

**SUPREME COURT OF CANADA**

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| **Citation:** Cojocaru *v.* British Columbia Women’s Hospital and Health Centre, 2013 SCC 30, [2013] 2 S.C.R. 357 | **Date:** 20130524  **Docket:** 34304 |

**Between:**

**Eric Victor Cojocaru, an infant by his Guardian *Ad Litem*, Monica Cojocaru**

**and Monica Cojocaru**

Appellants/Respondents on cross-appeal

and

**British Columbia Women’s Hospital and Health Centre and F. Bellini**

Respondents/Appellants on cross-appeal

and

**Dale R. Steele, Jenise Yue and Fawaz Edris**

Respondents

**And between:**

**Eric Victor Cojocaru, an infant by his Guardian *Ad Litem*, Monica Cojocaru**

**and Monica Cojocaru**

Appellants/Respondents on cross-appeal

and

**Dale R. Steele, Jenise Yue and Fawaz Edris**

Respondents

and

**British Columbia Women’s Hospital and Health Centre and F. Bellini**

Respondents/Appellants on cross-appeal

- and -

**Attorney General of Ontario, Trial Lawyers Association of**

**British Columbia and Canadian Bar Association**

Interveners

**Coram:** McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 123) | McLachlin C.J. (LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring) |

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Eric Victor Cojocaru, an infant by his

Guardian *Ad Litem*, Monica Cojocaru,

and Monica Cojocaru Appellants/Respondents on cross‑appeal

v.

British Columbia Women’s Hospital

and Health Centre and F. Bellini Respondents/Appellants on cross‑appeal

and

Dale R. Steele, Jenise Yue and Fawaz Edris Respondents

‑ and ‑

Eric Victor Cojocaru, an infant by his

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**Indexed as:  Cojocaru *v.* British Columbia Women’s Hospital and Health Centre**

2013 SCC 30

File No.: 34304.

2012:  November 13; 2013:  May 24.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for british columbia

*Torts — Negligence — Causation — Health law — Consent to care — Failure to inform — Plaintiffs alleging defendants were negligent in failing to obtain informed consent to vaginal birth after caesarean section or to prostaglandin induction and in failing to attend to plaintiff — Plaintiffs alleging lack of proper care resulted in ruptured uterus and son born with brain damage — Whether trial judge’s conclusion on liability of various defendants disclose palpable errors of fact or legal errors and should be set aside.*

*Judgments and orders — Reasons — Trial judge delivering reasons for judgment consisting of reproduction of plaintiffs’ written submissions — Whether trial judge’s decision should be set aside because reasons for judgment incorporated large portions of material prepared by others.*

Eric Victor Cojocaru, the son of Monica Cojocaru, suffered brain damage during his birth at the British Columbia Women’s Hospital and Health Centre. 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”. On the day in question, Ms. Cojocaru’s labour was induced at the Hospital by Dr. Edris, an obstetrical resident, with prostaglandin gel. Ms. Cojocaru was under the care of the on‑call obstetrician, Dr. Steele. As Ms. Cojocaru was a high‑risk patient, she remained at the Hospital and was attended to by Nurses Verwoerd and Bellini. During her labour later in the day, Ms. Cojocaru experienced a uterine rupture, which restricted Eric’s oxygen supply. It was 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. Eric and his mother brought an action in negligence against the Hospital, the attending Nurses Bellini, MacQueen and Verwoerd and Drs. Steele, Yue and Edris.

At trial, the Hospital, Nurse Bellini and the three doctors were found liable in negligence and damages were awarded to the plaintiffs in the amount of $4 million. The trial judge’s reasons reproduced large portions of the submissions of the plaintiffs. However, the trial judge did not accept all the submissions of the plaintiffs, discussed a number of issues and stated his final conclusions in his own words. The majority of the Court of Appeal held that the trial judge’s decision should be set aside because of the extensive copying from the plaintiffs’ submissions and ordered a new trial. The dissenting justice did not set aside the judgment because of the copying, but reviewed the case on its merits, and determined that the actions against Dr. Steele, Dr. Edris, the Hospital and Nurse Bellini should be dismissed. He indicated that he would have also reduced the damage award against the remaining defendant, Dr. Yue. The plaintiffs appealed the order of a new trial. The Hospital and Nurse Bellini cross‑appealed asking that the issue of liability and damages be resolved by the Court, rather than sending the matter back for a new trial.

*Held*: The appeal and the cross‑appeal should be allowed.

As a general rule, it is good judicial practice for a judge to set out the contending positions of the parties on the facts and the law, and explain in his or her own words her conclusions on the facts and the law. However, including the material of others is not prohibited. Judicial copying is a long‑standing and accepted practice, although if carried to excess, may raise problems. If the incorporation of the material of others is evidence that would lead a reasonable person to conclude, taking into account all relevant circumstances, that the decision‑making process was fundamentally unfair, in the sense that the judge did not put his or her mind to the facts, the argument and the issues, and decide them impartially and independently, the judgment can be set aside.

A complaint that a judge’s decision should be set aside because the reasons for judgment incorporate materials from other sources is essentially a procedural complaint. Judicial decisions benefit from a presumption of integrity and impartiality — a presumption that the judge has done her job as she is sworn to do. 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 the presumption is rebutted. The threshold for rebutting the presumption of judicial integrity and impartiality is high, and it requires cogent evidence. The question is whether the evidence presented by the party challenging the judgment convinces the reviewing court that a reasonable person would conclude that the judge did not perform her sworn duty to review and consider the evidence with an open mind.

The fact that a judge attributes copied material to the author tells us nothing about whether she put her mind to the issues addressed in that copying. Nor is lack of originality alone a flaw in judgment writing; on the contrary, it is part and parcel of the judicial process. 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 concern about copying in the judicial context is not that the judge is taking credit for someone else’s prose, but rather that it may be evidence that the reasons for judgment do not reflect the judge’s thinking. Extensive copying and failure to attribute outside sources are in most situations practices to be discouraged. But lack of originality and failure to attribute sources do not in themselves rebut the presumption of judicial impartiality and integrity. This occurs only if the copying is of such a character that a reasonable person apprised of the circumstances would conclude that the judge did not put her mind to the evidence and the issues and did not render an impartial, independent decision.

Here, 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, it cannot be concluded that the trial judge failed to consider the issues and make an independent decision on them. The presumption of judicial integrity and impartiality has not been displaced. On the contrary, the reasons demonstrate that the trial judge addressed his mind to the issues he had to decide. The fact that he rejected some of the plaintiffs’ key submissions demonstrates that he considered the issues independently and impartially. The absence in the reasons of an analysis of causation, and the alleged errors the reasons contain, go not to procedural unfairness, but to the substance of the reasons — whether the trial judge, having made his own decision, erred in law or made palpable and overriding errors of fact. The judgment should not be set aside on the ground that the trial judge incorporated large parts of the plaintiffs’ submissions in his reasons.

This said, aspects of the reasons disclose palpable and overriding error and must be set aside. No causal connection was established between the injury and Dr. Yue’s alleged negligence in failing to verify the orientation of the previous caesarean scar before recommending VBAC. The finding of liability against Dr. Yue for recommending VBAC should thus be set aside. However, the evidence in this case supports the trial judge’s finding of liability against Dr. Yue for failing to obtain Ms. Cojocaru’s informed consent to VBAC and should therefore be affirmed. Dr. Yue failed to adequately inform Ms. Cojocaru of the risks of VBAC. There is however no evidence to support a causal relationship between the induction and the harm suffered and therefore, the finding of liability against Dr. Yue for failure to obtain Ms. Cojocaru’s informed consent to induction of the birth cannot be sustained. The trial judge’s findings on damages were supported by the evidence and disclose no palpable and overriding error that would justify appellate intervention.

Dr. Edris cannot be held liable for inducing labour without ascertaining the orientation of Ms. Cojocaru’s uterine scar because there was no causal connection between this alleged negligence and the injury. The evidence also failed to establish a causal link between Dr. Steele’s actions and the injury. Lastly, even if Nurse Bellini had observed and reacted to the signs of uterine rupture earlier, as the trial judge said she should have done, the child could not have been delivered in time to avoid permanent brain damage because no operating room staffed with an anaesthetist was available in time. Therefore, the trial judge’s findings of liability against Nurse Bellini, the Hospital, Dr. Steele and Dr. Edris must be set aside.

**Cases Cited**

**Referred to:** *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41; *Hill v. Hamilton‑Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129; *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *English v. Emery Reimbold & Strick Ltd.*,[2002] EWCA Civ 605, [2002] 3 All E.R. 385; *Meadowstone (Derbyshire) Ltd. v. Kirk*, 2006 WL 690588; *Shin v. Kung*, [2004] HKCA 205 (HKLII); *James v. Surf Road Nominees Pty. Ltd.*,[2004] NSWCA 475 (AustLII); *Fletcher Construction Australia Ltd. v. Lines MacFarlane & Marshall Pty. Ltd. (No. 2)*, [2002] VSCA 189, [2002] 6 V.R. 1; *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States v. Marine Bancorporation, Inc.*,418 U.S. 602 (1974); *Sorger v. Bank of Nova Scotia* (1998), 39 O.R. (3d) 1; *R. v. Gaudet* (1998), 40 O.R. (3d) 1; *Canada (Attorney General) v. Ni‑Met Resources Inc.* (2005), 74 O.R. (3d) 641; *2878852 Canada Inc. v. Jones Heward Investment Counsel Inc.*, 2007 ONCA 14 (CanLII); *R. v. Dastous* (2004), 181 O.A.C. 398; *R. v. Kendall* (2005), 75 O.R. (3d) 565, leave to appeal refused, [2006] 1 S.C.R. x; *Janssen‑Ortho Inc. v. Apotex Inc.*, 2009 FCA 212, 392 N.R. 71.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, s. 686(1)(*a*).

**Authors Cited**

Silverman, Gregory M. “Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records over the Internet” (2004), 79 *Wash. L. Rev.* 175.

Stern, Simon. “Copyright Originality and Judicial Originality” (2013), 63 *U.T.L.J.* 1.

APPEAL and CROSS‑APPEAL from a judgment of the British Columbia Court of Appeal (Levine, Smith and Kirkpatrick JJ.A.), 2011 BCCA 192, 17 B.C.L.R. (5th) 253, 303 B.C.A.C. 278, 512 W.A.C. 278, 44 Admin. L.R. (5th) 231, 81 C.C.L.T. (3d) 183, [2011] 7 W.W.R. 82, [2011] B.C.J. No. 680 (QL), 2011 CarswellBC 886, setting aside a decision of Groves J., 2009 BCSC 494, 65 C.C.L.T. (3d) 75, [2009] B.C.J. No. 731 (QL), 2009 CarswellBC 917. Appeal and cross‑appeal allowed.

*Paul McGivern*, *Dan Shugarman*, *Ann Howell* and *Marie‑France Major*, for the appellants/respondents on cross‑appeal.

*Catherine L. Woods*, *Q.C.*, and *Adam Howden‑Duke*, for the respondents/appellants on cross‑appeal the British Columbia Women’s Hospital and Health Centre and F. Bellini.

*James M. Lepp*, *Q.C.*, *Mandeep K. Gill* and *Daniel J. Reid*, for the respondents Dale R. Steele, Jenise Yue and Fawaz Edris.

*M. David Lepofsky*, for the intervener the Attorney General of Ontario.

*George K. Macintosh*, *Q.C.*, and *Tim Dickson*, for the intervener the Trial Lawyers Association of British Columbia.

*Mahmud Jamal* and *Raphael Eghan*, for the intervener the Canadian Bar Association.

The judgment of the Court was delivered by

The Chief Justice —

I. Introduction

1. The main question on this appeal is whether a trial judge’s decision should be set aside because his reasons for judgment incorporated large portions of the plaintiffs’ submissions. For the reasons that follow, I conclude that while it is desirable that judges express their conclusions in their own words, incorporating substantial amounts of material from submissions or other legal sources into reasons for judgment does not without more permit the decision to be set aside. Only if the incorporation is such that a reasonable person would conclude that the judge did not put her mind to the issues and decide them independently and impartially as she was sworn to do, can the judgment be set aside.
2. This result, as we shall see, is consistent with longstanding practice in Canada and abroad. Yet, as the disagreement in the courts below and the arguments before us make clear, the jurisprudential framework and the governing principles involved are far from clear. This suggests the need to look carefully at the nature and function of reasons for judgment and the long tradition of judicial copying.
3. Applying the principles discussed below, I conclude that the incorporation of large portions of the plaintiffs’ submissions in the reasons in this case does not justify overturning the trial judge’s decision. The presumption of judicial integrity and impartiality has not been displaced. On the contrary, the reasons demonstrate that the trial judge addressed his mind to the issues he had to decide. This said, aspects of the reasons disclose palpable and overriding error and must be set aside. In the result, I would allow the appeal, but vary the trial judgment.

II. Statement of Facts

1. Eric Victor Cojocaru, the son of Monica Cojocaru, suffered brain damage during his birth at the British Columbia Women’s Hospital and Health 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.
2. Eric and his mother brought an action in negligence against the Hospital; attending Nurses Bellini, MacQueen and Verwoerd; and Drs. Dale R. Steele, Jenise Yue and Fawaz Edris.

III. Judgments

1. The trial judge found the Hospital, Nurse Bellini and three doctors liable in negligence and awarded damages to the plaintiffs in the amount of $4 million (2009 BCSC 494, 65 C.C.L.T. (3d) 75). The trial judge’s reasons reproduced large portions of the submissions of the plaintiffs. However, he did not accept all the submissions of the plaintiffs, discussed a number of issues and stated his final conclusions in his own words. He dismissed the claims against Nurse MacQueen and Nurse Verwoerd, and varied the quantum of damages from that suggested by the plaintiffs.
2. The majority of the Court of Appeal, Levine and Kirkpatrick JJ.A., held that the trial judge’s decision should be set aside and a new trial ordered. The “form of the reasons, substantially a recitation of the [plaintiffs’] submissions” constituted cogent evidence displacing the presumption of judicial integrity and impartiality (2011 BCCA 192, 17 B.C.L.R. (5th) 253, at para. 127). The majority of the Court of Appeal also found that the reasons failed to fulfill the functions of advising the parties and the public of the reasons for his decision and of providing a basis for appellate review.
3. Justice K. J. Smith dissented. The issue was whether the presumption of judicial integrity and impartiality was rebutted. The question was “whether a reasonable and informed person, considering all the circumstances, would apprehend that the trial judge failed to independently and impartially consider the evidence and the law and to arrive at his own conclusions on the issues” (para. 29). He concluded this test was not met. While the copying was “troubling” (para. 22), the reasons showed that the trial judge had applied his mind to the issues, done his own analysis and reached his own conclusions. This said, the trial judge had “overlooked and misapprehended important evidence, made errors in his legal analysis, and failed entirely to deal with a cogent defence argument” (para. 31). Reviewing the case on its merits, the dissenting Justice determined that the actions against Dr. Steele, Dr. Edris, the Hospital and Nurse Bellini should be dismissed. He indicated that he would also have reduced the damage award against the remaining defendant, Dr. Yue, but did not pursue this issue in light of the majority’s order for a new trial.

IV. Issues

1. The issues are as follows:

A. Should the trial judge’s decision be set aside because it copied large portions of the plaintiffs’ submissions?

B. If the judgment is not set aside for copying, does it disclose palpable errors of fact or legal errors?

A. *Should the Trial Judge’s Decision Be Set Aside Because it Copied Large Portions of the Plaintiffs’ Submissions?*

1. This was a complex case involving many issues. The trial judgment, rendered some time after a lengthy trial, consisted of 368 paragraphs. Only 47 were predominantly in the judge’s own words; the balance of 321 paragraphs was copied from the plaintiffs’ submissions. This raises the concern that the trial judge did not put his mind to the issues, the evidence and the law as he was sworn to do, but simply incorporated the plaintiffs’ submissions.
2. The question before us is whether a trial judge’s decision should be set aside because his reasons incorporate large portions of material prepared by others, in this case the plaintiffs.

1. A Matter of Procedure

1. Judicial decisions can be set aside either for substantive errors or procedural errors. A complaint that a judge’s decision should be set aside because the reasons for judgment incorporate materials from other sources is essentially a procedural complaint. It goes not to whether the decision is correct on the merits having regard to the evidence and the law, but to whether the process by which it was reached is procedurally fair. A fair process requires not only that the parties be allowed to submit evidence and arguments to the judge, but that the judge decide the issues independently and impartially as the judge is sworn to do. Extensive incorporation may raise concerns that the judge has not done so.
2. To determine whether a defect relating to reasons for judgment is evidence of procedural error negating a fair process, the alleged deficiency must be viewed objectively, through the eyes of a reasonable observer, having regard to all relevant matters: see e.g. *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267. Reasons need not be extensive or cover every aspect of the judge’s reasoning; in some cases, the basis of the reasons may be found in the record. The question is whether a reasonable person would conclude that the alleged deficiency, taking into account all relevant circumstances, is evidence that the decision-making process was fundamentally unfair, in the sense that the judge did not put her mind to the facts, the arguments and the issues, and decide them impartially and independently.

2. The Presumption of Judicial Impartiality

1. 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.
2. Judicial decisions benefit from a presumption of integrity and impartiality — a presumption that the judge has done her job as she is sworn to do. This reflects the fact that the judge is sworn to deliver an impartial verdict between the parties, and serves the policy need for finality in judicial proceedings.
3. Courts have repeatedly affirmed that the starting point in an inquiry such as this is the presumption of judicial integrity and impartiality. In *Teskey*,Charron J., for the majority, stated, at para. 19:

Trial judges benefit from a presumption of integrity, which in turn encompasses the notion of impartiality. . . . Hence, the reasons proffered by the trial judge in support of his decision are presumed to reflect the reasoning that led him to his decision.

1. Justice Abella, in dissent, agreed, writing at length about the judicial history of the presumption of integrity and the purposes it serves:

The presumption of integrity acknowledges that judges are bound by their judicial oaths and will carry out the duties they have sworn to uphold. This includes not only a presumption — and duty — of impartiality but also of legal knowledge. . . . [J]udges are presumed to know and act in accordance with their legal responsibilities . . . . [para. 29]

1. 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. In *Teskey*, Charron J. wrote, at para. 21:

Even though there is a presumption that judges will carry out the duties they have sworn to uphold, the presumption can be displaced. The onus is . . . on the appellant to present cogent evidence showing that, in all the circumstances, a reasonable person would apprehend that the [presumption is rebutted by the reasons].

1. Similarly, Abella J. in *Teskey* stated, at para. 33:

The test for displacing the presumption, therefore, requires that the apprehension of bias be reasonable in the eyes of someone who is reasonably informed about all the relevant circumstances. Those circumstances include “the traditions of integrity . . . and . . . the fact that impartiality is one of the duties the judges swear to uphold”.

1. 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:  *R. v. S. (R.D.)*,[1997] 3 S.C.R. 484, at para. 32, *per* L’Heureux-Dubé and McLachlin JJ., cited in *Wewaykum Indian Band v. Canada*,2003 SCC 45, [2003] 2 S.C.R. 259, at para. 59.
2. *Teskey* illustrates how attacks on judicial decisions on the basis of defects relating to the judgment process should be approached. In that case, the trial judge had convicted the accused, with reasons to follow. No reasons were forthcoming. Finally, the trial judge delivered elaborate reasons 11 months after the convictions, and only after repeated requests from counsel. The defence argued on appeal that the reasons were after-the-fact justifications of the verdict, raising concerns about whether the judge at the time of the convictions had considered the law and applied it to the evidence as he was sworn to do. A majority of this Court, *per* Charron J., set aside the convictions. The minority, *per* Abella J., would have upheld the convictions. Both judgments agreed that the starting point was the presumption of judicial integrity, and that the onus is on the party assailing the reasons to present cogent evidence to displace the presumption.
3. The basic framework for assessing a claim that the judge failed to decide the case independently and impartially may be summarized as follows. The claim is procedural, focussing on whether the litigant’s right to an impartial and independent trial of the issues has been violated. There is a presumption of judicial integrity and impartiality. It is a high presumption, not easily displaced. The onus is on the person challenging the judgment to rebut the presumption with cogent evidence showing that a reasonable person apprised of all the relevant circumstances would conclude that the judge failed to come to grips with the issues and decide them impartially and independently.
4. I add this. The Court of Appeal proposed, and it was argued before this Court, that the problem of copying attracts a “functional” inquiry into whether the reasons are adequate to advise the parties and the public of the reasons for the decision and to provide a basis for appeal.
5. In the criminal context, it has been held that reasons for judgment that do not fulfill these basic functions may result in a judgment being set aside if the appellate court concludes that it is a case of unreasonable verdict, error of law, or a miscarriage of justice within the scope of s. 686(1)(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869.
6. This Court has not explored whether, and if so how, this approach applies in civil cases, although it has twice considered and rejected the argument that reasons were functionally insufficient: *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129. In the administrative law context, it has held that challenges to the reasoning or result of a decision do not attract an independent sufficiency analysis and should be dealt with within the overall reasonableness analysis: *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708.
7. In a case such as this, the essence of the complaint is not that the reasons are functionally insufficient — the parties agree that on their face, the reasons explain what was decided and provide a basis for appellate review — but rather that the judge’s wholesale incorporation of the material of others shows that he did not put his mind to the issues and decide them impartially. It is a complaint not about sufficiency, but about process, and stands to be resolved on the basis of the core analysis in *Teskey* — whether the presumption of judicial impartiality has been rebutted.

3. When Is the Presumption of Judicial Integrity and Impartiality Rebutted?

1. The presumption of judicial integrity and impartiality is a high one, which can be rebutted only by cogent evidence.
2. Procedural defects relating to reasons for judgment are many and varied. In all cases, the underlying question is the same: Would a reasonable person, apprised of all the relevant circumstances, conclude that the judge failed to come to grips with the issues and make an impartial and independent decision, thereby defeating the presumption of judicial integrity and impartiality?
3. Evidence capable of displacing the presumption of judicial integrity and impartiality may take different forms. It may be *intrinsic*,arising on the face of the reasons themselves. For example, no reasons or unintelligible reasons may be challenged by the form of the reasons themselves. Or it may be *extrinsic*: for example, evidence that the judge issued a decision before receiving the submissions of counsel touching on an important issue; that the judge was overheard telling someone that he was determined to find in favour of one of the parties regardless of the evidence; or that there was delay in issuing the reasons or extensive incorporation of material. The analysis is holistic and contextual. The question is whether the evidence presented by the party challenging the judgment convinces the reviewing court that a reasonable person would conclude that the judge did not perform her sworn duty to review and consider the evidence with an open mind: *Teskey*.

4. Copying in Reasons for Judgment

1. The issue before us is not whether the practice of incorporating what others have written into judgments is a good thing. As we will see, judicial copying is a long-standing and accepted practice, yet one that, carried to excess, may raise problems. Rather, the issue is when, if ever, copying displaces the presumption of judicial integrity and impartiality.
2. Approached from this perspective, a number of the criticisms advanced against copying fall by the wayside. One such criticism, made by the majority of the Court of Appeal in this case, is the judge’s failure to attribute the incorporated material to the original author. This criticism is connected to the idea that the reasons should be the “original” product of the judge’s mind, and that to the extent they are not, the judge should acknowledge her sources. Failure to attribute sources and lack of originality, without more, do not assist in answering the ultimate question — whether a reasonable person would conclude from the copying that the judge did not put her mind to the issues to be decided, resulting in an unfair trial. The fact that a judge attributes copied material to the author tells us nothing about whether she put her mind to the issues addressed in that copying. Nor is lack of originality alone a flaw in judgment writing; on the contrary, it is part and parcel of the judicial process. It may not be best practice for judges to bulk up their judgments with great swaths of borrowed material. But the fact remains that borrowed prose, attributed or otherwise, does not, without more, establish that the judge has failed to come to grips with the issues required to be decided.
3. 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. The task of judgment writing is much different. As Simon Stern puts it:

Judges are not selected, and are only rarely valued, because of their gift for original expression. Just as most lawyers would rather present their arguments as merely routine applications of settled doctrine, yielding the same legal results that other courts have delivered repeatedly, judges usually prefer to couch their innovations in familiar forms, borrowing well-worn phrases to help the new modifications go down smoothly. The bland, repetitive, and often formulaic cadences of legal writing in general, and judicial writing in particular, can be explained in large part by a commitment to the neutral and consistent application of the law. . . . [T]he effort to demonstrate that similar cases are being treated alike often finds its rhetorical manifestation in a penchant for analyses that have a *déja lu* quality — usually because the words *have* been read before. This tendency, though visible throughout the legal system, is most pronounced at the trial level. [Emphasis in original; p. 1.]

(“Copyright Originality and Judicial Originality” (2013), 63 *U.T.L.J.* 1)

And again:

It is hardly news that legal writing is embedded in a network of precedent, formulas, and boilerplate, that it reflects a general preference for the tried and true over the novel, and that it routinely depends on practices — verbatim repetition of others’ words, adoption of others’ prose and arguments — that might trigger infringement claims in an intellectual property dispute. [p. 6]

1. The scope for judicial creativity is narrow, but not non-existent. It finds expression in the ordering of the reasons and the disposition of the arguments and issues, and in the occasional eloquent statement of the facts or restatement of the law. Nevertheless, it remains the case 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.
2. In this spirit, and in the interests of expediting judicial business, courts actively encourage parties to submit written arguments and proposed orders. This process is accelerating. In the United States, and more and more in Canada, courts welcome electronic submissions. Such submissions help the judge get the decision right, facilitate the task of judgment writing and speed the judicial process. As Gregory M. Silverman frankly observes, the “benefits provided by electronic filing” include “reduced time for . . . retyping as portions of one document can be easily transferred to another using the cut-and-paste operation of word processing software” (“Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records over the Internet” (2004), 79 *Wash. L. Rev.* 175, at p. 196).
3. The concern about copying in the judicial context is not that the judge is taking credit for someone else’s prose, but rather that it may be evidence that the reasons for judgment do not reflect the judge’s thinking. They are not the judge’s reasons, but those of the person whose prose the judge copied. Avoiding this impression is a good reason for discouraging extensive copying. But it is not the copying *per se* that renders the process of judgment writing unfair. A judge may copy extensively from the briefs in setting out the facts, the legal principles and the arguments, and still assess all the issues and arguments comprehensively and impartially. No one could reasonably contend that the process has failed in such a case.
4. To sum up, extensive copying and failure to attribute outside sources are in most situations practices to be discouraged. But lack of originality and failure to attribute sources do not in themselves rebut the presumption of judicial impartiality and integrity. This occurs only if the copying is of such a character that a reasonable person apprised of the circumstances would conclude that the judge did not put her mind to the evidence and the issues and did not render an impartial, independent decision.

5. The Permissibility of Judicial Copying: A Look at the Cases

1. Judges are busy. A heavy flow of work passes through the courts. The public interest demands that the disputes and legal issues brought before the courts be resolved in a timely and effective manner, all the while maintaining the integrity of the judicial process. In an ideal world, one might dream of judges recasting each proposition, principle and fact scenario before them in their own finely crafted prose. In reality, courts have recognized that copying is acceptable, and does not, without more, require the judge’s decision to be set aside. While the theoretical basis on which the result is explained varies, this is the position in England, various Commonwealth countries, the U.S. and in Canada.
2. In England, the Court of Appeal has affirmed that copying does not invalidate a decision: *English v. Emery Reimbold & Strick Ltd.*,[2002] EWCA Civ 605, [2002] 3 All E.R. 385. This view appears to be generally accepted. For example, in 2006, a British tribunal, applying *Emery*, explained that “there is nothing to prevent a Tribunal from adopting the arguments advanced on behalf of one of the parties if it accepts those arguments and has nothing to add to them”: *Meadowstone (Derbyshire) Ltd. v. Kirk*, 2006 WL 690588 (U.K. Employment Appeal Tribunal), at para. 21. Although the tribunal acknowledged that “[i]t is better practice for a Tribunal to spell out in its own words the reasons for any conclusion which it reaches”, if it chooses to repeat a party’s language, it cannot be said that this practice “fail[s] to meet . . . the minimum standards by which every judgment should be measured” (para. 21).
3. *Emery* was applied by the Hong Kong Court of Appeal in a case where the trial judge incorporated extensive portions of counsel’s submissions in the judgment, and the losing party appealed on grounds of procedural fairness and adequacy: *Shin v. Kung*, [2004] HKCA 205 (HKLII), at paras. 366-69 and 377. The court dismissed the appeal, holding that a judge is entitled to accept or reject a party’s case in its entirety. “A judge’s total adoption or rejection of counsel’s submissions *per se* does not imply the lack of independent adjudication, nor does it constitute a valid ground for upsetting the judgment on the basis of an unfair trial”, the court stated (para. 367). Applying the test of “a fair-minded and informed observer” (para. 377), it dismissed concerns about adequacy and bias.
4. In Australia, it has been held that “[a]doption of one party’s submissions by a judge . . . is one method of providing adequate reasons”, adding that “[i]t may not be the choice of every judge but it is impossible to say that it necessarily . . . falls short of the judicial duty to provide reasons”: *James v. Surf Road Nominees Pty. Ltd.*,[2004] NSWCA 475 (AustLII), at para. 168. In *Fletcher Construction Australia Ltd. v. Lines MacFarlane & Marshall Pty. Ltd. (No. 2)*, [2002] VSCA 189, [2002] 6 V.R. 1, at para. 163, the Victorian Supreme Court of Appeal, reviewing a trial judgment for adequacy, remarked that “[a] careful examination of the reasons for judgment shows that the judge adopted [the plaintiff’s] closing submissions almost in their entirety.” But it did not set the judgment aside for copying alone.
5. The United States Supreme Court ruled almost 50 years ago that when a trial judge “adopt[s] verbatim” the findings of fact submitted by counsel, “[t]hose findings, though not the product of the workings of the . . . judge’s mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence”: *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), at p. 656. This rule appears to have been consistently followed in the United States although not without occasional adverse comment in extreme cases, as in *United States v. Marine Bancorporation, Inc.*,418 U.S. 602 (1974), at p. 615, where extensive copying without citations to transcripts hampered appellate review and added to the appellate court’s burden. (See Stern, at p. 9, fn. 24.)
6. The Supreme Court of Canada has never ruled on the matter. However, the two leading cases, *Sorger v. Bank of Nova Scotia* (1998), 39 O.R. (3d) 1 (C.A.), and *R. v. Gaudet* (1998), 40 O.R. (3d) 1 (C.A.), support the view that copying does not in itself establish procedural unfairness, and that the question is whether the copying shows that the trial judge did not consider the evidence and issues and render an impartial, independent decision.
7. In *Gaudet*,the trial decision was upheld despite the fact that over 90 percent of its content was adopted from the Crown’s submissions (Stern, at p. 35). The trial judge had expressly stated that he had conducted an independent review, and the Ontario Court of Appeal said that there was “no reason to conclude that the trial judge did not do what he stated he had done — conduct an independent review of the evidence and carefully consider both the defence and Crown submissions” (p. 16).
8. In *Sorger*, the Ontario Court of Appeal approached the issue of extensive copying in reasons for judgment as a matter of procedural fairness. It was faced with a 128-page trial judgment consisting of nearly 125 pages transcribed from the parties’ submissions — 55 pages from the plaintiffs’ submissions and 70 pages from the defendants’ submissions (Stern, at p. 34). The trial judge devoted only two pages to findings of fact, all copied verbatim from the defendants’ material without any analysis of the evidence and no consideration of the jurisprudence. Evoking concerns about the fairness of the trial, the Court of Appeal concluded that the trial judgment offered “nothing to indicate that the trial judge attempted to grapple fairly and impartially with the case presented by the plaintiffs or decide it independently”. It concluded that “[a] reasonable and informed observer would have a reasonable apprehension that the mind of the trial judge was closed to a fair and impartial consideration of the appellants’ case” (pp. 8-9). The trial judge’s decision was set aside and a new trial ordered, not on the ground that the copying in itself vitiated the judgment, but on the ground that the copying, viewed in terms of the judgment as a whole, would satisfy a reasonable observer that the judge failed to grapple independently and impartially with the issues before him.
9. Subsequent cases affirmed that copying alone is not grounds for appellate intervention. The Ontario Court of Appeal upheld a decision on an application for a search warrant where the judge’s entire reasons consisted of a reference to one party’s arguments by paragraph number: *Canada (Attorney General) v. Ni-Met Resources Inc.* (2005), 74 O.R. (3d) 641. The losing party argued that the reasons were insufficient to fulfill their functions because they simply adopted paragraphs from the other party’s argument. The court rejected this submission.
10. In *2878852 Canada Inc. v. Jones Heward Investment Counsel Inc.*, 2007 ONCA 14 (CanLII), the same court, in a divided judgment and with some criticism, upheld reasons that incorporated the parties’ submissions by identifying them solely by paragraph number, lending a “writing by numbers” effect (Stern, at p. 24).
11. In *R. v. Dastous* (2004), 181 O.A.C. 398, where the trial judgment consisted of five paragraphs in which the trial judge stated he accepted all the Crown’s submissions, the Ontario Court of Appeal in a short judgment set the decision aside in part because the trial judge had given no reasons for his rejection of the accused’s evidence. In *R. v. Kendall* (2005), 75 O.R. (3d) 565, leave to appeal refused, [2006] 1 S.C.R. x, the same court rejected a trial judgment that consisted only of an expression of agreement with and adoption of the defence submissions at trial, again because it was impossible to know why the judge decided as he did.
12. The Federal Court of Appeal considered a judgment that reproduced verbatim 100 paragraphs of a trial judgment complete with original underlining, footnotes and references in *Janssen-Ortho Inc. v. Apotex Inc.*, 2009 FCA 212, 392 N.R. 71. After recommending that judges should attribute sources, the court nevertheless concluded that the judgment afforded “[no] basis to . . . conclude . . . that the Judge did not perform his duty to examine the evidence as he was called upon to do” (para. 79).
13. In summary, courts in Canada and elsewhere have held that copying in reasons for judgment is not, in itself, grounds for setting the judge’s decision aside. However, if the incorporation of the material of others would lead a reasonable person apprised of all the relevant facts to conclude that the trial judge has not put his or her mind to the issues and made an independent decision based on the evidence and the law, the presumption of judicial integrity is rebutted and the decision may be set aside.
14. This does not negate the fact that, as a general rule, it is good judicial practice for a judge to set out the contending positions of the parties on the facts and the law, and explain in her own words her conclusions on the facts and the law. The process of casting reasons for judgment in the judge’s own words helps to ensure that the judge has independently considered the issues and come to grips with them. As the cases illustrate, the importance of this may vary with the nature of the case. In some cases, the issues are so clear that adoption of one party’s submissions or draft order may be uncontroversial. By contrast, in complex cases involving disputed facts and legal principles, the best practice is to discuss the issues, the evidence and the judge’s conclusions in the judge’s own words. The point remains, however, that a judge’s failure to adhere to best practices does not, without more, permit the judge’s decision to be overturned on appeal.

6. Application to This Appeal

1. The question is whether the extensive copying from the plaintiffs’ submissions requires the trial judge’s decision to be set aside. The starting point is the presumption of judicial integrity and impartiality. To reframe the matter in the words of *Teskey*, the onus is on the party challenging the decision to show that a reasonable person apprised of all the circumstances would conclude that the judge did not put his mind to the issues and decide them impartially and independently, as his duty required. The bar is high, and cogent evidence is required to hurdle it. The reviewing court should not approach copying from a sceptical perspective, but from the perspective imposed by the presumption of judicial integrity and impartiality. In deciding whether the presumption is rebutted the court should consider the nature of the case, what was copied, the extent of the copying, how it functions in the reasons as a whole, and any other relevant circumstances.
2. In this case, the defendants rely on the extent of the copying, the quality of the copying, the lack of attribution for the copying, the nature of the case and the failure to fulfill the basic functions of reasons for judgment.

(a) *Extent of the Copying*

1. The copying, as already discussed, was extensive. The judgment consisted of 368 paragraphs. Only 47 were predominantly in the judge’s own words; the balance of 321 paragraphs was copied (with editorial changes) from the plaintiffs’ submissions.
2. As discussed, extensive copying does not in itself show that the reasons were not those of the judge. It may simply reflect the judge’s decision that he was persuaded by the material he copied and found it important. However, taken with other considerations, it may be a factor tending to show that the judge did not engage with the issues and make an impartial and independent decision on the evidence and the law, as his oath required him to do.
3. In this case, the trial judge wrote some original paragraphs and made findings contrary to the submissions of the plaintiffs, the party from which he copied. Although most of what the trial judge wrote in his own words concerned uncontroversial facts, the fact that he did so makes it more difficult to infer that the judge failed to consider the issues impartially and that the reasons do not reflect the thinking of the trial judge.

(b) *Quality of the Copying*

1. It is argued that errors in and omissions from what the judge copied show that he did not put his mind to the issues and decide the case impartially on the evidence and the law.
2. First, the defendants point to the fact that the trial judge copied a portion of the plaintiffs’ submissions that contained an error (the date of Dr. Yue’s consultation letter) that the judge had pointed out in open court. This shows, it is argued, that he was simply cutting and pasting in a mechanical fashion, and not putting his mind to the contents.
3. Had the error been one of substance, this would be troubling. However, it is of a more technical nature. Making a mistake as to the date of a letter does not offer convincing evidence that the trial judge did not put his mind to the substance of what was copied.
4. Second, the defendants contend that the trial judge’s incorporation of the plaintiffs’ arguments on causation without discussing the defendants’ criticism of them shows that he did not perform an independent causation analysis. They argue that the judge was simply cutting and pasting, and not putting his mind to the content of the material.
5. As the cases show, adopting the arguments of one of the parties without referring to the other party’s critique of them does not, without more, rebut the presumption of judicial impartiality. Nor are trial judges required to discuss every argument or alleged problem in arriving at a particular conclusion. Here the reasons, although in borrowed language, make it clear that the judge considered causation and made a decision on the issue. Any error in that conclusion goes to the merits rather than the process.
6. Third, the defendants argue that the failure of the judge to consider virtually any of the defendants’ submissions (except those quoted in the plaintiffs’ submissions) shows that he did not come to grips with the issues and the reasons do not reflect his own decision on them.
7. Again, this criticism is inconclusive. Indeed, the fact that the judge accepted some of the defendants’ submissions negates this inference. A comparison of the submissions of the plaintiffs and the reasons for judgment shows that the portions of the plaintiffs’ submissions that the judge copied were edited before being published in the reasons. This suggests that the judge did not uncritically accept the material and put his mind to its contents and whether they reflected his views.
8. I conclude that the quality of the copying would not lead a reasonable person to conclude that the copied material did not reflect the trial judge’s own thinking and views.

(c) *Lack of Attribution*

1. It is argued that the fact that the trial judge did not attribute the copied material to the plaintiffs supports the view that the reasons do not reflect the reasoning of the trial judge and undermines confidence that the portions copied reflect his own reasoning.
2. As the previous discussion establishes, judicial writing is highly derivative and copying a party’s submissions without attribution is a widely accepted practice. The considerations that require attribution in academic, artistic and scientific spheres do not apply to reasons for judgment. The judge is not expected to be original.
3. Beyond this, it is difficult to understand how attributed copying is more likely to reflect the judge’s thinking — or lack of thinking — than unattributed copying. In both cases, the judge has adopted the copied material as his own by putting it in his reasons.

(d) *Nature of the Case*

1. The nature of the case is relevant in assessing whether incorporation of the material of others rebuts the presumption of judicial integrity and impartiality and justifies setting aside the judge’s decision. Criminal cases, where the liberty of the accused is at stake, demand the high level of scrutiny described in *Teskey*. At the other end of the spectrum, straightforward motions in a civil case may require little more than a yes or no from the judge.
2. The case before us is a civil case, but one of considerable complexity. Moreover, the judge’s conclusions bore heavy consequences for the parties — a great deal of money was at stake, and the reputations of the doctors and Hospital staff were on the line.
3. However, it does not follow from the fact that a case is complex and the judge’s findings are important that the judicial incorporation of the material of others necessarily displaces the presumption of integrity. As discussed above, it is good practice in such cases for the judge to put the issues and his conclusions in his own words. But the question is not whether best practices were followed, but whether the copying constitutes cogent evidence that the judge failed to come to grips with the issues and decide them impartially and independently, as his oath required. If the answer to that question is yes, then the presumption of judicial integrity and impartiality is rebutted. If the answer is no, the judge’s decision stands.
4. In this case, we agree with Smith J.A., dissenting, that despite the judge’s extensive adoption of the plaintiffs’ argument, the evidence does not show that he failed to put his mind to the critical issues and decide them independently and impartially. The reasons, read as a whole, show that the trial judge considered the issues and the arguments on both sides, and came to a conclusion on each of the main issues.

(e) *Functions Not Fulfilled*

1. The Court of Appeal in this case correctly recognized that the issue was whether the trial judge’s extensive incorporation of the plaintiffs’ submissions rebutted the presumption of judicial integrity and impartiality. However, the majority of the Court of Appeal and the parties before this Court also discussed whether the reasons satisfied the basic functional requirements of informing the parties and the public of the reasons for the judge’s decision and providing a basis for appellate review.
2. As discussed above, this analysis is not applicable when the complaint, as here, is that the judge’s wholesale incorporation of the material of others in reasons for judgment shows that he did not put his mind to the issues and decide them independently and impartially.

(f) *Summary*

1. Despite extensive copying of the plaintiffs’ closing arguments, the defendants’ arguments do not rebut the presumption of judicial impartiality.
2. 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 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. The absence in the reasons of an analysis of causation, and the alleged errors the reasons contain go, not to procedural unfairness, but to the substance of the reasons — whether the trial judge, having made his own decision, erred in law or made palpable and overriding errors of fact.
3. 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.
4. The majority of the Court of Appeal acknowledged the need to displace the presumption of judicial integrity and impartiality before setting aside the judgment. It stated that “[t]he form of the reasons, substantially a recitation of the [plaintiffs’] submissions, is in itself ‘cogent evidence’ displacing the presumption of judicial integrity, which encompasses impartiality” (para. 127). In effect, the Court of Appeal held that the extensive copying *in itself* rebutted the presumption. The reasons of the trial judge, while imperfect, deal with all the salient aspects of the case. The fact that large portions were copied from the plaintiffs’ submissions does not displace the presumption that the trial judge engaged with the issues and decided them in accordance with the law. I conclude that the judgment should not be set aside on the ground that the trial judge incorporated large parts of the plaintiffs’ submissions in his reasons.

B. *Does the Judgment Disclose Errors of Law or Palpable and Overriding Errors of Fact?*

1. Having concluded that the decision of the trial judge should not be set aside because his reasons incorporated large portions of the plaintiffs’ submissions, the question is whether the trial judge’s conclusions on the liability of the various defendants disclose error and should be set aside. It is common ground that to set aside the trial judge’s conclusions, the party impugning the decision must demonstrate error of law or palpable and overriding error on questions of fact.
2. The trial judge, to recap, found the Hospital, Nurse Bellini and Drs. Yue, Edris and Steele liable in negligence. He dismissed the claims against Nurse MacQueen and Nurse Verwoerd.
3. The majority of the Court of Appeal, having concluded that the case must be returned for a new trial, did not deal with these issues. However, Smith J.A. in dissent considered the trial judge’s findings on liability. He was of the view that the claim against Dr. Yue should be maintained on one of the grounds advanced, and that the claims against Dr. Edris, Dr. Steele, Nurse Bellini and the Hospital should be dismissed in their entirety. He suggested that he would have reduced damages, but declined from considering this issue in view of the new trial ordered by the majority.
4. The plaintiffs argue that Smith J.A. erred in concluding that their claims against the defendants other than Dr. Yue should be dismissed. The defendant nurse and the Hospital cross-appeal and ask this Court to resolve the issues of liability and damages on the record before us, rather than send them back for a new trial. The defendant doctors asked for a new trial, but agreed during the oral hearing that it was open to this Court to substitute its own findings in the course of ordinary appellate review.

1. Liability of Dr. Yue

1. The trial judge found Dr. Yue negligent for recommending a vaginal birth after caesarean section, or VBAC procedure, without verifying the orientation of the caesarean scar; for failing to obtain Ms. Cojocaru’s informed consent to the VBAC procedure; and for failing to obtain her informed consent to induction of the birth.

(a) *Recommending the VBAC Procedure*

1. The trial judge found that Dr. Yue breached the standard of care by failing to verify the orientation of the previous caesarean scar before recommending VBAC as a delivery option (para. 154).
2. The issue is whether this conduct caused the harm Eric Cojocaru suffered. The trial judge concluded that causation was established because Ms. Cojocaru would not have attempted VBAC had Dr. Yue not recommended it (para. 216).
3. Justice Smith held that the trial judge asked the wrong question. The proper question was whether Dr. Yue’s failure to investigate the orientation of the scar caused the injury and loss. Had Dr. Yue investigated the scar, she would still have recommended VBAC. Hence, in his view, no causal connection was established between the negligence alleged and the injury.
4. I agree with Smith J.A. The trial judge short-circuited the causation analysis when he found that “[t]he negligence complained of is negligence in recommending VBAC as a delivery option. Had Dr. Yue not done this, Ms. Cojocaru would have had a repeat caesarean section and the injury would indeed have been avoided” (para. 216). Rather, the trial judge should have asked himself what harm flowed from Dr. Yue’s alleged negligent act: failing to verify the orientation of the scar.
5. VBAC is contra-indicated in patients who have a classical or inverted T incision uterine scar from a previous caesarean section. Dr. Yue formed the opinion that Ms. Cojocaru’s uterine scar was low transverse, and that Ms. Cojocaru was thus a candidate for VBAC. Dr. Yue’s only omission was her alleged failure to verify the orientation of the scar by obtaining the report from the Romanian operation.
6. The purpose of obtaining the operative report was to verify that the uterine scar was low transverse. Since Ms. Cojocaru’s uterine scar was, in fact, low transverse, no harm flowed from Dr. Yue’s omission.

(b) *Liability for Failure to Obtain Informed Consent to the VBAC Procedure*

1. The trial judge found Dr. Yue negligent in failing to obtain Ms. Cojocaru’s informed consent to the VBAC procedure. I would not interfere with this conclusion.
2. The defendants argue that the trial judge made errors in assessing Dr. Yue’s evidence. In my view, while the trial judge made such errors, they could not have affected the result.
3. Dr. Yue had little memory of Ms. Cojocaru, and instead testified as to her “invariable routine”. In finding that he could not rely on Dr. Yue’s “invariable routine”, the trial judge stated that Dr. Yue failed to chart *any* aspect of “her alleged conversation regarding the risks that she says were explained to Ms. Cojocaru” (para. 98(d)). This was an overstatement. Ms. Cojocaru’s chart indicates that modes of delivery were discussed, and Dr. Yue’s consultation letter — written to the physician who referred Ms. Cojocaru — noted that the chance of success of VBAC was 80 percent, and the risk of uterine rupture was 1 in 200. However, the trial judge’s concern was not that the statistical risks were not discussed, but that “there is no indication that the significance of that statistic was brought home to Ms. Cojocaru” (para. 93). In fact, the trial judge concluded that even if Dr. Yue *did* convey the risk of 1 in 200, this was insufficient to obtain informed consent (para. 107). The trial judge’s misstatement with respect to the charts does not undermine his finding that Ms. Cojocaru’s consent was not sufficiently informed.
4. Similarly, the trial judge was entitled to ignore the note “wants VBAC” written by Dr. Yue on Ms. Cojocaru’s chart. Although the defendants argue that this note is evidence that Ms. Cojocaru consented to the VBAC procedure, the note is ambiguous on the issue of whether the risks were sufficiently conveyed to Ms. Cojocaru. The trial judge was not required to minutely dissect every piece of evidence in his reasons.
5. The trial judge also erred in his assessment of the consultation letter. As noted by the trial judge during oral argument, it was dictated the same day as Ms. Cojocaru’s appointment, not two days later. Furthermore, the trial judge erred by expecting that a letter to Ms. Cojocaru’s physician should detail Ms. Cojocaru’s language difficulties or explain the significance of statistical risks (see C.A. reasons, at paras. 65-67). However, the trial judge did not rely on this letter for an adverse finding of credibility; rather, he found that Dr. Yue’s “invariable routine” was not corroborated by this letter. The trial judge simply preferred the evidence of Ms. Cojocaru over that of Dr. Yue. His misapprehension of the letter is insufficient to overturn this finding.
6. The evidence supports the trial judge’s conclusion that Dr. Yue failed to adequately inform Ms. Cojocaru of the risks of VBAC.
7. The evidence shows that Dr. Yue based her assessment of the risk of VBAC on an incorrect assumption about the reason for the Romanian caesarean section. Accordingly, she could not have fully informed her patient of the risks of VBAC.
8. Dr. Yue concluded that Ms. Cojocaru’s previous caesarean had been elective. On this basis, Dr. Yue advised Ms. Cojocaru that VBAC would have an 80 percent chance of success (trial reasons, at para. 103). This was in error. As found by the trial judge and supported by both the operative report and the Romanian obstetrician, Dr. Clepce, the Romanian caesarean section was undertaken for failure to progress (paras. 104-5). As Dr. Yue admitted, after a caesarean section for failure to progress, the likelihood of a successful VBAC is “significantly less than 80%” (accepted by the trial judge, at para. 106). Thus, Dr. Yue could not have properly advised her patient of the risks associated with VBAC.
9. For these reasons, I conclude that the trial judge’s finding of liability against Dr. Yue for failing to obtain Ms. Cojocaru’s informed consent to VBAC should be affirmed.

(c) *Liability for Informed Consent to Induction*

1. The trial judge found Dr. Yue liable for failure to obtain Ms. Cojocaru’s informed consent to induction of the birth. Justice Smith would have upheld this finding.
2. I cannot agree. The trial judge failed to conduct a separate causation analysis for the failure to obtain informed consent to *induction*, as distinct from the failure to obtain informed consent to VBAC. In my view, there is no evidence to support a causal relationship between the induction and the harm suffered.
3. There was no evidence to suggest that the alternative to induction — and, thus, the course of action that would have been followed had induction been refused — was a scheduled caesarean section. The most that can be said is that if Ms. Cojocaru had refused induction, her labour would not have been induced. The question is what harm flowed from the induction with prostaglandin gel.
4. The trial judge neither explicitly not implicitly found that the prostaglandin gel over-stimulated the uterus and caused the uterine rupture. Although there is evidence to support his finding that induction increases the risk of uterine rupture, it does not go so far as to show a causal relationship between the induction and the rupture in this case.
5. I would not sustain the finding of liability against Dr. Yue on this basis.

2. Liability of Dr. Edris

1. The trial judge held that Dr. Edris’s conduct failed to meet the requisite standard of care because he induced labour without ascertaining the orientation of Ms. Cojocaru’s uterine scar (para. 172).
2. Justice Smith held that this finding was in error because there was no causal connection between the alleged negligence — failure to ascertain the position of the scar — and the injury. I agree.
3. Ms. Cojocaru had a low transverse scar, and was thus not contra-indicated for either induction or VBAC. The trial judge’s findings that Dr. Edris was uncertain of the scar’s orientation and that he did not discuss this uncertainty with the on-call obstetrician, Dr. Steele, are of no moment. If Dr. Edris had ascertained the orientation of the scar, he would nevertheless have proceeded with the induction. Moreover, there is no evidence that the induction caused the uterine rupture.

Liability of Dr. Steele

1. Dr. Steele was the on-call obstetrician. When Nurse Bellini spoke with him at 18:05 to report on Ms. Cojocaru’s condition, he was in his car and on his way to another hospital. He did not return to the B.C. Women’s Hospital until after the delivery.
2. The trial judge found Dr. Steele negligent on two counts: first, for failing to assess Ms. Cojocaru earlier in the day (he criticized Dr. Steele for not having attended at any point between 10:00 and the emergency); and second, for failing to attend on her immediately when he spoke to Nurse Bellini. Instead, the trial judge said, “he left the hospital” (para. 173).
3. Justice Smith held that these conclusions were based on a misapprehension of the evidence and absolved Dr. Steele of liability. In his view, the evidence failed to establish a causal link between Dr. Steele’s actions and the injury. I agree.
4. First, there was no evidence to support the view that Dr. Steele’s failure to assess Ms. Cojocaru earlier in the day was a departure from the prevailing professional practice. There were no signs of uterine rupture until after 17:45. All the evidence supports the view that as the on-call obstetrician, Dr. Steele was entitled to rely on the obstetrical residents, Dr. Edris and Dr. Green, and the nursing staff to care for Ms. Cojocaru. He expected to be called when needed.
5. Second, as for his failure to attend on Ms. Cojocaru when he spoke with Nurse Bellini at 18:05, it is clear on the evidence that even if Dr. Steele had been present at that time — or at 18:00 when the trial judge found that the nurses first should have called a doctor — it would have made no difference. As discussed below, the Hospital’s only staffed operating room was occupied at that time — a fact which the trial judge failed to mention.

4. Liability of Nurse Bellini and the Hospital

1. The trial judge found Nurse Bellini (and therefore the Hospital which employed her) liable in negligence for not observing and responding to the signs of uterine rupture earlier. He found that Nurse Bellini should have called Dr. Green, the obstetrical resident present at the Hospital, by 18:00 hours, and that had she done so, the injury would have been avoided.
2. Justice Smith held that the evidence showed that even if Nurse Bellini had called Dr. Green at 18:00, the loss would not have been prevented, because the caesarean section could not have been performed in time to avoid the injury Eric suffered, due to lack of a staffed operating room. I agree.
3. Eric was extruded from the ruptured uterus and deprived of oxygen and nutrients at 18:18 (trial reasons, at para. 206). The trial judge found (and, indeed, it was undisputed) that the baby needed to be delivered within 10-15 minutes of oxygen deprivation to avoid permanent brain damage (that is, by 18:28-18:33) (para. 220).
4. The critical question is this: If Nurse Bellini had called Dr. Green at 18:00 as the trial judge found she should have, could Eric have been born before 18:28 to 18:33, when permanent brain damage occurred? The answer to this question, on the evidence before us, is no. The only operating room with an anaesthetist was not available until shortly before 18:30. Ms. Cojocaru’s operation commenced at the earliest possible time, 18:30, when the anaesthetist entered her operating room, and Eric was duly delivered at 18:41. Even if Nurse Bellini had sounded the alarm and called Dr. Green at 18:00 instead of having Nurse Verwoerd call him at 18:15, and if the caesarean section had been ordered within 10 minutes of that call, as appears likely, the result would have been the same because the operation could not have commenced before it did.
5. The trial judge appears to have reasoned that because it took 26 minutes from the time of Nurse Verwoerd’s call at 18:15 for Eric to be born, Eric would have been born by 18:26, before permanent brain damage, had Nurse Bellini made the call at 18:00 hours. However, this overlooked the fact that no operating room staffed with an anaesthetist was available until 18:30. On the evidence, it would not have been possible to get another anaesthetist in time to prevent the injury.
6. I conclude that even if Nurse Bellini had observed and reacted to the signs of uterine rupture by 18:00, as the trial judge said she should have done, and even if Dr. Steele had attended personally when he was paged, Eric could not have been delivered in time to avoid permanent brain damage.

5. Conclusion

1. The trial judge’s finding of liability against Dr. Yue for failing to obtain Ms. Cojocaru’s informed consent to VBAC should be affirmed. However, I agree with Smith J.A. that the trial judge’s findings of liability against Nurse Bellini, the Hospital, and Drs. Steele and Edris must be set aside.

6. Damages

1. The trial judge assessed damages against the defendants he found liable in the sum of $4,045,000, as follows (para. 367):

Non-Pecuniary Damages (Eric) $ 321,000

Non-Pecuniary Damages (Ms. Cojocaru) $ 40,000

Income Loss/Loss of Earning Capacity $ 850,000

Loss of Interdependent Relationship $ 25,000

Future Care Costs $ 2,665,000

“In Trust” Claim $ 144,000

TOTAL $ 4,045,000

1. Justice Smith indicated that he would have reduced the damages against Dr. Yue (the only defendant found liable) but declined to go into the matter in light of the new trial ordered by the majority.
2. The defendants challenge the trial judge’s conclusions on the quantum of damages.
3. In my view, the trial judge’s findings on damages were supported by the evidence and disclose no palpable and overriding error that would justify appellate intervention. The defendants essentially ask this Court to re-weigh the evidence, something we cannot do.
4. It is true that the trial judge overstated the matter when he referred to “clear and uncontradicted evidence” of “direct damage to Eric’s cerebral hemispheres” (para. 239). In fact, the evidence was contested; indeed, it seems arguable that the weight of the evidence was that there was no damage to the cerebral hemispheres. However, there was some evidence, particularly in the reports of Dr. Kaushansky and Dr. Hahn, on which the trial judge was entitled to find that Eric suffered damage to his cerebral hemispheres. Accordingly, I cannot conclude that the trial judge committed reversible error in his assessment of the nature of Eric’s injury.
5. I am also of the view that the trial judge was entitled to give little weight to the defendant physicians’ cost of care expert, Ms. Mageau. The trial judge found that she relied on a number of incorrect assumptions in her report. In arguing that the assumptions were well founded, the defendant physicians are asking this Court to re-weigh the evidence. Ms. Mageau based her assumptions on the findings of other experts, many of which were contradicted, and many of which the trial judge rejected. Accordingly, the trial judge was entitled to find that the assumptions underlying Ms. Mageau’s report were incorrect.

V. Disposition

1. 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.

*Appeal and cross‑appeal allowed with costs.*

Solicitors for the appellants/respondents on cross‑appeal: Pacific Medical Law, Vancouver; Whitelaw Twining Law Corp., Vancouver; Supreme Advocacy, Ottawa.

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Solicitors for the intervener the Trial Lawyers Association of British Columbia: Farris, Vaughan, Wills & Murphy, Vancouver.

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