

JOURNAL ARTICLE NO. 3
CIVILITY AT TRIAL: WHAT IS THE ROLE OF THE TRIAL JUDGE?

INTRODUCTION:

In our class discussion of *Marchand*¹, it was unanimously agreed that the conduct of defence counsel at trial was unacceptable. Although the Court of Appeal shared this opinion, the Court held that the manner in which the Trial Judge dealt with defence counsel's attacks on plaintiffs' counsel did not deprive the plaintiffs of a fair trial.

In this journal I shall review the conduct of counsel at the trial in *Marchand* and the manner in which this conduct was considered by the Court of Appeal. The concern I have with the decision of the Court of Appeal is, if the conduct of the defendants' counsel in this case did not deprive the plaintiffs of a fair trial, under what circumstances, if any, could a Court reach such a finding?

THE CONDUCT OF COUNSEL IN *MARCHAND*:

The judgment of the Court of Appeal in *Marchand* set out the unacceptable conduct of counsel stating:

“The record shows that from early on in the trial, any degree of trust between Mr. Wunder, on the one hand and Mr. Tait, counsel for Dr. Asher, and Mr. Liswood, counsel for the Hospital and nurses, on the other, had completely vanished, to be replaced by a level of rancour and hostility rarely, if ever, seen in an Ontario Court room. The record also amply supports the appellants' contention that Mr. Tait repeatedly attacked Mr. Wunder's integrity and competence. Comments about counsel that have no place in any Court room infected this trial from start to finish.”²

Specific examples cited by the Court of Appeal included Mr. Tait accusing Mr. Wunder of “a complete lack of integrity; of cheating and intentionally defying the rules of practice; of using the right to object to cross-examination to suggest answers to every witness who has come into this Court room”; of abuses of The Rules of Civil Procedure; ... of “flatly lying to the Court”; of deliberately misleading the Court; defying and deceiving the Court...; and “of committing an outrage on the Court.”³

¹ *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham*, (2000) 51 O.R. (3d) 97.

²*Ibid.*, at p.132.

³*Ibid.*, at pp.132-133.

Mr. Liswood also criticized Mr. Wunder in a similar manner. The criticism by Mr. Liswood alleged abuses of The Rules of Civil Procedure and alleged that Mr. Wunder violated Rule 10 of The Rules of Professional Conduct by knowingly attempting to deceive the Court and by knowingly misstating the contents of documents.⁴

The decision of the Court of Appeal stated that on occasion Mr. Wunder acted in a similar manner. Notwithstanding this finding, the Court held that Mr. Tait and Mr. Liswood must accept most of the responsibility “for conduct that by any reasonable standards of civility was unacceptable for any counsel let alone senior counsel who should know better”.⁵

During the argument of the appeal, the solicitors for the respondents made no attempt to defend Mr. Tait’s conduct and acknowledged that Mr. Tait’s conduct toward Mr. Wunder had fallen below an “acceptable standard”. Mr. Liswood also acknowledged that his own conduct at trial had been unacceptable.

THE APPEAL IN *MARCHAND*:

The plaintiffs appealed the trial decision of Mr. Justice Granger on the following grounds:

1. The Trial Judge erred in failing to find that the defendants were negligent;
2. The plaintiffs did not receive a fair trial because of the Trial Judge’s evidentiary rulings; and
3. The Trial Judge’s conduct of the trial raised a reasonable apprehension of bias.

On appeal, the appellants’ main contention was that the Trial Judge’s conduct of the trial raised a reasonable apprehension of bias.⁶ Although the Court considered all three grounds of appeal in its judgment, I shall focus upon the third ground of appeal which considered the Trial Judge’s conduct of the trial. Even though I concur with the finding of the Court of Appeal that the Trial Judge’s conduct of the trial did not raise a reasonable apprehension of bias, it is my opinion that the conduct of the defendants’ counsel at trial, and the Trial Judge’s failure to restrain this conduct, deprived the plaintiffs of their right to a fair trial. Upon reviewing the decision of the Court of Appeal, it appears that this issue may not have been specifically argued by counsel for the appellants.

⁴Ibid., at pp.134-135.

⁵Ibid., at p.134.

⁶Ibid., at p.129.

In my view, the Court of Appeal avoided criticizing Mr. Justice Granger for not admonishing the conduct of defence counsel during the trial. The Court took this approach by stating that the unprofessional conduct of counsel is a matter for The Law Society of Upper Canada and the issue before the Appeal Court centers not on the conduct of counsel but its impact on the fairness of the trial.

I believe a Trial Judge has a positive obligation to ensure that the rules of Court and The Rules of Professional Conduct are adhered to in the Court room. The Rules of Professional Conduct⁷ and The Canadian Bar Association Code⁸ set out the duties which a lawyer owes to other members of the profession, including the obligation that “the lawyer’s conduct toward other lawyers should be characterized by courtesy and good faith”.

The approach taken by the Court of Appeal in *Marchand* suggests that the unprofessional conduct of counsel at trial is not the responsibility of the Trial Judge. This would suggest that opposing counsel should report such conduct to The Law Society. I would expect when faced with such a complaint, The Law Society would question that if the conduct was as egregious as alleged, why did the Trial Judge not feel the same way and take action at that time.

In dismissing the appellants’ submission that a reasonable apprehension of bias arose from the Trial Judge’s refusal to restrain defence counsel, the Court of Appeal provided three answers:

1. The Trial Judge did not remain silent about counsels’ conduct and intervened during the trial;
2. The failure of the Trial Judge to control defence counsel does not automatically indicate judicial bias; and
3. Most of the attacks against Mr. Wunder occurred during submissions on motions rather than during the presentation of evidence.

With respect to the first answer, it is my view that the evidence does not support the finding reached by the Court of Appeal. The Court of Appeal decision indicated that on the 15th day of trial and on the following day, Mr. Justice Granger urged counsel to stop their “interminable fighting” and he emphasized the need for civility in the Court room. The only other occasion cited by the Court of Appeal upon which the Trial Judge commented on counsels’ conduct was on February 9, 1994 during a brief exchange between counsel and the Court.

⁷Law Society of Upper Canada, Rules of Professional Conduct. See Rule 6.01(1) and Rule 6.03(1).

⁸Canadian Bar Association Code of Professional Conduct, adopted by Canadian Bar Association, August, 1987. See Chapter I Integrity and Chapter XVI Responsibility to Lawyers Individually.

All parties on the appeal and all members of our class agreed that the conduct of defendants' counsel at trial was unacceptable. There is no indication provided in the Court of Appeal decision to suggest that the majority of this conduct occurred during the first 15 days of trial. One can only conclude that the conduct continued throughout the course of the trial. It appears that after speaking to counsel on the 16th day, Mr. Justice Granger simply elected to take a passive approach and not attempt to restrain counsel. This is recognized by the Court of Appeal which when referring to the inaction of Mr. Justice Granger stated "he was well aware of the acrimony and chose largely to ignore it".⁹

CONCLUSION:

In my view, the conduct of the defendants' counsel in *Marchand* deprived the plaintiffs of their right to a fair trial. I compare the role of a Trial Judge to that of a referee in a sporting contest. It is the obligation of the referee to ensure that the rules of the sport are enforced and to make all necessary calls and rulings. The Trial Judge occupies a similar role and is responsible to ensure that counsel adhere to the rules of Court in the Court room. Unlike the sports referee, the decision of the Trial Judge is subject to appeal and such appeal should also include scrutiny of the action or inaction of the Trial Judge and whether or not such conduct deprived any of the parties to a fair trial.

After carefully reviewing the conduct of Mr. Tait and Mr. Liswood, I am concerned that if the Court of Appeal does not find that conduct of this nature deprived the plaintiffs of a fair trial, virtually any conduct of counsel at trial may be tolerated subject to whatever disciplinary action might be taken by The Law Society of Upper Canada.

⁹*Marchand*, op.cit., at p.136.