The “Full Appreciation” Test and a Contextual Approach to Summary Judgment Motions in Ontario

By Barbara A. MacFarlane*

On December 5, 2011, the Court of Appeal for Ontario (with a panel comprised of five judges) released its much-anticipated decision in Combined Air Mechanical Services Inc. v. Flesch1 relating to five appeals that dealt with the expanded judicial powers on summary judgment motions resulting from the 2010 amendments to Rule 20 of the Ontario Rules of Civil Procedure. Despite the development of conflicting jurisprudence since the amendments came into effect, the Court of Appeal chose not to speak to the various interpretive approaches in the case law but rather to provide a fresh approach to the interpretation and application of the amended Rule 20.

At the hearing of the appeal in June 2011, in addition to counsel for the parties, five amicus curiae had provided their submissions (without taking a position on the facts or merits of any of the decisions under appeal), including representatives from the Attorney General of Ontario, the Ontario Bar Association, the Advocates’ Society, the Ontario Trial Lawyers Association and the County and District Law Presidents’ Association.

The restrictions imposed on motion judges by the former summary judgment jurisprudence no longer exist with the amendments to Rule 20. For example, prior to the amendments, it was understood by the judiciary that if any assessments of credibility were required to determine the matters at issue, a full trial was necessary. The Osborne Report, which led to the Rule 20 amendments, noted that the strict limits that the jurisprudence had placed on a judge’s power to assess the quality and cogency of the evidence in determining the existence of a “genuine issue for trial” were undermining the efficacy of Rule 20 and were deterring litigants from using this mechanism for summarily resolving disputes. With the new amendments, however, the powers on summary judgment motions were expanded to allow judges to weigh the evidence, evaluate the credibility of a deponent, and draw reasonable inferences from the evidence in determining whether there is a genuine issue requiring a trial. The amendments also allow the judge to direct the introduction of oral evidence to further assist in exercising these powers. Finally, the cost consequences for bringing a motion for summary judgment were altered, such that costs on a failed motion are now presumptively determined on a partial-indemnity scale (rather than the previous substantial-indemnity scale presumption).

In considering the possible applications of the new Rule 20 powers, it was difficult to anticipate how the Court of Appeal would deal with the complicated evidentiary issues presented by health-related litigation, such as medical negligence litigation. The “genuine issue” in these cases is actually comprised of several issues (such as standard of care, causation and damages), which more often than not require expert medical opinions. The “facts” and “issues” in medical negligence cases are usually not known until full disclosure is made, including seeking explanations and interpretations of the facts and evidence provided by the parties and the medical records. Additionally, locating and retaining the appropriate medical expert can take a considerable amount of time, particularly where the expert requires a significant amount of time to review the medical records (which are quite often voluminous). As a result of these complexities, it is very common to have a medical negligence action well underway before the necessary expert evidence has been marshalled by either side. Once opinions have been given, experts often have legitimate but differing views on the issues in the litigation.

With the expanded powers under Rule 20, some concern arose that, where no expert opinion was yet available to support a claim or defence in a medical negligence case, such cases would not survive a summary judgment motion. In many cases, the parties would not be in a position to truly put their “best foot forward” early on in the litigation process. More concerning was that, even in the face of conflicting expert opinions, the Court could prefer one expert’s opinion over another and summarily dismiss a plaintiff’s action.2

In the Court of Appeal’s explanatory judgment of Combined Air Mechanical Services Inc. v. Flesch, the Court sought to provide guidance to the profession regarding the nature of the test for determining whether or not summary judgment should be granted; the scope and purpose of the new powers given to judges hearing such motions; and the types of cases amenable to summary judgment. As stated by the Court of Appeal, the purpose of the new rule is to eliminate unnecessary trials. The underlying guiding principle, however, is that summary judgment should only be used where it is an appropriate means for effecting a fair and just resolution of the dispute before the Court. There is recognition that, in some cases, it is safe to determine the matter on a motion for summary judgment because the motion record is sufficient to ensure that a just result can be achieved without the need for a full trial. In other cases, the record is not adequate nor can it be made adequate, regardless of the tools now available to a motion judge and, in such cases, a just result can only be achieved through a full trial. The issues posed and the evidence available will vary, and the determination of whether there is a genuine issue requiring a trial will have to be made on a case-by-case basis.

The decision provides a descriptive and non-exhaustive typology of potential cases that are appropriate for summary judgment motions. The first type of case is where the parties and the Court agree that it is appropriate to proceed with a motion for summary judgment to determine part or all of a claim or defence. The second type of case involves those claims or defences that are shown to be without merit. The last group of cases mentioned by the Court are those that may be disposed of justly on the merits, without a trial. In order to assess whether or not a case can be determined justly through a summary judgement motion, the Court must determine if a “full appreciation” of the evidence and issues can be achieved by way of summary judgment, or if it can only be achieved by way of a trial.

In evaluating the impact of the new Rule 20 on Ontario’s litigation landscape, it was clear that the Court of Appeal recognized the continued importance that trials have in the civil justice system and the importance of keeping the interests of justice in mind when exercising judicial discretion on summary judgment motions. The Court noted that it is the trial judge who “participates in the dynamic of a trial, sees witnesses testify, follows the trial narrative, asks questions when in doubt as to the substance of the evidence, monitors the cut and trust of the adversaries and hears the evidence in the words of the witnesses.”3

The new summary judgment rule is distinct and separate from a trial of any kind, and the possibility of oral evidence is only a tool to be used by the Court to evaluate whether or not the evidence can be “fully” appreciated and the matter can be resolved by way of a motion for summary judgment. The Court noted that “unless full appreciation of the evidence and issues that is required to make dispositive findings is attainable on the motion record – as may be supplemented by the presentation of oral evidence…the judge cannot be ‘satisfied’ that the issues are appropriately resolved on a motion for summary judgment.”4 It follows that for the majority of complex cases involving significant credibility or conflicting expert opinions, a summary judgment motion is likely to be inappropriate, even if the record is supplemented with limited oral evidence. Rather, a “full appreciation” of the evidence and opinions will likely require a trial, including full explanation and cross-examinations of the medical opinions.

The Court’s clarification of the type of oral evidence envisioned by the new Rule 20 strengthens the interpretation that very complex medical cases are likely going to be found to be inappropriate for summary

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2 See for example, Chaszewski Estate v. 528089 Ontario Inc. (c.o.b. Whitby Ambulance Service), [2011] O.J. No. 2512 (Sup. Ct.), where a defence expert was preferred for relying on statistical evidence not commented on by the plaintiff’s expert. This decision, however, was overturned on appeal in the Court’s decision released February 13, 2012, see 2012 ONCA 97.
3 Ibid at para 47.
4 Ibid at para 55.
judgment in the ordinary course. The Court determined that “the discretion to direct the calling of oral evidence on the motion amounts to no more than another tool to better enable the motion judge to determine whether it is safe to proceed with a summary disposition rather than requiring a trial.”5 A party must still be in a position to present its case on a paper record. If unprepared to do so – or if counsel believes that the evidence is best explained orally by an expert to a trier of fact – then summary judgment is not the proper procedural route to a determination of the case on the merits. As part of the trial “dynamic”, it is imperative that the trier of fact fully comprehend the technical issues in dispute, and that counsel be permitted to present evidence from diverse medical witnesses in a sequence that will allow the trier of fact to develop an intimate understanding of the issues prior to reaching a decision. A summary judgment motion fails to allow counsel that opportunity and would arguably fail to afford the trier of fact the opportunity to fully comprehend all the intricacies of the evidence.

The Court also took note of the fact that not all cases are ready to put their “best foot forward” early on in the litigation process. “It will not be in the interest of justice to exercise the rule 20.04(1) powers in cases where the nature and complexity of the issues demand that the normal process of production of documents and oral discoveries be completed before a party is required to respond to a summary judgment motion.” Medical cases and other complex technical cases often require an expert to review the facts of the case at multiple stages to update their opinions and to guide counsel. An expert opinion will generally need to be updated after examinations for discovery have been conducted, or after further and more thorough medical evidence has surfaced on the injuries of the plaintiff. Cases based on the credibility of plaintiffs or defendants on, for example, what was said about symptoms, follow-up, or required testing, will often require consideration of multiple analyses, each depending on what evidence is eventually found to be credible. A full appreciation of such evidence will most often require the full scope of the ordinary procedure litigation process, making an early summary judgment motion an ill-fit tool to resolve the dispute.

The contextual approach taken by the Court of Appeal is a balanced approach to the powerful new tools held by summary judgment motion judges. The Court recognized the need to ensure that these motions become an effective tool to clear the civil justice court calendars of cases where it is just to do so. Where, however, the nature of the evidence is complex, or where an assessment of credibility would require a full trial and participation of the judge in the trial “dynamic”, the Court has recognized that the trial process remains the best and most just method to determine the dispute.

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5 Ibid at para 60.