UNREASONABLE REVIEW: THE LOSING PARTY AND THE PALPABLE AND OVERRIDING ERROR STANDARD

Paul J. Pape and John J. Adair[i]

Introduction

"Justice must not only be done, but must be seen to be done."[ii] This oft-stated principle is focused on the losing party, and is the basis on which the losing party is afforded many rights.[iii] Losing parties are entitled to be heard. They are entitled to have the basis for the decision explained to them in reasons. Their reasonable expectations are important when costs are being awarded to the successful party. These and other rights ultimately ensure the integrity of the system as a whole and support the repute of the administration of justice in the public eye.

However, the concern for the losing party's view of the world that is evident in many aspects of the trial process is arguably overlooked when it comes to defining and applying the standard of review on appeal. The appellant will often read that his or her appeal has been dismissed because the trial judge made no "palpable and overriding error." That is a judge's rule, not a people's rule (try explaining it to a client). It does little to promote the repute of the administration of justice in the eyes of the losing party.

This article concerns the standard of appellate review and, in particular, the relationship between that standard and the losing party. We undertake the examination in the context of two principles: first, that the Court of Appeal is a court of justice; and, second, that justice (and the perception of it) is a matter of process, the most important participant being the losing party. One party will always be unhappy with the result; but if that party views the process as fair and reasonable, justice has been substantially advanced because justice has been seen to be done. From that perspective, our Court of Appeal ought to ask not whether the trial judge made a palpable and overriding error but whether the trial judge's findings are reasonable on the record. There is jurisprudential support for this more probing standard of review and, more importantly, it will further the Court of Appeal's role as a court of justice.

The Supreme Court of Canada Speaks: *Housen* and *H.(L.)*

The Supreme Court of Canada has recently addressed the standard of appellate review in two decisions: *Housen v. Nikolaisen*[iv] and *L.H. v. Canada (Attorney General)*.[v]

Housen provides that the standard of review for questions of law is correctness. This is based on the notion that appeal courts serve a broad, law-making function that is not in play to the same degree in trial courts, which are focused more on resolving the immediate dispute between the

parties. On questions of fact, inferences drawn from facts and questions of mixed fact and law, the majority of the Court held that the standard is one of palpable and overriding error.

Two aspects of the majority judgment in *Housen* are of interest for our purposes. First, the majority chose the palpable and overriding error standard in light of the limited role it assigned to appellate courts:

> The appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities.[vi]

The majority of the Supreme Court held that the palpable and overriding error standard is a direct and ineluctable result of this limited role. Importantly, the majority signalled that where there is any evidence to support the finding of fact, it cannot be overturned:

> A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion [emphasis added].[vii]

Accepting that the appeal court is not there to retry the case, it is not at all clear why this deference is required. As will become apparent from the review of *H.(L.)*, there is a gap between avoiding a hearing *de novo* and the "some evidence" standard discussed in *Housen*: the gap is occupied by a reasonableness standard of review.

The second aspect of *Housen* that is of interest is the division between the majority and the dissent on the proper standard of review for inferences of fact. The dissent held that on inferences of fact, "the appeal court will verify whether [an inference] can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles."[viii]

In contrast, the majority applied the palpable and overriding error standard, holding that only inferences infected by such error could be set aside on appeal.[ix] In disagreeing with the dissent, the majority emphasized the words "*reasonably supported*" and distinguished that description from the palpable and overriding standard.[x] The majority was clearly aware that "reasonableness" lies between a *de novo* hearing and palpable and overriding error and concluded that that the strictness of the latter was required.

Two principles emerge from *Housen*. First, where there is any evidence to support a trial judge's finding of fact, that finding is not susceptible to appellate review. Second, review for reasonableness is insufficiently deferential and therefore not appropriate.

The Supreme Court of Canada revisited the standard of review question again 3 years later in *H.(L.)*, a case in which the Saskatchewan Court of Appeal held that its constituting legislation imposed a less deferential standard of review. At the Supreme Court, the majority purported to affirm *Housen*, holding that palpable and overriding error is still *the* standard of review. However, Fish J. (for the majority) also stated that other expressions are equally appropriate:

> "Palpable and overriding error" is at once an elegant and expressive description of the entrenched and generally applicable standard of appellate review of the findings of fact at trial. But it should not be thought to displace alternative formulations of the governing standard. In *Housen*, for example, the majority (at para. 22) and the minority (at para. 103) agreed that inferences of fact at trial may be set aside on appeal if they are "clearly wrong". Both expressions encapsulate the same principle: an appellate court will not interfere with the trial judge's findings of fact unless it can plainly identify the imputed error, and that error is shown to have affected the result.
>
> In my respectful view, the test is met as well where the trial judge's findings of fact can properly be characterized as "unreasonable" or "unsupported by the evidence" [emphasis added][xi]

Fish J. concluded that an appellate court, "may substitute its own view of the evidence and draw its own inferences of fact *where the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence*" [emphasis in original].

Ontario Court of Appeal – Applying *Housen* and *H.(L.)*

In *Waxman v. Waxman*, which followed *Housen* but was decided before *H.(L.)*, Doherty J.A. engaged in a detailed analysis of the standard of review and rejected the appellant's argument that the trial judge's findings ought to be subjected to review for reasonableness. He found this to be precluded by *Housen*:

> After *Housen*, appellate courts will not review findings of fact, either primary or those drawn by inference, by asking whether on the totality of the record, those findings are reasonable. Cases from this court such as *Keljanovic Estate v. Sanseverino* and *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* must be taken as overruled to the extent that they contemplate appellate review of findings of fact based on an independent albeit limited appellate reassessment of the reasonableness of the findings of fact made at trial [emphasis added; citations omitted].[xii]

The Supreme Court of Canada's decision in *H.(L.)* did not seem to change matters for the Ontario Court of Appeal, which has determined on many occasions – without analysis – that *H.(L.)* left the highly deferential standard from *Housen* intact and picked up on Fish J.'s statement that "unreasonable" is the "functional equivalent" of palpable and overriding error (such statement is, on its face, highly questionable).[xiii]

However, Doherty J.A. subsequently concluded that *H.(L.)* had, in fact, changed the standard of review analysis. In *Peart v. Peel (Regional Municipality) Police Services Board*, Justice Doherty described the standard of review landscape after *H.(L.)*:

> The proper description of the level of deference to be afforded fact finding, particularly fact finding based on inferences drawn from primary facts, has been the subject of some controversy: see the majority and dissenting opinions in *Housen v. Nikolaisen*. In *Waxman v. Waxman*, at paras. 301-306, this court articulated its interpretation of the majority view in *Housen v. Nikolaisen* as it related to the review of inferences drawn from primary facts. The analysis in *Waxman v. Waxman* has been overtaken by the judgment in *L. (H.) v. Canada (Attorney General)*. Fish J., for the majority at para. 56, described the standard of review applicable to findings of fact in these terms:
>
> > [I]t seems to me that unreasonable findings of fact -- relating to credibility, to primary or inferred "evidential" facts, or to facts in issue -- are reviewable on appeal because they are "palpably" or "clearly" wrong. The same is true of findings that are unsupported by the evidence. I need hardly repeat, however, that appellate intervention will only be warranted where the court can explain why or in what respect the impugned finding is unreasonable or unsupported by the evidence.
>
> It is probably impossible to provide an exhaustive list of the errors in the fact finding process that could potentially produce an unreasonable finding of fact. The list would, however, include:
>
> • the failure to consider relevant evidence;
>
> • the misapprehension of relevant evidence;
>
> • the consideration of irrelevant evidence;
>
> • a finding that had no basis in the evidence; and
>
> • a finding based on an inference that is outside of even the generous ambit within which there may be reasonable disagreement as to the inference to be drawn; that is, an inference that is speculation rather than legitimate inference [emphasis added; citations omitted].[xiv]

Thus, according to Justice Doherty, the standard of review was fundamentally changed by *H.(L.)*, which authorized appellate courts to engage in a reasonableness review. This interpretation of *H.(L.)* is consistent with the language of that decision. Although the majority in *H.(L.)* purported to affirm *Housen* and went so far as to say that "unreasonable" is the "functional equivalent" of palpable and overriding error,[xv] the language used by Fish J. cannot be anything but an expansion of the appeal courts' ability to intervene in a trial judge's findings. It seems fair to say, as Fish J. did, that "palpable and overriding error" equates to "clearly wrong". However, the addition of "unreasonable" and "unsupported by the evidence" signal a new, more probing standard of review. The suggestion that these are merely additional expressions of the same

standard is belied by the majority in *Housen*, who clearly distinguish review for reasonableness from the palpable and overriding error standard.

This interpretation of *H.(L.)* is also consistent with the examples given by Justice Doherty of errors that could potentially produce an unreasonable finding. For example, the "misapprehension of relevant evidence" lends itself to an argument that the trial judge's analysis was unreasonable even if the appellant cannot point to a specific error that is shown to be palpable and overriding. Importantly, Justice Doherty's analysis also displaced the "some evidence" standard that a respondent can point to in order to preclude review of an impugned finding and would replace it with a standard that precludes review of a finding only where the finding is reasonably supported by the evidence.

It remains to be seen whether the Court of Appeal will fully embrace *Peart* and use it to engage in more probing review. The court's willingness to do so will likely be determined on a panel-by-panel basis. Some judges will continue to see "unreasonable" and "palpable and overriding" as functional equivalents and conclude that, regardless of the nomenclature, great deference is owed to trial judges. Others may well use *Peart* and its interpretation of *H.(L.)* to overturn decisions that are unreasonable, regardless of whether the errors that make it so can be easily identified. It is worth noting that the nomenclature used in describing the standard of review can itself be of practical significance. The term "palpable and overriding error" creates a "hands off" mindset with some appellate judges. In contrast, a "reasonableness" standard by the very use of the term encourages more probing review.

The Proper Approach

The Purpose of the Court of Appeal

The proper approach to the standard of review ought to be determined with a view to the Court of Appeal's role. The Court of Appeal is, fundamentally, a court of justice. The goal is to ensure that, as much as possible, justice is both done and seen to be done. Rarely will a winning party complain that justice was not done or seen to be done. The focus in determining whether the Court of Appeal has fulfilled its role is of necessity on the losing party. Although the losing party will likely be unhappy with the result, justice can still be seen to be done.

This perspective is the basis for many requirements of the trial process. Perhaps the best example of this is the requirement that a trial judge provide reasons explaining the result. The policy rationale for this rule is that the losing party is entitled, so that justice be seen to be done, to know the basis on which he or she lost the case.[xvi] Similarly, the losing party has the right to be heard and, when costs are awarded, it is the losing party's expectations that serve as a litmus test.

Appellate Review Should be on a Reasonableness Standard

With this perspective in mind, the Court of Appeal should apply a reasonableness standard of review. The losing party who is told that there is no palpable and overriding error and who receives a short endorsement to that effect will not, in many cases, see justice to have been done. In contrast, a losing party will be more likely to be satisfied where the Court of Appeal concludes that the trial decision is reasonable and explains, even briefly, the basis for its conclusion.

A distinction must be drawn between review of trial decisions and review of a trial judge's findings of fact. The reasonableness standard applies to the findings of fact. If the findings of fact are reasonably supported by the evidence, then only a legal error will justify overturning the result. If one or more findings are not reasonably supported by the evidence, then the appellate court must determine whether the remaining findings continue to support the same result or whether the erroneous findings taint the result to the extent that the decision must be overturned. If all findings are reasonable, the decision must be upheld (absent a legal error) even if the court would have arrived at a different result.

The reality is that many judges already approach appeals this way and there is precedential authority to support this approach. In *Kerr v. Danier Leather Inc.*, the majority of the Supreme Court relied on *H.(L.)* and set aside the trial judge's finding with respect to a particular misrepresentation on the basis that, "the trial judge failed to provide any persuasive reasons to reject the unchallenged expert testimony on that point. His finding in that respect can properly be characterized as 'unreasonable' or 'unsupported by the evidence'".[xvii]

Applying a reasonableness standard has several implications for the way in which trial decisions are reviewed. First, the principle that where there is 'some evidence' to support a finding it cannot be overturned must be cast aside. A trial judge is entitled to believe 1 witness over 100, or to prefer 1 document in the face of a stack of contrary documents. However, the mere fact that there is 1 witness or 1 document supporting the trial judge's findings ought not to immunize these findings from appellate review. Rather, the question must be whether the findings are reasonable on the record. This is the standard applied in the United States and, at least there, is considered consistent with the deference owed to trial judges:

> A finding is clearly erroneous, and, therefore, lacking in support of competent evidence, when <u>although there may be evidence to support it</u>, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed [emphasis added].[xviii]

A respondent will almost invariably be able to point to "some" evidence that supports a trial judge's findings. However, ending the inquiry there fails to subject the trial decision to adequate review and will likely leave the appellant questioning the appeal process.

Second, as a corollary to the notion that some evidence is not of itself sufficient to dismiss the appeal, the Court of Appeal ought to engage in a hard review of the evidence to determine whether the trial decision is reasonable and ought to explain the analysis involved in dismissing or allowing an appeal. The "some evidence" principle and the "palpable and overriding error" standard of review permit a cursory explanation for dismissing an appeal. In contrast, providing reasons for concluding that a decision is reasonable or unreasonable "concentrates the judicial mind."[xix]

Asking whether the decision under appeal is reasonable would have significant benefits for appellants. Other changes to the appeal framework would also be helpful in ensuring that the losing party sees justice to have been done. For example, an appellant should not hear in the court of appeal that an argument is not properly before that court, either because it was not raised in the court below or because it was not in the appellant's factum. Judges of the Court of Appeal can and do consider arguments that were not raised below or in the factum, and they will decide cases based on those arguments if the equities of the situation demand that result (and the record is sufficient to allow it to be done).[xx]

Opponents of more exacting review of trial decisions will note that the policy reasons given for limiting appellate review include limiting the number and length (and, therefore, cost) of appeals. It can also be said that the sheer number of appeals being heard makes it impossible to provide detailed written reasons anytime an appeal is dismissed. However, these arguments should not preclude more meaningful review. Regarding the number and length of appeals, the overwhelming majority of appeals are fact-driven. For every ground-breaking constitutional decision, there are dozens of negligence and breach of contract cases. Clearly, appellants are not currently dissuaded by the standard of review that is being applied. With respect to the number of appeals and the court's ability to sift through the evidence on each one, the probing review is generally limited only to one or two issues of substance. In addition, many appeals could still be dismissed via a short endorsement where it is clear that there is no merit in the case.

To summarize, as a court of justice the Court of Appeal can substantially advance its mandate by engaging in reasonableness review. This will go farther in satisfying the losing party than the oblique "palpable and overriding error" standard. This approach is consistent with the court's role as an appellate court: the Supreme Court in *Housen* was wrong, with respect, to conclude that simply because the appeal court is not intended to retry the case, the palpable and overriding error and "some evidence" standards are required. The appropriate middle ground is a review for reasonableness. Where the trial judge's conclusions are within the ambit of what is reasonable,

this can be explained and the losing party will be more likely to see justice to be done. Where the trial judge has gone beyond the ambit of reasonableness, the decision ought to be overturned even if the appellant cannot specifically point to a palpable and overriding error.

---

[i] Of Pape Barristers Professional Corporation.

[ii] *R. v. Sheppard*, [2002] 1 S.C.R. 869 at para. 15 [*Sheppard*]

[iii] See the Advocates' Society Journal [**cite to AS Journal issue in tribute to The Honourable Mr. Justice Marvin Catzman**] tribute to the late Mr. Justice Catzman. The judges of the Court of Appeal for Ontario in their praise of Justice Catzman's work made several references to his concern for the losing party and the efforts he made to ensure that justice was seen to be done.

[iv] *Housen v. Nikolaisen*, [2002] 1 S.C.R. 235 [*Housen*]

[v] *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 [*H.(L.)*]

[vi] *Housen*, *supra* note 2 at para. 3

[vii] *Housen*, *supra* note 2 at para. 1

[viii] *Housen*, *supra* note 2 at para. 103. Although the dissent thought and stated this to be an identical standard of review, the majority believed it to be a lower standard.

[ix] *Housen*, *supra* note 2 at para. 21

[x] *Housen*, *supra* note 2 at para. 21

[xi] *H.(L.)*, *supra* note 3 at paras. 55-56

[xii] *Waxman v. Waxman*, 2004 CarswellOnt 1715 at para. 305 (C.A.) [*Waxman*]

[xiii] *MacDougall v. MacDougall*, 2005 CarswellOnt 7257 at para. 31 (C.A.); see also *Stemeroff v. Swartz*, 2005 CarswellOnt 2085 at para. 17; *Children's Aid Society of Nipissing and Parry Sound v. S.(S.)*, 2008 CarswellOnt 220 at para. 13 (C.A.).

[xiv] *Peart v. Peel (Regional Municipality) Police Services Board*, 2006 CarswellOnt 6912 at paras. 158-59 (C.A.)

[xv] *H.(L.)*, *supra* note 3 at para. 110

[xvi] *Young v. Young* (2003), 63 O.R. (3d) 112 at para. 27 (C.A.)

[xvii] *Kerr v. Danier Leather Inc.*, [2007] 2 S.C.R. 331 at para. 53

[xviii] *United States v. United States Gypsum Co.* 333 U.S. 364 (1948)

[xix] *Sheppard*, *supra* note 1 at para. 23

[xx] See, *e.g.*, *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.), in which sections 23 and 24 of the *Class Proceedings Act* were raised for the first time on appeal.