Speaker's Corner: Time to revisit Sattva on the standard of review?

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An issue that transpires on every civil appeal is the applicable standard of review. The standard of review is important because it dictates the level of deference the appellate court is to show.

The issues that confront a trial judge will lead to three possible classifications: question of law, fact or mixed fact and law. As discussed in the leading authority in *Housen v. Nikolaisen*, a trial judge's findings of fact and inferences of fact are entitled to deference and cannot be disturbed absent a "palpable and overriding error." Questions of law attract a correctness standard; in practical terms, an appellate court is free to substitute its opinion for that of the trial judge. Questions of mixed fact and law, which can fall somewhere along a spectrum with pure fact at one end and pure law at the other, are generally reviewable on the standard of palpable and overriding error.

Is the interpretation of a contract a question of law, fact or mixed fact and law?

Historically, as a legacy of trials by jurors who were likely illiterate, the courts considered contractual interpretation to be a question of law reserved for the judge.

Following the move to a contextual approach to construing contracts with the factual matrix featuring more prominently in the interpretative exercise, uncertainty swirled around the categorization of contractual interpretation questions with courts in different Canadian jurisdictions espousing different views and, accordingly, applying different standards of review.

In its landmark decision in *Sattva Capital Corp. v. Creston Moly Corp.* last year, the Supreme Court of Canada seemingly resolved the uncertainty. Abandoning the historical stance, Justice Marshall Rothstein, writing for a unanimous court, held that "contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix." Rothstein did, however, leave open the possibility of extricating a question of law from one of mixed fact and law. Legal errors made in the course of contractual interpretation, such as applying an incorrect principle or failing to consider all elements of a legal test, call for a more searching review for correctness. This is in keeping with the role of appellate judges to ensure consistency in the law and the notion that decisions of precedential value demand strict scrutiny. Nonetheless, as Rothstein made clear, circumstances where a question of law can be extricated will be rare.

After *Sattva*, however, it appears as though the certainty lawyers had hoped for remains elusive, particularly in the context of insurance contracts.

In *Vallieres v. Vozniak*, the Alberta Court of Appeal distinguished *Sattva* on the basis that it concerned an arbitral award that is appealable only on questions of law and, hence, "some of the restrictive language in *Sattva* does not apply to ordinary appeals in Alberta." The court then applied a standard of correctness to the trial judge's interpretation of a standard form agreement of purchase and sale. As a standard form contract with widespread use, any decision on its interpretation has significant precedential value and the primary objective should be consistency of results.

The Alberta Court of Appeal took the reasoning in Vallieres one step further in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.* in suggesting that insurance policies, as a category of contracts, should be subject to review for correctness. "To the extent that interpretation of an insurance contract is a mixed question of fact and law, it falls on the extreme end of that 'spectrum of particularly', and the standard of review for interpretation of insurance policies is correctness," the court stated.

In its view, insurance contracts are highly specialized contracts with terms the clients have no say over. Since there is no negotiation, any search for the parties' intention in the surrounding circumstances is but a legal fiction. Moreover, statutory provisions set or influence many insurance policies, a fact that raises the stakes in terms of general impact and justifies appellate intervention.

The Nova Scotia bench saw matters differently. It intimated in *Linden v. CUMIS Life Insurance Co.* that there is no principled reason why interpretation of insurance contracts warrants little or no appellate deference.

Instead, the same approach — correctness review for extricable questions of law and palpable and overriding error for questions of fact or mixed fact and law — should apply in insurance cases as in other matters.

Newfoundland and Labrador's Court of Appeal cleverly eschewed the issue. In *Scottish & York Insurance Co. Ltd. v. Drover*, a dispute over the meaning of the words "dependent" and "residence" in an auto insurance contract, Justice Leo Barry remarked: "This could fall within the class of cases involving an extricable principle of law, since the parties do not dispute the underlying facts."

Barry ultimately declined to characterize the nature of the question on the basis that the trial judge's conclusions passed muster.

The Supreme Court may soon have an opportunity to revisit the standard of review question, if it so chooses, with an application for leave to appeal filed in *Ledcor*. The Court of Appeal's analysis in *Ledcor* is not unpersuasive, although it appears to overstretch the measure of leeway offered in *Sattva*. Regardless, further guidance from our highest court will reduce the margin of divergence and, in turn, enhance the uniformity and predictability of decisions.

Until it provides more clarification, the impression shared by many lawyers, for better or for worse, is that appellate courts often engage in the interpretative task afresh rather than limiting themselves to dissecting the trial judge's analysis. They are hardly bashful about disturbing the trial judge's interpretation if they do not agree with it. As the maxim goes, where there's a will, there's a way.

For more, see "SCC issues 'big change' to contract law."

Anna Wong practises civil litigation with Landy Marr Kats LLP.

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