

# Appeal court slams judge's interventions

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Trial judges can expect to be named and shamed if they repeatedly display bias and derail trials by interfering with witness examinations.

On April 16, the Ontario Court of Appeal administered a severe tongue-lashing to Ontario Superior Court Justice Robert Scott, whose "improper" interjections during a five-day, judge-alone trial in 2011 caused a "miscarriage of justice" for two people accused of conspiring to produce and traffic marijuana.

"This is the second time in less than one year that this court has allowed appeals relating to judgments of this trial judge on the basis of reasonable apprehension of bias," Justices David Doherty, James MacPherson, and Eleanore Cronk wrote in their judgment in *R. v. Huang* [2013] O.J. No. 1695.

"In both instances, the perception of bias arose because of improper and unwarranted interventions by the trial judge during the examination of witnesses: see *Lloyd v. Bush*, 2012 ONCA 349," the panel noted. "In both instances, public resources were wasted, great inconvenience to the parties resulted, and the integrity of the administration of justice was tarnished."

The Court of Appeal reminded

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lower courts that it is "counsel's job, not the trial judge's, to explore inconsistencies in a witness' testimony....It bears repetition that trial judges, like appellate judges, must preside in a judicious fashion."

The appeal court's admonition was unusually pointed and blunt at the same time.

"It's a stinging rebuke of the trial judge," observed Criminal Lawyers' Association president Norman Boxall, who suggested such conduct by trial judges is neither common nor rare, although it is likely under-reported. "There would be a natural reluctance of lawyers to bring these types of appeals, particularly in [smaller] jurisdictions where they're more likely to appear in front of that jurist again," Boxall said.

He stressed that in an adversarial, rather than inquisitorial system, judges must be dispassionate listeners.

"One of the reasons that a judge being interventionist is problematic is the judge, by virtue of their position, carry with them authority, and persons want to please them," he explained. "So when judges ask questions of witnesses, sometimes it might be helpful. But there is always the danger

that the witness is actually hoping to please the judge, and is answering accordingly."

Commercial litigator Irvin Schein of Toronto's Minden Gross told *The Lawyers Weekly* the same problem has scuttled civil trials, leaving clients to bear the psychological and emotional costs, and having to "burn a bunch of cash" for reasons beyond their responsibility or control. He suggested it might be time for the Minister of Justice to consider the possibility of compensating such litigants.

"One hopes that this type of admonition — which I've never seen before in over 30 years of practice — will impact in a positive way on other judges," Schein said.

The Court of Appeal concluded that Justice Scott "fatally compromised" the fairness of the trial by interrupting the Crown's questioning of one of the accused, who was being asked to explain an apparent inconsistency in his story, but who had yet to finish testifying on the point.

The judge's intervention "clearly impugned the creditworthiness of the appellant's testimony by suggesting that he had or was about to commit perjury," and "gave rise to a reasonable apprehension of bias," the appeal court held in set-

## Judge's 'real jam'

Excerpts from Justice Robert Scott's comments during the Crown's cross-examination of an accused, from *R. v. Huang* [2013] O.J. No. 1695:

**THE COURT:** I'm going to have to stop you right there for a minute. Do you understand what perjury is, sir? Do you want to take a minute with your counsel and she will instruct you what perjury is and that usually it incorporates a year in custody.

**THE ACCUSED:** I don't think [my statement is] false.

**THE COURT:** Counsel is standing. Just a minute. Yes? Do you want to take a minute and speak to him about what perjury is about?

**DEFENCE COUNSEL:** Well Your Honour, with all due respect, Your Honour, I don't think it is proper for Your Honour to interject and caution him about perjury at a point when he is trying to explain an answer.

...I have concerns that if Your Honour believes that we are entering into perjurious evidence, you are obviously the trier of fact and I have concerns about this trial, frankly. If Your Honour has those concerns then....

**THE COURT:** I have concerns, counsel. I'll tell you that right now but he may be able to explain them. I just wanted to make sure that he didn't get himself entrapped into something that might cause some other charges. That's all I'm saying all right.

**DEFENCE COUNSEL:** Okay, Okay. I don't think that...

**THE COURT:** Do you want to counsel him with respect to what perjury means? That's all.

**DEFENCE COUNSEL:** No I don't. I don't think that...

**THE COURT:** That's all I'm looking for, all right....I just want to make sure that he doesn't get himself in a real jam here.

aside the convictions of Ying Huang and John Huang.

The court said the perjury insinuation could also have compromised the trial's fairness by intimidating the accused in his subsequent

answers to the Crown's questions.

The panel rejected the Crown's argument that defence counsel failed to object to the judge's remarks. "In our view, her objection was timely, restrained and entirely

appropriate. In any event, the failure by counsel to object, or to seek a mistrial, has never been taken to constitute a waiver by an accused at a criminal trial of his or her rights, especially as fundamental and unqualified a right as the entitlement to a fair and impartial trial."

Much as occurred with regards to *Huang*, a different appeal panel which last year reviewed Justice Scott's comments in *Lloyd v. Bush* [2012] O.J. No. 2343 was perplexed by the judge's interventions. In that civil trial the judge also appeared to make an adverse finding of credibility against one of the parties before the trial was over. He also broached the issue of civil fraud—a subject neither party had raised.

Setting aside Justice Scott's decision for apparent bias, Court of Appeal Justice Robert Armstrong observed in *Lloyd*: "On what basis the trial judge thought it was appropriate to make the above statement before the conclusion of the trial, it is impossible to fathom. There is nothing in the transcript to indicate what prompted this statement. It appears to come out of the blue. Neither counsel for the appellants nor counsel for the respondents were able to provide any explanation for it."