

**Criminal****The crying judge: Compassion does not equal bias | Marcel Strigberger**By **Marcel Strigberger**

Marcel Strigberger

(September 4, 2018, 10:23 AM EDT) -- B.C. provincial court Judge Monica McParland presided over a sexual interference case recently. She found the accused guilty. The defence lawyer moved to have the judge recuse herself from continuing on the basis of bias as the judge during the reading of a victim impact statement supposedly showed emotion as she allegedly cried.

The first question is can a judge show compassion? Enter Providence, R.I., municipal court Judge Frank Caprio.

His verdicts, loaded with compassion, have gone viral on social media. Judge Caprio, 80 years old by the way, for example dismissed a charge against a lady originating from Guatemala, who made a prohibited right turn on a red, as she was on her way to an English class. She said she did not see the sign. Judge Caprio, impressed with her efforts to learn English, made her a deal whereby the charge was being dismissed on her undertaking to complete the English course.

The kind judge notes, "I think I should take into consideration whether somebody is sick and whether their mother died and whether they have kids who are starving. I don't wear a badge under my robe. I wear a heart under my robe."

Is this what people want in a judge? Actually his videos on YouTube, etc., have attracted millions of viewers. They are attracted not to his toughness but to his heart.

Rewinding a few years back, during the hearings on the confirmation of Justice Sonia Sotomayor to the U.S. Supreme Court, there was an interesting debate over the role of empathy and compassion in decision making by judges. In praising Sotomayor, President Obama commented that empathy and compassion are some of her strengths.

We cannot really have a discussion on this topic without eliciting the views of Shakespeare. I refer of course to the bard's thoughts on the role of mercy in *The Merchant of Venice*, where Portia pleads, "And earthly power doth then show likest God's When mercy seasons justice."

So from Judge Caprio to President Obama to Shakespeare, to the millions of viewers on YouTube, there appears to be an appetite for judges with compassion.

Judge McParland ended up denying the motion to recuse. In a 13-page written decision she said, "I must determine whether if a reasonable, right minded person armed with all the relevant information would consider it more likely than not that I would, consciously or unconsciously, unfairly decide the matter."

Her honour's comments are much reminiscent of that iconic English maxim defining negligence. I talk of the test for negligence being, what would the reasonable man on the Clapham omnibus do under the circumstances? Applying it to this case, being in B.C., one must ask what would the reasonable judge on the Granville Street omnibus do? (To be more exact, this case was in Kelowna, not Vancouver. However I saw no merit in Googling the Kelowna transit system.)

More than likely we will not easily know the answer as it's not so simple to take a ride on that omnibus and readily spot a judge. I in fact once rode this bus and I did not see any of the passengers wearing judicial robes. It would help if judges riding public transit would wear appropriate garb in order to enable us to properly apply the reasonableness test. I did see a gentleman sporting a Vancouver Canucks sweatshirt. I suppose that was not overly helpful to determine this matter.

In the B.C. case Judge McParland noted, "Just because a judge demonstrates human compassion, it does not amount to judicial bias."

There is even a dispute whether the learned judge actually cried. Crown counsel said the judge merely "dabbed a tear in her eye with a tissue."

Does it really matter if it was a dab or a cry? The judge certainly did not come close to crying a river. It would take a lot more than a tissue to hold back a deluge of the Fraser.

The consensus is that judges are human, and humans, unlike the Tin Man, have hearts, and compassion does not of necessity equal bias.

I believe most humans would have no problems with the judge's reaction. They would not shed a tear for the defence.

*Marcel Strigberger retired from his Greater Toronto Area litigation practice and continues the more serious business of humorous author and speaker. [www.marcelshumour.com](http://www.marcelshumour.com).*

*Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Peter Carter at [peter.carter@lexisnexis.ca](mailto:peter.carter@lexisnexis.ca) or call 647-776-674*