Summary Judgment – Not Dead Yet?

Updated Jan. 24, 2014

Note: This commentary was written before the Jan. 23, 2014 decision of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC7, which substantially changed the law with respect to summary judgment. As a result, the commentary below and the cases cited must be read with caution.

Read our newer commentary on *Hryniak v. Mauldin*.

A great deal of interest was generated among the litigation bar following the decision of the Ontario Court of Appeal in *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 as how lower courts would interpret this decision. Would *Combined Air* have a chilling effect on motions for summary judgment? At least two very interesting subsequent decisions would seem to indicate that summary judgment is alive and well in Ontario.

Diebel v. Cox and Hordyk, 2012 ONSC 599 was a dispute between two sets of codefendants arising from a three vehicle collision. The Cox vehicle rear-ended the stopped Diebel vehicle pushing it into the path of the Hordyk vehicle. Hordyk moved for summary judgment dismissing the claim. At the opening of the motion, the plaintiff consented, but Cox opposed.

The plaintiff had expert evidence that Hordyk was driving at 90 to 95 kph, 10 to 15 kph above the posted 80 kph speed limit and that Hordyk had reacted properly and did not have sufficient time to avoid the collision. The plaintiff, who was an OPP officer testified that traffic on that stretch of road normally travelled at 10 to 15 kph over the limit and he would not have ticketed a driver for doing so.

Hordyk also had a report from an accident reconstruction expert who said that the plaintiff's injuries would have been similar to those he if fact sustained even if Hordyk had been traveling at the posted speed limit.

Hordyk therefore argued that the evidence was that he could not have avoided the collision and his speed in excess of the posted limit was not a contributing factor to the plaintiff's injuries.

Counsel of behalf of Cox argued that these were both triable issues.

Justice Flynn held that the only way that Cox could dispute the conclusions of the expert reports of the other two parties was to proffer expert reports of his own. As he had not done so, he had not "put his best foot forward", and the court was entitled to decide the matter on the basis of the

uncontradicted evidence in the expert reports before it. As a result, the court granted summary judgment in favour of Hordyk.

One wonders if this raises the bar for "putting ones best foot forward"? Is the responding party obliged to respond in kind at a motion for summary judgment to all expert reports of the moving party?

Secondly, is a court necessarily obliged to accept conclusions in an expert report even if they are uncontradicted by another expert? Can a court not simply reject all or part of an expert's opinion on its own hook?

Further, the report of the expert itself would not be evidence at trial, only the testimony of the expert would be, and that would be tested by cross-examination. It may very well be that at trial counsel for Cox would have been able to discredit the expert testimony by cross-examination without tendering his own expert.

Should the experts whose reports were tendered have been called by Cox as witnesses on a motion to be cross-examined? Would failure to do so be a failure to put one's best foot forward?

This case strikes me as putting a rather heavy and unfair onus on a respondent to a motion for summary judgment and it will be interesting to see if the Court of Appeal opines on these issues at a future date.

Bhattacherjee v. Marianayagam et al, 2013 ONSC 40 was also a dispute between two sets of codefendants involving a t-bone intersection collision between their two vehicles. The northbound defendant ("G") claimed to have entered the intersection on a green light, whereas the driver ("M") of the westbound vehicle in which the plaintiff was a passenger claimed to have entered the intersection on a amber signal, which, if true, would have meant the light was red for G. The plaintiff took no position on the motion.

This is not the sort of fact situation one would have thought to be ripe for a summary judgment motion. However M had pleaded guilty in traffic court to a charge of "Disobey Traffic Signal – Red" under s. 144(18) of the *Highway Traffic Act*. Notwithstanding the fact that M testified that she had done so on legal advice to plea bargain down the original charge of Careless Driving, Justice O'Connor found this amounted to an issue estoppel and was determinative of the issue as to whether M's vehicle had entered the intersection on a red light.

The court held that G, who had entered on a green light, could not be held even one per cent liable and there were no remaining issues of fact to be found at a trial. The court therefore awarded summary judgment in favour of the defendant G.

Again, it seems a bit unfair to G, who may have pleaded to the charge of running the light for purely economic or practical reasons to have this visited on her in the civil suit.

Both of these cases have issues that seem ripe for consideration by the Court of Appeal and it will be interesting to see if they are appealed and what the result might be.