

PART VIII

FINAL JUDGMENT, APPEALS AND REVIEW

CHAPTER 5

THE SCOPE AND STANDARDS OF INTERMEDIATE APPELLATE REVIEW¹

*Gerard J Kennedy*²

<https://www.cplj.org/publications/8-5-the-scope-and-standards-of-intermediate-appellate-review>

TABLE OF CONTENTS

1 Introduction.....	1
2 The Purposes of Appeals in the Common Law.....	2
3 The Standards of Scope of Appellate Review in the Common Law	4
4 Canada as a Case Study	7
5 The Common Law In Sum.....	16
6 The Standards and Scope of Appellate Review in the Civil Law.....	17
7 Highlights from Around the World.....	18
8 Italy as a Case Study	20
9 Concluding Thoughts.....	23
Abbreviations and Acronyms	24
Legislation	25
International/Supranational.....	25
National	25
Cases.....	26
National	26
Bibliography	29

¹ The common law portions of these sections are in part based on G J Kennedy, 'Civil Appeals in Ontario: How the Interlocutory/Final Distinction Became So Complicated and the Case for a Simple Solution?' (2020) 45 (2) Queen's Law Journal 243.

² Assistant Professor, Faculty of Law, University of Alberta Edmonton, Alberta, Canada.

1 INTRODUCTION

- 1 'Who wins last, wins' was the clever advertisement for a litigation boutique's appellate practice group.³ In litigation, this statement is undeniably true. At the same time, litigators' reputations mostly rise based on their reputation as trial lawyers. The very fact that appellate practice is considered boutique or niche demonstrates that it is an exceptional aspect of litigation.
- 2 A reason for appellate practice's nicheness—notwithstanding its importance—is the scope and standards of appellate review of decisions of first-instance courts. It is often very challenging to appeal a trial decision. But why is this the case? And how challenging is it actually? The answers to these questions of course relate to the scope and standards of appellate review. These obviously vary across jurisdictions. How the answers to these questions vary across jurisdictions will be the focus of this chapter.
- 3 A macro-level distinction between national approaches to the scope of standards of appellate review is immediately apparent: specifically, whether the jurisdiction is common law or civilian. Common law jurisdictions tend to have quite restricted grounds for appeal: it is very difficult to appeal findings of fact, while appellate courts have enormous ability to interfere with a trial court's legal determinations. This is understandable given the history and purposes of judging in the common law world. In many civil law jurisdictions, on the other hand, we see a much greater ability for the appellate court to essentially act as a 'second trial'. Though not unlimited, this also can be justified given peculiarities of trial processes in civilian jurisdictions.
- 4 This chapter's comparative analysis separates civil and common law before bringing everything together in the Conclusion. This is essential given that the purposes of common law appeals are notably different. And that indeed is where Part 2 starts: by looking at the history of appeals in the common law world, as well as their purposes that can be understood once that history is understood. Part 3 then gives a comparative survey of common law jurisdictions' approaches to the scope and standards of appellate review, looking at the United Kingdom, United States, and Australia. Part 4 gives particularly in-depth treatment to Canada as a case study. Part 5 summarizes lessons applicable throughout the common law world. Part 6 then introduces appeals in civil law jurisdictions, by looking at overarching considerations concerning standards and scope of appellate review as a corollary of civil code jurisdiction. Part 7 then looks at Germany, Quebec (a jurisdiction in Canada), and France as manifestations of how this works in practice. Part 8 then analyzes Italian scope and standards of appellate review as a particularly in-depth case law of appeals' scope and standards before Part 9's Conclusion brings everything together: while it is easy to overstate the differences between common law and civil law jurisdictions with respect to appeals, certain demarcating lines are

³ 'Appeals', Lerner LLP <http://www.lerners.ca/appeals/> accessed 23 August 2024.

nonetheless striking, even if how different jurisdictions approach factual appeals is very different indeed, and even though elements of convergence in approach has become evident in recent years.

2 THE PURPOSES OF APPEALS IN THE COMMON LAW

- 5 In the late 1100s, King Henry II of England sought to ensure that England had a 'common law' that would be applied consistently throughout his kingdom. Judges of His Majesty's Court of King's Bench would develop and refine the 'common law' to ensure consistent application of the law. Historically, however, the common law did not provide a right of appeal.⁴ Notwithstanding the fact that they did not come into existence in the twelfth century, appeals are very old. The Court of Appeal for England and Wales is the successor court of the Court of Exchequer Chamber. And the original Court of Exchequer Chamber came into existence in the 1300s as an appellate court, fewer than 200 years after Henry II sought to ensure that England had a 'common law'.⁵
- 6 It is not surprising that appeals would arise in a common law system. Common law reasoning is based upon precedents, analogies, and judicially delineated legal rules. What happens when the King's Bench judges (today, roughly analogous to the High Court of England and Wales⁶) disagree among each other about 'what the law is?'⁷ Having appellate courts engage in law-making is invaluable in ensuring citizens are aware of the law's content. This is the 'law-making' purpose of appeals in the common law.⁸
- 7 It is also essential to the theory of the common law that the law be consistently applied. The very name 'common law' implies that the law is common to all elements of the polity. If a judge has made a mistake regarding the content of the law, appellate courts can ensure the consistent application of the law to ensure that like cases are treated alike.⁹ This is the 'correction of legal errors' role of common law appeals.¹⁰
- 8 A third rationale for appeals also exists in the common law, that overlaps with but is nonetheless distinguishable from the second rationale: to prevent injustices. Errors, both factual and legal, might not just be offensive to the ideal of the common law (though, when they are legal errors, they are offensive, as noted above): they can also cause profound prejudices to the parties subject to them. Having decisions reviewed by a court with a level of distance - particularly when matters became heated at trial - is accordingly

⁴ J Sopinka and M A Gelowitz, *The Conduct of an Appeal* (3rd edn, LexisNexis 2012) para 1.1.

⁵ J H Baker, *An Introduction to English Legal History* (LexisNexis 2002) 137.

⁶ Kennedy (n 1) 247.

⁷ Quintessentially the role of the judicial branch, as Chief Justice John Marshall held in *Marbury v Madison* (Supreme Court, US) Judgment 24 February 1803 [5 US 137].

⁸ *Housen v Nikolaisen*, Case 27826 (Supreme Court, Canada) Judgment 28 March 2002 [2002 SCC 33] para 4, 16.

⁹ C R Sunstein, 'Problems with Rules' (1995) 83(4) California Law Review 953, 975.

¹⁰ *Housen* (n 8) para 9.

advantageous.¹¹ This concern is, to be sure, heightened in criminal law, where an accused person's liberty is at stake. It is accordingly guaranteed in international human rights law - specifically the *International Covenant on Civil and Political Rights*¹² - *vis-à-vis* criminal cases. In the civil context, this concern, though less acute, is still significant, given the potentially serious effects of a substantive injustice in the civil context.¹³ This is the 'injustice prevention' rationale for appeals.

- 9 In sum, therefore, three primary rationales for appeals exist in the common law: 1) *law-making*; 2) *error correction*; and 3) *injustice prevention*. The first rationale, in particular, is not as salient in civil law jurisdictions. Each of these three rationales is important and appellate process should ensure that these are realized. But it is also worth recognizing that these purposes of appeals are discrete. There may well be instances where an appellate judge is of the view that the first-instance decision-maker did not render the decision the appellate judge would have made but the purposes of appellate review would not be furthered by allowing the appeal. Regarding the first rationale, the fact is that relatively few cases require the delineating or the refining of legal rules. Moreover, in most common law systems, the primary jurisprudential responsibility lies with the apex courts. Though intermediary appellate courts have a jurisprudential responsibility as well, their primary role is error-correction.¹⁴ Regarding the second rationale, many common law rules incorporate judicial discretion into them, in fields such as quantification of damages¹⁵ or assessment of costs¹⁶. An appellate judge may accordingly come to the opinion that a trial judge has not 'erred' - but just exercised discretion - even in situations where the appellate judge would not have made the same decision at first instance. And regarding the last rationale, appellate judges should be rightly reticent to conclude that an 'injustice' has occurred at the hands of another judge given that judge's integrity and independence. Moreover, the historic (and to some extent continuing) use of juries in common law systems mandates a level of respect to non-jurisprudential decisions of the jury, which add an element of common sense to the fact-finding process in particular. Jurors, historically and to some extent to this day, were

¹¹ Kennedy (n 1) 248; H A Kaiser, 'L.M: A Hard Case Makes for Bad Sentencing Law' (2008) 56 (6) Criminal Reports 323.

¹² International Covenant on Civil and Political Rights 1966, Art 14 (5): 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law'. See also G J Kennedy, 'Persisting Uncertainties in Appellate Jurisdiction at the Supreme Court' (2013) 100 (6) Criminal Reports 96, 101.

¹³ The far-reaching consequences of inability to access to civil justice are explained in, eg, T C W Farrow, 'A New Wave of Access to Justice Reform in Canada' in A Dodek and A Woolley (ed), *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (University of British Columbia Press 2016).

¹⁴ See, eg, R J Sharpe, *Good Judgment: Making Judicial Decision* (University of Toronto Press 2018) 95-96.

¹⁵ J Sopinka, M A Gelowitz and W D Rankin, *The Conduct of an Appeal* (5th edn, LexisNexis 2023) para 2.79.

¹⁶ *Sun Indalex Finance, LLC v United Steelworkers*, Case 34308 (Supreme Court, Canada) Judgment 1 February 2013 [2013 SCC 6] para 247, citing *Hamilton v Open Window Bakery Ltd*, Case 29225 (Supreme Court, Canada) Judgment 19 February 2004 [2004 SCC 9] para 27 and *Nolan v Kerry (Canada) Inc*, Case 32205 (Supreme Court, Canada) Judgment 7 August 2009 [2009] SCC 39] para 126.

the finders of facts whose decisions were not legally recorded, another potential reason that findings of fact have historically not been appealable¹⁷, or appealable for only very narrow reasons.

- 10 It is also worth remembering that finality is a good in itself: a strong presumption of the finality of the trial judge's decision encourages respect for the trial process¹⁸ and provides certainty, allowing parties to rely upon a trial decision, knowing that it is not likely to be interfered with on appeal. The important but limited purposes of appeals in the common law, as weighed against the virtues of finality, are reflected in the scope and standards of appellate review in common law jurisdictions, a topic that will now be explored.

3 THE STANDARDS OF SCOPE OF APPELLATE REVIEW IN THE COMMON LAW

- 11 As explored above, the purposes of common law appeals are important. But it is also important to observe that these purposes are narrow. Accordingly, throughout common law jurisdictions, two commonalities regarding the scope and standards of appellate review are apparent:
- i. appellate courts are to review trial judges' legal determinations for correctness, but insofar as the law grants discretion to trial judges, appellate courts should generally only interfere if the discretion has been exercised unreasonably; and
 - ii. findings of fact should only be overturned exceptionally.
- 12 This division of roles is rooted in concerns about both efficiency and expertise. This division further reflects the purposes of appeals. Trial judges and juries (which, as will be noted, are particularly prevalent in the United States, but are seen in all common law jurisdictions) see evidence first-hand, and are thus in a privileged position *vis-à-vis* appellate courts to make findings of fact.¹⁹ And as Iacobucci and Major J J noted for the Supreme Court of Canada in *Housen v Nikolaisen*, appellate and trial courts have different purposes: 'while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application'.²⁰ Moreover, principles of

¹⁷ D Dyzenhaus and M Taggart, 'Reasoned Decisions and Legal Theory' in D E Edlin (ed), *Common Law Theory* (Cambridge University Press 2007) 139; J Baker, *Introduction to English Legal History* (5th edn, Oxford University Press 2019) 146-148.

¹⁸ *Housen* (n 8) para 4, 16; D Jutras, 'The Narrowing Scope of Appellate Review: Has the Pendulum Swung Too Far?' (2007) 32 *Manitoba Law Journal* 61, 65.

¹⁹ *Housen* (n 8) para 18.

²⁰ *Ibid* para 9.

judicial economy and finality mandate not interfering with a trial ruling unless clearly warranted.²¹

- 13 The United Kingdom, Australia, and the United States all demonstrate this, as will now be explored, before Canada is explored particularly in-depth as a case study.
- 14 In England and Wales, the Court of Appeal has clarified that appeals are not re-trials, judges' credibility determinations are entitled to deference, judges are assumed to have considered all of the evidence (in the absence of good reason to come to a contrary conclusion), and '[w]hat matters is whether the decision under appeal is one that no reasonable judge could have reached'.²² In other words, discretionary decisions are only to be disturbed in circumstances where no *reasonable* trial judge could have reached the conclusion that was in fact reached.²³ This means that appellate courts have a responsibility to ensure that an injustice was not occasioned—and that the result is defensible—but finality, as well as the limited purposes of appeals, caution against excessive intervention from the appellate court. Similarly, findings of fact are only to be interfered with exceptionally, assessing the reasonableness of the findings at issue.²⁴ Specifically, the appellate court is to ask whether the decision at issue is 'plainly wrong'²⁵, with 'plainly' not referring to the degree of confidence that the appellate court has that the trial judge was wrong but, rather, the obviousness of the mistake or being 'rationally insupportable'.²⁶ Again, the interests of finality caution against excessively interventionist appellate courts given concerns about appeals' limited purposes, and the comparative purposes and roles of trial and appellate courts.
- 15 Having said that, appellate courts continue to have a unique function in terms of delineating and refining the law. As such, English and Welsh courts will substitute their

²¹ Ibid para 4, 16; Jutras (n 18) in particular 65.

²² *Gabriele Volpi & Delta Ltd v Matteo Volpi*, Case CA-2021-000718 (Court of Appeal England and Wales, UK) Judgment 5 April 2022 [[2022] EWCA Civ 464] para 2, described in 'James Bradford Successful in the Court of Appeal: Important Restatement of Principles On Appeals of Factual Findings' (Essex Chambers, 6 April 2022) <https://www.39essex.com/information-hub/insight/james-bradford-successful-court-appeal-important-restatement-principles> accessed 23 August 2024.

²³ See, eg, *Piglowska v Piglowski* (House of Lords, UK) Judgment 24 June 1999 [[1999] 1 WLR 1360].

²⁴ P Pape and J Adair, 'Unreasonable Review: The Losing Party and the Palpable and Overriding Error Standard' (2008) 27(2) *Advocates' Society Journal* 6.

²⁵ *Volpi* (n 22) para 2.

²⁶ Ibid.

opinion for that of a lower court on a question of law, such as how to interpret a statute or the meaning of a particular common law doctrine.²⁷

- 16 Appellate standards vary slightly throughout the United States given that it is a federal jurisdiction with each level of government being sovereign in its own domain. In the main, however, there is a similar restraint in appellate standards. For instance, in the American state of California, when the question is one of fact, the appellate court asks itself the question of whether a reasonable judge or jury could have reached the result.²⁸ This is analogous to the standards in the United Kingdom. In the Federal Courts system, on the other hand, the standards of review vary depending on whether the initial decision-maker was a judge or jury. But in both instances, findings of fact and exercises of discretion are given significant deference, while this is less so on questions of law. Jury findings of fact are treated with particular deference. According to the Supreme Court of the United States in *Concrete Pipe & Products of Cal, Inc v Construction Laborers Pension Trust for Southern Cal*²⁹, a trial judge's findings of fact in a jury trial can only be disturbed if 'clearly erroneous'.³⁰ A standard of review that permits overturning a finding only if it is 'clearly erroneous [...] is significantly deferential, requiring a "definite and firm conviction that a mistake has been committed"'.³¹ Overturning a jury finding is even more deferential, perhaps reflecting the constitutional protection of the right to trial by jury in the United States.³² Jury findings of fact therefore are only appealable if 'no rational trier of fact' could have reached the factual decisions.³³ In fact, acquittals in criminal jury cases are not appealable at all.³⁴

²⁷ See, eg, J Sorabji, 'The Supreme Court of the United Kingdom and the Court of Appeal in England and Wales: Sharing the Appellate Load' in P Bravo-Hurtado and C H van Rhee (ed), *Supreme Courts Under Pressure: Controlling the Case Load in the Administration of Justice* (Springer Nature 2021) 155; C Blake and G Drewry, 'The Role of the Court of Appeal in England and Wales as an Intermediate Court' in A Le Sueur (ed), *Building the UK's New Supreme Court: National and Comparative Perspectives* (Oxford UP 2004) 221, 226-227. See also C Edmonds, 'Appeals from Decisions, Satisfactions and Value Judgments: Reviewing the House Rules' (2017) 41(2) Melbourne University Law Review 647.

²⁸ See, eg, R J Traynor, 'Some Open Questions on the Work of State Appellate Courts' (1957) 24(2) University of Chicago Law Review 211.

²⁹ *Concrete Pipe & Products of Cal, Inc v Construction Laborers Pension Trust for Southern Cal* (Supreme Court, US) Judgment 14 June 1993 [508 US 602].

³⁰ *Ibid* eg, 621.

³¹ *Ibid* 623, citing *United States v United States Gypsum Co* (Supreme Court, US) Judgment 8 March 1948 [333 US 364] 395.

³² The Seventh Amendment to the United States Constitution reads: 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law'.

³³ *Jackson v Virginia* (Supreme Court, US) Judgment 27 June 1979 [443 US 307] 319; J Rugg, 'Identifying and Understanding Standards of Review' (2019) The Writing Center at Georgetown University Law Centre <https://www.law.georgetown.edu/wp-content/uploads/2019/09/Identifying-and-Understanding-Standards-of-Review.pdf> accessed 23 August 2024.

³⁴ *US v Sanges* (Supreme Court, US) Judgment 4 April 1892 [144 US 310].

- 17 As in other common law jurisdictions, findings of law are appealable on the grounds of correctness, as the Supreme Court of the United States noted in *Pullman-Standard v Swift*.³⁵ When a federal appellate court is satisfied that a lower court judgment is tainted by legal error, it may substitute its opinion on what the law is. This becomes more challenging when there is a finding of mixed fact and law, and the question arises whether the facts were correctly applied to the law.³⁶ Self-evidently, the difference between a *de novo* review and a ‘clearly erroneous’ standard of review can be highly consequential. In *Pullman-Standard*, the Supreme Court held that insofar as the factual portions of the finding of mixed fact and law are impugned, the ‘clearly erroneous’ standard of review applies. This is similar to the Canadian inquiry into whether the question of law can be ‘parsed out’, as will be addressed below.
- 18 In Australia, findings of fact appear slightly easier to appeal, with the High Court having confirmed in *Fox v Percy*³⁷ that an appellate court must conduct a ‘real review of the trial’, draw inferences, and give the judgment that ought to have been given at first instance. Even so, appellate judges must recognize their naturally limited ability to second-guess factual findings. As such, standards such as ‘glaringly improbable’ (ie, not plausible, even if not strictly disprovable) and ‘incontrovertible’ (ie, clearly mistaken) are proposed with respect to challenging factual findings. At the same time, it is accepted that appellate courts may substitute their opinions on legal questions for those of courts below.³⁸
- 19 As such, virtually all common law jurisdictions have limited the ability of appellate courts to review determinations on questions of fact. While there is of course variation between common law jurisdictions, and even within different common law countries such as the United States, the overarching trend remains. Canada will now be explored in more depth as a case study of these principles.

4 CANADA AS A CASE STUDY³⁹

- 20 Canada fits into the orthodox common law approaches to appeals. Perhaps to prevent intermediary appellate courts from misusing their power, the Supreme Court of Canada has restricted appellate courts’ ability to interfere with trial judges’ decisions.⁴⁰ Given their role as law-making courts, appellate courts are primarily only entitled to review trial courts’ decisions for errors of law, with trial judges’ determinations of law being reviewed on a standard of correctness.⁴¹ Findings of fact, on the other hand, are only to

³⁵ *Pullman-Standard v Swift* (Supreme Court, US) Judgment 27 April 1982 [456 US 273].

³⁶ Rugg (n 33).

³⁷ *Fox v Percy* (High Court, Australia) Judgment 30 April 2003 [[2003] HCA 22].

³⁸ Edmonds (n 27) 661-663.

³⁹ See Kennedy (n 1).

⁴⁰ See *Ibid.*

⁴¹ *Housen* (n 8) para 8.

be disturbed if tainted by ‘palpable and overriding error’.⁴² Questions of mixed fact and law are reviewed on a spectrum of standards depending on the ease with which the question of law can be extracted.⁴³ Daniel Jutras has described this as ‘appellate restraint’ justly permeating review.⁴⁴

- 21 These deferential standards are not without controversy – for example, Paul Pape and John Adair have argued that findings of fact should be reviewed on a reasonableness standard.⁴⁵ Even so, Jutras has ably argued that appeals are not an intrinsic good or a logical corollary to decision-making but rather have particular, discrete purposes, such as delineating legal rules. He notes that there may be negative unintended consequences from expanding those purposes, such as needless litigation and lack of finality.⁴⁶
- 22 So, what are these standards of review? When conducting correctness review on questions of law, the appellate court is entitled to substitute its view of the law for the trial court.⁴⁷ No deference is owed, due to the appellate court’s roles to delineate and refine legal rules and to ensure consistent application of settled law.
- 23 Palpable and overriding factual error review, on the other hand, is a very deferential standard of review.⁴⁸ A ‘palpable’ error must be ‘plainly seen’⁴⁹ or ‘obvious’⁵⁰. Merely disagreeing with the result is insufficient for the appellate court to overturn the trial decision.⁵¹ Moreover, for factual errors to result in appeals being allowed, the error must also be ‘overriding’—in other words, with the potential to have affected the result.⁵² For example, if a trial judge makes an obvious mistake regarding the date on which a particular event occurred—but that mistake could not have been material—an appeal will not be allowed.
- 24 ‘Palpable’ error is close to synonymous with ‘no reasonable trial judge could have come to the same conclusion’. It is entirely possible for an error to be ‘palpable’ but not

⁴² Ibid para 10.

⁴³ Ibid para 26, 28; *Hryniak v Mauldin*, Case 34641 (Supreme Court, Canada) Judgment 23 January 2014 [2014 SCC 7] para 81. In criminal law, the Crown is forbidden from appealing on questions of fact—though egregious enough errors of fact have been classified as errors of law: see *Murphy v Saskatchewan Government Insurance*, Case 1485 (Court of Appeal, Saskatchewan, Canada) Judgment 29 April 2008 [2008 SKCA 57] para 5, cited in *Johannson v Saskatchewan Government Insurance*, Case CACV3007 (Court of Appeal, Saskatchewan, Canada) Judgment 13 June 2019 [2019 SKCA 52].

⁴⁴ Jutras (n 18).

⁴⁵ Pape and Adair (n 24).

⁴⁶ Jutras (n 18) in particular, 65.

⁴⁷ *Housen* (n 8) para 8-9.

⁴⁸ *Canada v South Yukon Forest Corporation*, Case A-307-10 (Federal Court of Appeal, Canada) Judgment 31 May 2012 [2012 FCA 165] para 46.

⁴⁹ *Housen* (n 8) para 5-6.

⁵⁰ *South Yukon* (n 48) para 46.

⁵¹ *Housen* (n 8) para 23.

⁵² *South Yukon* (n 48) para 46.

‘overriding’. This occurred in *Noftall v Evely*.⁵³ J A Hoegg, for a majority of the Newfoundland and Labrador Court of Appeal, agreed that a trial judge had made a palpable error regarding the location of a bus at the time of a motor vehicle accident. However, that judge also made it clear that this fact was not material in his assessment of liability and damages. Accordingly, she dismissed the appeal.

- 25 J A Stratas described the palpable and overriding error standard by analogizing to pulling at a tree: ‘When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall’.⁵⁴
- 26 To be sure, there are factual matters in Canada that can be construed as legal errors in certain situations—for instance, making a finding of fact in the absence of any evidentiary basis.⁵⁵ Moreover, though the palpable and overriding error standard is a high one indeed for an appellant to meet, it is not impossible. In *Honda v Keays*⁵⁶, J Bastarache, for a majority of the Supreme Court of Canada, concluded that a trial judge made several palpable and overriding errors in assessing a wrongful dismissal matter:
 - i. finding fault in an employer for relying on its own doctors in a letter to an employee;
 - ii. concluding that cancellation of accommodation was reprisal for retaining counsel when it was absolutely clear that this was an interim step pending confirmation of disability; and
 - iii. considering the worsening of a disability post-employment in assessing damages.
- 27 By and large, however, this is exceptional: civil appeals are meant to address errors of law and are only to address factual matters exceptionally. Moreover, even in *Keays*, the last error was, in part, a legal error, as a binding precedent governed how post-employment facts are to be considered and the trial judge misapplied that precedent.⁵⁷
- 28 It is also worth noting that these standards apply to findings of fact made on affidavit evidence, such as in the summary judgment (where matters are decided on affidavit evidence without a full trial)⁵⁸ or application (where it is decided at the outset that facts

⁵³ Case 12/03 (Court of Appeal, Newfoundland and Labrador, Canada) Judgment 14 August 2014 [2014 NLCA 30].

⁵⁴ *South Yukon* (n 48) para 46.

⁵⁵ See, eg, *R v JMH*, Case 33667 (Supreme Court, Canada) Judgment 6 October 2011 [2011 SCC 45] para 25.

⁵⁶ *Honda Canada Inc v Keays*, Case 31739 (Supreme Court, Canada) Judgment 27 June 2008 [2008 SCC 39].

⁵⁷ *Wallace v United Grain Growers Ltd*, Case 24986 (Supreme Court, Canada) Judgment 30 October 1997 [[1997] 3 SCR 701].

⁵⁸ *Hryniak* (n 43) para 81.

will be proven by affidavits) context⁵⁹. Arguably, these standards are less warranted in this context as the trial judge has not literally seen the witnesses. Even so, appellate courts are not in a superior position to review the findings of fact, and the interests of finality can still justify the deference. This underscores the consideration of finality.

- 29 The deferential standard of review even applies to ‘legislative and social facts’, as the Supreme Court of Canada held in *Bedford v Canada (Attorney General)*.⁶⁰ Such facts are quintessentially relevant in constitutional law, often being necessary to determine whether rights under the *Canadian Charter of Rights and Freedoms* are limited and, if so, whether those reasons are demonstrably justified in a free and democratic society.⁶¹ One can fairly query whether these facts are analogous to adjudicative facts. ‘What happened to the plaintiff’ can fairly be said not to be relevant outside the narrow parameters of a particular case. ‘Can assisted dying be contained without pressuring the vulnerable to die’ appears a horse of a different colour.⁶² This example seems especially pertinent after a particular trial judge’s findings on this issue became binding on appellate courts and led to the legalization of assisted suicide in Canada—which other countries are now viewing as a cautionary tale.⁶³ Notwithstanding this, C J McLachlin held that two considerations, both understandable, justify treating social and legislative facts akin to adjudicative facts:

First, to [treat such facts differently] would require the appeal court to duplicate the sometimes time-consuming and tedious work of the first instance judge in reviewing all the material and reconciling differences between the experts, studies and research results. A new set of judges would need to take the hours if not weeks required to intimately appreciate and analyze the evidence. And counsel for the parties would be required to take the appellate judges through all the evidence once again so they could draw their own conclusions. All this would increase the costs and delay in the litigation process. In a review for error — which is what an appeal is — it makes more sense to have counsel point out alleged errors in the trial judge’s conclusions on the evidence and confine the court of appeal to determining whether those errors vitiate the trial judge’s conclusions.

⁵⁹ *Canada (Attorney General) v Rapiscan*, Case A-106-14 (Federal Court of Appeal, Canada) Judgment 16 April 2015 [2015 FCA 96] para 21.

⁶⁰ *Bedford v Canada (Attorney General)*, Case 34788 (Supreme Court, Canada) Judgment 20 December 2013 [2013 SCC 72].

⁶¹ See also G J Kennedy, *The Charter of Rights in Litigation: Direction from the Supreme Court of Canada* (Thomson Reuters 2020) 4:31.

⁶² The issue in *Carter v Canada (Attorney General)*, Case 35591 (Supreme Court, Canada) Judgment 6 February 2015 [2015 SCC 5].

⁶³ See, eg, D Brooks, ‘The Outer Limits of Liberalism’ (*The Atlantic*, 4 May 2023) <https://www.theatlantic.com/magazine/archive/2023/06/canada-legalized-medical-assisted-suicide-euthanasia-death-maid/673790/> accessed 23 August 2024.

Second, social and legislative facts may be intertwined with adjudicative facts — that is, the facts of the case at hand — and with issues of credibility of experts. To posit a different standard of review for adjudicative facts and the credibility of affiants and expert witnesses on the one hand, and social and legislative facts on the other (as proposed by the Court of Appeal), is to ask the impossible of courts of appeal. Untangling the different sources of those conclusions and applying different standards of review to them would immensely complicate the appellate task.⁶⁴

- 30 Often the site of greatest controversy in civil appellate review is questions of mixed fact and law. The Supreme Court of Canada has held that such questions can be reviewed on a correctness standard of review, but only if the legal error can be extracted or parsed out from the factual determinations. This is possible—but rare. For instance, in *Neptune Wellness Solutions v Canada (Border Services Agency)*⁶⁵, J A Rennie considered a determination as to whether imports were ‘fit for human consumption’ within the meaning of certain tariff regulations referred to their fitness at the time of import or the time of sale to the consumer. In his view, this required consideration of principles of statutory interpretation and was unrelated to determining whether the krill at issue in that case were ‘fit for human consumption’. It was an exceptionally rare case that the question of law was extricable from the questions of fact. The Court accordingly was entitled to substitute its legal opinion for the tribunal’s below even though it agreed with the tribunal.
- 31 At the same time, courts are reluctant to conclude that questions of mixed fact and law can have the legal question easily separated. For example, in *Al-Ghamdi v College and Association of Registered Nurses of Alberta*⁶⁶, a physician tried to argue that a medical regulator had made a legal error by finding that he had committed ‘disruptive conduct’ even though the relevant regulations did not forbid ‘disruptive conduct’. The Court held that this was trying to find a legal error and disregarded the context in which the ‘disruptive conduct’ amounted to factual findings that were then assessed against the appropriate law. The standard of review was accordingly palpable and overriding error.
- 32 Similarly, in *Sattva v Creston Molly Corp*, the Supreme Court of Canada underscored that questions of contractual interpretation are questions of mixed fact and law.⁶⁷ Accordingly, trial judges’ determinations of the meaning of contracts can only be

⁶⁴ *Bedford* (n 60) para 51-52.

⁶⁵ *Neptune Wellness Solutions v Canada (Border Services Agency)*, Case A-267-19 (Federal Court of Appeal, Canada) Judgment 1 October 2020 [2020 FCA 151].

⁶⁶ *Al-Ghamdi v College and Association of Registered Nurses of Alberta*, Case 1703-0325-AC (Court of Appeal, Alberta, Canada) Judgment 27 February 2020 [2020 ABCA 81].

⁶⁷ *Sattva v Creston Molly Corp*, Case 35026 (Supreme Court, Canada) Judgment 1 August 2014 [2014 SCC 53].

disturbed in the event of palpable and overriding error or an extricable question of law—extricable questions of law that appellate courts are reluctant to hold present.

- 33 *Neptune Wellness* and *Al-Ghamdi* also illustrate that appellate powers are the same, whether they are employed on appeals from administrative tribunal or courts. This was underscored by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*.⁶⁸
- 34 Finally, even, in applying ‘correctness’ review, rules of law often give a trial judge space⁶⁹ in which to manoeuvre without falling into legal error when the order under appeal concerns an exercise of discretion. Sopinka, Gelowitz, and Rankin note that ‘overturning a discretionary order is substantially as difficult as overturning a clear finding of fact’.⁷⁰ In *Kostopoulos v Jesshope*, J A Robins stated that:

I think it manifest from the authorities that before an appellate court may properly intervene it must be shown that the discretion was exercised arbitrarily or capriciously or was based upon a wrong or inapplicable principle of law. The question to be addressed in this case is whether the trial judge committed an error of such a nature. If not, this Court is not entitled to interfere with his exercise of the discretionary power.⁷¹

- 35 Sopinka, Gelowitz, and Rankin observe that this reasoning ‘has since been re-affirmed and adopted in a number of Canadian jurisdictions’.⁷² As an example, costs orders have been held to be ‘quintessentially discretionary’ and are only reversible if tainted by an ‘error in principle’ or are otherwise ‘plainly wrong’.⁷³
- 36 While civil juries are relatively rare in Canada⁷⁴, their findings of fact are in many ways even more difficult to overturn than judges’. Considering that juries do not give reasons, it is difficult to observe flaws in their reasoning process. As such, in *Vancouver-Fraser Park District v Olmstead*, J de Grandpré held that ‘an appellate court will not interfere with the findings of a jury unless they are so entirely wrong as to justify the conclusion

⁶⁸ *Canada (Minister of Citizenship and Immigration) v Vavilov*, Case 37748 (Supreme Court, Canada) Judgment 19 December 2019 [2019 SCC 65].

⁶⁹ Also an issue in administrative law: see, eg, P L Strauss, “‘Deference’ is Too Confusing – Let’s Call Them “Chevron Space” and “Skidmore Weight”” (2012) 112(5) *Columbia Law Review* 114.

⁷⁰ Sopinka, Gelowitz and Rankin (n 15) para 2.60.

⁷¹ *Kostopoulos v Jesshope* (Court of Appeal, Ontario, Canada) Judgment 20 February 1985 [50 OR (2d) 54] 69-70.

⁷² Sopinka, Gelowitz and Rankin (n 15) para 2.63.

⁷³ *Sun Indalex Finance, LLC* (n 16).

⁷⁴ See, eg, K Corrick and M Rosenberg, ‘Trial by jury: The Canadian experience’ (2015) 9(17) *Sistemas Judiciales* 6 <https://sistemasjudiciales.org/wp-content/uploads/2018/03/946.pdf> accessed 23 August 2024.

that either the jury did not appreciate its duty or acted wilfully in violation of it'.⁷⁵ The Court of Appeal for Ontario channelled American precedents in this regard in *McIntyre v Grigg*. The unanimous Court held that '[t]he verdict of a civil jury will not be set aside against the weight of the evidence unless it is so plainly unreasonable and unjust to satisfy the court that no jury, reviewing the evidence as a whole and acting judicially, could have reached it'.⁷⁶

- 37 As noted above, many of the rationales for deference on factual matters relate to expertise: the appellate court is in a poorer, or at least no better, position to determine the facts than the trial court. And deference is also rooted in a rationale of finality, which is a good in itself. This is reflected in the strict limits on being able to raise new issues on appeal and raising fresh evidence on appeal. This concern is amplified in the context of jury trials, because the jury is meant to stand in for the community⁷⁷ - something judges definitionally cannot do. Moreover, the jury is the 'ultimate protection' against the law.⁷⁸
- 38 Parties are generally prohibited from raising new issues on appeal because the factual record to address them will often not be present. Moreover, courts can be understandably suspicious that the new issue was not raised in the court below due to strategic reasons, with the parties needing to live with the consequences of their strategic decisions at trial, particularly in an adversarial system of litigation. J Duff (as he then was) explained the rationale for the general rule in *Lamb v Kincaid*:

Had it been suggested at the trial that the plaintiffs ought to have proceeded in the manner now suggested, it is impossible to say what might have proved to be the explanation of the fact that the plaintiffs did not so proceed. Many explanations occur to one, but such speculation is profitless; and I do not think the plaintiffs can be called upon properly at this stage to justify their course from the evidence upon the record. A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.⁷⁹

- 39 In accordance with J Duff's admonition from *Lamb*, it must be clear that no prejudice follows from the consideration of the new issue. Moreover, the discretion to consider a

⁷⁵ *Vancouver-Fraser Park District v Olmstead* (Supreme Court, Canada) Judgment 23 October 1974 [[1975] 2 SCR 831] 837, citing *Saint John Gas Light Co. Hatfield* (Supreme Court, Canada) Judgment 1 May 1894 [23 SCR 164] 169, as synthesized in Sopinka, Gelowitz and Rankin (n 15) para 2.53.

⁷⁶ *McIntyre v Grigg*, Case C41585 (Court of Appeal, Ontario, Canada) Judgment 6 November 2006 [83 OR (3d) 161] para 38. See also Sopinka, Gelowitz and Rankin (n 15) para 2.55.

⁷⁷ *R v Hill*, Case 17457 (Supreme Court, Canada) Judgment 24 April 1986 [[1986] 1 SCR 313] 333.

⁷⁸ Law Reform Commission of Canada, *The Jury in Criminal Trials, Working Paper 27* (Department of Justice Canada 1980). This is mentioned in the context of jury charges, the rationale applies in the civil context as well.

⁷⁹ *Lamb v Kincaid* (Supreme Court, Canada) Judgment 7 May 1907 [(1907) 38 SCR 516] 539. See also Sopinka, Gelowitz and Rankin (n 15) para 2.118.

new issue is reduced when the issue was expressly abandoned prior to the hearing of the appeal. For instance, in *Gray v Cotic*,⁸⁰ the Supreme Court of Canada refused to let an appellant challenge a jury charge, when it was clear that it had agreed to questions being posed to the jury contrary to the position it took on appeal.

- 40 Having said that, courts will occasionally recognize that it is appropriate to address a new issue if it is necessary to prevent an injustice and ensure consistent application of the law. This often occurs in class proceedings where the refusal to certify can irreparably harm class members and can potentially be rectified by amending arguments slightly on appeal. For instance, J Nordheimer (as he then was) took note of this practice, while nonetheless agreeing that it creates practical problems, in *Good v Toronto (City) Police Services Board*.⁸¹ Moreover, while failure to object to irregularities at trial is usually fatal to the ability to complain about them on appeal, there is a line where what occurred is so unfair that the appellate court cannot countenance it, such as if racist and irrelevant innuendo is put before the jury and not subsequently corrected.⁸²
- 41 Moreover, there are exceptional cases where an issue can only be raised for the first time on appeal or, at least, it would be impractical not to raise it for the first time on appeal. An exceptional but illustrative example took place in *R v CP*, which concerned a constitutional challenge to the Supreme Court of Canada's jurisdiction.⁸³ J Abella, writing for a majority of the Court on this point, concluded that the issue could only ever be raised for the first time in the Supreme Court of Canada. Moreover, no parties were prejudiced by answering the question on appeal, especially as the question was fundamentally one of pure law.⁸⁴
- 42 But nor is a constitutional question being raised for the first time on appeal a reason to always hear new issues. In *Canadian Council for Refugees v Canada (Citizenship and Immigration)*,⁸⁵ J Kasirer, for a unanimous Court, declined to decide whether the *Canadian Charter of Rights and Freedoms*'s guarantee of equality rights was offended by a statutory regime that required refugee claimants to seek refugee status in the United States if they arrived in that country prior to coming to Canada. Claimants alleged that the regime disproportionately impacted women. The Federal Court judge did not decide the issue as she concluded that there was an unjustified limit on other rights protected by the *Charter*. The Supreme Court of Canada overturned her on that issue, but remitted

⁸⁰ *Gray v Cotic*, Case 16681 (Supreme Court, Canada) Judgment 27 September 1983 [[1983] 2 SCR 2].

⁸¹ *Good v Toronto (City) Police Services Board*, Case 288/13 (Superior Court of Justice, Divisional Court, Ontario, Canada) Judgment 6 August 2014 [2014 ONSC 4583].

⁸² See, eg, *Abdallah v Snopek*, Case 184/07 (Superior Court of Justice, Divisional Court, Ontario, Canada) Judgment 27 February 2008 [89 OR (3d) 771].

⁸³ *R v CP*, Case 38546 (Supreme Court, Canada) Judgment 7 May 2021 [2021 SCC 19].

⁸⁴ Kennedy (n 61) 4:40.

⁸⁵ *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, Case 39749 (Supreme Court, Canada) Judgment 16 June 2023 [2023 SCC 17].

the equality rights issue to the trial court largely because it is best practice to have the trial court make findings of fact.⁸⁶

- 43 Similar to the limits of raising new issues on appeal are the limits on introducing fresh evidence on appeal. The Supreme Court of Canada prescribed the test to admit new evidence in *Palmer v The Queen*:

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and

(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.⁸⁷

- 44 Many of the general common law purposes of appeals are reflected in these criteria. The first relates to strategic adversarial decisions made at trial and reflects the concern that a party may seek to re-litigate what was intended and designed to be final. The second criterion is based on a fundamental principle of evidence: it must be relevant.⁸⁸ The third dismisses implausible evidence, reflecting the fact that fanciful arguments are not to be entertained, and allegations that are incapable of belief can be dismissed summarily.⁸⁹ The final criterion reflects the need for a potential change in result, in line with the 'overriding' error consideration in 'palpable and overriding error'.
- 45 Though coming from a criminal case (and not as rigorously enforced when the defence proposes the fresh evidence in a criminal case, particularly regarding the first factor, given the penal consequences at stake⁹⁰), this test is quite strictly applied in civil cases, due to concerns about prejudice and respect for the trial adversarial system. For instance, in *Munro-Glasgow v Glasgow*, the Nova Scotia Court of Appeal declined to

⁸⁶ Kennedy (n 61) 4:40.

⁸⁷ *Palmer v The Queen* (Supreme Court, Canada) Judgment 21 December 1979 [[1980] 1 SCR 759] 775.

⁸⁸ See *R v Handy*, Case 27996 (Supreme Court, Canada) Judgment 21 June 2002 [2002 SCC 56].

⁸⁹ See, eg, *Operation Dismantle v The Queen*, Case 18154 (Supreme Court, Canada) Judgment 9 May 1985 [[1985] 1 SCR 441] 455.

⁹⁰ *Palmer* (n 87) 775.

admit fresh evidence on appeal when it was clearly available at trial but was not introduced.⁹¹

- 46 Having said that, courts will recognize when what is at stake in a civil appeal warrants departure from the strictness of the *Palmer* test. The criteria are not a rigid checklist and an overarching consideration of the interests of justice needs to be considered as they are applied. For instance, in *Dew Point Insulation Systems Incorporated v JV Mechanical Limited*⁹², J Bellamy permitted parties to introduce fresh evidence addressing issues that the master (a first-instance judge on certain matters) raised on her own initiative and which J Bellamy concluded the parties could not have been aware of as issues until she raised them. Moreover, in cases involving children, where it is clear that a child's wishes, maturity, and/or needs have changed after trial, courts will generally admit evidence to that effect given the need for 'up-to-date information on children' which is clearly related to *Palmer's* overarching criterion: the interests of justice.⁹³

5 THE COMMON LAW IN SUM

- 47 Common law judges, particularly common law appellate judges, are famous for their duties in crafting the legal rules of their jurisdictions. As such, it is unsurprising that they have extraordinary discretion to substitute their views on legal matters for those of first instance courts. At the same time, however, there is an enormous respect for the trial process. As such, outside of questions of pure law, there are highly restrictive standards of review in the common law world. Canada is a manifestation of this, with findings of fact only being appealable in the event of palpable and overriding error. Throughout the common law world, overturning discretionary decisions or jury awards is very challenging indeed. Jurisdictions have some variation of the theme that 'no reasonable jury' could have reached a jury decision before it can be varied.
- 48 To this point, it has been suggested that these restrictive standards of review are mostly based on respect for the trial process, including the interests of finality, as well as the fact that appellate courts are in a poorer, or at least no better, position regarding factual and discretionary matters than the trial court. But another possibility may be at play: respect for the adversarial system, key to the common law.⁹⁴ Notably, insofar as matters were argued at trial after proper adversarial argument, it is generally inappropriate for appellate courts to 'second guess' the consequences of the adversarial system running

⁹¹ *Munro-Glasgow v Glasgow*, Case S.C.A 01072 (Court of Appeal, Nova Scotia, Canada) Judgment 17 March 1983 [59 NSR (2d) 442].

⁹² *Dew Point Insulation Systems Incorporated v JV Mechanical Limited*, Case 184/08 (Superior Court of Justice, Divisional Court, Ontario, Canada) Judgment 21 December 2009 [259 OAC 179].

⁹³ *E(H) v M(M)*, Case C59991 (Court of Appeal, Ontario, Canada) Judgment 25 November 2015 [2015 ONCA 813]; Sopinka, Gelowitz and Rankin (n 15) para 2.179 ff.

⁹⁴ Justice R Jackson of the Supreme Court of the United States famously stated that 'a common law trial is and always should be an adversary proceeding': *Hickman v Taylor*, Case 47 (Supreme Court, US) Judgment 13 January 1947 [329 US 495] 516 (concurring), as quoted in NW Spaulding, 'The Rule of Law in Action: A Defense of Adversary System Values' (2008) 93(6) Cornell Law Review 1377, 1402.

its course. It allows a second opportunity to litigate and second-guess strategic decisions made in an adversarial context at trial. This is not only manifested in the high standards of review for factual matters, but also in the restrictions on raising new issues or introducing new evidence on appeal.

6 THE STANDARDS AND SCOPE OF APPELLATE REVIEW IN THE CIVIL LAW

49 Many of the characteristics of common law appeals reflect two different conceptualizations of the role of the judge in common law systems:

- 1) the judiciary delineates, refines, discovers, and/or makes (depending on which verb one is comfortable with) the common law; and
- 2) the trial judge is a passive observer, and not an inquisitor.

50 Neither of these characteristics are shared with civil law systems. In principle, all civil law is found in civil codes.⁹⁵ Accordingly, judges merely apply the codes. Of course, judges need to interpret the codes, and their interpretations can be quite persuasive on future courts.⁹⁶ But horizontal *stare decisis* and indeed even vertical *stare decisis* do not exist in the way they do in the common law. This makes appellate courts less specialized in law-making than their common law counterparts. Accordingly, there is less of a need for the courts to be specialized in jurisprudential development. They can have a greater role in correcting factual errors given the comparatively lesser role for error correction. We therefore generally see significantly greater willingness to revisit findings of fact on appeals in civil law jurisdictions.

51 Second, the common law trial judge is meant to be a passive observer. Accordingly, the parties' choices in the conduct of trial are generally to be honoured. In civil law jurisdictions, on the other hand, the trial judge is a disinterested inquisitor.⁹⁷ There is less of a need to bind a party to its decisions regarding the proving of facts given that the judiciary itself plays a role in finding facts at first instance. This is a stark point of contrast with common law systems of adjudication. Accordingly, civilian courts are, in the main, more willing to reconsider the record and factual findings and not consider themselves bound by counsel choices at trial—or the trial judge's investigation. To be sure, these are broad generalizations and differences between civil law jurisdictions are enormous. But in the main, civilian legal systems have appeals that are more interventionist than is often

⁹⁵ See, eg, O Cachard, 'Translating the French Civil Code: Politics, Linguistics and Legislation' (2005) 21(1) Connecticut Journal of International Law 41.

⁹⁶ See, eg, M A Lupoi, 'Appellate procedures in Italy' (2019) IJPL.

⁹⁷ Ibid.

seen in common law jurisdictions. As such, appeals are more common in civilian systems.⁹⁸

7 HIGHLIGHTS FROM AROUND THE WORLD

- 52 Key to civilian legal traditions is the primacy of a code, following the French tradition from the times of the Napoleonic Code.⁹⁹ Accordingly, powers of courts of appeal are constrained by governing legislation. As such, even in some ‘mixed’ systems, appellate restraint can be strikingly apparent. This is clearly the case in Quebec, Canada. Despite having a civil code for private law matters, the court structure in Quebec bears more similarities to common law jurisdictions.¹⁰⁰ The Quebec Court of Appeal has held that this should affect how it reviews first-instance decisions. In *Gercotech inc c Kruger inc Master Trust (CIBC) Mellon Trust Company*, the Court repeated the orthodox Canadian approach to civil appeals:

[7] First, with respect to pure questions of law, this Court will intervene only if the appellant successfully establishes that such an error exists and that this error affected the outcome of the case.

[8] Moreover, let us recall what a “palpable *and* overriding error” means, that is, the standard of review applicable to questions of fact or questions of mixed fact and law:

(a) an error is “palpable” where the litigant is able to identify it [TRANSLATION] “with great economy-of-means, without it provoking a long semantic debate, and without it being necessary to review large parts of documentary and testimonial evidence that is divided and contradictory”; it is an error [ORIGINAL ENGLISH] “that is obvious”, that one can [TRANSLATION] “put one’s finger on” and that is “not of a needle in a haystack, but of a beam in the eye”;

(b) a palpable error is “overriding” where it has a “critical” impact on a finding of fact or a finding of mixed fact and law, where it [TRANSLATION] “overwhelmingly precludes the judge’s finding on a question of fact and is likely to affect the outcome of the case”; to demonstrate such an error, it is not

⁹⁸ Federal Judicial Center, ‘Civil Litigation’ (*Judiciaries Worldwide: A Resource on Comparative Judicial Practice*) <https://judiciariesworldwide.fjc.gov/civil-litigation#:~:text=Appeals%20are%20more%20common%20in,higher%20courts%20that%20consider%20appeals> accessed 23 August 2024.

⁹⁹ See, eg, D Talon, ‘Reforming the Codes in a Civil Law Country’ (1980) 15 *Journal of the Society of Public Teachers of the Law*, New Series 33.

¹⁰⁰ G J Kennedy, ‘The Federal Courts’ Advantage in Civil Procedure’ (2024) 102(1) *Canadian Bar Review* 1, 43.

sufficient for the litigant to [ORIGINAL ENGLISH] “pull at leaves and branches and leave the tree standing. The entire tree must fall”.¹⁰¹

- 53 Generally speaking, however, civil law jurisdictions have appellate courts with enormous appellate powers, including over facts. For example, *les cours d’appel* in France historically considered the appeal a second trial before a different judge. Parties had a right to introduce new evidence with factual review being essential to set up matters before *Cour de Cassation* (the Supreme Court), which only reviews matters on questions of law.¹⁰² Having said that, there remain restrictions even before the courts of appeal in France: while new legal arguments and new evidence can be raised, new legal claims are prohibited.¹⁰³
- 54 Germany has historically followed a somewhat similar division of labour. As J Langbein noted in his seminal ‘The German Advantage in Civil Procedure’, ‘the first appellate instance in Germany involves review of the facts, both from the record and, if appropriate, by recalling witnesses or summoning new ones’.¹⁰⁴ Langbein acknowledges, from his American perspective, this system of appellate review is ‘astonishingly liberal’ and would generally be uneconomical but for ‘recording in pithy summaries the evidence gathered at first instance’.¹⁰⁵
- 55 Granted, this has changed—somewhat controversially—in recent years, moving away from the model of a ‘second trial’.¹⁰⁶ Though German appeals, as noted by Langbein, have historically been considered a ‘second bite at the apple’, 2001 amendments require appellate courts to accept factual findings of first instance courts unless there is ‘no clear indication of doubt of the correctness or completeness’ of the factual findings.¹⁰⁷ However, if an appellant can show doubt about the factual findings, *de novo* review can follow.¹⁰⁸ Moreover, there are restrictions even on the ability to appeal first instance decisions in Germany.¹⁰⁹ At least EUR 600 must be at stake, or there is no right of appeal. Similarly, default judgments and most interlocutory matters are not appealable—only final (and certain defined interlocutory matters) are.¹¹⁰ These reforms, as explored by M

¹⁰¹ *Gercotech inc c Kruger inc Master Trust (CIBC) Mellon Trust Company*, Case 500-09-027006-170 (Court of Appeal, Quebec, Canada) Judgment 3 July 2019 [2019 QCCA 1168] para 7-8. Translation in *Donaldson c Autorité des marchés financiers*, Case 500-09-027170-174 (Court of Appeal, Quebec, Canada) Judgment 11 March 2020 [2020 QCCA 401] para 88 (annotations and emphasis in original).

¹⁰² N N Pugh, ‘The Structure and Role of Courts of Appeal in Civil Law Systems’ (1975) 35(5) *Louisiana Law Review* 1163, 1165.

¹⁰³ B Prat, ‘Court Procedure in France’ (*Lexology*, 11 February 2020) <https://www.lexology.com/library/detail.aspx?g=953a3459-1141-4357-bfcb-43e79210106b> accessed 23 August 2024.

¹⁰⁴ J H Langbein, ‘The German Advantage in Civil Procedure’ (1985) 52(4) *University of Chicago Law Review* 823, 828.

¹⁰⁵ *Ibid* 857.

¹⁰⁶ H Deters, ‘The Scope and Standards of First Appeals – Germany’ (unpublished).

¹⁰⁷ P L Murray and R H Stürner, *German Civil Justice* (Carolina Academic Press 2004) 373.

¹⁰⁸ *Ibid* 374.

¹⁰⁹ *Ibid*.

¹¹⁰ *Ibid*.

Stürner, have the motivation of giving more weight to courts of first instances and have reduced the case load of the first-instance appeal court.¹¹¹ This was intended by Art 522(2) of the German Code of Civil Procedure (GCCP), which holds that an appellate court may strike out an appeal that has no chance of success.¹¹²

- 56 Having said that, Stürner also observes that there remains a tremendous emphasis in Germany on doing justice in individual cases. In this vein, while default judgments cannot be appealed according to Art 514 (1) GCCP, there are two remedies available against a default judgment. First, the defaulting party can lodge *Einspruch* (a protest) with minimal admissibility requirements pursuant to Art 341 GCCP. Second, in cases where no protest is available, an appeal is possible insofar as such an appeal is based on the fact that there was no negligent or intentional failure to comply with procedural requirements, pursuant to Art 514(2), sentence 1 GCCP. German appellate courts also encourage parties to settle on appeal (Art 278(1) GCCP).

8 ITALY AS A CASE STUDY

- 57 Italy is a jurisdiction that will explore many of the commonalities - and differences - between these civilian approaches to appeals. It is important to remember that Italian courts are divided into criminal and civil courts. Administrative law is, as in France, administered in an entirely different manner.¹¹³ This is demonstrative of the observation of A V Dicey that there was no analogue between French *droit administratif* and common law administrative law.¹¹⁴
- 58 Courts of appeal in Italy in civil matters are courts of second instance, reviewing decisions of the first-instance civil court: the *Tribunale*.¹¹⁵ As a civil law jurisdiction, procedural law, like all other law, is found in a Napoleonic type of code. *Stare decisis* is not followed in Italy even vertically, much less horizontally. As such, even decisions of the Supreme Court are only persuasive.¹¹⁶
- 59 On an appeal in Italy, the appellant bears the burden of proving the decision of the court below is 'defective'.¹¹⁷ Having said that, the grounds of appeal are nowhere near as restrictive as one finds in many common law jurisdictions. Specifically, appeals are allowed on legal and factual grounds and there is no different standard of review for appeals of legal and factual matters.¹¹⁸ Accordingly, an appeal court is permitted to make

¹¹¹ M Stürner, 'Sharing Responsibility: The German Federal Court of Justice and the Civil Appellate System' in P Bravo-Hurtado and C H van Rhee (ed), *Supreme Courts Under Pressure* (2021) *Ius Gentium: Comparative Perspectives on Law and Justice* 83.

¹¹² Deters (n 106).

¹¹³ Lupoi (n 96) 1.

¹¹⁴ M Walters, *AV Dicey and the Common Law Constitutional Tradition* (Cambridge UP 2021).

¹¹⁵ *Ibid* 2.

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid* 8.

¹¹⁸ *Ibid* 11.

determinations on the facts in the same manner it would be permitted to make determinations on the law. As Simona Grossi has noted, the evaluation of the facts is ‘*de novo*’¹¹⁹ and based on ‘the interpretation of facts’. She summarizes:

Judgments can be appealed before the Corte d'Appello after showing grounds for appeal. Usually the grounds for appeal concern the interpretation of the law, the granting or denial of evidence, and the interpretation of facts. The complaint on appeal does not comply with a specific layout but it should indicate and specify the grounds upon which the appeal is sought.¹²⁰

- 60 Grossi also notes that discretionary decisions are easier to appeal in Italy unlike in the United States where they are ‘virtually unassailable’.¹²¹
- 61 At the same time, an appeal is not truly a ‘second trial’—only claims and defences raised at first instance are permitted to be raised before the court of second instance. This is analogous to prohibiting raising new issues in common law appeals. This is a recent evolution in the law. In the original Code of Civil Procedure from 1940, there was more of a perception that new matters could be brought into the appellate proceedings, and that the trial was only a ‘first step’. That has since been amended.¹²² In this vein, recent decades have also seen restrictions on introducing new evidence on appeal. Like in Canada, only new evidence that was *unable* to be introduced at trial can be introduced on appeal.¹²³ This also underscores the solemnness of the trial and disincentivizes waiting to spring new evidence on parties for the first time on appeal. Having said that, an evidence-gathering phase may still be part of the appellate process.¹²⁴ While it is possible for the appellate court to seek new evidence at this stage (reflecting the civilian conceptualization of the judge as a disinterested inquisitor), in practice most appeals take place before the same factual record.¹²⁵
- 62 Italian civil appellate proceedings also have an initial ‘filtering stage’, where the appeal court needs to assess whether there is a ‘reasonable chance of success’ for the appeal on its merits.¹²⁶ This gives the appellate court a screening mechanism. Accordingly, while the powers of the appellate court in Italy are broader than Canada, there remains a triage process to determine which cases plausibly warrant a full appeal.¹²⁷ A case will go no

¹¹⁹ Ibid 12.

¹²⁰ S Grossi, ‘A Comparative Analysis Between Italian Civil Proceedings and American Civil Proceedings Before Federal Courts’ (2010) 20(2) *Indiana International & Comparative Law Review* 213, 232.

¹²¹ Ibid 242.

¹²² Lupoi (n 96) 12.

¹²³ Ibid 12.

¹²⁴ Ibid 16.

¹²⁵ Ibid.

¹²⁶ Ibid 16.

¹²⁷ F Fieconi, ‘The Role of Courts of Appeal in a Changing World: The Experience of the Court of Appeal of Milan in civil proceedings’ (*Diretto Penale Contemporaneo*, 28 September 2015) 4 <https://archiviodpc.dirittopenaleuomo.org/upload/1443288904FIECONI%202015.pdf> accessed 23 August 2024.

further, in other words, unless it warrants it. While this has been estimated to affect only 5% of appeals, it is a way to prevent 'strategic appeals'.¹²⁸ The common law, by contrast, would require a motion on notice to strike an appeal—a step that is so time consuming and expensive that the appeal may have been heard on its merits by the time it is resolved.¹²⁹ It is worth noting in this vein, however, that Ontario, Canada has recently amended its Rules of Civil Procedure to permit a party to ask a Court (trial or appeal) to dismiss, in writing, a proceeding that is 'on its face' frivolous, vexatious or an abuse of process of the Court.¹³⁰ This has been used by the Court of Appeal for Ontario to dismiss manifestly meritless appeals, but it is not automatic and a high bar must be cleared before the rule is employed.¹³¹

- 63 During the appeal process, the Italian Court of Appeal, as in Germany, can also encourage the parties to enter into alternative dispute resolution such as mediation and negotiation to assist in resolving matters capable of resolution.¹³²
- 64 After passing the filtering stage and the evidence collection stage, it is the duty of the appellate court to decide the case *de novo*, correcting errors and rendering the judgment that should have been granted at first instance. In other words, the judgment under appeal replaces the original judgment and it is not purely 'corrective'.¹³³ While the record will usually be the same, there is no different standard of review for findings of fact compared to findings of law. Again, however, the appellant must identify an element in the original decision that is allegedly an error based on the record before it, so the appeal is not truly a second trial.¹³⁴ This circumscribed, if still rather broad, function of appeals as a second instance court is a reflection of the legislature's intent,¹³⁵ which must be given primacy in a civilian legal system.¹³⁶ This is contrasted to the topic of Chapter Six: the role of the Supreme Court, as appeals may be taken to the Supreme Court of Italy only on questions of law.¹³⁷ This is similar to Germany: according to Art 133 German Court Constitution Act, the German Federal Court of Justice (the highest court of appeal

¹²⁸ Ibid.

¹²⁹ See the discussion in Kennedy (n 100) regarding ability to strike already summary processes.

¹³⁰ See, eg, G J Kennedy, 'Rule 2.1 of Ontario's *Rules of Civil Procedure*: Responding to Vexatious Litigant While Advancing Access to Justice?' (2018) 35 Windsor Yearbook of Access to Justice 243.

¹³¹ See, eg, *Wang v Banton*, Case M51875 (Court of Appeal, Ontario, Canada) Judgment 3 February 2021 [2021 ONCA 72].

¹³² Fieconi (n 127).

¹³³ A Carratta, 'Oggetto dell'appello ed evoluzione giurisprudenziale' (*Treccani: Il libro dell'anno del diritto 2019*, 2019) https://www.treccani.it/enciclopedia/oggetto-dell-appello-ed-evoluzione-giurisp-rudenziale_%28altro%29/ accessed 23 August 2024.

¹³⁴ Fieconi (n 127).

¹³⁵ Ibid.

¹³⁶ See, eg, Langbein (n 104).

¹³⁷ Lupoi (n 96) 16-17.

in civil and criminal matters) is responsible for hearing and deciding on appeals on points of law.¹³⁸

- 65 Despite the theoretically broad nature of Italian civil appeals, however, there is evidence that the 2012 restrictions on appellate practice indeed had effects in reducing the number of successful appeals and, accordingly, has been beneficial from the perspective of finality. F Fiecconi has estimated that 80% of appeals result in affirmations or (substantial) affirmations, indicating that stability in the law and results remains.¹³⁹

9 CONCLUDING THOUGHTS

- 66 He who wins last indeed wins in civil procedure. But it is preferable to win at each level, if only for, in Fiecconi's words, 'stability'.¹⁴⁰ And in many jurisdictions, winning at first instance is often essential because the ability to interfere with a trial decision, particularly on factual and discretionary matters, is very constrained. This is particularly the case in common law jurisdictions, with Canada being a striking case-in-point. Appellate courts often concentrate entirely on the law and are comparatively reluctant to engage in review of factual and/or discretionary matters. At the same time, respect for the trial process and the adversarial system further leads to a reluctance to have parties get a 'second trial' on appeal.
- 67 Civil law jurisdictions, on the other hand, are much more sanguine about appellate intervention. The details do matter: France and especially Quebec have healthy instances of appellate restraint, albeit not to the same extent as seen in many common law jurisdictions. And in no civil law jurisdiction would it be fair to call an appeal a 'second trial'. But in the main, as demonstrated by Italy, appellate courts have quite broad powers, even when they do not use them. Finality and efficiency may be sacrificed, but the ability to ensure the 'correct' result is furthered. These are all virtues—and it is interesting to observe how different jurisdictions have weighed them. This is all the more the case given a considerable degree of convergence in recent years: in common law countries, to reconceptualizing deeply problematic factual findings as errors of law; and in civilian systems, to generally upholding first instance results.

¹³⁸ This includes the *Revision* (appeal on point of law, Art 542 GCCP), *Sprungrevision* (leapfrog appeal from the first instance, Art 566 GCCP), *Rechtsbeschwerde* (legal complaint, Art 574 GCCP) and *Sprungrechtsbeschwerde* (leap frog legal complaint only in cases of non-contentious matters and family law disputes, Art 75 (1) Act on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction, and in cases of labour law disputes, Art 96a (1) Labour Court Act).

¹³⁹ Fiecconi (n 127).

¹⁴⁰ *Ibid.*

ABBREVIATIONS AND ACRONYMS

ABCA	Alberta Court of Appeal
ABQB	Alberta Court of Queen's Bench
Art	Article/Articles
ed(s)	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
EWCA Civ	England and Wales Court of Appeal (Civil Division)
FCA	Federal Court of Appeal [Canada]
ff	following
fn	footnote (external, ie, in other chapters or in citations)
HCA	High Court of Australia
ibid	<i>ibidem</i> (in the same place)
ie	<i>id est</i> (that is)
n	footnote (internal, ie, within the same chapter)
NLCA	Newfoundland and Labrador Court of Appeal
NSR	Nova Scotia Reports
OAC	Ontario Appeal Cases
ONCA	Ontario Court of Appeal
ONSC	Ontario Superior Court of Justice
OR	Ontario Reports
para	paragraph/paragraphs
QCCA	Quebec Court of Appeal
SCC	Supreme Court Canada
SCR	Supreme Court Reports
SKCA	Saskatchewan Court of Appeal
UK	United Kingdom
UP	University Press
US / USA	United States of America
v	Versus
WLR	Weekly Law Reports

LEGISLATION

International/Supranational

International Covenant on Civil and Political Rights 1966.

National

Criminal Code 1985 (Canada).

Act on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction,
Germany

German Code of Civil Procedure

Labour Court Act, Germany

United States Constitution (US).

CASES

National

Abdallah v Snopek, Case 184/07 (Superior Court of Justice, Divisional Court, Ontario, Canada) Judgment 27 February (2008), [89 OR (3d) 771].

Al-Ghamdi v College and Association of Registered Nurses of Alberta, Case 1703-0325-AC (Court of Appeal, Alberta, Canada) Judgment 27 February 2020 [2020 ABCA 81].

Bedford v Canada (Attorney General), Case 34788 (Supreme Court, Canada) Judgment 20 December 2013 [2013 SCC 72].

Buffalo Point First Nation, et al v Cottage Owners Association, Case CI 18-01-18407 (Court of Queen's Bench, Manitoba, Canada) Judgment 29 January 2020 [2020 MBQB 20].

Canada (Attorney General) v Rapiscan, Case A-106-14 (Federal Court of Appeal, Canada) Judgment 16 April 2015 [2015 FCA 96].

Canada (Minister of Citizenship and Immigration) v Vavilov, Case 37748 (Supreme Court, Canada) Judgment 19 December 2019 [2019 SCC 65].

Canada v South Yukon Forest Corporation, Case A-307-10 (Federal Court of Appeal, Canada) Judgment 31 May 2012 [2012 FCA 165].

Canadian Council for Refugees v Canada (Citizenship and Immigration), Case 39749 (Supreme Court, Canada) Judgment 16 June 2023 [2023 SCC 17].

Carter v Canada (Attorney General), Case 35591 (Supreme Court, Canada) Judgment 6 February 2015 [2015 SCC 5].

Concrete Pipe & Products of Cal, Inc v Construction Laborers Pension Trust for Southern Cal (Supreme Court, US) Judgment 14 June 1993 [508 US 602].

Dew Point Insulation Systems Incorporated v JV Mechanical Limited, Case 184/08 (Superior Court of Justice, Divisional Court, Ontario, Canada) Judgment 21 December 2009 [259 OAC 179].

Donaldson c Autorité des marchés financiers, Case 500-09-027170-174 (Court of Appeal, Quebec, Canada) Judgment 11 March 2020 [2020 QCCA 401].

E(H) v M(M), Case C59991 (Court of Appeal, Ontario, Canada) Judgment 25 November 2015 [2015 ONCA 813].

Fox v Percy (High Court, Australia) Judgment 30 April 2003 [[2003] HCA 22].

Gabriele Volpi & Delta Ltd v Matteo Volpi, Case CA-2021-000718 (Court of Appeal England and Wales, UK) Judgment 5 April 2022 [[2022] EWCA Civ 464],

Gercotech inc c Kruger inc Master Trust (CIBC) Mellon Trust Company, Case 500-09-027006-170 (Court of Appeal, Quebec, Canada) Judgment 3 July 2019 [2019 QCCA 1168].

Good v Toronto Police Services Board, Case 288/13 (Superior Court of Justice, Divisional Court, Ontario, Canada) Judgment 6 August 2014 [2014 ONSC 4583].

Gray v Cotic, Case 16681 (Supreme Court, Canada) Judgment 27 September 1983 [[1983] 2 SCR 2].

Hamilton v Open Window Bakery Ltd, Case 29225 (Supreme Court, Canada) Judgment 19 February 2004 [2004 SCC 9].

Hickman v Taylor, Case 47 (Supreme Court, US) Judgment 13 January 1947 [329 US 495].

Honda Canada Inc v Keays, Case 31739 (Supreme Court, Canada) Judgment 27 June 2008 [2008 SCC 39].

Housen v Nikolaisen, Case 27826 (Supreme Court, Canada) Judgment 28 March 2002 [2002 SCC 33].

Hryniak v Mauldin, Case 34641 (Supreme Court, Canada) Judgment 23 January 2014 [2014 SCC 7].

Jackson v Virginia (Supreme Court, US) Judgment 27 June 1979 [443 US 307].

Johannson v Saskatchewan Government Insurance, Case CACV3007 (Court of Appeal, Saskatchewan, Canada) Judgment 13 June 2019 [2019 SKCA 52].

Kostopoulos v Jesshope, (Court of Appeal, Ontario, Canada) Judgment 20 February 1985 [50 OR (2d) 54].

Lamb v Kincaid (Supreme Court, Canada) Judgment 7 May 1907 [(1907) 38 SCR 516].

Marbury v Madison (Supreme Court, US) Judgment 24 February (1803), [5 US 137].

McIntyre v Grigg, Case C41585 (Court of Appeal, Ontario, Canada) Judgment 6 November 2006 [83 OR (3d) 161].

Munro-Glasgow v Glasgow, Case S.C.A 01072 (Court of Appeal, Nova Scotia, Canada) Judgment 17 March 1983 [59 NSR (2d) 442].

Murphy v Saskatchewan Government Insurance, Case 1485 (Court of Appeal, Saskatchewan, Canada) Judgment 29 April 2008 [2008 SKCA 57].

Neptune Wellness Solutions v Canada (Border Services Agency), Case A-267-19 (Federal Court of Appeal, Canada) Judgment 1 October 2020 [2020 FCA 151].

Noftall v Evely, Case 12/03 (Court of Appeal, Newfoundland and Labrador, Canada) Judgment 14 August 2014 [2014 NLCA 30].

Nolan v Kerry (Canada) Inc, Case 32205 (Supreme Court, Canada) Judgment 7 August 2009 [2009] SCC 39].

Operation Dismantle v The Queen, Case 18154 (Supreme Court, Canada) Judgment 9 May 1985 [[1985] 1 SCR 441].

Palmer v The Queen (Supreme Court, Canada) Judgment 21 December 1979 [[1980] 1 SCR 759].

Piglowska v Piglowski, (House of Lords, UK) Judgment 24 June 1999 [[1999] 1 WLR 1360].

Pullman-Standard v Swint (Supreme Court, US) Judgment 27 April 1982 [456 US 273].

R v CP, Case 38546 (Supreme Court, Canada) Judgment 7 May 2021 [2021 SCC 19].

R v JMH, Case 33667 (Supreme Court, Canada) Judgment 6 October 2011 [2011 SCC 45]

R v Handy, Case 27996 (Supreme Court, Canada) Judgment 21 June 2002 [2002 SCC 56].

R v Hill, Case 17457 (Supreme Court, Canada) Judgment 24 April 1986 [[1986] 1 SCR 313].

Saint John Gas Light Co. Hatfield (Supreme Court, Canada) Judgment 1 May 1894 [23 SCR 164] 169.

Sattva Capital Corp v Creston Moly Corp, Case 35026 (Supreme Court, Canada) Judgment 1 August 2014 [2014 SCC 53].

Sun Indalex Finance, LLC v United Steelworkers, Case 34308 (Supreme Court, Canada) Judgment 1 February 2013 [2013 SCC 6].

Vancouver-Fraser Park District v Olmstead (Supreme Court, Canada) Judgment 23 October 1974 [[1975] 2 SCR 831].

United States v United States Gypsum Co (Supreme Court, US) Judgment 8 March 1948 [333 US 364].

US v Sanges (Supreme Court, US) Judgment 4 April 1892 [144 US 310].

Wallace v United Grain Growers Ltd, Case 24986 (Supreme Court, Canada) Judgment 30 October 1997 [[1997] 3 SCR 701].

Wang v Banton, Case M51875 (Court of Appeal, Ontario, Canada) Judgment 3 February 2021 [2021 ONCA 72].

BIBLIOGRAPHY

'Appeals', *Lerners LLP* <<http://www.lerners.ca/appeals/>> accessed 23 August 2024.

Baker J H, *An Introduction to English Legal History* (LexisNexis 2002).

----- *Introduction to English Legal History* (5th edn, Oxford University Press 2019).

Blake C and Drewry G, 'The Role of the Court of Appeal in England and Wales as an Intermediate Court' in Le Sueur A (ed), *Building the UK's New Supreme Court: National and Comparative Perspectives* (Oxford UP 2004).

Bradford J, 'James Bradford Successful in the Court of Appeal: Important Restatement of Principles On Appeals of Factual Findings' (*Essex Chambers*, 6 April 2022) <https://www.39essex.com/information-hub/insight/james-bradford-successful-court-appeal-important-restatement-principles> accessed 23 August 2024.

Brooks D, 'The Outer Limits of Liberalism' (*The Atlantic*, 4 May 2023) <https://www.theatlantic.com/magazine/archive/2023/06/canada-legalized-medical-assisted-suicide-euthanasia-death-maid/673790/> accessed 23 August 2024.

Cachard O, 'Translating the French Civil Code: Politics, Linguistics and Legislation' (2005) 21(1) *Connecticut Journal of International Law* 41.

Carratta A, 'Oggetto dell'appello ed evoluzione giurisprudenziale' (*Treccani: Il libro dell'anno del diritto 2019*, 2019) https://www.treccani.it/enciclopedia/oggetto-dell-appello-ed-evoluzione-giurisprudenziale_%28altro%29/ accessed 23 August 2024.

Corrick K and Rosenberg M, 'Trial by jury: The Canadian experience' (2015) 9(17) *Sistemas Judiciales* 6 <https://sistemasjudiciales.org/wp-content/uploads/2018/03/946.pdf> accessed 23 August 2024.

Deters H, 'The Scope and Standards of First Appeals – Germany' (unpublished)

Dyzenhaus D and Taggart M, 'Reasoned Decisions and Legal Theory' in Douglas E Edlin (ed), *Common Law Theory* (Cambridge University Press 2007) 139 Edmonds C, 'Appeals from Decisions, Satisfaction and Value Judgments: Reviewing the *House Rules*' (2017) 41(2) *Melbourne University Law Review* 647.

Federal Judicial Center, 'Civil Litigation' (*Judiciaries Worldwide: A Resource on Comparative Judicial Practice*) <https://judiciariesworldwide.fjc.gov/civil-litigation#:~:text=Appeals%20are%20more%20common%20in,higher%20courts%20that%20consider%20appeals.> accessed 23 August 2024.

Fieconi F, 'The Role of Courts of Appeal in a Changing World: The Experience of the Court of Appeal of Milan in civil proceedings' (*Diretto Penale Contemporaneo*, 28 September 2015) <https://archiviodpc.dirittopenaleuomo.org/upload/1443288904FIECONI%202015.pdf> accessed 23 August 2024.

Farrow T C W, 'A New Wave of Access to Justice Reform in Canada' in Dodek A and Woolley A (ed), *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (University of British Columbia Press 2016).

Grossi S, 'A Comparative Analysis Between Italian Civil Proceedings and American Civil Proceedings Before Federal Courts' (2010) 20(2) *Indiana International & Comparative Law Review* 213.

Jutras D, 'The Narrowing Scope of Appellate Review: Has the Pendulum Swung Too Far?' (2007) 32 *Manitoba Law Journal* 61.

Kaiser H A, 'L.M: A Hard Case Makes for Bad Sentencing Law' (2008) 56 *Criminal Reports* (6th) 323.

Kennedy G J, "'Civil Appeals in Ontario: How the Interlocutory/Final Distinction Became So Complicated and the Case for a Simple Solution?'" (2020) 45(:2) *Queen's Law Journal* 243. ['Kennedy Appeals'].

----- *The Charter of Rights in Litigation: Direction from the Supreme Court of Canada* (Thomson Reuters 2020) 4:31.

----- 'The Federal Courts' Advantage in Civil Procedure' (2024) 102(1) *Canadian Bar Review* 1.

----- 'Persisting Uncertainties in Appellate Jurisdiction at the Supreme Court' (2013) 100 *Criminal Reports* (6th) 96.

----- 'Rule 2.1 of Ontario's *Rules of Civil Procedure*: Responding to Vexatious Litigant While Advancing Access to Justice?' (2018) 35 *Windsor Yearbook of Access to Justice* 243.

Langbein J H, 'The German Advantage in Civil Procedure' (1985) 52(4) *University of Chicago Law Review* 823.

Law Reform Commission of Canada, *The Jury in Criminal Trials, Working Paper 27* (Department of Justice Canada 1980).

Lupoi M A, 'Appellate procedures in Italy' (2019) *IJPL*.

Murray P L and Stürner R H, *German Civil Justice* (Carolina Academic Press 2004).

Pape P and Adair J, 'Unreasonable Review: The Losing Party and the Palpable and Overriding Error Standard' (2008) 27(2) *Advocates' Society Journal* 6.

Prat B, 'Court Procedure in France' (*Lexology*, 11 February 2020)
<https://www.lexology.com/library/detail.aspx?g=953a3459-1141-4357-bfcb-43e79210106b> accessed 23 August 2024.

Pugh N N, 'The Structure and Role of Courts of Appeal in Civil Law Systems' (1975) 35(5) *Louisiana Law Review* 1163

Rugg J, 'Identifying and Understanding Standards of Review' (2019) The Writing Center at Georgetown University Law Centre <https://www.law.georgetown.edu/wp-content/uploads/2019/09/Identifying-and-Understanding-Standards-of-Review.pdf> accessed 23 August 2024.

Sharpe R J, *Good Judgment: Making Judicial Decision* (University of Toronto Press 2018).

Sopinka J and Gelowitz M A, *The Conduct of an Appeal* (3rd edn, LexisNexis 2012).

Sopinka J, Gelowitz M A and Rankin W D, *The Conduct of an Appeal* (5th edn, LexisNexis 2023).

Sorabji J, 'The Supreme Court of the United Kingdom and the Court of Appeal in England and Wales: Sharing the Appellate Load' in Bravo-Hurtado P and van Rhee CH (eds), *Supreme Courts Under Pressure: Controlling the Case Load in the Administration of Justice* (Springer Nature 2021).

Spaulding N W, 'The Rule of Law in Action: A Defense of Adversary System Values' (2008) 93(6) Cornell Law Review 1377, 1402.

Strauss P L, "'Deference" is Too Confusing – Let's Call Them "Chevron Space" and "Skidmore Weight"' (2012) 112(5) Columbia Law Review 114.

Stürner M, 'Sharing Responsibility: The German Federal Court of Justice and the Civil Appellate System' in P Bravo-Hurtado and C H van Rhee (ed), *Supreme Courts Under Pressure* (2021), *Ius Gentium: Comparative Perspectives on Law and Justice* 83.

Sunstein C R, 'Problems with Rules' (1995) 83(4) California Law Review 953.

Talon D, 'Reforming the Codes in a Civil Law Country' (1980) 15 Journal of the Society of Public Teachers of the Law, New Series 33.

Traynor R J, 'Some Open Questions on the Work of State Appellate Courts' (1957) 24(2) University of Chicago Law Review 211.

Walters M, *AV Dicey and the Common Law Constitutional Tradition* (Cambridge UP 2021).