Judicial “Copying” does not affect Independence or Impartiality: Supreme Court of Canada

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Rezumat:

Copierea unei lucrări a altuia fără menționarea autorului constituie plagiat. Cu excepția cazului în care ești judecător. Aceasta a fost opinia unanimă a Curții Supreme în cauza Cojocaru c. British Columbia Women’s Hospital and Health Centre, 2013 SCC 30. Hotărârea, pronunțată într-o cauză privind neglijența medicală, este încărcată cu probleme legate de drepturile de autor. Lucrarea de față analizează acele probleme.

Abstract:

Unattributed copying of another’s work is plagiarism. Except when you are a judge. This was the view of a unanimous Supreme Court in Cojocaru v. British Columbia Women’s Hospital and Health Centre, 2013 SCC 30. The decision, a medical negligence case, is riddled with copyright implications. This work explores those implications.

Keywords: copyright, plagiarism, judicial opinions, legal writing

1. Introduction

Unattributed copying of another’s work is plagiarism. Except when you are a judge. This was the view of a unanimous Supreme Court in *Cojocaru v. British Columbia Women’s Hospital and Health Centre*[15]. The decision, a medical negligence case, is riddled with copyright implications. This work explores those implications.

2. Facts

Eric Cojocaru suffered brain damage due to oxygen

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[15] 2013 SCC 30 (“*Cojocaru*”).

deprivation during his birth.[16] He now has cerebral palsy. The litigation, successful for the most part[17], concerned the failure of the respondents to obtain Mrs.Cojocaru's informed consent (given her previous caesarean section[18]).

3. Judicial History

The trial judge found the defendant respondents liable.[19] In doing so, 321 paragraphs of his 368 paragraph judgment was copied, without attribution, from the plaintiff's submissions.[20] A majority of the British Columbia Court of Appeal allowed the appeal and ordered a new trial, as the judicial function had not been performed.[21] The majority stated:

"...The form of the reasons, **substantially a recitation of the respondents' submissions, is in itself "cogent evidence" displacing the presumption of judicial integrity, which encompasses impartiality**. We have concluded that a reasonable and informed observer could not be persuaded that the trial judge independently and impartially examined all of the evidence and arrived at his own conclusions. ... impartiality is necessary to trial fairness. None of the parties to this litigation was fairly treated by the failure of the trial judge to properly grapple with this case. Neither they nor members of the public can be satisfied that justice has been done. The reasons are not transparent and persuasive, and their acceptance by this Court would risk undermining the confidence of the public in the administration of justice.

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**."[22]

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[16] Cojocaru v. British Columbia Women's Hospital and Health Centre, 2013 SCC 30 at para. 4.

[17] *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para. 123: "I would allow the appeal. I would also allow the cross-appeal and reverse the order of the trial judge in part. The plaintiffs are entitled to damages against Dr. Yue in the amount assessed by the trial judge and to costs in the courts below and on the appeal here, payable by Dr. Yue. The actions against Nurse Bellini, the Hospital and Drs. Steele and Edris are dismissed. The defendants, Nurse Bellini and the Hospital are entitled to their costs on the cross-appeal alone, payable by the plaintiffs. As Drs. Edris and Steele did not cross-appeal, they are not entitled to costs."

[18] *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para. 4:

"Eric Victor Cojocaru, the son of Monica Cojocaru, suffered brain damage during his birth at the British Columbia Women's Hospital and Health Care Centre ("Hospital"). Ms. Cojocaru had previously given birth to a child by caesarean section performed in Romania. On the recommendation of Dr. Yue, Ms. Cojocaru's prenatal care obstetrician, Ms. Cojocaru attempted to deliver Eric by "vaginal birth after caesarean section" or "VBAC". Ms. Cojocaru's labour was induced by Dr. Edris, an obstetrical resident, with prostaglandin gel at the Hospital in the morning of May 21, 2001. May 21 was a holiday, and Dr. Yue's patients — including Ms. Cojocaru — were under the care of the on-call obstetrician for that day, Dr. Steele. As Ms. Cojocaru was a high-risk patient, she remained at the Hospital during the day. In the afternoon, she was attended to by Nurses Verwoerd and Bellini. During her labour later that day, Ms. Cojocaru experienced a uterine rupture, which restricted Eric's oxygen supply. The parties have accepted that the scar from the previous caesarean section was implicated in the rupture. An emergency caesarean section was then performed. Eric suffered brain damage, which has given rise to cerebral palsy."

[19] *Cojocaru (Guardian Ad Litem) v. British Columbia Women's Hospital*, 2009 BCSC 494.

[20] Cojocaru v. British Columbia Women's Hospital and Health Centre, 2013 SCC 30 at para. 10.

[21] 2011 BCCA 192.

[22] 2011 BCCA 192 at paras. 127 and 128 (emphasis added).

4. Supreme Court

A unanimous Supreme Court allowed the appeal. Chief Justice McLachlin, writing for the Court, found that the presumption of judicial integrity and impartiality – "a high presumption, not easily displaced"[23] – was, in fact, not displaced. At para. 75 she noted that:

"It would have been better if the reasons had not copied extensively from the plaintiffs' submissions. However, to set aside the decision of the trial judge requires more. To rebut the presumption of judicial integrity, the defendants must establish that a reasonable person apprised of all the circumstances would conclude that the trial judge failed to consider and deal with the critical issues before him in an independent and impartial fashion. The defendants have not done so."[24]

The Chief Justice commented that society[25] (in general) and litigants[26] (in particular) expect that judges will perform their judicial functions independently and impartially. She states that the "threshold for rebutting the presumption of judicial integrity and impartiality is high. The presumption carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption."[27]

The Chief Justice euphemistically stated that "judicial copying is a longstanding and accepted practice"[28]. She further distances it from 'plain old' plagiarism through the amorphous use of "convention". At para. 32 she writes:

"To set aside a judgment for failure to attribute sources or for lack of originality alone would be to misunderstand the nature of the judge's task and the time-honoured traditions of judgment-writing. The conventions surrounding many kinds of writing forbid plagiarism and copying without acknowledgement. Term papers, novels, essays, newspaper articles, biographical and historical tomes provide ready examples. In academic and journalistic writing, the writer is faced with the task of presenting original ideas for evaluation by an instructor or by peers, or of engaging in principled debate in the press."[29]

In this instance, the Court found that despite rampant unattributed copying there was indeed evidence that the trial judge had made an independent assessment of the case's merits. At para. 74 the Chief Justice noted:

"... Taking full account of the complexity of the case, and accepting that it would have been preferable for the trial judge to discuss the facts and issues in his own words, I cannot conclude that the

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[23] *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para. 22.

[24] *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30.

[25] *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para. 14: "Society entrusts to the judge the weighty task of deciding difficult issues of fact and law in order to resolve disputes between citizens. Judges are appointed from among experienced lawyers and are sworn to carry out their duties independently and impartially."

[26] *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para. 18: The presumption of judicial integrity and impartiality means that the party seeking to set aside a judicial decision because the judge's reasons incorporated the material of others bears the burden of showing that a reasonable person, apprised of the relevant facts, would conclude that the judge failed to come to grips with the issues and deal with them independently and impartially."

[27] Cojocaru v. British Columbia Women's Hospital and Health Centre, 2013 SCC 30 at para. 20.

[28] *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para. 30.

[29] *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30.

trial judge failed to consider the issues and make an independent decision on them. **On the contrary, the fact that he rejected some of the plaintiffs' key submissions demonstrates that he considered the issues independently and impartially**…"[30]

Judges can seemingly copy without attribution, and without consequence, if it does not impair their judicial impartiality. This is called "judicial copying".

5. Implications

At the risk of irony, a unanimous Supreme Court of Canada said it best in *Ciba-Geigy Canada Ltd. v. Apotex Inc.*[31] that:

"One does not have to be a fanatical moralist to understand how appropriating another person's work, as that is certainly what is involved, is a breach of good faith."[32]

Indeed, I have never been accused of possessing fanatical morals, but the unattributed copying of counsel's submissions is certainly a breach of good faith, if not the law itself. Consider the fact that the seminal judgment on both originality and fair dealing in Canada was penned by none other than Chief McLachlin herself. In *CCH Canadian Ltd. v. Law Society of Upper Canada*[33], writing again for a unanimous Court, she defined "original" work as follows:

"For a work to be "original" within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an "original" work."[34]

In *CCH*, the Chief Justice also drew attention[35] to the moral rights provisions of the *Copyright Act*[36], and the Supreme Court's earlier decision in *Théberge v. Galerie d'Art du Petit Champlain inc.*[37] (yet another seminal decision in the area, except this time in relation to moral rights). In *Théberge*, a majority of the Court (including the Chief Justice) stated:

"Moral rights, by contrast, descend from the civil law tradition. They adopt a

[30] *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 (emphasis added).

[31][1992] 3 S.C.R. 120 (a passing off case embracing the tri-partite elements of the tort from *Reckitt & Colman Products Ltd. v. Borden Inc.*, [1990] 1 All E.R. 873).

[32] [1992] 3 S.C.R. 120.

[33] 2004 SCC 13 ("*CCH*").

[34] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at para. 16.

[35] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at para. 11.

[36] R.S.C., 1985, c. C-42.

[37] 2002 SCC 34 (*Théberge*).

more elevated and less dollars and cents view of the relationship between an artist and his or her work. They treat the artist's *oeuvre* as an extension of his or her personality, possessing a dignity which is deserving of protection. They focus on the artist's right (which by s. 14.1(2) is **not assignable**, though it may be waived) to protect throughout the duration of the economic rights (even where these have been assigned elsewhere) both the integrity of the work and **his or her authorship of it** (or anonymity, as the author wishes)."[38]

The Chief Justice, in particular, must have been aware of the copyright implications[39] of her reasons in *Cojocaru*, yet paid little attention to it. The furthest inquiry the Court makes into the copyright realm is where the Chief Justice noted that:

"… **judicial opinions, especially trial judgments, differ from the kind of writings that traditionally attract copyright protection, with the concomitant demands of originality and attribution of sources.** Judgments are "usually collaborative products that reflect a wide range of imitative writing practices, including quotation, paraphrase, and pastiche" (Stern, at p. 2). Judgments routinely incorporate phrases and paragraphs from a variety of sources, such as decided cases, legal treatises, pleadings, and arguments of the parties. Appellate judges may incorporate paragraphs borrowed from another judge on the case or from a helpful law clerk. Often the sources are acknowledged, but often they are not. Whether acknowledged or not, they are an accepted part of the judgment-writing process and do not, without more, render the proceeding unfair."[40]

This deflection of the judicial duty to attribute sources ignores the fact that all writing is derivative. Indeed, the Supreme Court of Canada has tirelessly stated that copyright is a "creature of statute"[41], and that creature states that "copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work"[42]. Despite extensive copyright reform in Canada[43], there is no statutory exemption for judges or judicial proceedings as there is in the UK[44].

[38] *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 at para. 15. Sub-section 14.1 (2) of the *Copyright Act*, R.S.C., 1985, c. C-42 states that: "Moral rights may not be assigned but may be waived in whole or in part."

[39] The Chief Justice, while sitting as such, also penned the foreword for David Vaver's book on copyright law (David Vaver, *Copyright Law* (Concord, Ont: Irwin Law Books, 2000)).

[40] *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para. 33 (emphasis added) (see also, See also, Crowne-Mohammed, Emir, "The Copyright Issues Associated with Judicial Decision-Making (or, Hold on to Your Briefs: Are Judges Required to Cite Material Written by Lawyers?) (June 20, 2011). Intellectual Property & Technology Law Journal, Vol. 22, No. 4, April 2010).

[41] *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 231 at para. 47; *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at para. 5; *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357, at p. 373; *Bishop v. Stevens*, [1990] 2 S.C.R. 467, at p. 477.

[42] Sub-section 5(1), *Copyright Act*, R.S.C., 1985, c. C-42.

[43] With significant reforms in 1988, 1997 and 2012 (see "Copyright Reform Process: A Framework for Copyright Reform", Government of Canada. 12 March 2008. 11 October 2008. <http://www.ic.gc.ca/epic/site/crp-prda.nsf/en/rp01101e.html> with respect to the 1998 and 1997 reforms; and the *Copyright Modernization Act*, S.C. 2012, c. 20 for the 2012 reforms).

[44] Section 45 of the UK's *Copyright, Designs and Patents Act 1988*, c. 48 provides that: "(1) Copyright is not infringed by anything done for the purposes of parliamentary or judicial proceedings. (2) Copyright is not infringed by anything done for the purposes of reporting such proceedings; but this shall not be construed as authorising the copying of a work which is itself a published report of the proceedings."

Given the *Copyright Act*'s non-exhaustive definition of literary work as "[including] tables, computer programs, and compilations of literary works"[45], the written submissions of counsel undoubtedly qualify as original, literary works. There is also no written waiver of counsels' moral rights in those works. The unattributed judicial incorporation of such works into judgments is not only plagiarism, but a breach of copyright and moral rights.

Furthermore, throughout the *Cojocaru* judgment the Chief Justice emphasizes that the unattributed copying, in this case, did not impair judicial impartiality[46]. Yet, little attention is paid to the impairment to judicial integrity that unattributed copying can give rise to. The Canadian Judicial Council[47], chaired by the Chief Justice, sets out the "Ethical Principal for Judges"[48]. In it, the Council sets out the general expectations with respect to judicial integrity, among other things:

"**Principles:**

1. Judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons.

2. Judges, in addition to observing this **high standard** personally, should encourage and support its observance by their judicial colleagues.

Commentary:

1. Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. **Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity.** Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality and good judgment. The Canadian judiciary has a strong and honourable tradition in this area which serves as a sound foundation for appropriate judicial conduct.

…

3. … The judge should exhibit **respect for the law**, integrity in his or her private dealings and generally **avoid the appearance of impropriety**."[49]

It may be that the trial judge's reasons, in this case, showed evidence of impartiality (as the Court found), but it is difficult to see how the unattributed and wholesale reproduction of over 85% of the plaintiff's submissions did not severely undermine judicial integrity.[50] The Supreme Court's unwillingness to

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[45] Section 2 ("literary work"), *Copyright Act*, R.S.C., 1985, c. C-42.

[46] *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at paras. 22, 26, 55, 56, 60 and 73.

[47] "The Canadian Judicial Council is a federal body created under the Judges Act with the mandate to promote efficiency, uniformity, and accountability, and to improve the quality of judicial service in the superior courts of Canada." (emphasis in original) (Canadian Judicial Council, "About the council", available at: http://www.cjc-ccm.gc.ca/english/about_en.asp?selMenu=about_main_en.asp).

[48] Available at: http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf.

[49] Available at: http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf.

[50] As Sir Stephen Sedley poignantly remarked in *Crinion & Anor v. IG Markets Ltd*, [2013] EWCA Civ 587: "Information technology has made it seductively easy to do what the judge did in this case. It has also made it embarrassingly easy to demonstrate what he has done. In principle, no doubt, it differs little from the modus operandi of the occasional judge, familiar to an earlier

seriously explore the copyright and moral rights implications of this "copying" might stem from the not too distant revelation that judicial integrity was indeed compromised, and is always compromised, when there is rampant and unattributed wholesale reproduction of counsel's submissions.

In the end, judges can seemingly copy without attribution, and without consequence, if it does not impair their judicial impartiality. This is called "judicial copying". It is, evidently, a "time-honoured tradition"[51]. For the rest of society – with arguably less stringent ethical obligations and codes of conduct[52] – it is called plagiarism. It can, and does, have dire consequences.[53]

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generation of counsel, who would pick up his pen (sometimes for the first time) and require the favoured advocate to address him at dictation speed. But in practice, for reasons which Lord Justice Underhill has described, the possibility of something approaching electronic plagiarism is new, and **it needs to be said and understood that it is unacceptable. Even if it reflects no more than the judge's true thinking, it reflects poorly on the administration of justice: for, as Lord Justice Underhill says, appearances matter**." (emphasis added).

[51] *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para. 32.

[52] As the Supreme Court of Canada noted in *Therrien (Re)*, 2001 SCC 35, [2001] 2 SCR 3 at paras. 110 and 111 "110. ... the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. In a paper written for its members, the Canadian Judicial Council explains: Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment. (Canadian Judicial Council, *Ethical Principles for Judges* (1998), p. 14) 111. The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens. This is eloquently expressed by Professor Y.-M. Morissette: [translation] [T]he vulnerability of judges is clearly greater than that of the mass of humanity or of "elites" in general: it is rather as if his or her function, which is to judge others, imposed a requirement that he or she remain beyond the judgment of others. ("Figure actuelle du juge dans la cité" (1999), 30 *R.D.U.S.* 1, at pp. 11-12) In *The Canadian Legal System* (1977), Professor G. Gall goes even further, at p. 167: The dictates of tradition require the greatest restraint, the greatest propriety and the greatest decorum from the members of our judiciary. We expect our judges to be almost superhuman in wisdom, in propriety, in decorum and in humanity. There must be no other group in society which must fulfill this standard of public expectation and, at the same time, accept numerous constraints. At any rate, there is no question that a certain loss of freedom accompanies the acceptance of an appointment to the judiciary." (emphasis added)

[53] See for example, "Dean of education at University of Windsor suspended over plagiarism", Windsor Star, December 10, 2012 (available at http://blogs.windsorstar.com/2012/12/10/dean-of-education-at- university-of-windsor-suspended-over-plagiarism).