Court Of Appeal Comes Full Circle In New Decision On “Boomerang” Summary Judgment

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Background

Mr. Drummond was injured when he tripped over a skateboard in a shopping mall that was managed by Cadillac Fairview. He started an occupier's liability action against the defendant. Cadillac Fairview defended the claim by denying that it was negligent and asserted a defence of contributory negligence. It moved for summary judgment dismissing the action brought against it.

The motion judge dismissed Cadillac Fairview's motion for summary judgment. However, the motion judge went on to grant judgment to Mr. Drummond and direct a trial for the assessment of damages.

Cadillac Fairview appealed to the Court of Appeal. The Court allowed the appeal and dismissed Mr. Drummond's action altogether.

Procedural Implications: Boomerang Summary Judgment

Procedurally, *Drummond* appears to retreat from previous decisions that endorsed a practice described by at least one judge as "boomerang" summary judgment. When one party moves for summary judgment on an issue, the "boomerang" reference refers to some courts' willingness – in a context where they are not prepared to grant that party's motion – to go further than dismissing the summary judgment motion by also granting summary judgment on the issue in favour of the other party to the proceeding. Indeed, there have been instances in which a motions judge has done so in the absence of a cross-motion by the other party formally seeking that relief.

This is precisely what occurred in *Drummond*. Mr. Drummond had, however, filed a factum indicating that if the court was prepared to grant judgment, judgment should be granted in his favour. The Court of Appeal was nevertheless critical of the motion judge's recourse to boomerang summary judgment.

But, in *Kassburg v. Sun Life Assurance Company of Canada*, the Court of Appeal upheld a decision in which the motion judge, in rejecting a motion for summary judgment on the basis of one party's assertion that a one year limitation period applied,

went on to grant a declaration in favour of the other party that its action was properly brought within the two year limitation period. The issue of whether the proceeding was out of time even if the two year limitation period applied was a live issue in the underlying litigation. The Court of Appeal in *Kassburg* reasoned, however, that boomerang summary judgment was "[c]onsistent with the decision of the Supreme Court in *Hryniak* and the clear wording and purpose of the summary judgment rule."

Similarly, in *King Lofts Toronto I Ltd. v. Emmons*, the Court of Appeal rejected the appellants' argument that the motion judge had erred in granting boomerang summary judgment in favour of a party "who had not given advance notice of a claim of summary judgment". In that case, the appellants sought summary judgment dismissing a solicitors' negligence claim against them. The motion judge rejected that motion and, in the absence of a cross-motion, granted summary judgment to the respondent on the basis of negligence and directed a trial on the quantum of damages. The Court of Appeal in *King Lofts*, again citing the "culture shift" in the Supreme Court of Canada's decision in *Hryniak*, endorsed boomerang summary judgment, which it said was "in line with the principle of proportionality" in the application of the summary judgment rule. Boomerang summary judgment, in the Court of Appeal's words, reflected "sensible management of the court process".

Most recently, in its 2016 decision in *Meridian Credit Union Limited v. Baig*, the Court of Appeal cited *Kassburg* and *King Lofts* for the proposition that it was "clear that it is permissible for a motion judge to grant judgment in favour of the responding party, even in the absence of a cross-motion for such relief".

Against this backdrop, it is surprising that the Court of Appeal unanimously concluded in *Drummond* that the motion judge's decision to grant boomerang summary judgment in the absence of a formal cross-motion reflected a "lack of procedural fairness" and was a "sufficient basis to allow the appeal". The problem, according to the Court of Appeal, was that the motion judge "failed to put Cadillac Fairview on notice that he might grant judgment against it". This is a difficult statement to square with the Court of Appeal's prior jurisprudence on boomerang summary judgment. The *Drummond* court did not cite any of its decisions in *Kassburg*, *King Lofts* or *Meridian*.

What seemed to trouble in the Court of Appeal in *Drummond* was that, in granting boomerang judgment in favour of Mr. Drummond, the motion judge did not comment on the defence of contributory negligence raised by Cadillac Fairview. While the motion judge may well have erred in this regard, the Court of Appeal's comments about boomerang summary judgment appear to be a broader indictment of that practice – a practice the Court of Appeal itself had formerly approved.

Accordingly, in order to avoid the issue of "procedural unfairness" identified by the *Drummond* court, a party seeking boomerang summary judgment should ensure that it formally seeks that relief by way of a cross-motion.

Evidentiary Implications: Affidavits Based on Information and Belief

Drummond also reiterates a note of caution about the use of hearsay evidence elicited through affidavits on summary judgment motions. Citing a recent decision, the Court of Appeal wrote that "[t]he court must conduct a careful screening of the evidence to

eliminate inadmissible evidence. The court should not give weight to evidence on a summary judgment motion that would be inadmissible at trial."

Under the *Rules of Civil Procedure*, hearsay affidavit evidence based on the affiant's "information and belief" may be tendered on motions, so long as the "source of the information and the fact of the belief are specified in the affidavit". The *Rules* also provide, however, that on the hearing of a summary judgment motion, "the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts".

In practice, affidavit evidence based on "information and belief" is regularly utilized on summary judgment motions. Courts hearing summary judgment motions have occasionally had a tendency to admit such evidence – even on core disputed questions raised on the motion – without engaging in the same kind of rigorous admissibility inquiry that is expected at trial.

In *Drummond*, Mr. Drummond deposed that his daughter had informed him that she had seen the owner of the skateboard playing with the skateboard on the floor with his feet. He also deposed that his fiancé had informed him of discussions she had had with two unidentified members of the shopping mall's cleaning staff, one of who had apparently told the skateboard owner to stop playing with his skateboard. In characterizing the evidence of Mr. Drummond's daughter and fiancé as going to "the heart of the plaintiff's negligence claim", the Court of Appeal held that the motion judge "erred in law by admitting that hearsay evidence", and cautioned motion judges in the following terms:

"If the evidence on information and belief in an affidavit goes to a fundamental contested aspect of the summary judgment motion, the motion judge should first determine whether the evidence would be admissible under the rules governing admissibility at trial. If the evidence meets those criteria, it is admissible on the motion. If the evidence does not meet the criteria for admissibility at trial, the onus should fall on the party proffering the evidence to justify some expansion of the rules governing admissibility in the context of the motion."

Here, the motion judge failed to offer any explanation as to why his daughter or fiancé could not have sworn their own affidavits.

The Court of Appeal's decision in *Drummond* serves as a reminder that the rules of evidence do not go out the window on a summary judgment motion – particularly where the evidence goes to the "heart" of the claim. Counsel eliciting evidence on core, contested issues in the context of a summary judgment motion should do so through primary witnesses. If the information is to be introduced into evidence through an affidavit based on "information and belief", the affidavit should anticipate the court's potential concerns with the quality of this evidence, and provide a basis for justifying to the court why the primary witnesses are unable to swear their own affidavits.

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