

## Civil Litigation

## FOCUS

## Has Rule 20 transformed summary judgment motions?

It used to be straightforward: was or wasn't there a genuine issue of fact for trial? Some recent Ontario Superior Court decisions have now upset that paradigm — and raised the question of whether motions judges are supposed to resolve spurious factual disputes, or find the facts.

The uncertainty that has crept into the law centres around changes in the summary judgment provisions of the Ontario *Rules of Civil Procedure* as part of former Associate Chief Justice Coulter Osborne's civil justice reform recommendations. The amendments grant motions judges new tools to engage in the formerly prohibited exercises of weighing evidence, evaluating credibility and drawing reasonable inferences from the evidence.

What has become unclear is whether these changes were intended to simply aid motions judges in disposing of factually unsupported claims and defences, or transform the premise of summary judgment motions and even the role of trials and trial judges in Ontario. The two streams of law that have developed since the changes to the Rules took effect were recently canvassed by the Ontario Court of Appeal's Justice Karen Weiler in *Bruno Appliance and Furniture Inc. v. Cassels Brock & Blackwell LLP*, [2011] O.J. No. 263.

In her reasons, Justice Weiler described, on the one hand, the interpretations of Justices David Brown and Sarah Pepall, who have embraced an expansive reading of the cumulative effect of the changes to Rule 20 in *Lawless v. Anderson*, [2010] O.J. No. 2017 and *Canadian Premier Life Insurance Co. v. Sears Canada Inc.*, [2010] O.J. No. 3987. Justice Brown remarked most recently in *Optech Inc. v. Sharma*, [2011] O.J. No. 377 that viva voce evidence called by a motions judge under Rule 20.04(2.2)'s



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mini-trial provision was not a forensic right of a party, “but a decision of the motions judge that seeing and hearing live witnesses would assist in performing the fact-finding exercise now available under Rule 20.04(2.1).”

Justice Weiler noted, on the other hand, in *Cuthbert v. TD Canada Trust*, [2010] O.J. No. 630, Justice Andromache Karakatsanis (as she then was) considered that while the analytical review and the availability of oral evidence had given motions judges new tools, it hadn't changed the focus of the inquiry, writing that it was “not the role of the motions judge to make findings of fact for the purpose of deciding the action on the basis of the evidence presented on a motion for summary judgment.” In her opinion, the changes to the Rule didn't permit substituting “a summary trial for a summary judgment motion.”

While *Bruno* didn't resolve the split in the lower court decisions, there are reasons to doubt the shift in summary judgment practice advocated by Justices

Brown and Pepall was intended by the Civil Rules Committee. In fact, it appears that if the shift was intended, it resurrects an issue long thought to be buried. If motions judges were meant to have the ability to find facts, wouldn't the Civil Rules Committee have expressly drafted that jurisdiction into the Rules?

It's clear Justice Osborne didn't fault the “no genuine issue for trial” test in his report as the source of the perceived dissatisfaction with the former practice, nor did he disparage the absence of a fact-finding power. Instead, he highlighted the difficulties that had arisen from how the Court of Appeal had confined the scope of the analytical powers of the motions judge.

In light of these considerations, it's reasonable to suggest that motions judges hearing summary judgment motions shouldn't seek to read a power to find facts into the Rules.

At least since *V.K. Mason Construction Ltd. v. Canadian General Insurance Group Ltd.*, [1998] O.J. No. 5291 (C.A.) it's been understood, with the exception of affirmative findings on specific points, that if there is no genuine issue requiring a trial, the incidental findings of summary judgment motions judges don't bind subsequent triers of fact.

After unsuccessfully moving for summary judgment, the defendant in *V.K. Mason* appealed out of fear that a trial court would consider itself bound by adverse findings made by the motions judge. In quashing the appeal, the court indicated the fear was unfounded, explaining that such findings were little more than explanations for the motions judge's ruling on whether there was a genuine issue for trial. The court's opinion highlights what has traditionally been at issue on a motion for summary judgment:

the genuineness of factual disputes, not the adjudication of the facts themselves.

Given the current state of the law, practitioners bringing or defending summary judgment motions must now give serious consideration to the possibility of being bound by unexpected factual findings which other tribunals could treat as *res judicata*. The question is, will we see more appeals like the one brought in *V.K. Mason* where parties to a summary motion are concerned about the effect of incidental adverse findings of fact? It is too early to tell, but the issue is one with which practitioners will have to cope while the law remains uncertain.

For now, and as *Bruno* makes clear, it remains to be seen how the Court of Appeal will ultimately interpret the ends to which the new powers granted to motions judges can be directed. It seems clearer that, as the techniques and methods of motions and trial judges converge, the distinction between their roles may, for all practical purposes, be fading away. ■

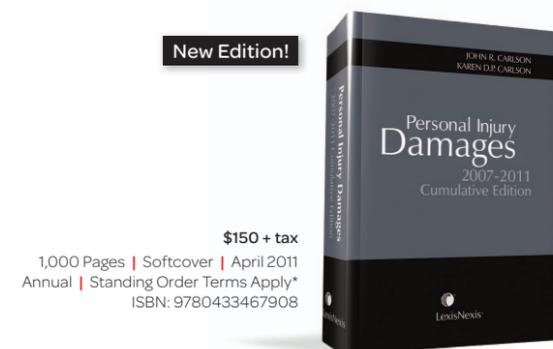
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## Allegations of misconduct require 'full particularity'

Police

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tions for other statutory complaint processes which contain similar provisions?

Subject to clarification by the Supreme Court of Canada, there are other rules which apply to civil claimants seeking police complaint and disciplinary information. In *Mohamed v. Durham Police*, [2011] O.J. No. 1146, as in *Andrushko*, the plaintiff sought production of “any public complaint or discipline files” at the defendant police officers' examinations for discov-

ery. Nothing was pleaded in this regard, however, and the plaintiff had no evidence suggesting that any complaint or discipline history existed.

The court held that, apart from the effect of the *Police Services Act* provisions, the questions were properly refused given the lack of a proper foundation in the statement of claim. As well, the court held, allegations of a history of misconduct cannot be pleaded in a “vague and general” manner. Rather, such allegations require “full particularity,” “commensurate with their level of seriousness.” The decision in *Mohamed* is cur-

rently under appeal.

Disclosure of complaint and disciplinary information is thus by no means automatic, even assuming it is admissible. Until that is clarified, the boundary between complaints and lawsuits against police will no doubt remain a fertile one for issues to arise. ■

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