

CASE LAW UPDATE

*Stephanie Turnham**

Cojocarú (Guardian Ad Litem) v British Columbia Women's Hospital and Health Center

2011 BCCA 192 (Released 14 April 2011)

Trial Fairness – Adequacy of Reasons for Decision

After a 30-day trial, the trial judge awarded over \$5 million to the plaintiffs for injuries caused during child birth. However, the trial judge's reasons consisted largely of a reproduction, without attribution, of the plaintiffs' written closing submissions. In this appeal judgment, the majority of the British Columbia Court of Appeal held that the reasons could not be taken to represent the trial judge's analysis of the issues or the reasoning of his conclusions. As a result, the Court of Appeal rejected the reasons and ordered a new trial.

The majority of the Court of Appeal noted the "difficult issues of principle" that arose from the format of the trial judge's reasons. The Court found that the reasons did not exhibit any sign that the trial judge had grappled with the difficult issues confronting him, but rather "one is left with page after page (84) of wholesale, uncritical reproduction of the respondents' written submissions."

Of the 368 paragraphs of the reasons, only 47 were in the judge's own words. Of the 222 paragraphs dealing with liability, only 30 were in the judge's own words. However, 20 of those paragraphs were introductory in nature, addressed uncontroversial facts, or simply summarized the plaintiffs' submissions.

The court referred to the case of *R v RM*, [2008] 3 SCR 3, where the Supreme Court of Canada explained the purpose behind reasons for judgment: (1) reasons provide public accountability; (2) reasons help ensure fair and accurate decision making – the task of articulating the reasons directs the judge's attention to the salient issues; and (3) reasons are a fundamental means of developing the law uniformly for future courts.

The Court of Appeal was particularly troubled by the fact that the trial judge did not attribute any of the passages in his reasons to the respondents' submissions. As noted by the Federal Court of Appeal in *Janssen-Ortho Inc v. Apotex Inc*, 2009 FCA 212, the adoption of submissions without acknowledgment "may lead to the impression that the judge has not done the work which he is called upon to do, namely to examine all the evidence before him and to make the

appropriate findings." The majority of the Court of Appeal felt that this impression had materialized in this case.

The Court was also troubled by the fact that the adoption of the submissions led the trial judge to ignore certain important pieces of information. For example, he failed entirely to deal with a cogent and uncontradicted defence argument on the issue of causation. As a result, he failed to discharge his burden of informing the losing parties of the reason for their loss.

In the result, the Court held the trial judge's reasons failed to satisfy the requirement of public accountability, and therefore could not be the subject of meaningful appellate review. The Court found that the presumption of judicial integrity and impartiality was displaced. A "reasonable and informed observer" would conclude that the appellants had not received a fair consideration of their case. Acceptance of the reasons would risk undermining the confidence of the public in the administration of justice.

Of note, the dissenting judge felt that the trial judge did independently and impartially consider the law and evidence, but would have overturned the trial decision on the substantive findings of negligence and liability.

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