

## THE NEW RULES AND ACCESS TO JUSTICE

On the cover page of the 2008-2009 Annual Report of the Judiciary there is an excerpt from the Latimer House Principles and it says:-

*“People should have easy and unhindered access to courts, particularly to enforce their fundamental rights.”*

At page 5 of that Report the Hon. Chief Justice in his introduction speaks of the philosophy that drives the Judiciary:-

*“to provide an accountable court system in which timeliness and efficiency are the hallmarks, while still protecting integrity, equality and accessibility and attracting public trust and confidence.”*

The Hon. Chief Justice at that same introduction quotes with approval a Commonwealth Secretariat study called “Bringing Justice Home”. He quotes the following excerpt:-

*“the historical experience of the common law has been that in reality, too many barriers have continued to deny citizens access to the courts. These barriers have been systemic, procedural, financial, physical and cultural. They include the related problems of delay and backlog, antiquated court facilities, outdated approaches to litigation by judges and lawyers and insufficiency of funding.”*

What is the primary function of the Judiciary? What service do judges perform as part of the Judicial Arm of the State? They are each there to resolve disputes according to law. When a case is thrown out because of failure to comply with the time limits of the rules, does this solve the dispute? Are the Judges now slaves to the very rules they have devised? Litigants are being driven from the seat of judgment before the merits of their cases are even considered.

Is this what we pay the Judges for?

Consider the Judiciary's Annual Report for 2008-2009. There is a wealth of statistics and graphs in there. At Table 7 on page 98 there is information on the amount of civil cases filed in the High Court from 2003 to 2009. When the new rules came into effect in 2005 there was a decrease in the number of cases filed. For 2003-2004 there were 6185 cases filed. In 2004-2005 it fell to 5976. In 2005-2006 there were 4121 cases filed. Since then the figure has steadily increased to 4950 in 2008-2009. We are given information on the number of cases determined for each year.

What is interesting about the statistics in this Report is that nowhere have we been given a breakdown of the amount of CPR cases thrown out for non-compliance or those that have been summarily dismissed at a case management conference without the benefit of a trial.

Access to justice is not measured by the amount of cases Judges clear from their lists each year. The citizens and taxpayers who are paying for the service of a professional judge must come away feeling satisfied that their case was heard and determined.

Are our Judges now spending more time on case management than on trying cases? Some practitioners have the view that the mechanical setting of strict and unrealistic time deadlines, where they have only weeks to prepare for a trial which is fixed for hearing some 10 months away is a form of procrastination by the Judges. Is simply adding more Judges to this scenario going to solve the problem?

And what about the timeliness of the Judges themselves? There are many complaints about delays in giving written judgments. There is no strict rule where a Judge is bound to deliver his written decision within a certain time. Unlike the strict deadlines they now impose on litigants, there are no sanctions for Judges who take sometimes years to deliver their judgments. Is that fair?

The Hon. Chief Justice Archie in his address at the opening of the 2009-2010 Law Term said:-

*"We accept our responsibility and are putting our house in order. At the last meeting of judges held in July we adopted a 120-day time limit for the delivery of*

*reserved judgments. The code of judicial conduct is now substantially complete and will be formally adopted and circulated for public information before the end of the year. This is the standard to which we will publicly agree to hold ourselves accountable and which you are entitled to expect and demand of us.”*

That was last year. Where is the draft Code of Judicial Conduct that was promised? A Bill to achieve the same thing had been brought to the Parliament sometime ago, but nothing became of it.

When the new rules were being formulated in 1998 or so, they were based on a Report on the Review of Civil Procedure by Judge Dick Greenslade. In 1998, Judge Greenslade recommended certain procedural changes, which became the basis of the new rules in Trinidad and Tobago. What seems to have been forgotten some 12 years later is that Judge Greenslade also recommended other changes to our civil justice system, which would support and justify these new rules. Some of these other recommendations were:-

- (a) A small claims court
- (b) A regulated system of contingency or “conditional” fees; and
- (c) compulsory professional indemnity insurance for attorneys.

None of these recommendations have ever been implemented since the new rules came into effect. The result of this is that it is now prohibitively expensive to bring claims valuing \$350,000.00 or less in the High Court having regard to the amount of up-front work that has to be done. Those costs can rack up and may even exceed the claim itself. Even before the trial the “candle can cost more than the funeral.” That interferes with access to justice.

At present Attorneys cannot charge contingency fees save for reasonable commissions on liquidated claims. The rise in the cost of litigation was expected under these new rules, hence the Greenslade recommendation of “conditional” fees. What is required is a regulated system of “conditional fees” in certain cases so as to provide an incentive for attorneys to assist clients who cannot afford. The UK has put in place such a system. The Law Association has considered amending the Code of Ethics to do so, but it may be that the Parliament would have to partially repeal the law of champerty and maintenance by

way of an amendment to the Legal Profession Act.

The insistence by the courts on strict compliance with the rules would leave, and have left many clients in the position where their cases are dismissed due to the delay of their attorneys. There are very few cases of attorneys being sued for professional negligence in this country. The majority of attorneys do not have professional indemnity insurance. Isn't it about time the law required attorneys to have such insurance – if only because their clients can be compensated for their negligence, in what has now become a very hazardous litigation system?

As far back as 1954 Professor L.C.B. Gower made the following remarks on the Evershed Report on English Civil Procedure:-

*“...litigation is fast becoming a luxury which few can afford, and which many of those who can, prefer to do without. At the worst the result is a denial of justice; at the best it marks the atrophy of the traditional judicial system of which we are deservedly proud. If, as is believed, this is an accurate diagnosis, it is apparent that the traditional attitude of apathy and complacency is a dangerous anachronism.”*

In 2010 we have a situation where the Courts, in an attempt to combat an attitude of “apathy and complacency” have gone, some might say, too far. They have taken a sledgehammer to kill a fly. The result is that a front-loaded system with pressurized deadlines and professional hazards has become too risky and expensive for the average citizen.

We all will remember the history of the development of the principles of equity as a reaction to the strict application of procedural forms and rules of the common law in England. Equity is commonly described as mitigating the rigor of the common law. The courts of equity developed these principles to apply justice where litigants were constrained by technical rules of procedure in the common law courts. Have we reached that position in Trinidad & Tobago?

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