

Partial Summary Judgment – An Option No More?

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Over five years after its release, it seems almost trite to say that the Supreme Court's decision in *Hryniak v. Mauldin*¹ was intended to facilitate efficiencies and cost-effectiveness in the adjudication of civil matters through the use of summary judgment motions. Indeed, the Supreme Court quite explicitly alluded to courts needing to change their practices in order to further access to justice through the effective use of such motions.

A question that has arisen recently, however, seems to be the extent to which those judicial directives apply to cases where “partial summary judgment” is sought.

Farooqi v. Lorenzo – Court Refuses to Schedule Motion

In *Farooqi v. Lorenzo*², a case involving a multi-party motor vehicle accident, Justice D.A. Wilson was faced with a defendant tow truck driver seeking to bring what Her Honour termed a “partial summary judgment motion” for an order that no liability rested with the tow truck driver and dismissing the action against him only.

The tow truck driver had attended at the scene of an accident and had been talking to the main plaintiff when a collision between co-defendant vehicles caused a co-defendant vehicle to hit the plaintiff.

Although the plaintiffs, a co-defendant and a third party intended to consent to the motion, one set of co-defendants intended to oppose the motion.

Justice Wilson refused to schedule the summary judgment motion sought. Relying on *Hryniak* and Court of Appeal authorities, Her Honour indicated that such motions for partial summary judgment ought to only be considered in rare cases and that a dismissal against only the one defendant risked creating duplicative proceedings or inconsistent findings of fact.

Justice Wilson's decision in *Farooqi* appears to stand at odds with a number of appellate authorities including, perhaps arguably, *Hryniak* itself.

While the Supreme Court in *Hryniak* did indeed speak to the risk of duplicative proceedings or inconsistent findings of fact in partial summary judgment cases where claims against some of the parties would proceed to trial in any event, the Court went on to note that “the resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach.”³

Court of Appeal Authorities

Subsequent to *Hryniak*, the Ontario Court of Appeal has also weighed in on the issue of partial summary judgment. In *Butera v. Chown, Cairns LLP*⁴, an appeal of a motion granting partial summary judgment dismissing only certain claims of misrepresentation against the defendants, the Court of Appeal appeared to express wariness about partial summary judgment.

The Court noted that the issue ought to be considered from the perspective of whether there was a risk of duplicative or inconsistent findings at trial and whether partial summary judgment was advisable in the context of the litigation as a whole.

The Court went on to point out a number of problems posed by partial summary judgment motions that would seem counter to the objectives of *Hryniak*, including delay in resolution of the main action, expense, and judicial burdens.

That said, while the Court in *Butera* noted that the partial summary judgment motion course should be considered a rare procedure, the Court did indicate its appropriateness in cases with “an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost effective manner.”⁵

In *Larizza v. Royal Bank of Canada*⁶, an appeal of a motion granting partial summary judgment by dismissing the action against two of the defendants, the Court of Appeal seemingly affirmed the appropriateness of such partial summary judgment in clear cases with standalone claims readily separable from the balance of the case.

The Court endorsed partial summary judgment where the motion judge is satisfied that the issues can be readily bifurcated from those in the main action and addressed in a focused and cost-effective manner.

Most recently, in *Extreme Venture Partners Fund LLP v. Varma*⁷, another appeal of a motion granting partial summary judgment and dismissing the plaintiffs’ claim against only one of several defendants, the Court of Appeal dismissed the appeal on various grounds. The Court rejected an argument that the case was not proper for partial summary judgment.

The Court noted, in fact, that the issue was *not* partial summary judgment “as the claim against the respondent was dismissed in its entirety.” While this comment would seem inconsistent with the Supreme Court’s comments in *Hryniak* (noted above), the Court did point out that the motion judge did not err given that the claim against the respondent “could be determined on a discrete legal issue pertinent only to the liability of the respondent”.⁸

Commentary

In light of these appellate authorities, Justice Wilson’s decision in *Farooqi* to not even schedule the sought partial summary judgment motion, on what was acknowledged to be a limited factual record before her, seems unexpected.

One questions how the defendant tow truck driver could face liability in the circumstances of the case as described. Arguably, that defendant’s liability is a discrete and extricable issue.

While the opposing co-defendants alluded to forthcoming expert engineering evidence on the issue of liability, that in itself hardly amounted to evidence of liability on the defendant tow truck driver. Certainly, the forthcoming evidence ought not to have precluded the mere scheduling of the requested motion.

Moreover, if the Court of Appeal’s decision in *Extreme Venture Partners Fund LLP* were to be relied on, the requested motion before Justice Wilson might not even be considered partial summary judgment.

Ultimately, although *Farooqi* may pose somewhat of a barrier, it would appear that partial summary judgment remains available in clear cases of extricable issues from the remaining litigation, with minimal risks of duplicative proceedings or inconsistent findings of fact.

For example, partial summary judgment should be considered the appropriate course in some multi-vehicle accident cases (where it is clear that one or more drivers was not involved in the accident and/or is clearly not liable), missed limitation period cases, cases where an incorrect party has been named, and in some cases involving different causes of action against different defendants (e.g., occupiers’ liability claims against some defendants and motor vehicle negligence claims against other defendants).

Consistent with *Hryniak*, the dismissal of an unnecessary defendant can significantly advance access to justice and be the most proportionate, timely and cost-effective approach. It can reduce litigation costs; it can focus the remaining parties on the real issues in dispute, thereby increasing the potential for settlement; and it can shorten the length of trials, thereby saving judicial resources.

It is respectfully submitted that courts should embrace an approach where proceedings can be reasonably streamlined and efficiencies can be created.

¹ 2014 SCC 7.

² 2019 ONSC 2547.

³ *Ibid* at para 60.

⁴ 2017 ONCA 783.

⁵ *Ibid* at para 34.

⁶ 2018 ONCA 632.

⁷ 2019 ONCA 446.

⁸ *Ibid* at para 9.