JUSTICE

Appeal judges in B.C. cases went too far, top court says

Ruling reaffirms sexual assault conviction, backs plaintiff in residential schools lawsuit

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JUSTICE REPORTER
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The Supreme Court of Canada administered a sound spanking to the B.C. Court of Appeal yesterday, overturning two cases in which the province's highest court had second-guessed trial judges.

In a pair of 7-0 rulings, the Supreme Court stuck up for judges who preside over difficult trials and craft subtle judgments assessing the credibility of witnesses only to stand by in frustration as appellate judges brush them aside.

"It must be recognized that the task of trial judges assessing evidence in such cases is very difficult indeed," Mr. Justice Marshall Rothstein wrote in the first case, a sexual-assault lawsuit. "However, that does not open the door to an appellate court, being removed from the testimony and not seeing the witnesses, to reassess the credibility of the witnesses."

The court reinstated the original trial ruling in the lawsuit. Launched by a former resident of a residential school, the plaintiff now stands to receive an undetermined damages award.

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In its second ruling yesterday, the Supreme Court restored three convictions for sexual assault to a Fort St. John man who had sexual intercourse with his stepdaughter three decades ago.

The trial had become a credibility contest between the complainant - who said that the assaults began when she was nine - and the defendant, who insisted that they had consensual sex only after she had passed the age of majority.

Chief Justice Beverley McLachlin said that, contrary to a B.C. Court of Appeal finding, the trial judge in the case provided sufficiently cogent reasons for finding him guilty.

"Assessing credibility is not a science," she said.

"It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events."

There may also be subtle reasons that a judge may not wish to be overly explicit, she said: "Judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanour."

In the residential schools lawsuit, the plaintiff, identified as F.H., attended the Sechelt Indian Residential School in British Columbia from 1966 to 1974.

He alleged that he was sexually assaulted in a washroom on four occasions when he was 10 years old by a school supervisor, Ian Hugh McDougall.

Soon after revealing the assaults in 2000, F.H. sued Mr. McDougall, the Order of the Oblates of Mary Immaculate and the federal government.

In her trial ruling, B.C. Supreme Court Justice Kristi Gill acknowledged that F.H's testimony contained substantial inconsistencies as to the frequency and gravity of the sexual assaults. Nonetheless, she found him to be a credible witness.

The inconsistencies involved differing accounts given by F.H. about the number of assaults, and contradictions in his account of school geography and the precise nature of the assaults.

Ruling 2-1 to overturn Judge Gill's decision, the B.C. Court of Appeal later faulted Judge Gill for failing to consider the inconsistencies adequately.

But the Supreme Court said yesterday that their B.C. brethren should have kept their hands off Judge Gill's verdict unless they found "palpable and overriding errors."

"The events occurred more than 30 years before the trial," Judge Rothstein said. "Where the trial judge refers to the inconsistencies and deals expressly with a number of them, it must be assumed that she took them into account in assessing the balance of probabilities."

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