Civil Procedure
Winter Term 2026

LECTURE NOTES NO. 13

X. APPEAL

The law respecting appeals is complicated and we will only scratch the surface.

An appeal is not a process that allows for a retrial of the dispute in another court - that would obviously be wasteful and undermine finality of decisions. Rather, we wish to have trials (or dispositions of motions or applications) be dealt with fairly and the law applied properly, but is every type of error one that would justify new proceedings or a different result? No.

Basically, there are five relevant points to consider:

1. **Is the nature of the Order to be appealed *interlocutory* or *final*?**

2. **What Court has jurisdiction to hear the appeal?**

3. **Is "leave" (permission) required to appeal and, if so, what are the criteria for granting leave?**

4. **What is the *standard of appeal* to be met to succeed?**

5. **If the appeal is allowed, what should be the remedy?**

—

Courts of Justice Act

> 132. A judge shall not sit as a member of a court hearing an appeal from his or her own decision.
>
> **133. No appeal lies without leave of the court to which the appeal is to be taken,**
>
> **(a) from an order made with the consent of the parties; or**
>
> **(b) where the appeal is only as to costs that are in the discretion of the court that made the order for costs.**
>
> **134. (1) Unless otherwise provided, a court to which an appeal is taken may,**

(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;

(b) order a new trial;

(c) make any other order or decision that is considered just.

(2) On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal.

(3) On motion, a court to which an appeal is taken may, in a proper case, quash the appeal.

(4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,

(a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;

(b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and

(c) direct a reference or the trial of an issue,

to enable the court to determine the appeal.

(5) The powers conferred by this section may be exercised even if the appeal is as to part only of an order or decision, and may be exercised in favour of a party even though the party did not appeal.

(6) A court to which an appeal is taken shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred.

(7) Where some substantial wrong or miscarriage of justice has occurred but it affects only part of an order or decision or some of the parties, a new trial may be ordered in respect of only that part or those parties.

Please review Rules 61 and 62

Principal routes of appeal:

Court Making a Decision	Type of (Civil) Decision	Appeal Court
Small Claims Court	Order for Damages	Under $3500: No right of appeal. Over $3500: Div. Ct; CJA, s.31; O. Reg 626/00; 343/19.
Associate Judge (Master)	**Interlocutory**	**S.C.J.;** **CJA, s.17(a)**
	Final	**Div. Ct.;** **CJA, s.19(1)(c)**
SCJ	**Interlocutory** **(Leave required)**	**Div. Ct.;** **CJA, s.19(1)(b)**
	Final (over $50,000)	**C.A.;** **CJA, s.6(1)(b)**
	Final (under $50,000)	**Div. Ct.:** **CJA, s.19(1)(a), 19(1.2)**
Div. Ct.	Single judge (motion to vary)	Panel of the Div. Ct.; CJA, s.21(5)
	Question of law or mixed fact and law (Leave required)	C.A.; CJA, s.6(1)(a)
C.A.	Single judge (motion to vary)	Panel of the C.A.; CJA, s.7(5)

Appeals from the Court of Appeal go to the Supreme Court of Canada, with Leave granted by either the C.A. or the S.C.C. The S.C.C. can also grant Leave to hear matters directly from the trial level.

Please note that individual statutes may provide otherwise.

Please note sub-rule 62.02 (4) with respect to the appeal of interlocutory orders and the granting of Leave:

> Grounds on Which Leave May Be Granted
>
> 62.02 (4) **Leave to appeal from an interlocutory order shall not be granted unless,**
>
> (a) **there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the panel hearing the motion, desirable that leave to appeal be granted**; or
>
> (b) **there appears to the panel hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in the panel's opinion, leave to appeal should be granted.**

This is a high bar.

Final and Interlocutory Orders

Capital Gains Income Streams Corp. v. Merrill Lynch Canada Inc.
2007 ONCA 497 (Ont. C.A.)

This was the appeal of an unsuccessful motion to enforce a settlement agreement made to the Court of Appeal. Was the Motion Judge's decision *final* or *interlocutory?*

> **Doherty J.A.:**
>
> 1 The appellant corporations (the "appellants") claimed to have reached a settlement of litigation arising out of a contractual dispute with the respondent, Merrill Lynch Canada Inc. ("Merrill Lynch"). Pursuant to rule 49.09 of the Rules of Civil Procedure, the appellants moved for judgment in the terms of the settlement. Merrill Lynch resisted the motion, claiming that no final settlement had been reached by the parties. The motion judge dismissed the appellants' motion.
>
> 2 **The appellants appealed the order dismissing their motion to this court. Prior to the date scheduled for oral argument, the court, through its senior legal officer, wrote to counsel raising the question of this court's jurisdiction to hear the appeal. This court has jurisdiction to hear the appeal if the order under appeal is final: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 6(1)(b). However, if the order under appeal is interlocutory, this court has no jurisdiction and the appellants' appellate remedy lies in an application for leave to appeal to the Divisional Court:**

Courts of Justice Act, s. 19(1)(b). Counsel for the appellants took the position that the order was final and providing the court with authority for that position.

…

12 **The motion judge properly concluded that the terms of the purported settlement were not at issue between the parties. The issue was whether a binding contract had been reached by the parties.** If the parties had reached an agreement, the terms of that agreement were as reflected in the agreements prepared by the appellants and sent to Merrill Lynch in 2005.

…

15 The motion judge went on, however, to conclude his analysis in these words:

> **[37] In my view, and I so find, I cannot give summary judgment that there is a binding settlement agreement. There is a genuine issue for trial in this regard. For the reasons given, the motion is dismissed. The proceeding is continued as if there had been no accepted offer to settle. [Emphasis added.]**

…

32 I would hold that the order under appeal is interlocutory. This court has no jurisdiction to hear the appeal. The appeal must be quashed. **The question of whether or not there was a settlement agreement remains a live issue in this proceeding. That, of course, does not foreclose the appellants from pursuing their appellate remedies in the Divisional Court should they choose to do so.**

–

Laskin J.A. (dissenting)

3 The distinction between final and interlocutory orders bedevils this court. Far too much ink has been spilled over the pages of the Ontario Reports, grappling with this distinction. Even when the parties themselves do not raise the issue, the court itself often feels compelled to do so — as it did in this case — because the court's jurisdiction to hear an appeal turns on the distinction: final orders are appealable as of right to this court; interlocutory orders are not.

4 And yet, despite the very large number of decisions on whether a particular order is final or interlocutory, our court's jurisprudence on the distinction has been anything but a model of consistency. See Garry D. Watson & Craig Perkins, Holmested and Watson *Ontario Civil*

***Procedure*, looseleaf, vol. 5 (Toronto: Thomson Carswell, 1993) at 62-19 to 62-48.2 The litigation bar — even the experienced members of that bar — cannot always fathom whether an order is final or not. There is no better example than this case. Two first-class advocates, Mr. Slaght for the appellants and Mr. Douglas for the respondent, came to this court because, in both their opinions, the order of the motion judge was a final order. Even when pressed in oral argument, and even though it would have been very much in his client's interest to take the position that the order under appeal was interlocutory, Mr. Douglas, with his typical candour, maintained that the order was final.**

…

5 The majority of this panel, however, has said to both sides that the order of the motion judge is interlocutory. And, it has done so in reasons that, I accept, are cogent. But, I do not agree with them.

6 The appellants, Capital Gains Income Streams Corporation and Income Streams III Corporation (collectively the "Funds" or "Quadravest"), brought a motion under rule 49.09 for judgment in accordance with a settlement they claim to have reached with the respondent, Merrill Lynch Canada Inc. The motion judge dismissed the motion. Although the court raised the preliminary issue whether the motion judge's order was final or interlocutory, both sides fully argued the merits of the appeal.

7 **On the preliminary jurisdictional issue, the question is whether the motion judge finally determined that the parties did not reach a settlement. If he did finally determine that there was no settlement, his order is final; if he did not, his order is interlocutory**. See *Chertow v. Chertow* (2001), 146 O.A.C. 141 (Ont. C.A.).

8 **In my opinion, the answer to this question is a close call, arguable on both sides. Because it is, I do not believe that we should be quick to dispose of the appeal on this preliminary jurisdiction issue raised by the court. In my respectful view, we do not serve the parties or their counsel well by doing so. I would treat the order as final and address the appeal on the merits.**

9 Aspects of the motion judge's reasons suggest that his order is interlocutory. Doherty J.A. has referred to those aspects. To me, however, other aspects of the motion judge's reasons suggest that his order is final. I point out two.

10 First, the motion judge concludes his reasons, at para. 37, with these words: "*For the reasons given, the motion is dismissed. The proceeding is continued as if there had been no accepted offer to settle*." [Emphasis added].

As Doherty J.A. points out, these words seem inconsistent with the earlier part of the paragraph in which the motion judge says that whether there is a binding settlement agreement "is a genuine issue for trial".

11 Yet, what else can these italicized words mean but that this action must proceed on the basis that there is no settlement? Despite what the motion judge said earlier in his reasons, the effect of these words is that the Funds cannot plead a settlement in this action. Consistent with this meaning, the motion judge did not grant the Funds leave to amend their statement of claim to allege a settlement, or even direct the trial of an issue on whether the parties reached a settlement. Thus, at least in this part of his reasons, the motion judge finally determined that for the purpose of this litigation there was no settlement. This determination makes his order a final order. Both counsel so interpreted his words.

12 A second aspect of the motion judge's reasons that argues for treating his order as a final order is seen in the substance of what he decided. His statement that whether the parties reached a binding settlement raises a genuine issue for trial is itself based on a mistaken understanding of the Funds' position. The motion judge mistakenly believed that Quadravest challenged the credibility of a critical component of Merrill Lynch's defence. It did not. Once that mistaken understanding is corrected and given effect to, there can be no doubt from the motion judge's reasons that he found the parties had not reached a settlement agreement. In substance, he finally determined that question.

13 On the motion, Merrill Lynch filed the affidavit of Jacquie Alexander, Director and Global Risk Manager of the Global Markets & Investment Banking Group of Merrill Lynch, who participated in the settlement discussions with Quadravest. In her affidavit, she said that anything she agreed to in principle "required approval from senior management on Merrill's business side, since they would be the ones most affected by the loss associated with any settlement." The motion judge seized on this statement in Ms. Alexander's affidavit. He examined the record on the assumption that her statement was true. And, he concluded that if it were true, the record showed that the parties might have reached an agreement in principle, but not a final deal. His conclusion is at para. 32 of his reasons:

> [32] In my view, the affidavit evidence of Ms. Alexander, *if accepted as true*, would mean that a reasonable person in Quadravest's position would not have believed there was a mutual intention that the 'agreement' as of June 3, 2005 was to be a legally binding agreement. The parties would have thought that there was an agreement-in-principle and a *probable* 'done deal', but one still subject to the formal agreement of Merrill's senior management, that is, management senior in authority to Ms. Alexander. [Emphasis in original.]

14 On the motion judge's view of the record, senior management of Merrill Lynch had not given its approval. Thus, if he accepted Ms. Alexander's evidence that approval was needed, he was bound to conclude that the parties had not settled. The only reason the motion judge could not decide whether the parties had or had not settled was because he could not determine the veracity of Ms. Alexander's statement. For him, this was an issue of credibility that could not be resolved on affidavit evidence:

[34] The material fact as to whether there was mutual intention to create a completed, legally binding settlement agreement as of June 3, 2005 (not subject to approval by the senior management of Merrill before being binding) is in dispute. On the record before me, the determination of this issue turns upon findings as to credibility in respect of Ms. Alexander. I cannot make any finding in this regard on the basis of mere affidavit evidence (let alone affidavit evidence that is not contradicted by cross-examination).

15 But, the credibility of Ms. Alexander's statement was not in issue. Although Peter Cruickshank, Quadravest's Chief Financial Officer, disputed her affidavit evidence, for the purpose of the motion, Quadravest accepted that she made this statement and any agreement in principle was subject to the approval of Merrill Lynch's senior management. Quadravest argued that the correspondence showed that Merrill Lynch's senior management had approved the agreement reached after lengthy settlement discussions, but later, after reassessing the settlement's financial implications, reneged on the deal.

16 Thus, no issue of credibility arises on the motion or on the appeal. Once the credibility of Ms. Alexander's statement is accepted, the disagreement between Quadravest on the one hand, and Merrill Lynch and the motion judge on the other, turns on their respective assessments of the written record. In substance, the motion judge has concluded that on the assumption Ms. Alexander's statement is credible, the parties did not reach a binding settlement. As Quadravest accepts that assumption, effectively the motion judge's order finally determines the question of settlement. In my view, we should treat the motion judge's order as a final order appealable as of right to this court.

Standards of Appellate Review

Housen v. Nikolaisen
2002 SCC 33 (S.C.C.)

The plaintiff was the passenger in a truck; the defendant the driver. The defendant lost control of the truck, it rolled, and the plaintiff was left paralyzed from the shoulders down. The plaintiff also sued the municipality for failing to post proper signage warning of the bend. The plaintiff was successful against both. At trial, the judge rejected the municipality's argument that the claim was statute-barred against it as proper notice had not been given within 30 days (notice was a day late). The municipality's appeal went to the Saskatchewan Court of Appeal, who allowed the appeal holding that the trial judge had misdirected herself on the statutory standard of care applicable to maintaining roads by municipalities. A further appeal to the SCC was allowed on the basis that there was no 'palpable and overriding error' even if the trial judge had made mistakes in her judgment.

The case is important as it provides a comprehensive review of the law on the appellate court's jurisdiction to interfere with the trial judgement.

Per Iacobucci and Major JJ. (for the majority):

> 1 **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.
>
> ...
>
> 3 The role of the appellate court was aptly defined in *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (B.C. C.A.), at p. 204, where it was stated:
>
> > 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.
>
> 4 While the theory has acceptance, consistency in its application is missing. **The foundation of the principle is as sound today as 100 years ago. It is premised on the notion that finality is an important aim of litigation. There is no suggestion that appellate court judges are somehow smarter and thus capable of reaching a better result.** Their role is not to write better judgments but to review the reasons in light of the arguments of the parties and the relevant evidence, and then to uphold the

decision unless a palpable error leading to a wrong result has been made by the trial judge.

5 What is palpable error? The *New Oxford Dictionary of English* (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The *Cambridge International Dictionary of English* (1996) describes it as "so obvious that it can easily be seen or known" (p. 1020). *Random House Dictionary of the English Language* (2nd ed. 1987) defines it as "readily or plainly seen" (p. 1399).

6 The common element in each of these definitions is that palpable is plainly seen. Applying that to this appeal, in order for the Saskatchewan Court of Appeal to reverse the trial judge the "palpable and overriding" error of fact found by Cameron J.A. must be plainly seen. As we will discuss, we do not think that test has been met.

...

A. Standard of Review for Questions of Law

8 On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness: *Kerans*, supra, at p. 90.

9 There are at least two underlying reasons for employing a correctness standard to matters of law. First, the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations...

A second and related reason for applying a correctness standard to matters of law is the recognized law-making role of appellate courts which is pointed out by *Kerans*, supra, at p. 5:

> The call for universality, and the law-settling role it imposes, makes a considerable demand on a reviewing court. It expects from that authority a measure of expertise about the art of just and practical rule-making, an expertise that is not so critical for the first court. Reviewing courts, in cases where the law requires settlement, make law for future cases as well as the case under review.

Thus, while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law.

B. Standard of Review for Findings of Fact

10 **The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error"...** While this standard is often cited, the principles underlying this high degree of deference rarely receive mention. We find it useful, for the purposes of this appeal, to review briefly the various policy reasons for employing a high level of appellate deference to findings of fact.

11 **A fundamental reason for general deference to the trial judge is the presumption of fitness — a presumption that trial judges are just as competent as appellate judges to ensure that disputes are resolved justly**... Kerans, supra, at pp. 10-11, states that:

If we have confidence in these systems for the resolution of disputes, we should assume that those decisions are just. The appeal process is part of the decisional process, then, only because we recognize that, despite all effort, errors occur. An appeal should be the exception rather than the rule, as indeed it is in Canada.

...

15 ... the above authorities can be grouped into the following three basic principles.

(1) Limiting the Number, Length and Cost of Appeals

16 Given the scarcity of judicial resources, setting limits on the scope of judicial review is to be encouraged. Deferring to a trial judge's findings of fact not only serves this end, but does so on a principled basis. Substantial resources are allocated to trial courts for the purpose of assessing facts. To allow for wide-ranging review of the trial judge's factual findings results in needless duplication of judicial proceedings with little, if any improvement in the result. In addition, lengthy appeals prejudice litigants with fewer resources, and frustrate the goal of providing an efficient and effective remedy for the parties.

(2) Promoting the Autonomy and Integrity of Trial Proceedings

17 The presumption underlying the structure of our court system is that a trial judge is competent to decide the case before him or her, and that a just and fair outcome will result from the trial process. Frequent and unlimited appeals would undermine this presumption and weaken public confidence in the trial process. An appeal is the exception rather than the rule.

(3) Recognizing the Expertise of the Trial Judge and His or Her Advantageous Position

18 The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the judge's familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.

C. Standard of Review for Inferences of Fact

19 **We find it necessary to address the appropriate standard of review for factual inferences because the reasons of our colleague suggest that a lower standard of review may be applied to the inferences of fact drawn by a trial judge. With respect, it is our view, that to apply a lower standard of review to inferences of fact would be to depart from established jurisprudence of this Court, and would be contrary to the principles supporting a deferential stance to matters of fact.**

20 Our colleague acknowledges that, in *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.), this Court determined that a trial judge's inferences of fact and findings of fact should be accorded a similar degree of deference. The relevant passage from Geffen is the following (per Wilson J., at pp. 388-89):

> It is by now well established that findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it is established that the trial judge made some palpable and overriding error which affected his assessment of the facts. ... Even where a finding of fact is not contingent upon credibility, this Court has maintained a non-interventionist approach to the review of trial court findings. ...
>
> ...

23 **We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. As we discuss**

below, it is our respectful view that our colleague's finding that the trial judge erred by imputing knowledge of the hazard to the municipality in this case is an example of this type of impermissible interference with the factual inference drawn by the trial judge.

...

25 Although the trial judge will always be in a distinctly privileged position when it comes to assessing the credibility of witnesses, this is not the only area where the trial judge has an advantage over appellate judges. Advantages enjoyed by the trial judge with respect to the drawing of factual inferences include the trial judge's relative expertise with respect to the weighing and assessing of evidence, and the trial judge's inimitable familiarity with the often vast quantities of evidence. This extensive exposure to the entire factual nexus of a case will be of invaluable assistance when it comes to drawing factual conclusions. In addition, concerns with respect to cost, number and length of appeals apply equally to inferences of fact and findings of fact, and support a deferential approach towards both. As such, we respectfully disagree with our colleague's view that the principal rationale for showing deference to findings of fact is the opportunity to observe witnesses first-hand. It is our view that the trial judge enjoys numerous advantages over appellate judges which bear on all conclusions of fact, and, even in the absence of these advantages, there are other compelling policy reasons supporting a deferential approach to inferences of fact. We conclude, therefore, by emphasizing that there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge — that of palpable and overriding error.

D. Standard of Review for Questions of Mixed Fact and Law

26 At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts: *Canada (Director of Investigation & Research) v. Southam Inc.,* [1997] 1 S.C.R. 748 (S.C.C.), at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal or factual...

27 Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In Southam, supra, at para. 39,

this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:

> ... if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

28 However, where the error does not amount to an error of law, a higher standard is mandated. Where the trier of fact has considered all the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed law and fact and is subject to a more stringent standard of review: Southam, supra, at paras. 41 and 45. While easy to state, this distinction can be difficult in practice because matters of mixed law and fact fall along a spectrum of particularity. This difficulty was pointed out in Southam, supra, at para. 37:

> ... the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, Standards of Review Employed by Appellate Courts (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

29 When the question of mixed fact and law at issue is a finding of negligence, this Court has held that a finding of negligence by the trial judge should be deferred to by appellate courts...

30 This more stringent standard of review for findings of negligence is appropriate, given that findings of negligence at the trial level can also be made by juries. If the standard were instead correctness, this would result in the appellate court assessing even

jury findings of negligence on a correctness standard. At present, absent misdirection on law by the trial judge, such review is not available. The general rule is that courts accord great deference to a jury's findings in civil negligence proceedings:

> **The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.**

...

36 To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in Jaegli Enterprises, supra, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

...

37 In this regard, we respectfully disagree with our colleague when he states at para. 106 that "[o]nce the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts". In our view, it is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.

...

51 As discussed above, the trial judge's finding was that an ordinary motorist could approach the curve in excess of 60 km/h in dry conditions, and 50 km/h in wet conditions, and that at such speeds the curve was hazardous. The trial judge's finding was not based on a particular speed at which the curve would be approached by the ordinary motorist. Instead, she found that, because the curve was hidden and sharper than would be anticipated, a motorist exercising ordinary care could approach it at greater than the speed at which it would be safe to negotiate the curve.

52 As we explain in greater detail below, in our opinion, not only is this assessment far from reaching the level of a palpable and overriding error, in our view, it is a sensible and logical way to deal with large quantities of conflicting evidence. It would be unrealistic to focus on some exact speed at which the curve would likely be approached by the ordinary motorist. The findings of the trial judge in this regard were the result of a reasonable and practical assessment of the evidence as a whole.

Appeal from a Jury Verdict

Lazare v. Harvey
2008 ONCA 171 (Ont. C.A.)

The plaintiff successfully sued in negligence in regards to a car accident but sought to appeal the jury's verdict not to award damages for loss of future income.

Lang J.A.:

3 The only issue on appeal is the jury's decision to award zero in damages to the appellant for loss of future income. The respondent did not cross-appeal the jury's non-pecuniary damages award and neither party appealed the award for loss of past income or for Family Law Act damages.

4 **The appellant does not challenge the instructions given by the trial judge, which all agree were both thorough and careful. The appellant only argues that the verdict with respect to damages for loss of earning capacity or loss of future income is so unreasonable and unjust that no jury, considering the evidence as a whole and acting judicially, could have reached it. The respondent argues that the appellant has not discharged the burden of establishing an unreasonable verdict** because there was evidence that the appellant's future income was not affected by her injury and because the appellant's expert opinion, that may have otherwise supported a loss of future income, was successfully challenged on cross-examination.

...

18 In her charge regarding loss of future income, the trial judge explained correctly and repeatedly that the appellant need only establish that her loss was a real and substantial possibility. She emphasized that the appellant was not required to establish this loss on a balance of probabilities, which is of course a different and higher standard. In particular, the trial judge gave the following specific instruction:

> The onus is not on the plaintiff to prove on the balance of probabilities that her future earning capacity will be lost or diminished. The onus is a lower one. [The appellant] need only satisfy you on the evidence that there is a reasonable and substantial risk of loss of income in the future to be entitled to damages under this heading.
>
> What you have to decide, then, is whether there is a real and substantial risk that [the appellant] will suffer a loss of future income, because of the injuries she sustained in the accident. The higher and/or more substantial the risk of [the appellant] suffering such a loss, then the higher the award she should receive. However, in arriving at your assessment under this heading you should exclude from your consideration any remote, fanciful or speculative possibilities. I repeat again: The burden is on the plaintiff to satisfy you that there is a real and substantial risk that she will suffer a future loss of income by reason of the injuries she sustained in the accident.
>
> Put another way, the plaintiff must satisfy you that there is a real and substantial possibility that she will suffer such a loss.

19 The trial judge canvassed the medical evidence about the extent to which the appellant's condition would affect her income in the future. She explained to the jury that the appellant's rehabilitation expert, Dr. Tepperman, was not one of the appellant's treating physicians. She also pointed out that the expert had had no contact with the treating physicians, that he was retained by the appellant's lawyer for the purposes of the lawsuit, that he had spent a limited time examining the appellant, and that this was the first occasion he had given a medical-legal opinion regarding lymphedema.

20 In addition, the trial judge reminded the jury that Dr. Tepperman did not give the opinion that the appellant would be faced with retirement in ten years in his original report. Rather, at that time, he only opined that the appellant would always require sedentary employment, that she would lose time from work periodically, particularly if she suffered complications, that she may require a more protracted absence from work if she suffered more significant complications, and that she could be forced into early retirement.

21 The trial judge summarized the positions of the parties' counsel. The appellant's counsel argued that the appellant would likely have been forced to retire at age 37. As a result, she would lose about $2.5 million if the jury found she would have practised law and $2.6 million had she successfully pursued her career with the Blue Jays. The respondents' lawyer argued that the appellant suffered no loss because she would not have gained entry to law school and because it was not a real and substantial possibility that she would be forced into early retirement by her injury.

22 At the end of her instructions on this issue, the trial judge again reminded the jury about the lower onus for loss of future income:

> Members of the jury, I remind you again that in considering the question of whether [the appellant's] working life will be cut short because of her injuries, it is not up to the plaintiffs to satisfy you that it is more probable than not that this is so. Their onus is a lower one. You must be satisfied that there is a real and substantial possibility that [the appellant's] working life will be cut short because of her injuries.

Standard of review

23 **The "reasonableness" standard of review of a jury verdict was set out in the seminal case of *McLean v. McCannell*, [1937] S.C.R. 341 (S.C.C.). In that case, Duff C.J. explained at p. 343 that, "the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it." Duff C.J. emphasized that the appellate court's authority to set aside a jury verdict should be exercised with caution.**

24 This test, and the principle that the standard for appellate review of a jury verdict in a civil case is "very high", have since been applied in numerous decisions of this court... **Most recently, in Bovingdon (Litigation Guardian of) v. Hergott, 2008 ONCA 2 (Ont. C.A.) , Feldman J.A. noted the high standard created by McCannell and commented that, "[c]onsequently, it is relatively rare for a jury verdict in a civil case to be overturned on appeal."**

...

29 Accordingly, the test of reasonableness in the civil context asks whether the jury's verdict is so unwarranted by the evidence as to justify the conclusion that the jury did not appreciate and acted in violation of its duty. In those cases where there is some evidence to support the jury's verdict, high deference will be accorded and the verdict will not be set aside even if

> another conclusion is available on the evidence. I am guided by these principles in assessing the jury's verdict in this case.

The appellant was not successful in this appeal for the fact that there was evidence upon which the jury could base its verdict; hence, it was rational.

Appellate Jurisdiction:
Ineffective Assistance in Administrative Proceedings

Gligorevic v. McMaster
2012 ONCA 115 (Ont. C.A.)

What is the standard of review for the appeal of an administrative body's decision where the allegation that the appellant was represented ineffectively? "The deferential standard of palpable and overriding error."

Per Cronk J.A.:

> (1) Standards of Review
>
> 43 The standard of review applicable to the Board's capacity decision is uncontroversial. The issue before the Board — whether Mr. Gligorevic was capable of making his own decision regarding treatment with antipsychotic medication — required the Board to apply the evidence before it to the statutory test for capacity set out in s. 4(1) of the Act. In Starson, at paras. 84-88, the Supreme Court held that this question of mixed fact and law is reviewable on a standard of reasonableness. See also New Brunswick (Board of Management) v. Dunsmuir, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.); Giecewicz v. Hastings, 2007 ONCA 890, 288 D.L.R. (4th) 587 (Ont. C.A.), leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 97 (S.C.C.). There is no suggestion that the Board erred in its interpretation of the statutory test for capacity.
>
> 44 In contrast, the appeal to the Superior Court involved an allegation that PGT Counsel's assistance was ineffective. The determination of this issue required the Superior Court Justice to consider the test for ineffective assistance of counsel and to apply that test to the facts of this case as established by the written record before her. This, too, is a question of mixed fact and law. However, it attracts the deferential standard of palpable and overriding error, unless the Superior Court Justice made some extricable error in principle with respect to her appreciation of the test or its application, in which case the error may amount to an error of law that is reviewable on the correctness standard. Further, where hearing fairness is fatally compromised, standard of review considerations assume less significance. See Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at

para. 37; Country Pork Ltd. v. Ashfield (Township) (2002), 60 O.R. (3d) 529 (Ont. C.A.), at para. 41; Waxman v. Waxman (2004), 186 O.A.C. 201 (Ont. C.A.), at paras. 290-93, 296-97; L. (H.) v. Canada (Attorney General), 2005 SCC 25, [2005] 1 S.C.R. 401 (S.C.C.), at paras. 72-75; FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd., 2007 ONCA 425, 85 O.R. (3d) 561 (Ont. C.A.), at paras. 45-46; Fendelet v. Dohey, 2007 ONCA 475 (Ont. C.A.), at para. 4.