November 3, 2015

When Judicial Decisions Go from Wrong to Wrongful – How Should the Legal System Respond?

By: Alice Woolley

Case Commented On: *R v Wagar*, 2015 ABCA 327 (CanLII)

Introduction

Judges make wrong decisions. As I discussed in a recent ABlawg post, errors in judicial decisions are to be expected given the human frailty of participants in the judicial system – the judges, the lawyers and the parties. But at some point can the quality of an error in a legal judgment change – can it go from wrong to wrongful? That is, at some point does the error go from being a product of the judge's humanity to being a product of a moral or ethical failure? And if a judicial decision crosses that line, how ought the legal system to respond? In particular, how can it respond so as to respect judicial independence while also ensuring public confidence in the administration of justice?

In this blog I explore these questions through Judge Robin Camp's decision and conduct in *R v Wagar*, a decision overturned by the Court of Appeal (*R v Wagar* 2015 ABCA 327 (Canlii) and summarized and commented on by my colleague Jennifer Koshan here. I argue that legal decisions go from being wrong to wrongful when they demonstrate both disrespect for the law and a failure of empathy in regards to the persons who appeared before the court. In my opinion, Judge Camp's decision falls within this category; it demonstrates both disrespect for the law governing sexual assault and a pervasive inability to understand or even account for the perspective of the complainant.

I also argue that while appellate courts, and official regulators like the Canadian Judicial Council, need to be cautious in sanctioning judicial decisions, they also need to be willing to do so when those decisions are wrongful. Because when a judge demonstrates disrespect for the law and disregard for the people the law affects, the need to act to maintain public confidence in the administration of justice outweighs concerns about protecting judicial independence. In addition, academics and lawyers must be willing to identify and criticize wrongful judgments, and rules in codes of conduct directing lawyers to "avoid criticism that is petty, intemperate or unsupported by a *bona fide* belief in its real merit" should be interpreted and applied carefully so as not to inhibit such criticism (Law Society of Alberta, Code of Professional Conduct, Rule 4.06(1), Comm'y; Federation of Law Societies, Code of Professional Conduct, Rule 5.6-1, Comm'y).

When Does a Judicial Decision Become Wrongful?

In his work on moral psychology, Jonathan Haidt argues that our moral judgments – our decisions and our reactions – flow from our intuitions and emotions. We do not reason through to moral conclusions; rather, we use reason to explain and justify our intuitive responses to moral

circumstances ("The emotional dog and its rational tail: a social intuitionist approach to moral judgment" (2001) 108(4) Psychol Rev 814-34).

Haidt identifies key "other-condemning" emotions as anger and disgust. Triggers for anger include the moral wrongs of betrayal, insult and unfairness; triggers for disgust include "hypocrisy, betrayal, cruelty, and fawning" (Jonathan Haidt "The Moral Emotions" in R. J. Davidson, K. R. Scherer, & H. H. Goldsmith (Eds.), *Handbook of affective sciences* (Oxford: Oxford University Press, 2003) pp. 852-870; my papers on intuition/moral emotion and legal ethics can be found here and here).

Judge Camp's conduct and reasons in *Wagar* angered and disgusted me. And, following Haidt, my claim here is that my anger and disgust are moral emotions elicited by the wrongfulness of that conduct and reasons. And the purpose of this part of this post is to use reason to explain those emotions, and by doing so to derive general lessons about the type of judicial behaviour that properly evokes anger and disgust – i.e., that is wrongful, rather than merely wrong.

The first disturbing aspect of Judge Camp's reasons is with respect to his legal analysis. As Professor Koshan notes, Judge Camp suggested that the limits on questioning the complainant's sexual history "hamstring the defence" and arose from "very, very incursive legislation" (Crown Factum, para. 73). Having made this comment, he then proceeded to allow cross-examination in this regard without complying with the requirements for a hearing under section 276(2) and section 276.1 of the Criminal Code.

Judge Camp also criticized the Canadian legal position that a judge ought not to consider whether a complainant reports the assault immediately. As described in the Crown's Factum:

> In the Crown's preliminary submissions, the Trial Judge commented that the Complainant "abused the first opportunity to report" before conceding this was "no longer contemporarily relevant". In the Crown's final submissions, he commented that the recent complaint doctrine (defined as complaining to your family or someone in authority as soon as you can) was "followed by every civilized legal system in the world for thousands of years" and "had its reasons" although "[a]t the moment it's not the law". When the Crown submitted that the antiquated thinking had been set aside for a reason, he replied "I hope you don't live too long, Ms. Mograbee" (Crown's Factum, at para 58).

The Supreme Court of Canada has been clear (in *R v DD,* [2000] 2 SCR 275 at para 60-63) that adverse inferences as to credibility, premised on the mere fact that a complainant failed to 'raise a hue and cry,' constitute an error of law. Judge Camp's comments suggest that he was aware of that rule, but skeptical as to its validity given its departure from the historical practices of "every civilized legal system."

The Crown also details in its Factum Judge Camp's troubling approach to the law of consent, in which he appeared to place the onus on the complainant to "make it clear that she's not consenting" (Crown's Factum, at para 97) and also to assess the fact of the complainant's consent from the respondent's point of view (which would be relevant to a defence of a mistaken belief in consent, but not to the existence of consent itself) (Crown's factum at paras 92-99).

In its reasons, the Court of Appeal stated "we are satisfied that the trial judge's comments throughout the proceedings and in his reasons gave rise to doubts about the trial judge's understanding of the law governing sexual assaults" (*Wagar*, at para 4).

Making a mistake when applying the law does not make a judgment wrongful, even in a serious criminal case. As noted above, judges make mistakes all the time and that they do so is an understandable product of their humanity. Mistakes merit neither anger nor disgust. But in this case, Judge Camp's errors, when combined with his criticisms of the law and his overall attitude towards the complainant, suggest that the issue was not human error. Rather, it invites the inference that Judge Camp simply did not accept the parameters the law imposes on judging allegations of sexual assault, that the failures in his legal analysis arose not from a mistake, but because he did not like the law as it exists and so assessed the case through his personal judgment, not the legal judgment law requires.

As I have written about extensively in relation to the lawyer's role (see, e.g., on advising here, on fiduciary duties here and in general here) fidelity to law – respect for the compromise to the problem of pluralism that the law reflects – is an essential ethical and legal obligation of lawyers. Lawyers ought to respect the confines of legality in their advising and in their advocacy (although what that looks like in each context is quite different). And if lawyers ought to do so, then surely no real argument needs to be made to assert that judges must as well. Indeed, what authority can a judge claim other than through the law? A judge who adopts an attitude other than fidelity to law seeks to rule by fiat, not by law. And that is wrongful.

The second disturbing aspect of the judgment arises from Judge Camp's apparent inability to occupy a point of view different from his own. Here, to imagine what it would be like to be a broke and homeless 100 lb woman, and to imagine how that person might experience the world. Judge Camp implied through his questions that a 100 lb. woman may be able to avoid being sexually assaulted by a 240 lb man simply by closing her knees ("why couldn't you just keep your knees together") or by sinking her "bottom down into the basin" (Crown Factum, at para 59). He also implied that a rational response to a perceived threat of violence when you are a 100 lb woman is to scream, and that if that woman does not complain about an accused locking her in a bathroom with him, "She can take her chances, perhaps in the hope of getting him in trouble" (Crown Factum, at para 62). He suggested that a 19 year-old girl who is broke and homeless and steals does so not out of desperation, but because it "didn't cross her mind that she should work to earn money to buy those things" (Appeal Record, p. 431).

What is troubling about this to me is not that this occurred in relation to a sexual assault complainant (although I agree very much with Professor Koshan's critique of that aspect of the case). What is disturbing to me is that this occurred in relation *to anyone at all whose conduct the judge is assessing*. As a judge, it is essential that you be able to imagine what it would be like to be someone else, to have had a different set of cultural, socio-economic, gender or sexual experiences than the ones you have had or enjoyed. Otherwise you will simply fail to appreciate the evidence before you – you will draw the wrong inferences, and make the wrong findings, because what you think you see will not actually be what happened. As Justice Abella recently noted in *Yukon Francophone School Board Education Area #23 v Yukon (Attorney General)* 2015 SCC 25:

> A judge's identity and experiences are an important part of who he or she is, and neither neutrality nor impartiality is inherently compromised by them. Justice is the aspirational application of law to life. Judges should be encouraged to experience,

> learn and understand "life" — their own and those whose lives reflect different realities ((at para 34). See also: Adam Dodek "In Praise of Judicial Empathy, Humility and Sympathy").

And perhaps because my lived experience is at least somewhat closer to that of the complainant, Judge Camp's apparent perspective here seems illogical and even bizarre. A 100 lb woman will not prevent a 240 lb man from having sex with her by shutting her knees or dropping her bottom into the sink. In many circumstances staying quiet is the safest and most rational way for a physically weaker person to avoid harm. To be clear, I am not making any judgments about whether Mr. Wagar sexually assaulted the complainant. But what I am saying is that whatever the nature of that sexual encounter, the complainant's failure to shut her knees, drop her bottom into the sink or to make a fuss when the door was locked could not be seen as relevant to consent by anyone who imagined, even for a moment, what it would be like to be her in those circumstances.

When you put those two aspects of the judgment together, you have I think the key elements of a wrongful judicial decision: disrespect for the law and an absence of empathy. A judge who merely disrespects the law acts very badly. And a judge who lacks empathy does so as well. But it is the judge who does both, who disregards the law and the people who appear before him or who are affected by his judgments, who acts wrongfully, and whose judgments properly warrant anger and disgust.

How Do We Respond?

One response to a wrongful decision is censure of the judge by a higher court. That did not happen here. The Court of Appeal's reasons, while clear and unequivocal in overturning Judge Camp's decision, are also temperate and measured. They do not criticize the trial judge himself, or suggest that his decision had crossed from the wrong to the wrongful.

A different approach was taken by Justice L'Heureux-Dubé in her concurring decision in *R v Ewanchuk* [1999] 1 SCR 330. In that judgment Justice L'Heureux-Dubé said the following about then Alberta Court of Appeal Justice McClung:

> In the Court of Appeal, McClung J.A. compounded the error made by the trial judge (at para 88).
>
> Even though McClung J.A. asserted that he had no intention of denigrating the complainant, one might wonder why he felt necessary to point out these aspects of the trial record. Could it be to express that the complainant is not a virgin? Or that she is a person of questionable moral character because she is not married and lives with her boyfriend and another couple? These comments made by an appellate judge help reinforce the myth that under such circumstances, either the complainant is less worthy of belief, she invited the sexual assault, or her sexual experience signals probable consent to further sexual activity (at para 89).
>
> The expressions used by McClung J.A. to describe the accused's sexual assault, such as "clumsy passes" (p. 246) or "would hardly raise Ewanchuk's stature in the pantheon of chivalric behaviour" (p. 248), are plainly inappropriate in that context as they minimize the importance of the accused's conduct and the reality of sexual aggression against women (at para 91).

> This case has not dispelled any of the fears I expressed in *Seaboyer*, *supra*, about the use of myths and stereotypes in dealing with sexual assault complaints (see also Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990), 28 *Osgoode Hall L.J.* 507). Complainants should be able to rely on a system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions (at para 95).

In response Justice McClung wrote a heated letter to a national newspaper, for which he was subject to censure by the Canadian Judicial Council. One famous Canadian lawyer, Eddie Greenspan, came to his defence, noting in an editorial that L'Heureux-Dubé had effectively labeled McClung "the male chauvinist pig of the century, the chief yahoo from Alberta, the stupid, ignorant, ultimate sexist male jerk". He described her judgment as "unnecessary and mean-spirited" and that she was "intemperate, showed a lack of balance, and a terrible lack of judgment." In his view, Supreme Court judges "were not given the right to be bullies. They were not given the right to pull a lower court judge's pants down in public and paddle him." (reproduced in *Lawyers' Ethics and Professional Regulation*, 2d ed (LexisNexis, 2012) pp. 583-584).

Greenspan does have a point. Judges in a superior court do have power in relation to lower court judges. They have the last word as well as the power to reverse. And if a superior court uses its power to excoriate lower court judges, those lower court judges may write to avoid censure rather than to search for justice – i.e., their independence may be impaired.

On the other hand, Greenspan's rhetoric overstates to an absurd extent what Justice L'Heureux-Dubé actually said. Further, when a judge in a lower court makes a decision that crosses the threshold from wrong to wrongful – where he or she disrespects the law and exhibits a total failure of empathy – the decision brings the administration of justice into disrepute. It undermines the rule of law: the ability of people to receive a fair and impartial consideration of their position in law, and to believe that that consideration is available to them. At that point, the concern for judicial independence has to be balanced against the need to uphold both the reality and the belief in the rule of law, and the fair administration of justice.

As a consequence, while I admire the Court of Appeal's restraint – and understand that it may have been warranted in part because of the failure of Wagar to participate in the appeal – I also think that superior court criticism of judges who make wrongful decisions are justifiable and appropriate for ensuring public confidence in the judicial system.

Another response to wrongful decisions is official regulatory sanction through the Canadian Judicial Council or, for Alberta provincial court judges, the Alberta Judicial Council. Regulatory sanctions against judges are rare, time-consuming and occasionally contentious; like appellate court criticism of lower court judges, they raise the real threat of interference with judicial independence. Again, however, regulators must – and do – take into account the need to maintain confidence in the administration of justice; judicial decisions which reflect a disregard for the law and a failure of empathy are appropriately subject to regulatory sanction.

Cases in which regulators have been willing to act against judges who have made wrongful decisions include the Dewar case out of Manitoba, where a judge was censured (and apologized and undertook sensitivity training) after making comments in a sexual assault trial which reflected "negative and outdated gender stereotypes, as casting blame on the victim and showing

an unacceptable gender bias against women" (CBC, November 2011). They also include the Cosgrove case out of Ontario, where Paul Cosgrove resigned as a judge following the recommendation by the Canadian Judicial Council that he be removed from office. As summarized in the Council's report:

> The Inquiry Committee found that the judge's conduct included: an inappropriate aligning of the judge with defence counsel giving rise to an apprehension of bias; an abuse of judicial powers by a deliberate, repeated and unwarranted interference in the presentation of the Crown's case; the abuse of judicial powers by inappropriate interference with RCMP activities; the misuse of judicial powers by repeated inappropriate threats of citations for contempt or arrest without foundation; the use of rude, abusive or intemperate language; and the arbitrary quashing of a federal immigration warrant (Council Report, at para 6).

In a case out of New Brunswick, a provincial court judge was removed from office after saying that the people of the Acadian Peninsula were all dishonest (*Moreau-Bérubé v New Brunswick* 2002 SCC 11 at para 3). In these cases, the regulatory concern has been that "the actions and expressions of an individual judge trigger concerns about the integrity of the judicial function itself." (*Moreau-Bérubé* at para 58). Or as the Council put it in the Cosgrove case:

> Public confidence in the judiciary is essential in maintaining the rule of law and preserving the strength of our democratic institutions. All judges have both a personal and collective duty to maintain this confidence by upholding the highest standards of conduct. After inquiring into the conduct of the Honourable Paul Cosgrove, we find that he has failed in the due execution of his office to such an extent that public confidence in his ability to properly discharge his judicial duties in the future cannot be restored (Council Report, at para 1).

In my view Judge Camp's failures in this case – his failure to respect the law or to be able to imagine or perceive accurately the perspective of the complainant – are of this kind. They trigger concerns about the integrity of the judicial function and they undermine the rule of law and the strength of our democratic institutions.

It is noted that since the time he issued his decision in *Wagar*, Judge Camp has been appointed to the Federal Court of Canada. This could lead some to argue that there is no ongoing concern here, since he will no longer hear sexual assault cases. The Federal Court does, though, hear judicial reviews of immigration cases, and sexual violence can be an issue in that context, particularly in refugee claims. And even if that were not the case, it does not redress the injury to the administration of justice caused by this decision. That injury warrants official regulatory response.

The final response to wrongful judgment is informal – criticism by lawyers and academics of the kind offered here by myself and Professor Koshan. While not having the power and authority of formal regulatory sanction, informal criticism has the benefit of being able to identify and respond to issues in a more timely fashion. It can also draw on a range of perspectives and expertise on the issues. And it can help to inform and motivate the formal regulatory agenda.

The various Codes of Conduct that govern Canadian lawyers, direct caution in criticizing judges. In the Commentary to Rule 4.06(1), the Law Society of Alberta Code states:

> Proceedings and decisions of courts and tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, but judges and members of tribunals are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. First, a lawyer should avoid criticism that is petty, intemperate or unsupported by a bona fide belief in its real merit, since, in the eyes of the public, professional knowledge lends weight to the lawyer's judgments or criticism (See also, Federation of Law Societies Code of Professional Conduct, Rule 5.6-1).

This point is well taken. Judges cannot defend themselves and lawyers must ensure their criticisms are temperate and made in good faith. But at the same time, as the Code notes elsewhere:

> Lawyers are often called upon to comment publicly on the effectiveness of existing statutory or legal remedies or the effect of particular legislation or decided cases, or to offer an opinion about cases that have been instituted or are about to be instituted. This, too, is an important role the lawyer can play to assist the public in understanding legal issues (Rule 6.05(1) Comm'y); FLS Rule 7.5-1 Comm'y).
>
> Fair trials and hearings are fundamental to a free and democratic society. It is important that the public, including the media, be informed about cases before courts and tribunals. The administration of justice benefits from public scrutiny (Rule 6.05(2) Comm'y; FLS Rule 7.5-2 Comm'y).

The exhortation to fair and temperate criticism needs to be understood in light of these broader concerns. As the Supreme Court said in *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, "lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so" (at para 68).