Prod. Liab.	Franklin
Anderson v. Service Merchandise	6/27/86	1992	6	Remanded	Prod. Liab.	Franklin
Jones v. O'Young	4/85	1992	7	Remanded	Med. Mal.	Franklin
Vergara v. Doan	5/31/79	1991	13	Reversed	Med. Mal.	Henderson; Dobbs
Smith v. Richmond Memorial Hospital	7/88	1992	4	Remanded	Med. Mal.	Dobbs
United Blood Service v. Quintana	5/27/83	1992	9	New Trial	Prod. Liab.	Henderson; Dobbs; Epstein

7. At first, we suspected that casebook editors had been eliminating incident dates from the summary of the facts. However, after attempting to trace the history of several dozen cases, we have concluded that state and federal reporters also almost uniformly fail to notice, or focus in any way, on the often huge delays involved.

8. Casebooks also routinely fail to recognize delays as an issue of any importance. For example, trial delay does not appear in the index of any of the four casebooks used in this study. In fact, those casebooks which mention delay anywhere in the text typically dedicate no more than one line to the issue. The following excerpt is a common example: "In general, the system stands accused of overcompensating the slightly injured, undercompensating the seriously injured, delaying the payment of claims . . ." HENDERSON ET AL., *supra* note 5, at 794. The only exception among the casebooks used in this study is the Dobbs & Hayden text, which dedicates four short paragraphs to the problem of delay in a chapter of 20 pages entitled *Evaluating Tort Law*. DOBBS & HAYDEN, *supra* note 2, at 824.

NAME OF CASE	INCIDENT DATE	APPELLATE OPINION DATE	DELAY IN YEARS	FINAL DISPOSITION	TYPE OF CASE	CASEBOOK
Hines v. Denver & Rio Grande Western Railroad Co.	9/85	1992	7	Remanded	Other	Henderson
Wegner v. Milwaukee Mutual Insurance Co.	8/27/86	1991	5	Remanded	Other	Dobbs
Sokolowski v. MediMart	12/30/85	1991	6	Affirmed	Other	Dobbs
Khan v. Shiley Inc.	7/29/83	1990	7	New Trial	Prod. Liab.	Henderson
Indiana Harbour Belt Railroad v. American Cyanamid Co.	1/2/79	1990	11	Remanded	Other	Henderson; Dobbs; Epstein; Franklin
Ward v. K-Mart Corp.	10/11/85	1990	5	Affirmed	Other	Henderson; Dobbs; Epstein
McDougald v. Garber	9/7/78	1989	11	New Trial	Med. Mal.	Henderson; Dobbs; Epstein; Franklin
Berkovitz v. United States	5/10/79	1988	9	Remanded	Prod. Liab.	Epstein; Franklin
Camacho v. Honda Motor Co.	3/78	1988	10	Remanded	Prod. Liab.	Dobbs; Henderson
Polmatier v. Russ	11/20/76	1988	12	Affirmed	Priv. Intent.	Dobbs; Epstein
Boyle v. United Technologies Corp.	4/27/83	1988	5	Remanded	Prod. Liab.	Dobbs; Epstein; Franklin
Corva v. United Services Automobile Ass'n	3/29/79	1985	6	Affirmed	Other	Henderson
Delaney v. The Empire Insurance Co.	6/11/80	1985	5	Affirmed	Other	Henderson
Strauss v. Belle Realty Co.	7/13/77	1985	8	Remanded	Other	Dobbs; Epstein; Franklin
Burnett v. National Enquirer	3/27/76	1983	7	Affirmed	Other	Epstein; Franklin
Hardy v. LaBelle's District Co.	12/78	1983	5	Affirmed	Other	Dobbs
Trimarco v. Klein	1976	1982	6	New Trial	Other	Henderson; Epstein; Franklin

NAME OF CASE	INCIDENT DATE	APPELLATE OPINION DATE	DELAY IN YEARS	FINAL DISPOSITION	TYPE OF CASE	CASEBOOK
Dickens v. Puryear	4/2/75	1981	6	Rev/Aff'd in part	Other	Dobbs
LaBrier v. Anheuser Ford, Inc.	4/17/75	1981	6	New Trial	Other	Dobbs
Wendland v. Ridgefield Construction Services, Inc.	10/30/73	1981	8	Remanded	Other	Dobbs
Gleason v. Guzman	9/29/70	1981	11	Affirmed	Other	Dobbs
Bernier v. Boston Edison Co.	5/24/72	1980	8	Affirmed	Other	Dobbs
Lode v. Mercanio	4/11/73	1979	6	Affirmed	Other	Dobbs
Smith v. Knowles	2/13/74	1979	5	Affirmed	Med. Mal.	Dobbs
Berman v. Allan	11/3/74	1979	5	Remanded	Med. Mal.	Henderson; Dobbs
Daly v. General Motors Corp.	10/31/70	1978	8	Reversed	Prod. Liab.	Dobbs; Franklin
Zuther v. Schild	2/7/73	1978	5	Affirmed	Other	Dobbs
Safeway Stores, Inc. v. Nest-Kart	1/71	1978	6	Affirmed	Prod. Liab.	Dobbs; Epstein; Franklin
Becker v. Interstate Properties	8/31/72	1977	5	Reversed	Other	Henderson; Dobbs
Farwell v. Keaton	8/26/66	1976	10	Reversed	Other	Henderson; Dobbs; Franklin
Tarasoff v. Regents of University of California	10/27/69	1976	7	Affirmed	Med. Mal.	Henderson; Dobbs; Epstein; Franklin
Altieri v. Colasso	4/2/66	1975	9	Remanded	Priv. Intent.	Dobbs
Katko v. Briney	6/16/67	1971	4	Affirmed	Priv. Intent.	Henderson; Dobbs; Epstein; Franklin
Womack v. Eldridge	5/27/70	1974	4	Reversed	Priv. Intent.	Franklin
Steinhauser v. Hertz Corp.	9/4/64	1970	6	New Trial	Other	Epstein; Franklin
Brune v. Belinkoff	10/58	1968	10	New Trial	Med. Mal.	Henderson; Epstein
Coyne v. Campbell	7/5/57	1962	5	Affirmed	Other	Henderson; Epstein
Seffert v. L.A. Transit Lines	10/11/57	1961	4	Affirmed	Other	Franklin

NAME OF CASE	INCIDENT DATE	APPELLATE OPINION DATE	DELAY IN YEARS	FINAL DISPOSITION	TYPE OF CASE	CASEBOOK
Brown v. Martinez	9/54	1961	7	Remanded	Other	Dobbs
Garratt v. Dailey	7/16/51	1955	4	Reversed	Priv. Intent.	Henderson; Dobbs; Epstein; Franklin

SUMMARY OF THE FINDINGS

For these fifty-one cases, collected from four popular casebooks, the average length of time between incident and appellate opinion is 6.94 years, with almost half (twenty-three) involving remands or new trials ordered by appellate judges. Only eighteen out of fifty-one cases were approved at the appellate level. There were eight reversals, and two dismissals.

ALTERNATIVES

While it is difficult to leap from the specific findings of this limited study to broader general conclusions about the tort system, these findings still offer general insight into the problem of claim payment delays. Even based only on the findings of this very brief, rudimentary study, the need for attention to the problem of payment delays seems obvious. The current fault based tort mechanism is often profoundly deficient with regard to handling claims quickly (especially in cases involving product liability and medical malpractice claims). How can severely injured claimants, often facing serious uncompensated medical and wage losses (or worse), be expected to hold out for 6.94 years (the average delay from this cross-section of cases) before receiving compensation, not to speak of the emotional drain such delays prolong?⁹ But still more telling is the indifference of judges and law professors to the plight of those facing such delays, even when such

9. "[I]njured persons, with mounting medical expenses and wage losses, are often pressured into settling their cases with a tremendous discount against the delay that a jury trial would entail" JEFFREY O'CONNELL, *THE BLAME GAME* 126 (1987). See also PAUL C. WEILER, *MEDICAL MALPRACTICE ON TRIAL* 52 (1991).

According to the General Accounting Office (GAO) survey of malpractice claims closed in 1984, the median time from medical injury to tort claim was thirteen months, and the time from claim to payment was another twenty-three months, or a total of three years before the typical patient received any financial redress for an injury. Such a delay is a serious drawback in any compensation scheme. The personal trauma of having to deal with a major disabling injury cannot be alleviated simply by receiving a benefit check in the mail years after the injured party and family had to adjust to the disaster.

Id.

delays stare them in the face. Courts might try to justify this failure to acknowledge such delays in that at least the case being litigated will clarify the law, supposedly leading to more prompt settlement of future cases. But this excuse overlooks the huge delays that prevail in settled as well as litigated cases (about sixteen months even in the routine auto accident case), and the individual hardship in the case before the court.¹⁰ Some concern about the law's delay for parties involved ought to be occasionally referenced, if such concern exists. Based on the foregoing, what if anything can be expected from judges or law professors (and presumably their students when later practicing law) on their own initiatives regarding such delays?¹¹

10. See ALI, *supra* note 1, at 12.

11. The senior author has suggested making changes in the existing tort system, such as early offers, contingency fee reforms, and auto choice insurance options in an effort to deal with, among other things, the problem of delays in personal injury cases. For proposals substituting prompt payment for economic loss in place of dilatory, full-scale claims in auto personal injury cases, see Auto Choice Reform Act of 1997, S. 625, 105th Cong. (1997); Jeffrey O'Connell et al., *The Comparative Costs of Allowing Consumer Choice For Auto Insurance In All Fifty States*, 55 MD. L. REV. 160 (1996); see also JOINT ECONOMIC COMMITTEE STUDY, 105th CONG., 2D SESS., AUTO CHOICE: RELIEF FOR BUSINESS & CONSUMERS (July 1998). For reform of contingency fees with an eye toward encouraging more timely payment, see LESTER BRICKMAN ET AL., RE-THINKING CONTINGENCY FEES (1994); Lester Brickman et al., *The Contingency Fee Proposal, With Section-By-Section Commentary*, 44 EMORY L.J. 194 app. (1995); Michael Horowitz, *Making Ethics Real, Making Ethics Work: A Proposal for Contingency Fee Reform*, 44 EMORY L.J. 173 (1995). The contingency fee is proposed for action by either statute or court rule. Perhaps thus prodded, some judges might be prompted to act. For a bill, see S. 1861, 104th Cong. § 201 (1996). For another reform proposal, encouraging prompt payment restricted to economic losses for all types of personal injury claims, see S. 1861, 104th Cong. § 101 (1996); Jeffery O'Connell, *Two-Tier Tort Law: Neo No-Fault & Quasi-Criminal Liability*, 27 WAKE FOREST L. REV. 871, 883-92 (1992).

