Friday, April 15, 2011

Unusual Allegations of Plagiarism by a Trial Judge

The BC Court of Appeal has released the **Cojocaru (Guardian Ad Litem) v. British Columbia Women's Hospital and Health Center**, 2011 BCCA 192 decision, in which it overturns the Trial decision, citing that the Trial Judge did not demonstrate, through the Trial judgment, that the Reasons given were an independent analysis of the Trial evidence.

A sensational news story already, it will have some legs since this was a 2 to 1 decision in the Court of Appeal and the plaintiff's lawyer has stated publicly that an appeal is likely. The **Vancouver Sun's article on this story is found here**.

The BC Court of Appeal cited three previous decisions whereby Judges were alleged to have utilized, verbatim, large parts of counsel submissions to formulate their reasons:

1. *R. v. Gaudet* (1998), 40 O.R. (3d) 1, 125 C.C.C. (3d) 17 (C.A.);
2. *Sorger v. Bank of Nova Scotia* (1998), 39 O.R. (3d) 1, 160 D.L.R. (4th) 66 (C.A.); and
3. *Janssen-Ortho Inc. v. Apotex Inc.*, 2009 FCA 212, 392 N.R. 71.

As a practicing lawyer, it strikes me that there is substantial merit in the dissenting opinion of Mr. Justice Smith – Trial Judges obviously cannot be said to be said to have abandoned their responsible to independently review and assess and opine on the evidence, simply because they refer to some of the submissions of counsel. This is even more pronounced with the high file load imposed on Judges.

The norm is that Judges are extremely hard-working and take extensive and detailed notes during any Trial. They typically then spend extra time, at night, organizing or summarizing their notes, in order to keep a handle on all the issues at play – particularly in a long 30 day Trial, as was the case here.

In this case, the majority decision noted that not only must justice "be seen" to have occurred, but that in this specific case, that there is an absence of evidence within the Trial judgment that shows the Trial Judge's own reasoning process to deciding the case:

Reasons for Judgment of the Honourable Madam Justice Levine and the Honourable Madam Justice Kirkpatrick:

[107] We have had the privilege of reading the draft reasons for judgment of our colleague, Mr. Justice Smith, in this most troubling appeal.

[108] The trial judge's reasons for judgment raise difficult issues of principle that confront the basis for appellate review.

[109] This is not an ordinary case of "insufficient reasons", as dealt with by the Supreme Court of Canada in a series of recent cases, represented by R. v. Sheppard, 2002 SCC 26, [2002] 1 S.C.R. 869, and R. v. R.E.M., 2008 SCC 51, [2008] 3 S.C.R. 3 (applied to civil cases in F.H. v. McDougall, 2008 SCC 53, [2008] 3 S.C.R. 41). On their face, the reasons for judgment of the trial judge, if accepted as such, are amenable to appellate review and thus satisfy what has emerged as the functional test for sufficiency of reasons. On that basis, there is an urge to deal with these appeals on their merits and seek to resolve the issues of law and fact raised by the appellants' arguments, as Mr. Justice Smith has done so thoroughly.

[110] The alternative – rejecting the reasons for judgment – is to impose upon the parties to this complex litigation the financial and emotional expense of remounting their cases at a new trial.

[111] Despite this hardship for the parties, we are, with great respect, unable to agree with our colleague's fundamental conclusion that the trial judge independently and impartially considered the law and the evidence and arrived at his own conclusions on the complex issues before him. We conclude that the reasons for judgment must be rejected because they cannot be taken to represent the trial judge's analysis of the issues or the reasoning for his conclusions.

[112] On our analysis, the reasons for judgment do not meet the functional requirement of public accountability. They cannot satisfy the public that justice has been done, and would, if

accepted, undermine support for the legitimacy of the justice system. On those bases, the reasons do not allow for meaningful appellate review.

[113] When one closely examines the trial judge's published reasons, laid side-by-side with the respondents' written submissions, one is left with the indelible impression that the trial judge could not have applied his own reasoning process to the case. This impression is most acute in that portion of the reasons that address liability.

[114] It is true, as our colleague has noted, that 47 of the 368 paragraphs of the reasons are in the judge's own words, or substantially his own words. The reasons on liability run to 222 paragraphs, 30 of which are in the judge's own words. However, most of those paragraphs (20) address uncontroversial facts, or are introductory in nature, or simply summarize the respondents' submissions. No independent reasoning was required to be applied in those paragraphs and none is evident.

[115] Rather than exhibiting any sign that the trial judge grappled with the difficult issues confronting him, one is left with page after page (84) of wholesale, uncritical reproduction of the respondents' written submissions.

[116] This most unfortunate circumstance renders this case factually distinguishable from most of the cases referred to by our colleague that have considered the issue.

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[128] As difficult as it will be for the parties to remount this trial, we have reluctantly concluded that there is no principled basis to deal with these appeals on their merits because the trial judge's reasons for judgment cannot be considered to represent his reasons, do not meet the functional requirement of public accountability, and do not allow for meaningful appellate review.

[129] It follows that we would allow the appeals and order a new trial. We would order that the costs of the first trial, this appeal, and the second trial be in the cause.

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