

Summary Judgment: A Comparative and Critical Analysis

W.A. Bogart

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SUMMARY JUDGMENT: A COMPARATIVE AND CRITICAL ANALYSIS*

By W. A. BOGART**

I. INTRODUCTION	553
II. THE DEVELOPMENT OF SUMMARY JUDGMENT	554
III. RULE 33: A CASE OF ARRESTED DEVELOPMENT	557
A. Introduction	557
B. Deficiencies of Rule 33	559
1. The Narrowness of the Scope of the Rule	559
2. The Confusion in Interpreting Rule 33	560
3. The Use of the Rule to Obtain Pre-Pleading Discovery	563
4. The Rule Operates only at the Initial Stage of the Action	563
C. Originating Notice of Motion	564
D. Summary of Reform of Rule 33	565
IV. ENGLISH ORDER 14 AND ITS PROGENY	565
A. English Order 14	565
B. Progeny	570
V. RULE 56 AND ITS PROGENY	575
A. Introduction	575
B. Rule 56: Decisions of Courts and Observations of Commentators	578
C. Some Empirical Data on Rule 56	582
D. Summary Judgment in the State Courts	586
E. How Does Rule 56 Really Function?	589
VI. THE PROPOSAL OF THE CIVIL PROCEDURE REVISION COMMITTEE OF ONTARIO	596
VII. RECOMMENDATIONS AND CONCLUSIONS	598

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** Associate Professor of Law, University of Windsor.

I. INTRODUCTION

The difficulty with civil procedure in Canada is that it is not taken seriously. A recurring theme in Canadian legal literature is the need for the development of a truly Canadian jurisprudence and a Canadian view of law.¹ Academics are continually exhorted to produce more and better works on various areas of Canadian law.² Civil procedure is, however, one subject which has almost always been left out in any serious discussion of how legal academic research and writing can be improved and expanded. Although there has been some writing in the area of civil procedure³ and some recent projects,⁴ research and writing about civil procedure and the administration of justice reflect a meagre record even set against the comparatively undeveloped background of Canadian legal research in general.⁵

This paper will provide a specific example of the consequences of the failure to adopt an analytical and purposive approach in Canada, and more particularly in Ontario, to civil procedure. Summary judgment should hardly be an exotic or arcane subject to anyone interested in civil procedure and the administration of justice. It seems virtually axiomatic that trials should not be held to dispose of cases where it can be demonstrated prior to the trial that the essential facts are not in dispute. This axiom is the rationale for the development of a smoothly functioning summary judgment procedure. In Canada, however, this fundamental proposition has not been the basis for summary judgment. In Ontario particularly, the idea of a sophisticated summary judgment mechanism seems never to have taken hold; instead, the basic mechanism for dealing with pre-trial judgments, Rule 33, is an elaboration of a provision contained in a mid-nineteenth century English statute enacted to facilitate debt collection. It seems astonishing, though perhaps not so astonishing given the paper's initial comments, that no one has ever written a critique of the Ontario provision, if only to point out that it is seriously out of step with its English, and even more so with its American, counterparts.

This paper will examine summary judgment and suggest that reform in Canada is badly needed. In this regard, Rule 33 of Ontario will receive the

¹ Arthurs, *Paradoxes of Canadian Legal Education* (1976-77), 3 Dal. L.J. 639 at 650.

² See, e.g., Arthurs, *id.*; *To Know Ourselves: The Report of the Commission on Canadian Studies* (Symonds Report) (Ottawa: Ass'n of Universities and Colleges of Canada, 1975); Lederman, *Canadian Legal Education in the Second Half of the Twentieth Century* (1971), 21 U. Toronto L.J. 141; Veitch and MacDonald, *Law Teachers and Their Jurisdiction* (1978), 56 Can. B. Rev. 710.

³ E.g., Williston and Rolls, *The Law of Civil Procedure* (Toronto: Butterworths, 1970), a two-volume work which is primarily descriptive of the existing *Rules of Practice* in Ontario; Watson, Borins and Williams, *Canadian Civil Procedure: Cases and Materials* (2d ed. Toronto: Butterworths, 1977); Gertner, ed., *Studies in Civil Procedure* (Toronto: Butterworths, 1979).

⁴ See, e.g., Ontario Law Reform Commission, *Fourteenth Annual Report* (Toronto: Min. of the A. G., 1980-81) for a description of its class action project.

⁵ See the list of recently published Canadian texts listed in Veitch and MacDonald, *supra* note 2, at 713 nn. 14 and 15.

most attention since it is perhaps the best example, both in terms of its expression and its actual use, of what is wrong with summary judgment. The paper will also suggest that, in addition to providing a new mechanism for summary judgment, the courts must be persuaded to alter their position away from adherence to a philosophy which stipulates that, except in the clearest of cases, parties should have a right to a trial. The courts should recognize that the need to advance the administration of justice and to prevent the party moving for summary judgment from being subjected to the costs and delay of a full trial before the case is disposed of may outweigh, in some cases, the predilection to permit a full trial to dispose of a lawsuit.

In order to develop fully the ideas outlined above, the paper will proceed as follows. The next section of the paper will briefly sketch the development of summary judgment in England, Canada, and the United States. This background will describe the genesis of modern summary judgment procedures and will also indicate that Ontario, while at one point within the mainstream of summary judgment procedures, became in the 1920s a victim of arrested development and did not, unlike England and the United States, continue to refine and develop a more sophisticated summary judgment mechanism. The third section of the paper will focus on Rule 33 as it exists in Ontario and will discuss in detail its shortcomings. Sections four and five contain a full discussion of the present English and American provisions for summary judgment. These provisions will be discussed as existing alternatives to Rule 33. As will become clear, the paper prefers the American approach but will suggest that that approach may also be improved and may be revised for Canadian usage. In section six a recent draft rule suggested by the Civil Procedure Revision Committee of Ontario will be discussed. In the last section the paper offers its own analysis of summary judgment and how it should be utilized.

II. THE DEVELOPMENT OF SUMMARY JUDGMENT

The origins of summary judgment can be traced to Roman Law and to the medieval period.⁶ In the American states⁷ and in England prior to 1855,⁸ there were also some attempts to develop mechanisms for dealing with claims without the necessity of a trial. Modern summary judgment procedures, however, are usually taken to have their origins in an English Act,

⁶ Millar, *Three American Ventures in Summary Civil Procedure* (1928-29), 38 Yale L.J. 193.

⁷ *Id.*; Clark and Samenow, *The Summary Judgment* (1928-29), 38 Yale L.J. 423 at 463-66.

⁸ Greenbaum and Reade, *The King's Bench Masters and English Interlocutory Practice* (Baltimore: Johns Hopkins Press, 1932) 76 *et seq.* A detailed history of early developments in England and on the continent is contained in Bauman, *The Evolution of The Summary Judgment Procedure, An Essay Commemorating the Centennial Anniversary of Keating's Act* (1955-56), 31 Ind. L.J. 329; see also Sunderland, *The English Struggle for Procedural Reform* (1925-26), 39 Harv. L. Rev. 725 and Branda, *Summary Judgment in the Federal Courts* (1950-51), 99 U. Pa. L. Rev. 212.

the *Summary Procedure on Bills of Exchange (Keating's Act)*.⁹ The purpose of *Keating's Act* was indicated clearly by its preamble:

Whereas bona fide holders of dishonoured Bills of Exchange and Promissory Notes are often unjustly delayed and put to unnecessary Expense in recovering the Amount thereof by reason of frivolous or fictitious Defences to Actions thereon, and it is expedient that greater facilities than now exist should be given for the Recovery of Money due on such Bills and Notes. . . .¹⁰

The *Act* contained a procedure to obtain judgment against debtors who sought delay of payment by raising spurious defences.¹¹

By the *Judicature Act, 1873* and later by the *Rules of the Supreme Court, 1883*, the procedure was extended to cover cases where the plaintiff sought to recover a debt or liquidated demand in money.¹² In addition to the claim being for a debt or liquidated demand, the claim had to fall within one of six categories.¹³ In order to obtain summary judgment the plaintiff had to issue a specially endorsed writ (but no statement of claim or complaint) containing a claim within one of the six categories.¹⁴ After the defendant appeared to the specially endorsed writ, the plaintiff could, on affidavit made by himself or by any person who could swear to the facts, apply to a judge for final judgment.¹⁵ Unless the defendant could by affidavit, by his own *viva voce* evidence, or by other means satisfy the court that there was a good defence on the merits or disclosed facts which would be deemed sufficient to entitle him to defend, the court could enter judgment.¹⁶

⁹ 1855, 18 & 19 Vic., c. LXVII; Casson and Dennis, eds., *Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice* (21st ed. London: Stevens, 1975) [hereinafter *Odgers'*]. Before *Keating's Act*, a defendant who was sued could force a trial, even for such clear cases as the price of goods sold, by simply putting upon the record a plea, no matter how meritless. Gradually, the complaints of bankers and holders of bills in London became so intense against the abuse by defendants that *Keating's Act* was passed in 1855.

¹⁰ Quoted in Clark and Samenow, *supra* note 7, at 424.

¹¹ Bauman, *supra* note 8, at 337 *et seq.*; Louis, *Federal Summary Judgment Doctrine; A Critical Analysis* (1973), 83 Yale L.J. 745 at 745.

¹² *Odgers'*, *supra* note 9, at 61; Clark and Samenow, *supra* note 7, at 424 *et seq.*

¹³ *Id.* at 425. The six categories were for

. . . all actions where the plaintiff seeks to recover only a debt or liquidated demand in money, payable by the defendant, with or without interest, arising:

(A) on a contract, express or implied (as for instance on a bill of exchange, promissory note or check, or other simple contract debt); or

(B) on a bond or contract under seal for the payment of a liquidated amount in money; or

(C) on a statute where the sum sought to be recovered is a fixed sum or in the nature of a debt other than a penalty; or

(D) on a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand only; or

(E) on a trust; or

(F) in actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant.

¹⁴ *Id.* at 428-36.

¹⁵ *Id.*

¹⁶ *Id.*

As might be supposed, there were many difficulties with the mechanism; for example, there was the need to constantly interpret the meaning of "debt or liquidated demand." Any problems this mechanism had are shared by Rule 33 as it exists in Ontario. Therefore, a review of these difficulties will be deferred until Rule 33 is discussed in detail. In 1937 the procedure was significantly altered and made applicable in the Queen's Bench Division to all actions except a few that were specifically enumerated.¹⁷ With the alteration and broadening of the mechanism, the English introduced a modern version of summary judgment which is still being used and which has inspired similar mechanisms in other jurisdictions.¹⁸ The paper will later discuss the modern English practice in more detail as a present alternative to summary judgment in Ontario.

Across Canada, Ontario,¹⁹ New Brunswick, Nova Scotia, British Columbia, Saskatchewan, Manitoba and Alberta adopted at an early date a procedure similar to the English procedure.²⁰ Quebec had a summary judgment procedure applicable to specific kinds of cases but the procedure did not resemble the English model.²¹ The Canadian experience up to the mid-

¹⁷ Odgers', *supra* note 9, at 61-62.

¹⁸ See the discussion of provisions in British Columbia, Alberta and Nova Scotia in Section IV. B. of the paper.

¹⁹ Ontario procedure appears to have been initiated in 1881. Revisions were made in 1893, 1913 and by 1927, Rule 33 provided that:

the writ, of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, where the plaintiff seeks to recover a debt or liquidated demand in money (with or without interest, and whether the interest be payable by way of damages or otherwise), arising

(a) Upon a contract, express or implied (as for instance on a bill of exchange, promissory note, check, or other simple contract debt); or

(b) On a bond or contract under seal for the payment of a liquidated sum or on a judgment; or

(c) On a statute where the amount sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(d) On a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand; or

(e) On a trust, and also

(f) In actions for the recovery of land (with or without a claim for rent or mesne profits);

(g) In actions for the recovery of chattels; and

(h) In actions for foreclosure or sale.

While Rule 33 was (and still is) very similar to the procedure under the initial English rule, one difference was that under Rule 33 the plaintiff was not required to file an affidavit; only the defendant was required to file one when he appeared. If he did not file an affidavit, the plaintiff was entitled to default judgment. Upon the affidavit being filed the plaintiff could cross-examine or simply move for judgment. Judgment would be granted if the court was not satisfied that the defendant had a good defence. Clark and Samenow, *supra* note 7, at 436-39; Taylor and Ewart, *The Judicature Act and Rules 1881, and Other Statutes and Orders Relating to the Practice of The Supreme Court of Judicature for Ontario With Notes* (Toronto: Carswell, 1881); Rankin, ed., *Holmsted and Gale on The Judicature Act of Ontario and Rules of Practice* (Toronto: Carswell, 1982) (annotated) a four-volume work [hereinafter Holmsted and Gale].

²⁰ Clark and Samenow, *supra* note 7, at 439-40.

²¹ *Id.*

1920s, particularly that of Ontario, led one commentator to cite that it was a valuable precedent for developing a summary judgment procedure for the United States.²²

In America, apart from some very early attempts at developing a summary judgment mechanism,²³ many of the states initially, at least, were strongly influenced by the original English practice.²⁴ Other states adopted more restricted versions of the English practice.²⁵ Virginia and Indiana, two of the early experimenters, did have procedures that were theoretically applicable, generally, to all causes of actions. The Virginia procedure, however, was highly informal and it depended upon a great deal of judicial discretion for implementation. In Indiana, the procedure was weak and undeveloped.²⁶ Finally, in some states there were curious provisions providing for summary judgment if certain kinds of individuals, usually some kind of public officials, were sued.²⁷

Conspicuously, summary judgment did not develop in the Federal Court of the United States until 1938 when Federal Rule 56 was promulgated.²⁸ Rule 56 ushered in a new and expansive approach to summary judgment. Since the Rule provides a functioning alternative to Ontario's Rule, it will be given a detailed examination after Rule 33 has been examined and criticised more fully.

III. RULE 33: A CASE OF ARRESTED DEVELOPMENT

A. Introduction

The entire text of Rule 33 is set out as Appendix A to the paper.

The deficiencies of Rule 33 may be stated briefly: (a) the scope of the Rule is too narrow—(i) it applies only to limited kinds of actions and relief, (ii) it is not available to the defendant and (iii) it likely cannot be used where difficult and complicated questions of law arise; (b) the Rule itself has been interpreted in confusing and confining ways so that it is diffi-

²² *Id.* at 439.

²³ Millar, *supra* note 6.

²⁴ Clark and Samenow, *supra* note 7. The authors discuss the summary judgment procedure adopted in Connecticut, New Jersey, New York, Michigan, District of Columbia, Illinois, Delaware, Pennsylvania, Indiana, Virginia, West Virginia, Alabama, Kentucky, Arkansas, Tennessee and Missouri.

²⁵ See, e.g., the discussion in Clark and Samenow, *supra* note 7, of the early New York and Michigan procedures.

²⁶ *Id.* at 462-63.

²⁷ *Id.* at 466 *et seq.*

²⁸ By federal legislation known as the *Conformity Act* (June 1, 1872, c. 255, §5, 17 Stat. 197; Rev. Stat. §914), summary judgment was available at law in Federal Court prior to 1938 but only in states which had provided for it. Moreover, there was no comparable mechanism in equity suits since the federal equity rules did not provide for summary judgment. Wright and Miller, 10 *Federal Practice and Procedure* (St. Paul: West, 1973) at 365.

cult to know what actions will be deemed to fit within the Rule; (c) the Rule is subject to abuse by plaintiffs who have claims that come within the Rule but clearly are not appropriate for summary judgment and who use the Rule to obtain pre-pleading discovery of defendants; and (d) the Rule restricts summary judgment to the preliminary stages of the action only.

A plaintiff who wishes to assert a cause of action falling within Rule 33 need only issue a specially endorsed writ of summons which states the claim as it comes under one of the twelve categories of Rule 33(1). Indeed, there is a special form stipulated to be used that reflects these categories.²⁹ Once the specially endorsed writ is served, the defendant has fifteen days to enter an appearance and file an affidavit of merits in reply.³⁰

Before the defendant decides to file an affidavit of merits he may move to strike out the writ as improperly endorsed. The motion, which is brought before a master, may be made on two grounds: that the claim does not fall within Rule 33 or that the writ is improper for lack of particularity.³¹ The second ground is relatively unimportant since an endorsement, otherwise proper, can be amended to give sufficient particulars.³² The first ground, however, has given rise to literally hundreds of cases attempting to interpret the Rule, some of which will be reviewed below in the part of the paper discussing the scope of the categories.

If the defendant fails to enter an appearance and file an affidavit of merits, the plaintiff may proceed to sign judgment (purely a clerical act) and issue execution against the defendant to satisfy the judgment.³³ If the defendant does enter an appearance and does file an affidavit of merits (except in the limited circumstances where he is exempted from filing an affidavit),³⁴ the plaintiff may either move for judgment immediately or may cross-examine the defendant upon his affidavit and then move for judgment³⁵ before a master.³⁶

The court will give judgment to the plaintiff where it is "... satisfied that the defendant has not a good defence to the action or has not disclosed such facts as may be deemed sufficient to entitle him to defend the action. . . ."³⁷ If judgment is refused the suit thereafter proceeds as a normal action.³⁸

²⁹ R.R.O. 1980, Reg. 540, r. 817. See Form 8a provided therein.

³⁰ *Id.*, r. 35(1) and r. 42(1).

³¹ Williston and Rolls, 1 *The Law of Civil Procedure* (Toronto: Butterworths, 1970) at 297 [hereinafter 1 Williston and Rolls].

³² *Id.*

³³ R.R.O. 1980, Reg. 540, r. 51.

³⁴ *Id.*, r. 42(3).

³⁵ *Id.*, r. 58(1).

³⁶ *Id.*, r. 209 and r. 210.

³⁷ *Id.*, r. 58(2).

³⁸ 1 Williston and Rolls at 297.

B. Deficiencies of Rule 33

1. The Narrowness of the Scope of the Rule

It will be obvious from a reading of the rule, that quite apart from the claim having to be a "debt or liquidated demand" (in the categories (a)-(i)), it is necessary for the claim to come within one of the twelve categories. If the claim does not come within one of the twelve categories it simply cannot be specially endorsed, even if it is clear that the plaintiff has an unanswerable claim against the defendant for a sum of money or for some other form of relief such as a declaration or an injunction. This narrowness of the Rule means that other actions where the facts are not essentially in dispute cannot be subject to a procedure during the initial stages in the suit to test whether there is a necessity for a trial. Since the purpose of a trial is to establish facts, where the facts are not in dispute, it should not be necessary to have a trial. This simple proposition, which underlies any sophisticated summary judgment mechanism, is utterly without expression in Rule 33. Instead, the Rule proceeds by categorization.

While the categories often do reflect classes of cases where the facts are not likely to be in dispute this is by no means always the case. Certain kinds of tort cases, suits over real estate transactions, contract cases and civil rights cases³⁹—cases which have been subject to summary judgment in other jurisdictions⁴⁰—could, upon analysis by the court, be found to contain no important facts in dispute and therefore be appropriate for summary judgment. Moreover, it is difficult to see why the remedy itself should limit use of summary judgment. If the facts can be ascertained not to be in dispute, why should it matter whether monetary relief is being claimed or an injunction, declaration, specific performance or some other form of relief?

The Rule is obviously too narrow not only because of the limitation as to the kinds of action and remedies but also because it is only available to the plaintiff. It is possible to envision many cases where the defendant could establish that there were no facts in dispute and that the law dictated an outcome in his favour. As will be discussed below, studies of Federal Rule 56, which makes summary judgment available to the defendant, indicate that in fact defendants have sometimes used the Rule more often than plaintiffs.⁴¹ Under Rule 33, however, the most that the defendant can establish is that judgment should not be given for the plaintiff at the point when the plaintiff moves for judgment. The defendant is not allowed to establish that he should have judgment.

The third aspect of the narrowness of the Rule stems from the limits

³⁹ The Ontario Court of Appeal decided that a cause of action for violation of civil rights does exist at common law: *Bhadauria v. Board of Governors of Seneca College of Applied Arts and Technology* (1979), 27 O.R. 142, 80 C.L.L.C. 14,003 (C.A.). However, the Supreme Court of Canada reversed this decision; (1981), 124 D.L.R. (3d) 193. Nevertheless, the *Canadian Charter of Rights and Freedoms*, will, of course, be the basis of many civil rights actions.

⁴⁰ See the discussion, *infra* in Section V.

⁴¹ See note 196, *infra*.

imposed upon the court in deciding questions of law. These limitations, no doubt, are due partly to the fact that the master is deciding these motions and his office is seen as administrative rather than judicial⁴² and also because of the overwhelming reluctance to give judgment⁴³ for whatever reason. Though there is some support for the view that a master can, in fact, entertain questions of law,⁴⁴ there is plenty of support for the view that it is not appropriate to decide questions of law on these motions.⁴⁵ Again, however, if the function that distinguishes a trial from any other court proceeding is to decide facts and the facts are not in dispute, it makes little sense to have a trial to decide questions of law. Once the underlying facts are settled, questions of law, by their nature, do not require a trial to be decided.

2. The Confusion in Interpreting Rule 33

The categories under Rule 33 seem proof positive that the forms of action are not truly dead but continue to live an unexamined existence in the Rules of Practice. Motion after motion is devoted to twisting and contorting the twelve categories in an attempt to make a myriad of circumstances fit within them. Not only have Ontario courts accepted the pigeon-hole structure of the Rule, but they have also embraced its confinements with ardor. In this setting, interpretations of subsections of the rule have been unduly strict. Statements like the following abound:

The Rule has specified precisely the nature of the contracts out of which claims must arise to entitle the plaintiff to specially endorse the writ. The Court is entitled to assume that it was intended to exclude all other kinds of contracts. *Expressio unius est exclusio alterius*. It is a *casus omissus*. One cannot deal with the Rule on a surmise that a broker's claim for indemnity was passed over *per incuriam*.⁴⁶

So strict is the observance of the requirements of the Rule, that it has been held that a writ that has been specially endorsed improperly is a nullity and a judgment obtained under it may be set aside no matter how long the defendant delays, no matter how meritorious or unmeritorious the claim might be, and no matter what the prejudice is to the defendant.⁴⁷ Given this setting, it is evident that the exercise of pigeon-holing a claim has absolutely nothing to do with the merits of the action or even with ascertaining whether the claim is one in which the facts are not sufficiently in dispute so that judgment can be given.

The meaning to be attributed to the generally applicable concept of "debt or liquidated demand" illustrates the almost irrational quality of some

⁴² 1 Williston and Rolls at 478 *et seq.*; see also *Glore v. Foreign Utilities Ltd.*, [1938] O.W.N. 131 (H.C.) and *Orpen v. McCaskey*, [1938] O.W.N. 301 (H.C.).

⁴³ See cases cited in Carthy, Millar and Cowan, *The Ontario Annual Practice 1982* (Agincourt: Can. Law Book, 1982) under r. 58 and in 1 Holmsted and Gale, under r. 58.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Waite, Reid & Co. v. Bader*, [1967] 2 O.R. 84 at 87 (H.C.).

⁴⁷ *Madison Constr. Ltd. v. Shields Constr. Co.*, [1956] O.W.N. 835 (H.C.).

of the interpretations. The expression "debt or liquidated demand" has been described as follows:

The term 'liquidated demand' and the word 'debt' do not necessarily mean the same thing. 'Liquidated demand' may, in some cases, be wider than 'debt'. 'Debt', on the other hand, may include more than 'liquidated demand'. In *Williamson v. Playfair*, a 'liquidated demand' was defined as follows:

"The plaintiff alleges that the defendant has received \$3,400, to which he (the plaintiff) is entitled. If the fact be as the plaintiff alleges, then a jury or the Court must give a verdict for that specific sum, and they could not properly give any more or any less; that, it appears to me, is what is meant by a 'liquidated demand'."

In *Odgers on Pleading and Practice*, the expression was defined as follows:

"...whenever the amount to which the plaintiff is entitled (if he is entitled to anything) can be ascertained by calculation or fixed by any scale of charges or other positive data, it is said to be *liquidated* or 'made clear'.⁴⁸ [footnotes omitted]

The fact that this description requires a "scale of charges" or other "positive data" limits the application of summary judgment in the situations where liability is clear but damages have to be assessed. The notion of "liquidated demand" prevents the Rule from being applied to cases where the obligation of the defendant is clear but there will have to be a comprehensive inquiry into the extent of his liability.⁴⁹

The limitation of claims to "debt or liquidated demand," while obviously constrictive, may be defensible within the narrow viewpoint of the Rule. Many of the additional interpretations given to "liquidated demand," however, are not even defensible from that viewpoint. For example, there are several cases that have held that an endorsement will be improper if any external evidence will have to be introduced to ascertain the precise sum owing.⁵⁰ Accordingly, the plaintiff must be able to demonstrate that the precise amount owing is known or must resort to incredible artifice in drafting the endorsement so that the endorsement, no matter how long and elaborate, can be interpreted as containing within its four corners the means by which the necessary calculations can be made in order to arrive at the precise amount.

On the other hand, even if the amount owing is settled, it has been held that it cannot be the subject of a specially endorsed writ if the amount is to be characterized as "damages" since damages are not included in the concept of liquidated demand.⁵¹ Accordingly, cases involving claims arising out of pre-estimated damages have been held not to come within the rules even though the sums sued for are precisely ascertained.⁵² Likewise, where the

⁴⁸ 1 Williston and Rolls at 284.

⁴⁹ See cases cited in 1 Holmsted and Gale, under r. 33 § 7.

⁵⁰ See, e.g., *McIntyre v. Munn* (1903), 6 O.L.R. 290 (chambers); *Montana v. Corcoran*, [1938] O.W.N. 188 (H.C.).

⁵¹ 1 Williston and Rolls at 288, but compare 1 Holmsted and Gale under r. 33 § 8, which lists cases that support the proposition that damages are not included in the concept of liquidated demand.

⁵² See, e.g., *Gold Dust Corp v. Marquette* (1931-32), 41 O.W.N. 283 (H.C.) and *Jones Neon Displays Ltd. v. Huba*, [1961] O.W.N. 338 (H.C.).

plaintiff sued for the balance of moneys owing under an agreement for purchase of a leasehold interest in certain premises and specially endorsed his claim alleging he was ready and willing to convey and to show good title it was held that this was a claim for damages and specific performance and, for that reason alone, the writ could not be specially endorsed.⁵³ Similarly, where the plaintiff availed himself of an acceleration clause contained in an agreement for the sale of land under which there had been default and sued for the purchase price, it was held that the action was for specific performance or for damages for breach of contract. The claim, therefore, was not liquidated, and the writ was precluded from being specially endorsed.⁵⁴ In a related vein, claims for *quantum meruit* have been ruled to be *per se* excluded⁵⁵ even though there is authority in other jurisdictions that such claims are not to be excluded if the amount involved is liquidated.⁵⁶

The meaning attributed to certain words and phrases within certain specific categories further accentuates the artificiality which now governs the Rule. For example, there are several cases attempting to decide whether "simple contract" in Rule 33(1) (b) and (c) means not under seal⁵⁷ or uncomplicated,⁵⁸ but, none of the cases has suggested that either of the two meanings, by themselves, has much to do with deciding what cases should be disposed of summarily. "Goods" under Rule 33(1) (b) has been held to include electrical energy so that the claim might be specially endorsed.⁵⁹ Under Rule 33(1) (g) a claim for an amount owing pursuant to a Family Court hearing is not specially endorsable even though the sum is certain, because the Family Court in the particular proceeding makes an "order" and an "order" is not a "judgment."⁶⁰ Under Rule 33(1) (h) a claim by a municipality for welfare payments recoverable under the *General Welfare Assistance Act*⁶¹ is properly specially endorsed as a claim upon a statute⁶² but an order made pursuant to the *Deserted Wives' and Childrens' Maintenance Act*⁶³ is not.⁶⁴ An order for the return of a deposit paid to a real estate agent⁶⁵ may be specially endorsed under the *Real Estate and Business Brokers*

⁵³ *Leader v. Tod-Heatly*, [1891] W.N. 38.

⁵⁴ *South Kensington Land Co. v. Harland* (1924), 27 O.W.N. 151 (chambers), and compare *Hood v. Martin* (1882), 9 P.R. 313.

⁵⁵ See the cases cited in 1 Holmsted and Gale under r. 33 § 19.

⁵⁶ See, e.g., *Lagos v. Grunwaldt*, [1910] 1 K.B. 41 (U.K.); *Ben Ginter Constr. Co. v. Celgar Ltd.* (1967), 61 W.W.R. 766 (B.C.S.C.).

⁵⁷ *Cantalia Sod. Co. v. Patrick Harrison & Co.*, [1968] 1 O.R. 169 (H.C.); *Dominion Herb Distrib. Inc. v. Pasen*, [1968] 2 O.R. 203, 69 D.L.R. (2d) 651 (H.C.).

⁵⁸ *Norcom Telecommunications Ltd. v. Northern Telephone Ltd.*, [1965] 2 O.R. 725 (D.C.).

⁵⁹ *Great Lakes Power Co. v. North Can. Enterprises Ltd.*, [1972] 3 O.R. 770 (D.C.).

⁶⁰ *Featherstone v. Featherstone*, [1971] 3 O.R. 474 (master's).

⁶¹ R.S.O. 1980, c. 188.

⁶² *Borough of North York v. Sonne*, [1967] 1 O.R. 475 (master's).

⁶³ R.S.O. 1970, c. 128, rep. by S.O. 1978, c. 2, s. 76.

⁶⁴ *Featherstone*, *supra* note 60.

⁶⁵ *Day v. Caleb* (1974), 5 O.R. (2d) 461 (H.C.).

*Act*⁶⁶ but a claim for vacation pay and for payment in lieu of notice pursuant to the *Employment Standards Act*⁶⁷ may not.⁶⁸

3. Use of the Rule to Obtain Pre-Pleading Discovery

It is clear that it is extremely difficult to obtain judgment on a motion for judgment involving a claim that has been specially endorsed.⁶⁹ The cases are full of statements warning against the granting of judgment except in the clearest of cases. For example, it has been said that: "[t]he plaintiff must make out a case which is so clear that there is no reason for doubt as to what the judgment of the Court should be if the matter proceeded to trial"⁷⁰ and that "[s]hort of a situation following cross-examination on affidavits which completely destroys all facets of the defence, the Master should not deal with it. Furthermore, if there is left open a question of credibility on any branch of the defence which has not been completely destroyed, it should be left to the trial Judge."⁷¹

Although it is difficult to obtain judgment, there are many cases falling into a shadowy area where the plaintiff is within his rights to invoke the procedure under Rule 33. Frequently, a plaintiff will proceed by specially endorsed writ even where it is clear that the defendant has a defence or will at least be able to raise so many questions of fact that a trial is likely.

In these circumstances, plaintiffs proceed in this way in order to gain pre-pleading discovery of defendants. Rule 33 certainly provides no disincentive for this: the defendant is forced to file an affidavit stating his defence, he may be cross-examined on it, he is not able to know in detail what the plaintiff's claim will be (as the plaintiff is not obliged to have his statement of claim prepared) and he may, in cases where the plaintiff has more resources than the defendant, be the victim of a war of attrition. Thus, in the circumstances just described, the special endorsement becomes a mere procedural gimmick, used for a purpose quite different from that originally intended and for a purpose that often has little to do with the merits of the action.

4. The Rule Operates only at the Initial Stage of the Action

A proceeding for summary judgment under a writ that is specially endorsed must operate at the beginning of an action, if at all. This means that if the facts become sufficiently settled at some later stage of the action, the action cannot be submitted to a summary proceeding.

⁶⁶ R.S.O. 1980, c. 431.

⁶⁷ R.S.O. 1980, c. 137.

⁶⁸ *Wulff v. Durham Chair and Store Fixtures Ltd.* (1975), 10 O.R. (2d) 57 (H.C.).

⁶⁹ See the cases listed in OAP under r. 58 and 1 Holmsted and Gale under r. 58.

⁷⁰ *Serpa v. Confederation Life Ass'n* (1974), 3 O.R. (2d) 721 at 722, 46 D.L.R. (3d) 641 at 642 (C.A.), though compare *Bortolussi v. Giulia Construction Limited* (1977), 20 C.P.C. (Ont. Div. Ct.) and *Bank of Montreal v. Cockell* (1981), 20 C.P.C. 1 (Ont. H.C.).

⁷¹ *Can. Imperial Bank of Commerce v. Copeland* (1974), 5 O.R. (2d) 382 at 384 (Div. Ct.).

. A qualification to the above statement is contained in the present Rules 63 and 64:

63. A party may, at any stage of an action, apply for such judgment or order as he may, upon any admissions of fact in the pleadings or in the examination of any other party be entitled to; and it is not necessary to wait for the determination of any other question between the parties.

64. A party may, at any stage of an action, apply for such judgment or order as he may be entitled to where the only evidence consists of documents and such affidavits as are necessary to prove their execution or identity without the necessity of any cross-examination, or, where minors are concerned, and evidence is necessary so far only as they are concerned, for the purpose of proving facts that are not disputed.⁷²

This is of small consequence, however, because Rule 64, by its terms, has a very limited application and there appear to have been no cases which have invoked it. Further, because the operation of Rule 63 turns on an "admission" rather than an adjudication by the court that the facts are essentially not in dispute, its use has been severely confined. Rarely will a party expressly admit to a crucial fact even though an objective assessment of the testimony taken as a whole might lead to the conclusion that those facts have been established.

In addition, the cases are clear under Rule 63 that even if there has been an admission, judgment should not be granted where there is any serious question of law to be argued.⁷³ Again, one may ask why this is so. Once the facts are settled that is precisely the time the law should be decided and applied to the facts—a trial is neither necessary nor useful at that point. In contrast, Rule 124⁷⁴ specifically permits a party to have a point of law that has been raised in the pleadings disposed of before trial and Rule 125⁷⁵ provides that upon the determination of the point of law, the court may pronounce such judgment as is deemed proper.

C. *Originating Notices of Motion*

Finally, before leaving discussion of Rule 33 at this point, some brief mention should be made of originating notices of motion since they are an additional means of obtaining summary disposition of issues, in a limited range of cases. Rules 607 to 621⁷⁶ provide that an individual wishing to have a deed,⁷⁷ will,⁷⁸ contract,⁷⁹ agreement,⁸⁰ or "other instrument"⁸¹ or his rights to the title of land decided may bring an originating notice of motion to

⁷² R.R.O. 1980, Reg. 540.

^{72a} For a case dealing with Rule 63 see *Royal Trust Corporation of Canada v. Zadkovich* (1980), 17 C.P.C. 97 (Ont. H.C.).

⁷³ See the cases listed in OAP under r. 63 and in 1 Holmsted and Gale under r. 63.

⁷⁴ R.R.O. 1980, Reg. 540.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*, r. 611.

⁷⁸ *Id.*

⁷⁹ *Id.*, r. 612.

⁸⁰ *Id.*

⁸¹ *Id.*, r. 611.

have the matter disposed of. In addition certain other statutes specifically provide that originating notices of motion may be brought to decide questions arising under the statutes.⁸²

The advantages of an originating notice of motion are that service of the notice of motion commences the proceedings and that the notice of motion, along with any affidavits (either of the applicant or respondent) which are delivered and any cross-examination thereupon are the basis upon which the questions are decided.⁸³ Theoretically, the hearing can be seven days after the notice of motion is served⁸⁴ although in fact there is usually some delay to provide for cross-examination upon the affidavits. The great limitation upon this procedure is that if the facts are in dispute it cannot be utilized and a trial of issues will be ordered.⁸⁵ In addition, of course, the procedure is not generally available. Nevertheless, the existence of the originating notice of motion is a means of summarily disposing of matters that meet the requirements of this procedure.

D. *Summary of Reform of Rule 33*

In recommending changes to address the above-described deficiencies the thrust of this paper is that a new mechanism for summary judgment should adopt a functional approach. The basic test for this approach should be whether on a motion for summary judgment, at any point before trial, the court can determine whether crucial facts are not in dispute. If the facts are not in dispute then the court should be empowered to dispose of the action either on behalf of the plaintiff or the defendant and regardless of the type or nature of the claim. The mechanism should also contain a means for responding to the prevailing attitude that "parties should have their day in court." The court should consider the desirability of sparing the opposite party the cost and delay involved in a trial and the desirability of administrative efficiency in deciding whether summary judgment should be granted in a particular case.

These recommendations assume a drastic change in summary judgment proceedings as they are known under Rule 33. There are two mechanisms for summary judgment, however, which exist and which do reflect many of the aspects of a summary judgment mechanism that are advocated in this paper. They are the modern English Order 14 and the United States Federal Rule 56 and their respective progeny.

IV. ENGLISH ORDER 14 AND ITS PROGENY

A. *English Order 14*

The complete Order 14 as it now exists is set out as Appendix B to this paper.

In 1937 the procedure under the original Order 14 became applicable in the Queen's Bench Division to all actions except certain ones which are

⁸² See the list compiled in 1 Williston and Rolls at 467.

⁸³ *Id.* at 486-92 and see R.R.O. 1980, Reg. 540, r. 238 for provision for a record.

⁸⁴ R.R.O. 1980, Reg. 540, r. 217.

⁸⁵ See the cases listed in OAP under rr. 607-22 and in 3 Holmsted and Gale under rr. 607-22.

now listed in Order 14, Rule 1.⁸⁶ The Order is now applicable to every action begun by writ in the Queen's Bench Division (including the Admiralty Court) or the Chancery Division except: (a) an action which includes a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment or seduction; (b) an action which includes a claim by the plaintiff based on an allegation of fraud; (c) an Admiralty action *in rem*.⁸⁷ The foregoing are actions in which there is a right to a jury.⁸⁸ Order 14 also does not apply to an action to which Order 86 applies.⁸⁹ Order 86 contains a procedure for summary judgment in actions for specific performance or rescission (and related forms of relief) involving the purchase, sale or exchange of property.⁹⁰ Finally, the Rule does not apply to actions in Probate. Nevertheless, the exceptions are relatively minor, and the Order may be said to be of general application with respect to causes of action. Moreover, the applicability of the Order does not seem restricted in terms of the remedy sought. It applies to an action for an account,⁹¹ to a claim for an injunction⁹² and it has been said that there is no reason why it may not be used in an action which seeks a declaration or specific performance.⁹³ It is still restrictive in terms of parties, however, since only a plaintiff (or a defendant by way of counterclaim) may utilize it.⁹⁴

Briefly, the procedure under Order 14 is as follows: after the defendant has entered an appearance and the plaintiff has served the statement of claim, the plaintiff takes out a summons before a master to obtain leave to enter judgment either in whole or in part.⁹⁵ There appears to be a constraint in respect of when in the action the summons is to be taken out. It is said that the application is to be made expeditiously and this is taken to mean before the statement of defence is served, although it appears that if the plaintiff can explain the delay and demonstrate that there should be summary judgment it can still be available after service of the statement of defence.⁹⁶

⁸⁶ Jacobs, ed., 1 *The Supreme Court Practice 1982* (London: Sweet & Maxwell, 1981) Ord. 14, r. 1(2) (a), (b) [hereinafter 1 *Supreme Court Practice*].

⁸⁷ *Id.*, r. 1(2) (a), (b), (c).

⁸⁸ *Id.* at 159.

⁸⁹ *Id.*, Ord. 14, r. 1(3).

⁹⁰ *Id.*, Ord. 86, r. 1.

⁹¹ *Id.* at 159.

⁹² *Shell-Mex & B.P. Ltd. v. Manchester Garages Ltd.*, [1971] 1 W.L.R. 612, [1971] 1 All E.R. 841 (C.A.). The summons for summary judgment for an injunction under Ord. 14, however, must be issued directly before a Judge in chambers and cannot be issued before the master who has no power to grant an injunction; 1 *Supreme Court Practice* at 159.

⁹³ *Id.* at 159-60.

⁹⁴ *Id.*, Ord. 14, r. 5; Odgers', *supra* note 9, at 62.

⁹⁵ The summary of the procedure is taken in large part from Odgers', *id.* at 63-65 and from Lord Evershed and Other Lawyers, eds., 29 *Atkin's Encyclopaedia of Court Forms in Civil Proceedings* (2d ed. London: Butterworths, 1976) at 135 *et seq.* [hereinafter *Atkin's*].

⁹⁶ Odgers', *supra* note 9, at 63; *Atkin's* at 139. Nevertheless, this constraint means that in most cases applications will take place even before the statement of defence is served.

The summons must be supported by an affidavit verifying the facts on which the claim is based. The affidavit must also state that, on the deponent's belief, there is no defence to the claim.⁹⁷ The affidavit may contain statements of information or belief with the sources and grounds but it is open to the court to conclude that such statements are insufficient to support the application.⁹⁸

In order to prevent judgment the defendant must show, usually by affidavit, that there is a real issue which ought to be tried.⁹⁹ The master may order the defendant to attend and be examined under oath or to produce any leases, deeds, books or documents, or copies of extracts.¹⁰⁰

At the hearing the master may give judgment in whole or in part, or he may give leave to defend, with or without conditions. It is said that leave to defend ought to be given whenever there is an issue to be tried, even though the master may think that the defendant will fail.¹⁰¹ In weak cases, however, the master may impose conditions and the master enjoys a wide discretion,¹⁰² but if the conditions deal with matters such as payment into court or giving security¹⁰³ they must not be so stringent as to, in effect, bar the defendant from raising any triable issue.¹⁰⁴ If the master concludes there is not a defence he or she will order that judgment be entered, and, thereafter, the plaintiff is a judgment creditor.¹⁰⁵

If the master gives leave to defend either as to the whole or part of the claim, with or without conditions, or if he orders that, pending the trial of a counterclaim, judgment be stayed, he is required to give directions in respect of the action and its further conduct.¹⁰⁶ The power of the master to

⁹⁷ Statements in an affidavit will not cure a defect in the statement of claim: *Odgers*, *supra* note 9, at 64.

⁹⁸ In these circumstances, the facts relied on should be verified by someone who has direct knowledge concerning the facts: *Atkin's*, *supra* note 95, at 140-41.

⁹⁹ 1 *Supreme Court Practice*, Ord. 14, r. 3.

¹⁰⁰ *Id.* r. 4(4).

¹⁰¹ *Odgers*, *supra* note 9, at 65.

¹⁰² *Id.* at 64-65.

¹⁰³ *Id.*

¹⁰⁴ Nevertheless, it is said that if the master concludes that the defence could ultimately be exposed as a sham, he may allow the defendant to proceed only on condition that the defendant make a payment into court. This order is particularly appropriate if the defendant's assets may be dissipated. *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ 1 *Supreme Court Practice*, Ord. 14, r. 6. As a result he may make several orders, including the following. He may transfer the action for trial to the appropriate County Court if it is within its jurisdiction or if the parties sign a memorandum. He may also transfer the action for trial to an official referee. If the time for the trial is estimated not to exceed two hours, the master may direct the action be set down for trial in the Short Cause List. If it appears that the action should have an early trial, the master may direct that the action is appropriate for a speedy trial, whereupon the parties may apply to have a date fixed for trial as early as is practicable. Finally, provided both parties consent, the master may direct the action to be tried by himself or another master who, with a few exceptions, will exercise the same jurisdiction, powers and duties of a High Court Judge. See *Atkin's*, *supra* note 95, at 150.

give leave to defend on conditions and his duty to give subsequent directions for the conduct of litigation are useful tools in shaping the litigation in its subsequent stages. Moreover, the availability of these tools means that rather than either granting summary judgment or refusing it outright the master may tailor a middle course based on the circumstances of the particular case.¹⁰⁷

Despite the relatively elaborate procedure set up by Order 14, it appears that the Order has not been given an expansive interpretation and it is still used most often where the plaintiff is attempting to collect a debt and there is no real defence.¹⁰⁸ It remains quite easy for the defendant to satisfy the court that "... there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial."¹⁰⁹ Three reasons may be offered to explain why the Order has not been given an expansive interpretation.

First, there are many statements in the cases to the effect that the defendant need only indicate a state of facts that should be tested by means of a trial. Order 14 is "... intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay"¹¹⁰ and "the summary jurisdiction conferred by that Order must be used with great care. A defendant ought not to be shut out from defending unless it is very clear indeed that he had no case in the action under discussion."¹¹¹ Thus when the circumstances of the case are complicated in any way, Order 14 is not likely to be employed. For example, it is said that Order 14 may be used in negligence cases when it can be clearly established that there is no defence as to liability.¹¹² The fact remains, however, that it

¹⁰⁷ An appeal lies from the judgment or order of the master to a judge in chambers. If the judge affirms or grants an order giving unconditional leave to defend, no further appeal will be available and no leave to appeal can be obtained. If the judge gives conditional leave to defend, however, an appeal lies to the Court of Appeal from such order, either by the plaintiff or by the defendant. In addition, if the judge dismisses the summons, the plaintiff may appeal to the Court of Appeal. See Atkin's, *id.* at 155-56.

¹⁰⁸ See *Judicial Statistics England, Wales and Northern Ireland for the Year 1979* (Cmd. 7977, 1980) [hereinafter *English Judicial Statistics*]. At page 50 of the report, the statistics reveal the following: In 1979, the Queen's Bench Division gave judgment (as opposed to merely entertaining summons') in 3,196 cases. Of these 3,196 cases, it is probably fair to suggest that in about 2,700 of these cases the claim was based on debt. See also *English Judicial Statistics for 1977 and 1978*. In addition, see Silberman, *Masters and Magistrates Part I: The English Model* (1975), 50 N.Y.U.L. Rev. 1070 at 1100-1101. But see the recent decision of the Court of Appeal, refusing to give summary judgment for part of a claim for unliquidated damages where liability had been admitted: *Associated Bulk Carriers Ltd. v. Koch Shipping Inc.*, [1978] 2 All E.R. 254, [1978] 1 Lloyd's Rep. 24 (C.A.).

¹⁰⁹ 1 *Supreme Court Practice*, Ord. 14 r. 3(1).

¹¹⁰ *Jones v. Stone*, [1894] A.C. 122 at 124 (P.C.).

¹¹¹ *Sheppards & Co. v. Wilkinson* (1889), 6 T.L.R. 13 (C.A.).

¹¹² 1 *Supreme Court Practice* at 159.

appears that there has only been one reported case involving summary judgment on a negligence claim¹¹³ and the court was criticised for granting summary judgment in these circumstances.¹¹⁴

Another aspect of the court's unwillingness to examine the factual allegations in the defendant's affidavit in order to determine whether there should be a trial is the court's reluctance to permit examination of the defendant in respect of his affidavit. The English procedure does not have the wide powers of discovery that exist in the United States or even the procedure of cross-examination upon affidavits that exists in Ontario. Under Order 14, Rule 4(4) (b) the court may, if it appears that there are special circumstances, order the defendant ". . . to attend and be examined on oath." However, it is said that this power is only to be exercised in exceptional cases because otherwise it would lead to expense and to the trial of actions on summonses.¹¹⁵ As a result, the allegations in the defendant's affidavit usually go untested and are, therefore, more likely to be accepted at face value by a court.

The second reason which may be offered to explain why Order 14 has not been given an expansive interpretation lies in the court's attitude to questions of law under this Order. It appears that, even when the facts are not in dispute, leave should be given to defend where a difficult question of law is raised.¹¹⁶ Unless the point is clear and a court is satisfied that it is really unarguable, leave to defend will be granted.¹¹⁷ For example, in one case the validity of a Canadian judgment was disputed on the ground of exclusion of evidence, apparently rightly excluded by Canadian law but wrongly excluded by English law. This discrepancy was held to be an arguable defence since it gave rise to a question of law and on that ground alone leave to defend had to be given.¹¹⁸

The third reason why the Order has not been given an expansive interpretation may lie in the words ". . . or . . . there ought for some other reason to be a trial." The former Order 14, Rule 1 provided that the defendant should be given the right to defend if he "shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally" and these words have been replaced with the "some other reason" wording, just quoted, that is said, if anything, to be wider in scope than the former wording.¹¹⁹

¹¹³ *Dummer v. Brown*, [1953] 1 Q.B. 710 (Eng. C.A.).

¹¹⁴ Note (1954), 70 L.Q. Rev. 22.

¹¹⁵ *Millard v. Baddeley* (1884), W.N. 96; *Sullivan v. Henderson* (1973), 1 W.L.R. 333 (Ch.D.); 1 *Supreme Court Practice* at 168-69.

¹¹⁶ *Electric and General Contract Corp. v. Thomson-Houston Elec. Co.* (1893), 10 T.L.R. 103 (Q.B. Div.); *Crawford v. Gillmor* (1891), 30 L.R.I. 238 (C.A.).

¹¹⁷ *Cow v. Casey*, [1949] 1 K.B. 474.

¹¹⁸ *Robinson v. Fenner*, unreported, 1911 (C.A.) and compare *Scarpetta v. Lowenfeld* (1911), 27 T.L.R. 509 (K.B. Div.) and *Robinson v. Fenner*, [1913] 3 K.B. 835, all of which are cited in 1 *Supreme Court Practice* at 170.

¹¹⁹ 1 *Supreme Court Practice* at 168-70.

It has been held, for instance, that the need for the defendant to interrogate or cross-examine the plaintiff may constitute one of these reasons.¹²⁰ In *Miles v. Bull*,¹²¹ the plaintiff claimed possession of a farmhouse which he had purchased from the defendant's husband. The defendant was separated from her husband and English law, at that time, did not generally recognize the right of a wife to occupy the matrimonial home against third parties. The defendant (on the summons) had made out no defence. The Court held, however, that the claim was one in which the relevant facts were under the control of the plaintiff and the defendant would have to depend on discovery, interrogatories, and cross-examination to elicit facts that would assist her. The Court, therefore, concluded that Order 14 was not appropriate.¹²²

B. Progeny

Even though Order 14 is, by its own terms, limited and it has been given a restrictive application, its operation based on a functional "no defence to a claim" test makes it an attractive alternative to mechanisms such as Rule 33 based on the concept of "debt or liquidated demand." It is not surprising, therefore, that British Columbia, Alberta and Nova Scotia have recently adopted summary judgment procedures that are clearly inspired by Order 14.

Most of the following discussion will focus on Rule 18 of British Columbia, primarily because there are now two publications available on British Columbia practice¹²³ and, therefore, there exists at least some discussion of and annotations to the British Columbia Rule. Nevertheless, some reference will be made to the Alberta and Nova Scotia Rules and related cases.

The procedure under British Columbia's Rule 18 is roughly similar to Order 14 but four points should be noted about the British Columbia Rule and the way that it differs from the English Order. First, it is unlimited in respect of the kinds of actions to which it applies.¹²⁴ Second, it does not contain general language in favour of a trial as does Order 14, Rule 3, that

¹²⁰ *Harrison v. Bottenheim* (1878), 26 W.R. 362 (Eng. C.A.).

¹²¹ [1968] 3 W.L.R. 1090 (Q.B.). The case is discussed in Silberman, *supra* note 108, at 1101-1102.

¹²² *Miles v. Bull*, *id.* at 1096 where it was stated by Megarry J.:

These last words seem to me to be very wide. They also seem to me to have special significance where, as here, most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories, and cross-examination those which will aid her. If the defendant cannot point to a specific issue which ought to be tried but nevertheless satisfies the court that there are circumstances that ought to be investigated, then I think that those concluding words are invoked.

¹²³ McLachlin and Taylor, 1 *British Columbia Practice* (Vancouver: Butterworths, 1979: issue 6, Dec./81); Fraser and Horn, 1 *The Conduct of Civil Litigation in British Columbia* (Vancouver: Butterworths, 1978).

¹²⁴ Recall the limitations in this regard imposed by 1 *Supreme Court Practice*, Ord. 14, r. 1(2).

is: "... there ought for some other reason to be a trial of the claim..."¹²⁵ Third, it appears, though the issue does not seem to have been firmly decided, that an application for summary judgment is not limited to the initial stage of the action.¹²⁶ Fourth, the Rule has been made available to defendants.¹²⁷

The British Columbia rules have only been in effect since 1976 and the scope and application to be given to them through judicial interpretation is not clear. Nonetheless, despite the differences between British Columbia Rule 18 and English Order 14 which might point towards a more enlarged ambit for the British Columbia Rule, it may be argued that that Rule is being as restrictively interpreted as English Order 14 and probably even more so.

While Rule 18 is broader and gives greater discretion than did the former British Columbia Order 14 (which was not unlike Ontario's Rule 33), several cases have suggested that the same principles should be followed under Rule 18 in deciding whether to grant judgment.¹²⁸ Thus, it is said that, in determining if there is a defence which precludes summary judgment, the test is whether there is a case to be argued, not whether it will succeed.¹²⁹ Further, it is said that the court's power is limited to determining if the facts disclosed raise a *bona fide* triable issue,¹³⁰ although the courts seem curiously unconcerned about trying to state with any precision what a

¹²⁵ In this respect compare 1969 Alberta, *The Supreme Court Rules* (Edmonton: Queen's Printer, 1968) Rule 159(2):

Upon the application, unless the defendant, by affidavit or otherwise, satisfies the court that he has a good defence on the merits, or that *there ought, for some other reason, to be a trial of the claim or the part of the claim*, the court may direct such judgment for the plaintiff as he may be entitled to [emphasis added].

Nova Scotia's Rule 13 does not have comparable wording. See *Nova Scotia Civil Procedure Rules and Related Rules* (Halifax: Queen's Printer, 1971).

¹²⁶ See Fraser and Horn, *supra* note 123, at 562-64 and see the Alberta case of *Mire v. Northwestern Mutual Ins. Co.*, [1972] 2 W.W.R. 257, 23 D.L.R. (3d) 322 (C.A.) and *Marr v. Clark* (1977), 3 B.C.L.R. 154 (S.C.). Compare, however, McLachlin and Taylor, *supra* note 123, at 552-54 where it was said, citing *Royal Bank of Canada v. Potts*, unreported, 1979 (B.C.S.C.), that it remains doubtful whether an application for summary judgment will be entertained after examination for discovery and, in any event, where one motion for summary judgment has been dismissed, a second motion later in the proceeding will not be entertained. In respect of Alberta see *MacDonald v. Granger et al* (1980), 14 Alta. L.R. (2d) 103 (M.C.).

¹²⁷ Compare the Alberta and Nova Scotia rules which have not been expanded in this way.

¹²⁸ McLachlin and Taylor, *supra* note 123, at 555, citing *Canadian Imperial Bank of Commerce v. Nandhra* (1982), 31 B.C.L.R. 242 (C.A.).

¹²⁹ McLachlin and Taylor, *id.* at 555, citing *Marr v. Clark*, *supra* note 126; *Point Grey Investment Co. v. Borsuk*, unreported, 1977 (B.C.S.C.); *W.W. Works Ltd. v. Argus & Pike Contractors Ltd.*, unreported, 1977 (B.C.S.C.).

¹³⁰ McLachlin and Taylor, *id.* at 555, citing *Re Hughes v. Sharpe* (1969), 5 D.L.R. (3d) 760, 68 W.W.R. 706; *Canadian Imperial Bank of Commerce v. Nandhra*, *supra* note 128. See also the Nova Scotia cases of *Lunenburg City Press Ltd. v. Deamond* (1977), 18 N.S.R. (2d) 689 (C.A.) and *Bank of Nova Scotia v. Dombrowski* (1978), 29 N.S.R. (2d) 532 (C.A.).

case warranting argument or a "bona fide triable issue" is. The courts have, however, clung tenaciously to the notion that questions of law should not be decided on these motions¹³¹ even though one set of commentators has, as has this paper, argued that it is entirely appropriate to decide questions of law if the facts have been settled.¹³² In addition, perhaps expectedly, the courts have continued to enthusiastically embrace the norm that a party should not be deprived of his day in court.¹³³

Those interested in giving summary judgment a vital existence may conclude that the foregoing does not bode well. Additional cases, including one from Alberta, dealing with what the defendant must do to resist summary judgment may be even more disturbing because of their possible consequences. In *Federal Business Development Bank v. Pallan*,¹³⁴ it was held that where the facts upon which the defendant must rely to establish his defence are not within the defendant's sphere of knowledge or activities and are unlikely to be obtained without discovery, summary judgment ought to be refused.

If nothing else, this case seems oddly decided considering the circumstances. The facts were that the plaintiff was suing a guarantor on a guarantee. It was alleged that the plaintiff or someone on its behalf had entered into arrangements which were prejudicial to the defendants and they were therefore released. The plaintiff's affidavit did not refer to this allegation. The defendant's affidavit referred to information given to him by the Re-

¹³¹ McLachlin and Taylor, *id.* at 555, citing *Re Hughes v. Sharp, id.*, and *Canadian Imperial Bank of Commerce v. Nandhra, id.*; Fraser and Horn, *supra* note 123, at 561, citing *Williamson v. Christensen* (1964), 48 W.W.R. 314 (B.C.S.C.) and *City Lumber Co. v. Sleeman* (1962), 34 D.L.R. (2d) 350, 39 W.W.R. 81 (Man. C.A.).

¹³² Fraser and Horn, *supra* note 123, at 561 state:

It has been held that the matter ought to be allowed to go to trial where there is a difficult point of law to be determined. This seems wrong in principle. Refusing to grant summary judgment where there is no real issue of fact but a real issue of law does not avoid the Court's obligation to make a difficult decision but merely postpones it at the expense of a full dress trial. It may be that the point of law is difficult because it will turn upon very fine definitions of the facts which can only be developed upon trial and to refuse summary judgment in these circumstances may be justified. But the reason is not that the law is difficult but that the facts are difficult. [footnotes omitted]

¹³³ McLachlin and Taylor, *supra* note 123, at 555, citing *Toronto Dominion Bank v. Fortin* (1978), 85 D.L.R. (3d) 111, [1978] 2 W.W.R. 761, 5 B.C.L.R. 224 (S.C.); *Deveau v. Greater Vancouver Antique Dealers' Association (No. 2)*, [1978] 2 W.W.R. 95 (B.C.S.C.); *Bogardus, Wilson Ltd. v. Rich-View Glass Ltd.* (1978), 7 B.C.L.R. 207 (S.C.); *Wall and Redekop Realty v. Graham*, unreported, 1978 (B.C.S.C.); *Bank of Montreal v. Harmex Management Ltd.*, unreported, 1977 (B.C.S.C.); *Carlyle Shepherd & Associates Ltd. v. Smith*, unreported, 1978 (B.C.S.C.); *The Shell Co. of Hong Kong Ltd. v. May*, [1979] 2 W.W.R. 443 (B.C.S.C.). See also the Nova Scotia case *Dodge City Leasing v. Keddy Rent-A-Car Limited* (1978), 22 N.S.R. (2d) 14 (T.D.).

¹³⁴ (1978), 9 B.C.L.R. 59 (S.C.). See also *Gray O'Rourke Advertising Western Ltd. v. London Drugs Ltd.*, unreported, 1977 (B.C.S.C.) cited in McLachlin and Taylor, *supra* note 123, at 555. In that case it was held that where the defendant has filed a statement of defence before his or her solicitors learned of the application for summary judgment, the application may be refused even though the defendant has filed no affidavit setting out a defence.

ceiver appointed by the plaintiffs about these arrangements. The Court held that the affidavit was defective since it was based on hearsay. Instead of invoking Rule 18(2) (a), however, and making arrangements for the Receiver to be examined, the court simply dismissed the application for summary judgment. Moreover, real difficulties arise in respect of the attitude of the court regarding what onus lay upon the defendant to controvert the plaintiff's claim. In respect of this point the court stated:

The question arises in my mind: Is there an obligation on a defendant to in effect verify under oath the allegations of fact that he raises in his statement of defence when he is called upon to oppose an application for summary judgment?¹³⁵

The Court went on to hold that mere allegations in the statement of defence were sufficient to raise a triable issue and suggested that the plaintiff would elicit details of the defence at discovery.¹³⁶

A recent Alberta decision, *View West Constr. Ltd. v. City of Calgary*,¹³⁷ takes the same position in respect of the need to file an affidavit. In this case, the court seized upon the phrase "or otherwise" in Rule 159(2)¹³⁸ to suggest that an affidavit from the defendant was not required and that the statement of defence would suffice and no affidavit need be filed to establish, as a defence, an allegation of acquiescence on the part of the plaintiff.

A moment's reflection reveals how dangerous the implications of these cases can be. If bare allegations in statements of defence are taken routinely as sufficient to place the facts in dispute then an open invitation is given to pleading sham defences. Pleadings are taken to contain only assertions of facts, not the underlying evidentiary basis.¹³⁹ If assertions can be advanced with the knowledge that they will not have to be substantiated on a summary judgment motion by an affidavit revealing the evidence in support, let alone an affidavit the strength of which is tested by cross-examination or by some other means, such as the examination of a witness whose evidence might be determinative, artful pleading will be raised to a new level and summary judgment will be close to evisceration.

It is interesting to note that a similar problem arose under United States Federal Rule 56. The Third Circuit was primarily responsible for enunciating a rule that well-pleaded claims and defences were invulnerable to attack.¹⁴⁰ As a result, Rule 56(e) was amended in 1963 to make clear that an opposing party cannot just rest on allegations or denials in the pleading

¹³⁵ *Supra* note 134, at 62.

¹³⁶ *Id.* at 63.

¹³⁷ (1978), 7 C.P.C. 310 (Alta. S.C.T.D.); but compare *Barrowman v. Ranchland Asphalt Services Ltd.* (1981), 21 C.P.C. 12 (Alta. S.C.T.D.).

¹³⁸ Rule 159(2) states:

Upon the application, unless the defendant, by affidavit or otherwise, satisfies the court that he has a good defence on the merits, or that there ought, for some other reason, to be a trial of the claim or the part of the claim, the court may direct such judgment for the plaintiff as he may be entitled to.

¹³⁹ 2 Williston and Rolls, *supra* note 3, at 647.

¹⁴⁰ 10 Wright and Miller, *supra* note 28, at §2739.

but must instead, through his own affidavit or otherwise, set forth specific facts which are in issue and for which a trial is required.¹⁴¹

The extension of British Columbia's Rule 18 to make it available to defendants has also, to this point, been given a most cautious interpretation by the British Columbia courts in the few cases where the defendant has moved for summary judgment. In *Morris v. The Queen*¹⁴² it was held that summary judgment would not be granted where allegations of conspiracy were involved and where the plaintiff would probably require examinations for discovery and discovery of documents in order to obtain facts, even though it was concluded that the pleadings and affidavits indicated no cause of action against the defendant applicant. It will be recalled that the "need for discovery" rationale formed part of the reason for refusing summary judgment in *Federal Business Development Bank v. Pallan*, discussed above.

The availability of discovery as a reason for deferring summary judgment is a factor upon which a court should, unquestionably, exercise some latitude. There are, however, two potential problems raised by such deferral. The first relates to whether there can be another motion for summary judgment once one motion has been brought and refused. There is some authority which suggests there cannot be a second motion.¹⁴³ This reasoning, to the extent it exists, must be wrong. It would be ludicrous to refuse summary judgment because of the assertion that discovery is needed and then refuse to permit the results of discovery to be tested by a subsequent motion. The second problem lies in the danger of a court too readily acceding to the assertion that full discovery is required before a summary judgment motion can be entertained. Such an accession could result in the opposing party and

¹⁴¹ The Advisory Committee Note on the Federal Rules with regard to the amendment to Rule 56(e) is as follows:

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well-pleaded," and not suppositious, conclusory, or ultimate. . . .

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule.

A copy of the Advisory Committee Notes to the Federal Rules is set out in an Appendix to Wright and Miller, 12 *Federal Practice and Procedure* (St. Paul: West Pub. Co., 1973) at 499-500.

¹⁴² Unreported, 1977 (B.C.S.C.), appeal, on a different point, dismissed (1979), 14 B.C.L.R. 197 (C.A.). See also *Burns v. Wing Investments Ltd.* (1979), 14 B.C.L.R. 100 (C.A.) and *Progressive Construction Ltd. and Progressive Contracting Ltd. v. Newton* (1980), 25 B.C.L.R. 330 (S.C.).

¹⁴³ *Royal Bank of Canada v. Potts*, *supra* note 126.

the courts being burdened, in time and costs, with useless discoveries before the summary judgment was ultimately granted.

A second case which reveals an unjustifiable attitude of caution towards summary judgment motions on behalf of defendants is *Interior Contracting Co. v. Smithers*.¹⁴⁴ In that case the motion for summary judgment was made after discoveries. The contents of the discoveries are not clear from the report of the case but it appears that a servant of the plaintiff admitted some crucial allegations of the defendant in respect of a denial that certain representations were made. Instead of dealing with what effect should be accorded the testimony contained in the examination for discovery, the Court denied the motion for summary judgment because plaintiff's counsel "guardedly indicated" that the plaintiff might have other witnesses who could testify regarding the representations.¹⁴⁵ This decision, which allows a party to resist summary judgment, even after discovery, by having counsel raise the mere possibility of some further witnesses who might be able to convert the case into one of disputed fact is perhaps even more devastating than the potential consequences of *View West Constr. Ltd. v. City of Calgary*.

One final observation should be made before leaving this section of the paper. It was remarked in the section of the paper dealing with Ontario's Rule 33 that certain mechanisms such as originating notices of motion and Rules 63 and 64 existed as other means of disposing of certain matters summarily. England and British Columbia also have a mechanism for originating notices of motion, though not identical in scope and procedure¹⁴⁶ and provisions comparable to Rules 63 and 64.¹⁴⁷ Therefore, whatever role originating notices of motion and Rules like 63 and 64 are to play, they do not supplant procedures based on Order 14.

V. RULE 56 AND ITS PROGENY

A. Introduction

The entire text of Rule 56 is set out as Appendix C to the paper.

Rule 56 has been applied in a "flood of reported opinions"¹⁴⁸ and anything approaching a summary of individual cases which have interpreted the Rule would be impossible, even if it were otherwise desirable. What is possible and much more desirable is to discuss the Rule in terms of some of the patterns and trends that have emerged from the cases that have dealt with it.

Accordingly, this section of the paper will proceed as follows. This subsection will discuss, in general, the purpose of the Rule and briefly de-

¹⁴⁴ (1978), 7 C.P.C. 74 (B.C.S.C.).

¹⁴⁵ *Id.* at 75.

¹⁴⁶ England: see 1 *Supreme Court Practice*, Ord. 5. British Columbia: see Fraser and Horn, *supra* note 123, at ch. 6, "Choice of Procedure."

¹⁴⁷ England: see 1965 *English Rules of the Supreme Court*, Ord. 27, r. 3 and 1 *Supreme Court Practice* at 500 *et seq.* British Columbia: see Fraser and Horn, *supra* note 123, at ch. 21, "Summary Disposition of Proceedings," esp. para. 21.2.

¹⁴⁸ 10 Wright and Miller, *supra* note 28, at 384.

scribe the procedure under it. The next subsection will deal with comments by courts and commentators in respect of how the Rule should be used, especially in particular cases. Following this, the paper will discuss how the Rule has actually been interpreted. That discussion will depend on data and empirical studies which have investigated how, when and by whom, the Rule has been used and when motions for summary judgments have and have not been successful.

The following sub-section will discuss some of the progeny of Rule 56, summary judgment rules in the state courts. This discussion will be useful not only in relating more experience under rules very similar to Rule 56 but in also suggesting that, although the substantive base for causes of action varies markedly between the U.S. Federal Court and the courts of the various Canadian provinces (and the Canadian Federal Court), this is not a factor which, in itself, would make the Rule inappropriate as a precedent for Canadian courts. This point will be fully developed in the last subsection of this section of the paper. Finally, the paper will turn to a critique of the Rule itself and offer some suggestions of others, and of its own, regarding how the Rule might be better utilized.

As a prelude to a more detailed discussion on the purpose and scope of Rule 56, it will be useful to quote from Wright and Miller, *Federal Practice and Procedure*, a leading commentary on the Federal Rules, a passage which deals with the purpose and scope of Rule 56. The authors conclude that the mere saving of time and expense should not be the sole purpose of any summary judgment rule, and state that Rule 56 has a greater purpose. In their words:

Rule 56 provides the means by which a party may pierce the allegations in the pleadings and obtain relief by introducing outside evidence showing that there are no fact issues that need to be tried. . . . In this connection, the rule may be utilized to separate formal from substantial issues, eliminate improper assertions, determine what, if any, issues of fact are present for the jury to determine, and make it possible for the court to render a judgment on the law when no disputed facts are found to exist.¹⁴⁹ [footnotes omitted]

As will be observed, the Rule allows the plaintiff to move for summary judgment after 20 days from the start of the action;¹⁵⁰ the defendant is allowed to move at any time.¹⁵¹ There is no limit in respect of the kinds of action to which the motion applies.¹⁵² The party moving may simply make the motion or he may also submit "supporting affidavits"¹⁵³ and, in addition, any discovery that may have been held by the time of the motion may also be used.

The non-moving party must, within 10 days, respond to the motion, and he may submit opposing affidavits.¹⁵⁴ The Rule requires also that in

¹⁴⁹ *Id.* at 373-74 and 376-77 and the 1981 Pocket Part at 113-14.

¹⁵⁰ R. 56(a).

¹⁵¹ R. 56(b).

¹⁵² R. 56(b).

¹⁵³ R. 56(a).

¹⁵⁴ R. 56(c).

order to defeat the motion, the non-movant must do more than provide "mere allegations or denials."¹⁵⁵ There is a provision, however, that a court may permit an adjournment "... to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just..."¹⁵⁶ if it appears from the affidavits of an opposing party that, for reasons given by him he cannot present, by affidavit, facts which are required "... to justify his opposition..."¹⁵⁷ The summary judgment is to be granted if the pleadings, depositions, answers to interrogatories and admissions on file, along with affidavits¹⁵⁸ "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."¹⁵⁹

Even if the motion for judgment is not granted the court is required, if practicable, "by examining the pleadings and the evidence before it and by interrogating counsel [to]... ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted."¹⁶⁰ These facts, including the extent to which damages and other relief is not disputed, are then specified in the court's order and the order specifies whatever other proceedings in the lawsuit which "are just."¹⁶¹ It is said that this requirement has the same effect as a pretrial conference in which the judge excludes those issues about which there is no dispute from the trial of the action.¹⁶²

Before continuing it will be useful to focus upon the essential test of Rule 56 "... no genuine issue as to any material fact and... entitle[ment] to a judgment as a matter of law."¹⁶³ This standard is more precise than the "no defence" language of Order 14. This is so because it says clearly what it is that a court is to ascertain, that is, that material facts are not in issue and it separates questions of fact from law while making it clear that once the facts are not in dispute questions of law are to be decided. The following passage gives a concise description of how the "genuine issue of material fact" has been interpreted:

The basic legal issue in summary judgment is determining the existence of a genuine issue of material facts, which is the basis for denying the motion. No blanket formula has been or could be developed to make this determination, but some guides may exist. Any doubt in the case is to be resolved in favour of the nonmovant, so that the movant has the burden of establishing the absence of a triable question as well as showing that he is entitled to a judgment. There is

¹⁵⁵ R. 56(e).

¹⁵⁶ R. 56(f).

¹⁵⁷ R. 56(f).

¹⁵⁸ R. 56(c).

¹⁵⁹ R. 56(c).

¹⁶⁰ R. 56(d).

¹⁶¹ R. 56(d).

¹⁶² McLauchlan, *An Empirical Study of the Federal Summary Judgment Rule* (1977), 6 J. Leg. Studies 427 at 430, citing Wright, *Handbook of the Law of Federal Courts* (2d ed., St. Paul: West, 1970) at §99.

¹⁶³ R. 56(c).

also a built-in resistance to summary judgment arising from the jury's role. The rule of thumb followed by most judges is to let the case go to trial and to the jury when in doubt. There is also the tactical problem, which can still arise, of delaying the proceedings by moving for summary judgment even when there is a clear issue of fact that must be tried.¹⁶⁴ [footnote omitted]

B. Rule 56: Courts and Commentators

Although summary judgment procedure is available in all kinds of actions, both courts and commentators have suggested that it is more appropriate in some kinds of actions than in others. A review of the categories of cases where summary judgment may encounter rocky terrain in its application will provide further perspective on this Rule.

It is said that negligence actions are rarely appropriate for summary judgment.¹⁶⁵ Quite apart from the supposition that negligence actions are likely to give rise to conflicting testimony,¹⁶⁶ both the courts and commentators have evinced great respect for the role of the jury in these cases.¹⁶⁷ Though the courts are willing to admit exceptions, it is said that the separate functions of judge and jury in such actions militate against summary judgment. While Wright and Miller have recognized this, they have observed that:

... it would be wrong to assume that summary judgment is never appropriate in negligence actions. A summary judgment motion in favour of defendant should be granted in those cases in which there is no genuine issue as to any fact that is crucial to plaintiff's cause of action so that as a matter of law he cannot recover. Thus, a judgment under Rule 56 has been found appropriate when plaintiff has named a party as a defendant on the basis of a master-servant or agency relationship that in fact does not exist. Similarly, when plaintiff has asserted a statutory right to relief, defendant has been able to defeat the action without trial by showing that plaintiff does not fall within the legislative protected class. Summary judgment also is appropriate when defendant can show that plaintiff in some way has waived his possible recovery, or has named the wrong party as defendant, or has any other ironclad legal defense.

A defense will not be a sufficient basis for summary judgment in a negligence suit when there is a disputed issue of fact relating to it. For example, the defense that no agency relationship exists may be countered by calling into issue the scope of the employment, the amount of control asserted by defendant, or some other element of the relationship. Similarly, there may be genuine issues about the status of plaintiff, concerning the validity of the release signed by plaintiff, or with regard to any other defense.

It is even more difficult for defendant to prevail on a Rule 56 motion when it is based on the assertion that there is no factual dispute with regard to an issue of negligence or contributory negligence, inasmuch as these questions are thought of as being within the special competence of the jury. But there are some instances in which it may appear that even if the facts are as plaintiff asserts

¹⁶⁴ McLaughlan, *supra* note 162, at 431.

¹⁶⁵ 10 Wright and Miller, *supra* note 28, at § 2729 and the 1981 Pocket Part at 206; McLaughlan, *id.* at 433 and the authorities he cites in n. 44. A discussion of summary judgment in negligence cases is also found in Moore and Wicker, eds., 6 Pt. 2 *Moore's Federal Practice* (2d ed. Albany: Matthew Bender, 1982) at ¶ 56.17 [42].

¹⁶⁶ 10 Wright and Miller, *supra* note 28, at § 2729.

¹⁶⁷ *Id.*

them to be, there still can be no recovery and the entry of summary judgment for defendant is proper. It bears repeating, however, that even when there is no dispute as to the facts, it usually is for the jury to decide whether the conduct in question meets the reasonable man standard; accordingly, courts have denied motions for summary judgment on issues of negligence, assumption of risk, contributory negligence, *res ipsa loquitur*, and pain and suffering.¹⁶⁸ [footnotes omitted]

This mystique of the jury in the United States clearly does not exist in England¹⁶⁹ and Canada—in some quarters one is hard pressed to make the case for even the continued existence of the civil jury,¹⁷⁰ let alone any extensive use of it.¹⁷¹ Therefore, whatever the factors deemed relevant in deciding whether a particular case is appropriate for summary judgment, deference to the jury need not be one of them. For example, in negligence cases if all that remains for resolution on a summary judgment motion is the application of the reasonable man standard to a settled factual situation, the judge can proceed unimpeded by any fear of giving affront to a civil jury tradition.

Actions involving state of mind are another class of cases which it has been suggested are often inappropriate for summary judgment. This is so because it is often thought that when state of mind is involved, credibility will often be central to the case. Yet it seems just as certain that a party's desire, taken alone, to have witnesses' testimony tested before a jury, will not suffice to have a motion denied. For there to be a trial in these circumstances, the evidence on the motion must itself cause sufficient doubts about witnesses' testimony for there to be a genuine issue of material fact.¹⁷²

The Supreme Court's attitude towards summary judgment when state of mind is involved is well illustrated by its decision in *Poller v. Columbia Broadcasting System, Inc.*,¹⁷³ a case involving antitrust claims. In refusing summary judgment the Court, in a five to four decision¹⁷⁴ *per* Mr. Justice Clark, stated:

Summary procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility

¹⁶⁸ *Id.* at 561-74.

¹⁶⁹ Though it is to be noted that the few types of cases which are exempted from summary judgment by Ord. 14 are the cases where a jury is available: see *supra* note 88 and accompanying text.

¹⁷⁰ See, for *e.g.*, Ontario Law Reform Commission, *Report on Administration of Ontario Courts, Part I* (Toronto: Min. of the A. G., 1973) ch. 11, "The Jury in Civil Cases."

¹⁷¹ But see the Manitoba Law Reform Commission, *Report on The Administration of Justice in Manitoba Part II—A Review of the Jury System* (Winnipeg: The Commission, 1975).

¹⁷² 10 Wright and Miller, *supra* note 28, at 583.

¹⁷³ 82 S. Ct. 486, 368 U.S. 464 (1962).

¹⁷⁴ Mr. Justice Harlan, in dissent, stated that Rule 56 "... does not indicate that it is to be used any more 'sparingly' in antitrust litigation than in other kinds of litigation." *Id.* at 493 (S. Ct.), 478 (U.S.).

and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury . . .¹⁷⁵

The *Poller* decision has had a rather chilling effect upon courts and commentators in respect of the advisability of summary judgment motions in antitrust cases.¹⁷⁶ It is just as true, however, that the Supreme Court and other federal courts have granted summary judgment in certain antitrust cases.¹⁷⁷ This has usually occurred when state of mind issues have not been present or where the evidence on the motion has clearly established that no genuine issue of material fact has been established. For example, it was held in *Mutual Fund Investors, Inc. v. Putnam Management Co.*¹⁷⁸ that once the allegations of conspiracy made in an antitrust action complaint are rebutted by probative evidence supporting an alternative interpretation of the defendant's conduct, the plaintiff must come forward with specific support of his or her allegations and if he or she fails to do so, summary judgment is proper.

Another aspect of antitrust cases militating against summary judgment is that they are often of an involved and complex nature and, therefore, will often give rise to an unsettled set of facts,¹⁷⁹ although the courts have been clear that if the facts are settled, legal questions ought to be decided even if they too are complicated and involved.¹⁸⁰

Antitrust and patent litigation¹⁸¹ are the two types of cases most often mentioned as involving a complexity that points away from summary judgment. Suits under various civil rights acts, copyright cases, actions involving standards of obscenity and stockholder derivative suits, however, are also sometimes cited as types of cases which can involve complicated issues or issues of public importance¹⁸² and therefore may require special treatment on a summary judgment action. Nevertheless, Wright and Miller, after an extensive review of the case law, doubted whether a truly different standard was being applied in these cases and indicated that the analysis by courts proceeded in the usual way, that is, deciding whether material facts were in issue. They state:

Despite the fact that some courts use language indicating that they are applying a "different" standard in deciding summary judgment motions in "complicated" or "important" cases, closer inspection reveals that there is little variation from the consideration typically used under Rule 56(c). Thus although the courts in the antitrust and patent cases cited in the notes accompanying the text earlier in this section suggest the application of different summary judgment criteria in

¹⁷⁵ *Id.* at 491 (S. Ct.), 473 (U.S.).

¹⁷⁶ 10 Wright and Miller, *supra* note 28 at §§ 2730 and 2732 and the cases cited therein and the 1981 Pocket Part at 226-27 and 238-43.

¹⁷⁷ See the cases cited in 10 Wright and Miller, *id.* at § 2730n. 15 and the 1981 Pocket Part at 227-28; Wright, *supra* note 162, at 493n. 10.

¹⁷⁸ 553 F.2d 620 (9th Cir. 1977).

¹⁷⁹ 10 Wright and Miller, *supra* note 28, at 587-89 and the 1981 Pocket Part at 226-27.

¹⁸⁰ *Id.* at 608 and n. 52 and the authorities cited therein.

¹⁸¹ *Id.* at 611 *et seq.* and 1981 Pocket Part at 243-45.

¹⁸² *Id.* at 614-15.

those actions, the factor actually explored frequently is whether the record reveals the existence of any unresolved questions of motive, intent, credibility, demeanor, or issues of material fact that justify proceeding to trial.¹⁸³

Two further classes of cases were at one time suggested as inappropriate for summary judgment: those cases involving equitable relief and cases where the United States is a party. *Seaboard Surety Co. v. Racine Screw Co.*¹⁸⁴ indicated that equitable relief could not be granted on summary judgment, apparently because it was thought that the discretion of a court, an important factor in granting or refusing equitable remedies, should be exercised at trial rather than on motion. This decision has been expressly repudiated by other decisions¹⁸⁵ and severely criticized by the commentators¹⁸⁶ and for good reason: any right of discretion can be exercised by a motion judge and the court should not be allowed to force a trial for that reason only. Accordingly, it is probably safe to suggest that cases in which equitable relief is requested are not set apart from other cases in terms of summary judgment.

The Advisory Committee Note makes clear that Rule 56 applies to any action where the United States is a party.¹⁸⁷ Some doubts had been expressed, however, because of a problem of interpretation between the requirements of Rule 55(e) and Rule 56 but these doubts have now been resolved.¹⁸⁸ Summary judgment motions where the United States has been plaintiff or defendant

¹⁸³ *Id.* at 617. See also the comments of the American College of Trial Lawyers regarding various proposed revisions to the *Manual for Complex Litigation: Recommendations of the American College of Trial Lawyers on Major Issues Affecting Complex Litigation* (1981), 90 Federal Rules Decisions 208. At 226, the paper, in supporting vigorous use of summary judgment in complex litigation, states:

Courts should be receptive to early full and partial summary judgment motions in complex cases. There is no basis in policy, precedent or the language of Rule 56 for the conclusion that the standard for granting summary judgment is more stringent in complex cases than in ordinary litigation.

Use of the summary judgment device under Rule 56 is potentially one of the most effective means of reducing the time and expense of complex litigation. In fact, recognition of the unique role that can be played by full or partial summary judgment in complex cases should logically lead to an expanded use of this vehicle for terminating or simplifying litigation in such situations. Surprisingly, not only has the scope and availability of summary judgment not been expanded in the "big case," it has been suggested by certain courts and the Manual that the device's reach should actually be restricted in complex litigation. Close examination of the applicable precedents, however, reveals that in most instances courts have treated summary judgment motions in complex cases in the same manner as in ordinary cases.

¹⁸⁴ 203 F. 2d 532 (7th Cir. 1953).

¹⁸⁵ *Elias v. Manis*, 292 S.W. 2d 836 (Tex. Cir. App. 1956); *Booth v. Barber Transp. Co.*, 256 F. 2d 927 (8th Cir. 1958); *Thickman v. Schunk*, 391 P. 2d 939 (S. Ct. Wyo. 1964).

¹⁸⁶ Wright, *Handbook of the Law of Federal Courts* (3d ed. St. Paul: West, 1976) at 493; 10 Wright and Miller, *supra* note 28, at § 2731.

¹⁸⁷ A copy of the Advisory Committee Note to the Federal Rules is set out in an Appendix to 12 Wright and Miller, *supra* note 141. The point in respect of Rule 56's applicability to the U.S. government is found at 497 of the Appendix.

¹⁸⁸ 10 Wright and Miller, *supra* note 28, at 618.

are many and varied.¹⁸⁹ Indeed, the kinds of cases in which the United States is a party now seem as much an illustration of the breadth of the Rule as anything else.

C. *Some Empirical Data on Rule 56*

The foregoing discussion, citing decisions of United States federal courts and statements of commentators, conveys an impression of what the courts are doing, and what they should be doing within the guiding principles that have been articulated. Nonetheless, leaving aside questions of what the courts should be doing these citations do not always reflect entirely what the courts *are* doing. Moreover, taken by themselves, reported decisions involving Rule 56 create an impression of many cases arising in which summary judgment is successfully claimed and still more where it is at least sought. It is true that Rule 56 motions are frequently made, but a correct impression of the frequency of the use of Rule 56 and the success of these motions can only come from comparing cases in which summary judgment motions are brought with all other Federal court cases.

Probably the best study that investigates the use of summary judgment is one done by McLauchlan.¹⁹⁰ The study collects two sets of data. The first consists of a sample of all reported federal cases from 1938 to 1968 in which the motion was made, either under Rule 56 or under Rule 12(b) (6). The second set of data involves the study of a total population of cases which were filed in one federal district court, the District Court for the Eastern Division of the Northern District of Illinois in Chicago, for the 1970 fiscal year.¹⁹¹ From these two sets of data, many revealing points can be made.

¹⁸⁹ The United States has moved for summary judgment in actions seeking compliance with or enjoining violations of the antitrust laws, price controls, rent controls, the *Securities Act* and *Securities Exchange Act*, the *Fair Labour Standards Act* and the *False Claims Act*. Rule 56, where the government is plaintiff, has also been involved in contract, commercial paper, condemnation, tax claims, title to property and status of federal employees actions. See 10 Wright and Miller, *supra* note 28 at 624-30. Where the United States has been the defendant, examples of actions include: suits for relief on constitutional grounds, actions asserting rights in real or personal property, patent suits, proceedings on commercial paper, contract cases, actions under the *War Contracts Hardship Claims Act*, the *Contracts Settlement Act*, the *Trading with the Enemy Act*, tort litigation, including actions under the *Federal Torts Claims Act* and other statutory causes, tax claims, insurance claims, common law actions of conversion, detinue, and replevin and conflicts over government employment status. See 10 Wright and Miller, *supra* note 28, at 632-41.

¹⁹⁰ McLauchlan, *supra* note 162.

¹⁹¹ *Id.* at 435. While the study is very useful there are criticisms to be made of it and specific ones will be raised at appropriate points. A general criticism concerns what precisely the author means by summary judgment motions. It is unclear (see at 435 and n. 55) but he appears to include motions brought under Rule 12(b) (6) where the allegation is that there has been a failure to state a claim upon which relief may be granted. The difficulty with doing this (again assuming this is what has been done), is that the latter kind of motion can also be brought functionally under Rule 56 by simply bringing it on the basis of the pleadings alone. See 10 Wright and Miller, *supra* note 28, at 392. Therefore, if motions are excluded for failing to state a claim upon which relief can be granted under Rule 12(b) (6), they should also be excluded when brought under Rule 56, or alternatively, such motions under both Rules should have been included.

The study indicates that in respect of types of actions in which summary judgment was employed, those involving statutory actions and contract were most frequent.¹⁹² Somewhat surprising was the comparatively large number of summary judgment motions used in tort cases and the high success rate of them, although there were some differences between the two sets of data.¹⁹³ In addition, there was a reasonable number of antitrust cases.¹⁹⁴ On the other hand, no reference was made to summary judgment based on debt, the type of case which is at the center of Rule 33 and which is still the most frequent under English Order 14.¹⁹⁵

In respect of the parties moving for summary judgment, the study confirmed that, not only do defendants make extensive use of this procedure, but, in fact, they make use of it more frequently than do plaintiffs.¹⁹⁶ Perhaps even more significant is the fact that defendants have a higher success rate than plaintiffs, both in terms of outright success and in terms of orders for partial summary judgment.¹⁹⁷ The study accounted for these differences by suggesting that they reflect the advantage defendants (who were most frequently found to be corporations)¹⁹⁸ had because of the burden of proof placed on plaintiffs. This is an important point and will be discussed fully in the final subsection of this section of the paper.

Perhaps the most interesting findings and conclusions of the paper center around the amount of time saved by summary judgment motions and the number of summary judgment motions brought in relation to all actions filed in the Federal Court. The study's conclusions suggested that time was indeed saved by summary judgment.¹⁹⁹ Moreover, the results were less impressive than they could have been. For example, the study compared periods involving length of time up to trial but did not include length of trial in any of its comparisons. If these figures had been available the differences might have been even more dramatic since partial summary judgment may significantly reduce trial time and even completely unsuccessful summary judgment motions may help clarify the issues for the parties and thereby also reduce the time at trial. In addition, as already mentioned, not many debt cases would be present in a Federal Court study. These kinds of cases, however, are likely to be the simplest and most successful and, therefore, perhaps the ones

¹⁹² *Id.* at 435-36.

¹⁹³ *Id.* at 438-39 and 750.

¹⁹⁴ *Id.* at 439.

¹⁹⁵ One explanation why there are few debt actions in Federal Court is that for a claim to be in Federal Court, it usually will arise from the Constitution or from federal legislation or be based upon diversity jurisdiction, that is, where the plaintiff and the defendant reside in different states. Wright, *supra* note 186, at 63 *et seq.* In addition, for a diversity case to be filed in Federal Court there must be at least ten thousand dollars in controversy; Wright, *supra* note 186, at 85 *et seq.* For this reason it may be expected that most debt collection cases will be filed in the state courts.

¹⁹⁶ McLauchlan, *supra* note 162, at 441-42.

¹⁹⁷ *Id.* at 441-42.

¹⁹⁸ *Id.* at 443.

¹⁹⁹ *Id.* at 458-59.

brought on the most quickly, thus having the potential to further dramatically increase the differences between cases where summary judgment is used and where it is not.

The truly disturbing aspect of the study is its finding that very few summary judgment motions are actually brought. The data available from the Illinois District Court study show that summary judgment motions were used in about four per cent of the cases²⁰⁰ and were successful in about one half of the cases in which they were employed.²⁰¹ These figures, which receive support from other studies,²⁰² tend to dampen any enthusiastic claims concerning summary judgment as an aid to easing the burden on crowded courts. Several points can be made, however, which indicate that summary judgment is more effective than these figures suggest.

In the first place, they do not indicate the prophylactic effect of the Rule. It may be suggested that many more claims might be filed if it were not known that a reasonably potent device lies near the threshold of litigation, waiting to dispose of claims which are not well-founded. By the same token, many more plaintiffs may obtain successful results through default judgment or very early settlement because defendants realize summary judgment is available against weak statements of defence.

Second, as mentioned previously, debt cases do not seem to have formed part of the study and debt cases unquestionably make extensive use of summary judgment procedures. Authorities in England,²⁰³ Ontario,²⁰⁴ and the United States,²⁰⁵ bear this out.

Third, the study does not make a qualitative distinction between the kinds of cases in terms of complexity and potential length and cost which may be eliminated by summary judgment. In this respect the use of summary judgment to eliminate class action cases or to give relief to the representative

²⁰⁰ *Id.* at 452.

²⁰¹ *Id.*

²⁰² Note: *Use of Summary Judgment by Type of Case* (1952), 36 Minn. L. Rev. 515; McDonald, *The Effective Use of Summary Judgment* (1961), 15 S.W.L.J. 365; Guher, *Summary Judgments—Tactical Problem of the Trial Lawyer* (1962), 48 Va. L. Rev. 1263; Bauman, *A Rationale of Summary Judgment* (1958), 33 Ind. L. J. 467 at 467n. 2 citing statistics in the Federal Court for the southern district of California, northern district of Illinois, Massachusetts, and eastern district of Pennsylvania; Comment, *Summary Judgment in Texas: A Selective Survey* (1977), 14 Houston L. Rev. 854, citing statistics of Tex. Civ. Jud. Council Ann. Rep. (1968-75).

²⁰³ See English Judicial Statistics, *supra* note 108 and the text of that footnote. It also should be recalled that the procedure is not available to defendants.

²⁰⁴ See, e.g., *Court Statistics Annual Report* (Toronto: Min. of the A.G., 1979).

²⁰⁵ See Cohen, *Summary Judgments in the Supreme Court of New York* (1932), 32 Colum. L. Rev. 825 and Saxe, *Summary Judgments in New York — a Statistical Study* (1934), 19 Cornell L.Q. 237. These studies were done at a time when the procedure was confined, essentially, to debt collection. Nevertheless, there is nothing to suggest summary judgment for debt collection enjoys any less vigorous usage today. See also the discussion and authorities cited, on this point, in the next subsection of the paper.

plaintiff or to the class makes an interesting point of comparison. For example, the *Class Action Study* of the Committee on Commerce of the U.S. Senate²⁰⁶ suggests that summary judgment has been an effective means of dealing with class actions. Of all the cases studied where the action had been terminated, 13.6 percent were disposed of in the defendant's favour through summary judgment and 9.9 percent were disposed of in the plaintiff's favour, either for the representative number or for the class, through summary judgment.²⁰⁷ Results indicating a significant usage of summary judgment were also found in a study done in respect of antitrust class actions,²⁰⁸ one of the most complex and involved type of actions. The Harvard Law Review, in an article on class actions also points to summary judgment as an effective means of eliminating unmeritorious antitrust class actions:

Defendants are not in the position of having to rely upon protracted and expensive trial procedures to screen out frivolous claims. In antitrust actions, as in other suits, summary judgment is available to short-circuit litigation of clearly nonmeritorious suits. Although it has traditionally been thought that "summary procedures should be used sparingly in complex antitrust litigation", . . . in recent years courts, while repeating the maxim, have not hesitated to make use of summary judgment to dispose of nonmeritorious antitrust actions. . . .²⁰⁹

Finally, it can be argued that comparing the number of summary judgment motions with all claims filed to yield a concept of frequency and success of summary judgment motions is a distorting comparison. For one thing, many cases are terminated through default judgment and, therefore, could never be terminated by summary judgment. It can be asserted that a more accurate comparison would be between cases terminated by trial and cases terminated by summary judgment. Since it is known that the vast majority of cases are terminated before trial, a comparison of cases terminated by summary judgment with cases terminated by trial would yield a much more favourable comparison.

Some English statistics support this last point. In 1979, 149,244 writs were issued from the Queen's Bench and there was default judgment in 55,531 cases. Of the remaining cases there were a total of 3,196 judgments under Order 14 as opposed to 2,008 cases disposed of after trial.²¹⁰ Another

²⁰⁶ *Committee on Commerce, U.S. Senate, Class Action Study* (Washington: U.S. Gov't Print Office, 1974). The portion of the study which will be referred to in this paper, involved an examination of the docket sheets and court records of all class actions filed in the United States District Court for the District of Columbia between July 1, 1966 and December 31, 1972.

²⁰⁷ *Id.* at 8-10. Percentages were obtained by the author of this paper from statistics produced by the study.

²⁰⁸ DuVal, *The Class Action As an Antitrust Enforcement Device, The Chicago Experience*, [1976] A.B. Foundation Research J. 1272 at 1303 *et seq.* Summary judgment did seem more prevalent in non-class antitrust actions as opposed to class antitrust actions.

²⁰⁹ *Developments in the Law - Class Actions* (1976), 89 Harv. L. Rev. 1318 at 1364 n. 162.

²¹⁰ English Judicial Statistics, *supra* note 108, at 50-52. See also English Judicial Statistics for 1977 and 1978.

way of comparing may be to contrast the number of cases disposed of by summary judgment with the number of cases set down for trial. This latter figure will contain many cases that are never disposed of at trial but does represent cases that have persisted in the court system to quite an advanced stage of litigation. In 1979 there were 9,934 cases set down for trial as opposed to the 3,196 cases mentioned in which judgment under Order 14 was given.²¹¹ Using these figures, it could be argued that without summary judgment, cases remaining in the system to an advanced stage of the proceedings would be increased by about one third. These figures are quite dramatic, particularly when it is recalled that the procedure is not available to the defendant under Order 14.

Despite these qualifications, and they are important ones, the fact probably is that summary judgment is not used successfully in as many cases as it ought to be. In the United States, where litigation is expanding,²¹² it seems a legitimate concern that ways be found to handle in some rational manner this burgeoning caseload. It is understandable that summary judgment be looked to as one of the ways this might be done. The final subsection of this section attempts to examine how summary judgment under Rule 56 could be given a better, and more expansive, interpretation.

D. *Summary Judgment in the State Courts*

Because of the different substantive bases between state courts and the United States Federal Court, it will be useful to look briefly at summary judgment motions in state courts. Certainly, between the two, any cause of action which could possibly arise is likely to be covered. This subsection will amplify some points that have already been touched upon with regard to state courts and will focus on New York's Rule 3212²¹³ and Section 437c of the California Code of Civil Procedure.²¹⁴

In looking at New York's Rule 3212, two points can be made in respect to its similarity to Ontario's Rule 33. In the first place, the development of New York's Rule 3212 bears a striking resemblance to the development of Ontario's Rule 33. Rule 3212 was originally limited to actions to recover a debt or liquidated demand on a contract or judgment; it was gradually expanded to nine categories into which successful claims had been pigeonholed;²¹⁵ and finally, in 1959, it was made applicable to all kinds of actions.²¹⁶

The second point to be made is in respect of the use of summary judgment to collect debts. Though there do not appear to have been any empirical

²¹¹ *Id.*

²¹² See, e.g., Manning, *Hyperlexis: Our National Disease* (1977), 71 *Nw. U.L. Rev.* 767; Sander, *Varieties of Dispute Processing* (1976), 70 *FRD* 111.

²¹³ *N.Y. Civ. Prac. Law & R.* § 3212 [hereinafter *CPLR* § 3212]; see, e.g., Weinstein, Korn and Miller, *infra* note 217.

²¹⁴ *Cal. Code of Civ. Proc.* § 437(c).

²¹⁵ Weinstein, Korn and Miller, *infra* note 217, at § 3212 : 32-147, 148.

²¹⁶ The exception to its applicability was in matrimonial actions. That exception was deleted: see Weinstein, Korn and Miller, *infra* note 217, at § 3212 : 32-148.

studies done on this point, it seems clear that summary judgment is utilized often as a means of determining whether or not there is any defence to an allegation that money is owed.²¹⁷ Indeed, in New York there is a special rule dealing with a procedure for summary judgment when “. . . an action is based upon an instrument for the payment of money only or upon any judgment”²¹⁸ The essential practice under this rule is subject to Rule 3212, but it is designed to make the procedure in particular circumstances perhaps even more “speedy and effective.”²¹⁹

The provisions in California's Rule 437c attempt to address a recurring problem in the summary judgment debate—whether the question of credibility should be grounds for refusing summary judgment. Neither New York's Rule 3212 nor Ontario's Rule 33 makes a similar attempt. The presence of an issue of credibility of a witness is likely to lead a court to conclude that the witness' testimony should be tested by *viva voce* examination at trial, and therefore, to refuse summary judgment.²²⁰ This is the position taken by the Advisory Committee on the Federal Rules in its note to the 1963 amendment to Rule 56(e).²²¹ Generally, it can be said that if the credibility of a witness is challenged specifically, and bases for contradiction of the testimony are offered, the case should go to trial.²²² The difficulty has been that the courts have sometimes too readily found credibility to be in issue. The danger is that nearly any summary judgment motions can be said to raise a credibility

²¹⁷ Leighton, *The "Care and Feeding" of Creditors' Claims Under California Procedure* (1962-63), 14 Hastings L.J. 1 at 11; Weinstein and Korn, *Preliminary Motions in New York: A Critique* (1957), 57 Colum. L. Rev. 526; Note, *Summary Judgment in New York: The New Rule 113* (1959), 33 St. John's L. Rev. 414 at 416. See also the cases cited in West's Ann. Cal. Codes, *Code of Civ. Proc.* and Weinstein, Korn and Miller, 4 *New York Civil Practice* (New York: M. Bender, 1979) at § 3212 : 32-172 *et seq.*

²¹⁸ CPLR § 3213 states:

Motion for summary judgment in lieu of complaint.

When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise.

See, e.g., Weinstein, Korn and Miller, *id.* at § 3212 : 32-200.

²¹⁹ *Id.* at § 3213.01a : 32-203 and § 3213.02b : 32-213.

²²⁰ 10 Wright and Miller, *supra* note 28, at § 2726; Zack, *California Summary Judgment: The Need for Legislative Reform* (1971), 59 Cal. L. Rev. 439 at 461 *et seq.*; Zack, *The 1973 Summary Judgment Act, New Teeth for an Old Tiger* (1973), 48 Cal. State B. J. 654 at 658.

²²¹ *Supra* note 141.

²²² 10 Wright and Miller, *supra* note 28 at 521 and 1981 Pocket Part at 165.

problem unless the facts are admitted, since almost all evidence contained in documents, affidavits and discovery will be offered to refute the position of the other party and thus can be viewed as raising the issue of which side will enjoy the court's confidence in its veracity.

California Section 437c seeks to address this problem directly. The fifth paragraph provides:

If a party is otherwise entitled to a summary judgment pursuant to the provisions of this section, summary judgment shall not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to such fact; or where a material fact is an individual's state of mind, or lack thereof, and such fact is sought to be established solely by the individual's affirmation thereof.²²³

The paragraph has the obvious effect of preventing a finding of credibility—for whatever reason—from prohibiting a successful summary judgment.²²⁴ On the other hand, it does make specific allowance for situations where a trial might be necessary. Where the evidence is given by the sole witness to a fact, it becomes very important to allow the other side to test the strength of the testimony and to allow the court to judge the demeanor of the witness for itself.

In looking at the New York and California rules, what emerges clearly is that the summary judgment procedures in these states resemble very closely Rule 56 and that the general attitude towards summary judgment and the way it functions is similar in both the Federal and state courts.²²⁵

²²³ *Cal. Code of Civ. Proc.*

²²⁴ In Zack, Review, *supra* note 220, where a proposal like the paragraph under discussion was put forward, it is stated at 478:

Rather than condone the broad application of the "credibility" and "cross-examination" theories of defeating summary judgment—with the attending doubt as to when these conceptually unbounded theories are applicable—it is desirable to limit the substantive areas where they can be employed.

²²⁵ See subsection B of this section of the paper. See also Hittner, *Summary Judgments in Texas, 1981 Annual Survey* (1980), 21 *S. Texas L. J.* 1; Brown, *Summary Judgment in Maryland* (1979), 38 *Maryland L. Rev.* 188; Comment, *Summary Judgment in Texas: A Selective Survey* (1977), 14 *Houston L. Rev.* 854; Damsel, *Summary Judgment Obsolete or a Useful Tool* (1977), 51 *Fla. B.J.* 535; Comment, *Alabama Summary Judgment Practice* (1977), 7 *Cum-Sam. L. Rev.* 493; Bashara, *The Elusive Summary Judgment Rule: Sifting Through the Maze* (1976), *Det. C. L. Rev.* 397; Sheehan, *Summary Judgment: Let the Movant Beware* (1976), 8 *St. Mary's L.J.* 253; Martinis, *Summary Judgment Procedure in Oregon: the Impact of Oregon's Adoption of Federal Rule 56* (1976), 13 *Williamette L. J.* 73; Browning, *A Glance at Summary Judgment* (1975), 27 *Mercer L. Rev.* 285; Horton, *Good Earth and Summary Judgment* (1975), 49 *Conn. B.J.* 411; Comment, *Nickol v. U.S.—District Courts Prohibited From Entering Summary Judgment When Reviewing Administrative Record*, [1974] *Utah L. Rev.* 819; Armenakis, *Privacy and Summary Judgment: New Test, New Beneficiaries* (1975), 6 *Seton Hall L. Rev.* 454; Note, *The Procedural Mirage: Post-Holl Summary Judgment Law in Florida* (1975), 27 *U. Fla. L. Rev.* 729; Siler, *Summary Judgment: a Comparison of its Application by North Carolina and Federal Courts in Negligence Actions* (1973), 9 *Wake Forest L. Rev.* 523; David, *Summary Judgment in California: The Case for Judicial Reform* (1973), 25 *Hastings L.J.* 119.

Therefore, any lingering reservations about the appropriateness of a summary judgment rule for Canadian courts which would resemble Rule 56, based on the differences in substantive causes of action, would seem to be unfounded.

E. *How Does Rule 56 Really Function?*

It has been noted that:

[n]ot surprisingly, most contemporary summary judgment decisions involve challenges to the claimant, who is normally the party with the burden of proof. Few, however, set forth a useful rationale for deciding whether to grant the motion. Most simply draw from the available clichés, which are selected in classic cut-and-paste style to support whatever result the court feels is proper. In reality most judges are simply muddling through and denying the motion whenever they are in doubt. This timorous approach obviously reduces the danger of unjust dismissals, but it does so at the cost of permitting at least some useless trials to be conducted.²²⁶ [footnote omitted]

Perhaps the most difficult aspect of summary judgment is trying to gauge which factors are used, and ought to be used, by a court in any particular case when it is deciding whether or not to grant summary judgment. It has been said that "summary judgment is a drastic remedy and should be used with caution,"²²⁷ that if there is the "slightest doubt"²²⁸ it should be denied and that a "scintilla of evidence"²²⁹ is sufficient to refuse the motion.

Clearly these phrases reveal a counsel of caution. By the same token, it seems just as obvious that these phrases cannot literally mean what they say:²³⁰ as a matter of logic there will always be some doubt as to facts because probabilities are the basis of legal proof.²³¹ One commentator has stated:

It is frequently said that summary judgment should not be granted if there is the "slightest doubt" as to the facts. Such statements are a rather misleading gloss on a rule that speaks in terms of "genuine issue as to any material fact" and would, if taken literally, mean that there could hardly ever be a summary judgment, for at least a slight doubt can be developed as to practically all things human.²³² [footnotes omitted]

A discussion of some of the leading cases will illustrate how the courts have decided whether genuine issues of material fact exist and which factors

²²⁶ Louis, *supra* note 11, at 746.

²²⁷ Zack, *California Summary Judgment*, *supra* note 220, at 449.

²²⁸ Louis, *supra* note 11, at 760 *et seq.*

²²⁹ 10 Wright and Miller, *supra* note 28, at 549.

²³⁰ The courts themselves have recognized the questionable value of such phrases. In *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 388 F. 2d 272 (2nd Cir. 1967) Kaufman J. stated at 279:

the law provides no magical talisman or compass that will serve as an unerring guide to determine when a material issue of fact is presented. As is so often true in the law, this is a matter of informed and properly reasoned judgment. [footnote omitted]

²³¹ Bauman, *supra* note 202, at 487.

²³² Wright, *supra* note 186, at 493-94.

are taken into account in making this decision. It will be observed how prominent are the roles of burden of proof and credibility in these decisions.

*Lundeen v. Cordner*²³³ involved a case in which the guardian of named beneficiaries under group life and annuity plans for benefits sued for payments. An intervenor asserted that there had been a change of beneficiaries. It was established that the insured had requested beneficiary changes in accordance with his will, he had completed the necessary forms and these had been transmitted to the home office of the employer company. The home office replied stating that the beneficiary forms had been received and that there appeared to be no reason why they would not be acceptable. The forms were forwarded to the employer's annuity and insurance department but a search of that department did not disclose the forms. Nevertheless, the court held, on a motion for summary judgment brought by the intervenor, that the change had been effective and, accordingly, granted summary judgment.

Crucial to the court's decision were affidavits by one Burks, introduced by the intervenor. Burks was a fellow employee of the deceased and supervised the filling out of the requisite forms. Burks gave positive evidence in his affidavits that the change of beneficiary had been made. The court rejected the plaintiff's submission that there should be a trial to test Burks' credibility. One reason for the court's decision was the unavailability of Burks at the trial since he was out of the jurisdiction.²³⁴ A second reason was the fact that the plaintiff had not herself sought out Burks' affidavit.²³⁵ Of more importance were the circumstances of Burks' affidavits: he appeared to be unbiased; he had no financial or personal interest in the litigation; his testimony was competent; his participation in the change of beneficiaries was in the regular course of his duties; and both affidavits were internally consistent and in agreement with the documents which were exhibits.²³⁶ The Court stated:

[w]here there is no indication that the affiant was biased, dishonest, mistaken, unaware or unsure of the facts, the cases declaring that cross-examination is necessary when one of the above is present, have no application here. There being no positive showing that this witness's testimony could be impeached or that he might have additional testimony valuable to plaintiff, summary judgment was properly granted. The opposing party cannot as a matter of course force a trial merely in order to cross-examine such an affiant, nor must the Court deny the motion for summary judgment on the basis of a vague supposition that something might turn up at the trial.²³⁷

The need for cross-examination, however, has caused the court to refuse summary judgment, particularly when motive, intent, or subjective feelings are in issue.²³⁸ This seems especially true when the party moving for sum-

²³³ 354 F. 2d 401 (8th Cir. 1966).

²³⁴ *Id.* at 408.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ 10 Wright and Miller, *supra* note 28, at 720.

mary judgment testifies to these issues on his own behalf. In these situations the courts have held that the opposing party has a right to cross-examine the moving party at trial and need do nothing else in order to have the motion defeated, despite the presence of Rule 56(e). For example, *Cross v. United States*²³⁹ was an action for a refund of income taxes paid by an assistant professor of Romance languages and the issue was the deductibility of the expenses of a trip to Europe. Cross contended that the purpose of the trip was to improve his familiarity with foreign languages and culture while the government claimed that all or part of the trip was a vacation and, therefore, not deductible. Cross filed a motion for summary judgment and supported it with his own deposition which asserted that the trip was for educational motives. The government filed no counter-affidavit. The Court of Appeals, Second Circuit, in reversing the district court's grant of summary judgment stated:

While there was no dispute that Professor Cross was a teacher of languages and that he travelled abroad, many of the facts remain largely within his own knowledge and the Government should have the opportunity to test his credibility on cross-examination. . . . While we have recently emphasized that ordinarily the bare allegations of the pleadings, unsupported by specific evidentiary data, will not alone defeat a motion for summary judgment, this principle does not justify relief where, as here, the disputed questions of fact turn exclusively on the credibility of movants' witnesses.²⁴⁰ [footnotes omitted]

The conflict that exists in respect of what the moving party must establish to obtain summary judgment and what the opposing party must do to resist summary judgment is illustrated clearly by some earlier cases in the Second Circuit. Judge Charles E. Clarke, the draftsman of the Federal Rules, represented an expansive view of Rule 56, while Judge Jerome N. Frank represented a cautious view of the Rule. The famous case of *Arnstein v. Porter*,²⁴¹ involving allegations of copyright infringement, presented these views in stark contrast. In that case there was an issue whether the defendant could have had access to the plaintiff's composition in order to copy it. The defendant denied access or copying and the plaintiff admitted that there was no evidence to support him on this aspect of the case. Even though the majority *per* Judge Frank called the testimony "fantastic," it held that the grant of summary judgment was an error because the defendant's credibility was a question of fact and the plaintiff might be able to discredit the defendant's denial by cross-examination.

Vigorously dissenting, Judge Clark described the majority opinion as one of an "anti-intellectual and book-burning nature"²⁴² and stated:

Of course it is error to deny trial when there is a genuine dispute of facts; but it is just as much error—perhaps more in cases of hardship, or where impetus is

²³⁹ 336 F. 2d 431 (2d Cir. 1964).

²⁴⁰ *Id.* at 433.

²⁴¹ 154 F. 2d 464 (2d Cir. 1946).

²⁴² *Id.* at 478.

given to strike suits—to deny or postpone judgment where the ultimate legal result is clearly indicated.²⁴³ [footnote omitted]

A more expansive view of summary judgment can be detected in the Second Circuit's decision in *Dyer v. MacDougall*²⁴⁴ where the court, including Judge Frank, affirmed a summary judgment. This case was a slander action and summary judgment was granted after the defendant presented affidavits of persons to whom the slanders were alleged to have been uttered, denying that the remarks had been made. More recent cases, however, at least in the Second Circuit, seem to reflect Judge Frank's view that great caution should be exercised in granting these motions.²⁴⁵

In addition, it does seem clear, generally, in terms of burden of proof and presumptions, that the moving party has the onus of establishing that there is "no genuine issue as to any material fact." Corollaries of this principle are that construction of evidence presented to the court and inferences therefrom are made to favour the party opposing the motion and that facts alleged by that party, when supported by evidence, are regarded as true.²⁴⁶ The articulation of this principle and its corollaries often leads to a comparison of summary judgment with a motion for a directed verdict at trial. That motion, made either after the plaintiff has delivered his or her evidence or after both parties have completed their evidence, rests on the assertion that no question of fact exists to be determined by the trier of fact—in the United States, often a jury—and that the moving party is entitled, as a matter of law, to be granted judgment in his or her favour.²⁴⁷

²⁴³ *Id.* at 480.

²⁴⁴ 201 F. 2d 265 (2d Cir. 1952).

²⁴⁵ Wright, *supra* note 186, at 496.

²⁴⁶ 10 Wright and Miller, *supra* note 28, at 524-30 and 1981 Pocket Part at 168-71.

²⁴⁷ *Id.* at 406-10 states:

[T]he ability to take account of the evidence's credibility depends on whether the motion is brought under Rule 50 or Rule 56. On a summary judgment motion the court is not permitted to rule on the credibility of the material that is presented. Indeed, as is discussed more fully elsewhere, when there is an issue whether the testimony of an affiant or deponent would be credible if presented at trial, the court must deny summary judgment and leave that question to be resolved by the finder of fact. However, a directed verdict motion typically would be made after the witness had testified and the court could take account of the possibility that he either could not be disbelieved or believed by the jury.

Nonetheless, both motions have significant points of similarity. For example, the moving party under Rule 56, as well as under Rule 50, has the burden of showing that there is no genuine issue of material fact that needs to be resolved by the jury. Moreover, on both a Rule 56 and a Rule 50 motion all inferences are drawn in favour of the nonmoving party.

Both motions also call upon the court to make basically the same determination—that there is no genuine issue of fact and that the moving party is entitled to prevail as a matter of law. As a result, several courts have equated the showing required for a grant of summary judgment with that for a directed verdict and have stated that a court should not grant summary judgment if it could not direct a verdict in the same case or, conversely, that summary judgment should be granted if a directed verdict would be proper. On the other hand, it has been argued that because summary judgment comes at a relatively early stage in the

The appropriateness of making the moving party bear the onus, of construing the evidence presented to the Court and inferences therefrom in favour of the opposing party and of regarding facts alleged by that party when supported by evidence as true, has not gone unquestioned. The McLauchlan Study demonstrated that, both in terms of number of motions brought and success of motions, these burdens gave an advantage to the defendant.²⁴⁸ The defendant has an advantage because plaintiffs must prove all essential elements of a claim in order to succeed, whereas the defendant need only disprove one essential element of the claim in order to prevail. Therefore, the defendant, even when he bears the onus on a summary judgment, is still more likely to be able to discharge that onus.

The exception to this difference between plaintiffs and defendants occurs when defendants assert affirmative defences. But since defendants asserting affirmative defences usually also deny one or more of the plaintiff's allegations, these defendants should still be able to resist summary judgment with more success than plaintiffs.²⁴⁹

In addition to the advantage to the defendant just discussed, the provisions for putting the burden so clearly on the moving party may have a pronounced effect upon both the plaintiff and the defendant so far as bringing summary judgment motions. Such a burden probably inhibits the bringing of these motions by both plaintiffs and defendants.

Louis has described a change in the interpretation of Rule 56 which he advocates, based upon co-ordinating the onus on summary judgment motions with the allocation of burden of proof at trial:

If a motion for summary judgment is otherwise in order, the court must then decide the critical, final question of whether there is a "genuine issue" of fact with respect to the existence of the essential elements the motion has questioned or sought to establish. Commentators generally agree that under existing law the

litigation, courts should be more reluctant to grant summary judgment than to direct a verdict. Thus, the Fourth Circuit stated in *Pierce v. Ford Motor Company*:

Even in cases where the judge is of opinion that he will have to direct a verdict for one party or the other on the issues that have been raised he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment.

Although it is true that there are situations in which a court might direct a verdict but deny summary judgment, the approach suggested by the *Pierce* case can be criticized as being too restrictive and as having a debilitating effect on the utility of Rule 56. Admittedly, courts must take care to preserve the parties' right to a full trial of any disputed fact issues; however, if none appear to exist or are foreseeable, there is no reason to require a trial on the off-chance that one will develop. [footnotes omitted.]

For an empirical study of directed verdicts see: McLauchlan, *An Empirical Study of Civil Procedure: Directed Verdicts and Judgments Notwithstanding Verdict* (1973), 2 J. Leg. Studies 459. For an extremely detailed discussion of directed verdicts particularly in the Federal Court, see Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts* (1971), 55 Minn. L. Rev. 903.

²⁴⁸ See the discussion of this point in subsection (c) of this Section of the paper.

²⁴⁹ Louis, *supra* note 11, at 745n. 4. This point is also discussed in 6 Moore's, *supra* note 165, at 56-735 *et seq.*

movant has the burden of clearly establishing the absence of any issue of material fact, even if his opponent would bear the burden of proof on that issue at trial.

It is the contention of this article that a better approach would be to coordinate summary judgment proof requirements with the allocation of the burden of proof at trial. The way in which the question regarding any 'genuine issue [of] . . . fact' is resolved should depend primarily upon the nature of the moving party's trial proof burden: Courts should grant such motions less readily when the moving party is seeking to establish the existence of an essential element of a claim or defense that he has asserted and with respect to which he bears the burden of proof at trial than when he is seeking to establish the non-existence of an essential element of a claim or defense asserted against him and with respect to which the opposing party bears the burden of proof at trial (or, more precisely, the burden of production or of coming forward).²⁵⁰ [footnotes omitted]

Having the court take into account how the burden of production of evidence would be distributed at trial in deciding whether material facts had or had not been established would be a beneficial refinement to the provisions for onus on summary judgment motions. Take a simple example from a libel suit where the plaintiff moves for summary judgment. It is true the plaintiff would still be left with establishing that there was no issue that the words in question had been published and that they would, absent establishment that they were true, constitute libel. If the defendant pleaded justification, however, the court could recognize that on the motion the defendant would have the onus of establishing that there was a genuine issue whether the words were true or not in order to resist summary judgment, since he would have the burden of production on that issue at trial.²⁵¹

Moreover, there is another factor connected with the provisions for onus. Since the party who moves for summary judgment has the entire onus, the party resisting summary judgment may seek to raise a "genuine issue" by telling the party and the court as little as possible about his side of the case. This seems particularly true when the defendant is resisting summary judgment.²⁵² Rule 56(e) deals with this problem to some extent, but a party wishing to resist summary judgment may file a *pro forma* affidavit and thereby throw the burden onto the party moving for summary judgment to adduce sufficient evidence, either through himself or through his witness, or by discovering the party resisting²⁵³ summary judgment, to establish the absence of factual issues. Allowing the court to take into account how the burden of production of evidence would be distributed at trial will, at least to some extent, curb this and create a countervailing pressure on the opposing party to adduce the evidence he has for establishing that an issue exists. For instance, in the hypothetical example of the libel suit cited above, once the

²⁵⁰ *Id.*, Louis, *supra* note 11, at 748. For a Canadian discussion of the extent and allocation of burdens of proof see Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974) at 384 *et seq.*

²⁵¹ Sopinka and Lederman, *id.*, at 403. For an article that utilizes Louis' analysis and applies it to summary judgments in Minnesota, see: Pielemeier, *Summary Judgment in Minnesota: A Search For Patterns* (1981), 7 William Mitchell L. Rev. 147.

²⁵² Louis, *supra* note 11, at 759 *et seq.*

²⁵³ *Id.*

plaintiff, by his own evidence or through the defendant's evidence, established that the words in question had been published and they would constitute libel, the onus would shift to the defendant to establish justification. Therefore, the defendant would be at an increased risk if he did not disclose all the facts within his control which would at that point establish justification.²⁵⁴

The difficulty with the provision for onus shifting, however, as Louis himself appears to admit,²⁵⁵ is that it does not go far enough. Even if the Court does take into account how the burden of production should be distributed at trial, the fact remains that in most instances the burden will remain on the plaintiff since he must prove all essential elements of a claim to succeed. Except for the case of affirmative defences, where the burden can be shifted to the defendant when the plaintiff is moving for summary judgment, the plaintiff will retain the burden of proving these essential elements and, accordingly, in many cases will not be aided by the shifting of onus.

Therefore, in addition to a provision for the taking into account of the burden of production at trial, there should be other modifications which should apply to all summary judgment motions no matter which party is applying. In practice, such modifications would probably help plaintiffs more, simply because they encounter more difficulties at present. A simple but useful step would be to eliminate the corollaries discussed earlier, that construction of the evidence presented to the court and inferences therefrom are made to favour the party opposing the motion and that facts alleged by that party, when supported by evidence, are regarded as true; this will further curtail the advantages of the opposing party. The corollaries are neither necessary logically nor functionally for the operation of the principle that the moving party has the onus. On the other hand, they may often tip the balance against summary judgment. For example, it is possible to imagine a different result in the *Cross* case if the corollary that construction of the evidence and inferences therefrom are made to favour the opposing party were removed.

Another measure that would be very effective in expanding summary judgment is curtailing the pervasiveness of credibility as a decisive factor in the refusal of summary judgment.²⁵⁶ The solution of California's Section 437c quoted in the preceding subsection appears to be an appropriate response to the problem. The presence of this section in the Rule would clearly be an influencing factor in a case such as *Arnstein v. Porter*, where the mere opportunity to test the credibility of witnesses under cross-examination without any concrete expectation that their evidence would be impeached, seemed to be the decisive factor. In such cases, the applicable portion of Section 437c would favour granting summary judgment.

²⁵⁴ *Id.* at 753 *et seq.*, particularly at 758-59. For a discussion of this formulation in the context of summary judgment in political libel cases, see Gillig, *The Role of Summary Judgment in Political Libel Cases* (1979), 52 S. Cal. L. Rev. 1783.

²⁵⁵ *Id.*, Louis at 764.

²⁵⁶ *Id.* at 759 *et seq.*

VI. THE PROPOSAL OF THE CIVIL PROCEDURE REVISION COMMITTEE OF ONTARIO

In deciding what language and model to adopt for summary judgment in Canada and particularly in Ontario, it will be useful to look briefly at the proposed summary judgment rule of the Civil Procedure Revision Committee of Ontario. The entire text of the proposed Rule 22 is set out as Appendix D to this paper.

The Rule is available to both plaintiffs and defendants and is unrestricted in respect of the kinds of actions to which it is applicable and the nature of the relief sought. The plaintiff, at any time before an action is set down for trial, may apply for summary judgment on the ground that there is no defence to the action or no defence with respect to one or more of the claims or to the whole or part of any claim or that the only defence is to the amount claimed.²⁵⁷ There is also a provision for hearing the application under situations of urgency.²⁵⁸ The defendant, after he has delivered his statement of defence and before the action is set down for trial, may apply for summary judgment on the ground that there is no merit in the action or no merit with regard to one or more claims or to the whole or part of any such claim.²⁵⁹

The Rule further provides that where the applicant satisfies the court that there is no defence or merit to the action (whichever test is applicable) and that the applicant is entitled to judgment as a matter of law, the court may grant judgment.²⁶⁰ The Rule goes on to provide that where the only defence is to the amount claimed, the court may either direct a trial on that issue or a reference to determine that amount;²⁶¹ where there is only a question of law, the court may determine the question and grant judgment accordingly;²⁶² and where the only claim is for an accounting, the court may grant judgment with a reference.²⁶³

In addition, the provisions for costs in respect of unsuccessful motions and where affidavits are filed in bad faith,²⁶⁴ the provisions for incidental orders and conditional orders where a trial is necessary²⁶⁵ and the requirement that both sides must file affidavits, in opposition and support, in which a party sets forth all the material facts upon which he intends to rely, to the extent that he had personal knowledge thereof and in which he swears that

²⁵⁷ *Civil Procedure Revision Committee (Williston Committee)* (Toronto: Min. of the A.G., 1980), r. 22.01(1) (a).

²⁵⁸ *Id.* r. 22.01(1) (b).

²⁵⁹ *Id.* r. 22.01(2).

²⁶⁰ *Id.* r. 22.04(1).

²⁶¹ *Id.* r. 22.04(2).

²⁶² *Id.* r. 22.04(3).

²⁶³ *Id.* r. 22.04(4).

²⁶⁴ *Id.* r. 22.06.

²⁶⁵ *Id.* r. 22.05(2).

he knows of no fact material to the motion which has not been disclosed,²⁶⁶ are all provisions which address some of the aspects referred to in this paper in respect of summary judgment procedure. Moreover, the provision which permits a master, on a question of law, to adjourn the motion to a judge,²⁶⁷ seems a good compromise solution to any fears that the expanded procedure gives excessive case dispositive power to a master.²⁶⁸

Finally, Rule 22 allows the court that refuses to grant summary judgment to place the case on a speedy trial list.²⁶⁹ This is a compromise: the applicant does not get summary judgment but, by the same token, the respondent is not allowed to dawdle on his way to trial. The danger is that the speedy trial list will become an escape hatch for an indecisive court, allowing claims to remain in the system which should not be there. Moreover, if too many cases get assigned to the speedy list it may not be too "speedy." And, such a list causes cases not on the list to come to trial more slowly since some judge-time, that would otherwise be available, is consumed by the speedy list.

Of course these provisions could be modified for the better. For example, Rule 22.02, which requires both sides to file affidavit evidence, should in addition contain a provision like Federal Rule 56(f), which would allow the opposing party to explain why he cannot produce evidence and would allow the court to grant an adjournment to permit the party to obtain the affidavit or to permit discovery.²⁷⁰ Moreover, in Ontario the parties cannot discover individuals who are not parties, but they can examine an individual for the purpose of supporting or resisting a motion²⁷¹ and it should be made clear that this procedure is applicable to summary judgment motions.

The objectionable aspect of the Rule is its permissive quality and the fact that the language used is a curious mixture of Federal Rule 56 and English Order 14. For example, Rules 22.01, 22.02 and 22.04 speak in terms of "no defence to the action" and "no merit to the action" and Rule 22.04(1) and (3) state that the court may grant judgment. Rule 22.05, however, speaks in terms of "material facts . . . not in dispute." Finally, Rule 22.04 speaks about "no defence or merit to the action" and the "applicant is entitled to judgment as matter of law." The terminology is extremely confusing; for example, Rule 22.01 leads one to believe that the "no defence

²⁶⁶ *Id.* r. 22.02.

²⁶⁷ *Id.* r. 22.04(3).

²⁶⁸ It is interesting to speculate whether there may be a constitutional problem in giving masters power to grant judgment on a summary judgment motion, arising from section 96 of the *British North America Act*. This question appears never to have been conclusively answered although a few western cases indicate that there may be a problem: see *Lucy v. Interbuild Dev. Ltd.*, [1975] 1 W.W.R. 244, 48 D.L.R. (3d) 150 (Alta. T.D.) and *Kordyban v. Hryirchuk* (1980), 17 C.P.C. 7, 13 Alta. L.R. (2d) 196 (Q.B.), but see *Barrowman v. Ranchland Asphalt Services Ltd.*, *supra* note 137.

²⁶⁹ *Supra* note 257, at r. 22.05(1) (a).

²⁷⁰ See the discussion of this point in *Louis*, *supra* note 11, at 767.

²⁷¹ See r. 230 of the present *Rules of Practice*.

or no merit" language encapsulates both questions of law and fact, whereas Rule 22.04 suggests that questions of law are somehow outside the test of "no defence" or "no merit," whichever is applicable, and, therefore, "no defence" or "no merit" are merely meant to capture the idea that the facts are settled. The nature of the test required to be used by the court would be much clearer if "no genuine issue of material fact and entitlement as a matter of law" were used.

In addition, the use of permissive language in the Rule is an open invitation to courts to shy away from summary judgment and to use any difficulty open to dispute to refuse to grant it when, for instance, questions of law remain and, perhaps, even when both the facts and law are settled. The permissiveness of the language of Rule 22 may, unfortunately, be the functional counterpart of the "there ought for some other reason to be a trial" language of English Order 14²⁷² even though that specific language has been, rightly, omitted from Rule 22.

VII. RECOMMENDATIONS AND CONCLUSIONS

The difficult decision in framing a summary judgment rule is to decide how effectively it should operate. There is no suggestion here that it should be expanded to such a degree that there would actually be a predisposition in favour of summary judgment, but this paper has suggested that the tendency against summary judgment, at least in British and Canadian cases, should be eliminated. Yet, this is a question which is wholly unaddressed in the proposed Rule 22 of the Civil Procedure Revision Committee of Ontario or the other Canadian rules on summary judgment.

The norm that "every person is entitled to a day in court" tips the scales heavily away from summary judgment and it may fairly be asked why it is that Canadian and English courts seem so enamoured in this principle. No doubt it reflects an underlying attitude concerning the degree to which the courts are open to all persons allowing them to present their case and to receive justice from a judge. To the extent that this norm reflects that attitude it is laudable, but it may be wrongly directed. A norm which would strive to provide access to the courts for everyone would better reflect the underlying attitude and it might be better expressed by stating that everyone has a right to access to the courts, but not necessarily to a trial. Such a norm could lead, on the one hand, for example, to the development of a more sophisticated class action mechanism and to more liberalized rules in respect of standing and, on the other hand, for example, to a more expansive summary judgment mechanism.

Eliminating an action before trial involves a difficult decision. If there is a vigorous policy in this regard it is possible to imagine that some actions that might possibly succeed at trial will nevertheless be eliminated by summary judgment and this possibility quite rightly counsels caution. Against

²⁷² See the discussion of this point in Section IV(a) of this paper.

the possibility of eliminating a few meritorious actions, however, must be weighed the disadvantage of the present situation. Hundreds of cases are allowed to persist in the court system, many all the way through to trial, at incredible cost in time and money to the court system and the opposing party and, sometimes, even to the party wishing to pursue the weak claim or defence and who does so more out of unfounded conviction than a realistic appraisal of the chances of success.

At this point the argument might be presented that our system of "winner recovers costs" is a sufficient deterrent to actions in which the facts are undisputed from persisting in the courts and, therefore, a strong summary judgment procedure is unnecessary. That argument, however, fails to understand that summary judgment has a function independent of the costs regime and that it should be evaluated separately. For example, in a "no way" cost system, where each party bears its own costs, summary judgment can be the means, and possibly the fairer means, of eliminating actions which should not persist in the system to trial. The tougher the summary judgment, presumably, the fewer such cases will enter the system and those that do can be eliminated.

Conversely, in a "winner recovers costs" system, summary judgment can eliminate appropriate cases which have not been deterred by the threat of that costs regime, for instance, cases where the party subject to summary judgment either has sufficient financial resources or, by contrast, has so few resources that he is undeterred by the costs sanction. The desirable aspect of summary judgment, in whatever costs regime it operates, is that it can look to the specific aspects of a particular case as it performs its elimination and deterrent function. Costs, on the other hand, can be a clumsy broad-axe which can deter not only cases which should not be allowed to go to trial, but also cases which are clearly meritorious but in which the parties are afraid of the cost consequences of losing, even if that possibility is remote.

The decision on a summary judgment motion to eliminate an action will be a hard one. But the realities of modern litigation are hard, too. The fact is that the middle class, let alone the poor, in many cases cannot afford the cost of litigation. In addition to providing greater access, the judicial system should be striving to make the procedures of the administration of justice as speedy and inexpensive as is consistent with quality, no matter who is litigating. An expanded summary judgment procedure will hardly solve all these problems but it can be a valuable tool in deciding what cases should be allowed to call upon the full resources of the administration of justice—courts, parties and lawyers.

Of course, it seems clear that a judiciary hostile to any change which would limit the right of a party to a trial can defeat the intent of almost any formulation of a rule. However, perhaps the judiciary has adopted an attitude favouring the day in court norm because that norm has never been seriously challenged by alternatives which, if accepted, would permit the courts to modify their attitudes. The simple realization that present methods for disposing of cases, particularly in Ontario, may have resulted from the failure

to seriously investigate alternatives, should lead to a curiosity about what other methods are available for adoption and what impact they can have.

More specifically, the summary judgment mechanism should be formulated to indicate that the courts are not to be inhibited solely by the fact that the granting of summary judgment will, in a particular case, deprive the opposing party of the opportunity of having the case disposed of by trial.²⁷³

In addition, the Rule could be made substantially more expansive by reflecting the factors discussed in the previous subsection; thus, the court would take into account how the burden of production would be distributed at trial; it would abolish the rule that the construction of evidence and the inferences therefrom are to be in favour of the party opposing the motion and that facts alleged by the opposing party, when supported by evidence are to be taken as true; and, it would curtail the pervasiveness of credibility as a decisive factor in the refusal of summary judgment.²⁷⁴

One does not have to be too perceptive to realize that there is now a respectable body of literature that contains a common theme of dissatisfaction with the courts.²⁷⁵ No doubt there is interesting terrain to explore, such as alternative methods of resolving disputes.²⁷⁶ Such exploration will be made

²⁷³ The following language is suggested as a formulation to accomplish this:

In deciding whether a genuine issue of material fact exists the court shall be guided by the following factors:

- (a) The fact that the party opposing the summary judgment will be deprived of an opportunity to have the case disposed of by a trial shall not be considered as a separate factor. The court, however, may weigh the disadvantage to the party opposing the summary judgment if the judgment were granted against the disadvantage to the moving party and to the courts, including time and money, if the motion were refused.
- (b) How the burden of production would be distributed between the parties at trial.
- (c) There shall be no rule arising from the bringing of the motion only, in favour of either party in respect of the construction of evidence presented to the court and inferences therefrom or in respect of the truth of allegations even when supported by evidence.
- (d) If a party is otherwise entitled to summary judgment pursuant to the provisions of this section, summary judgment shall not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion of the Court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to such fact; or where a material fact is an individual's state of mind, or lack thereof, and such fact is sought to be established solely by the individual's affirmation thereof.

²⁷⁴ *Id.*

²⁷⁵ In Canada, two of the more recent ones have been written by judges: see Estey, *Who Needs Courts?* (1981), 1 *The Windsor Yearb. of Access to Justice* 263 and Hugessen, "Are the Courts Cost-efficient?" in *The Cost of Justice* (Toronto: Carswell, 1980) at 47-58.

²⁷⁶ There is a growing body of literature dealing with methods of resolving disputes outside the traditional court system. See, for example, the following bibliography: Sander and Snyder, *Alternative Methods of Dispute Settlement—A Selected Bibliography* (Washington: ABA Committee on Resolution of Minor Disputes, 1979).

easier if, at the very least, it can be decided what kinds of disputes our courts should be deciding at the end of the twentieth century. This question is made more intense as class actions, suits in the public interest (standing cases), cases arising out of the Charter of Rights and other forms of litigation having extended impact, knock ever more loudly at the courtroom door.

The courts themselves, however, do not have to wait in beginning to address the many problems which are present. They can, within admittedly limited confines, use the tools they presently have to ensure that cases before them are resolved in both a just and expeditious manner. The inherent jurisdiction of the court to supervise the conduct of the action, the capacity to award costs against abusive lawyers, dismissal for want of prosecution, requirements for leave to appeal interlocutory orders and pre-trials, are all tools which could be used much more expansively than they are at present to ensure a system that produces fair results in cases which are under control of the courts. A summary judgment mechanism, utilized in a mildly vigorous way, would be a good place to begin.

Appendix A

ONTARIO RULE 33

33.—(1) At the option of the plaintiff, the writ of summons may be specially endorsed with a statement of his claim where the plaintiff seeks to recover a debt or liquidated demand in money (with or without interest and whether the interest be payable by way of damages or otherwise) arising,

- (a) upon a simple written promise to pay or upon a written acknowledgement of debt; or
- (b) upon a simple contract, express or implied, for goods sold and delivered; or
- (c) upon a simple contract, express or implied, where the price or method of calculation of the price has been agreed upon for
 - (i) work done or services rendered, or
 - (ii) work done or services rendered and for the supply and installation of materials; or
- (d) upon a cheque, promissory note or bill of exchange; or
- (e) upon an account settled between the parties in writing; or
- (f) upon a bond or contract under seal for payment of a liquidated sum, but not including a claim for liquidated damages; or
- (g) upon a judgment; or
- (h) upon a statute where the amount sought to be recovered is a fixed sum of money or is in the nature of a debt other than a penalty; or
- (i) upon a guarantee in writing where the claim against the principal is in respect of a debt or liquidated demand;

or the writ of summons may be specially endorsed with a statement of his claim,

- (j) in an action for recovery of land; or
- (k) in an action for recovery of chattels; or
- (l) in an action for foreclosure, sale or redemption.

(2) The writ in such cases shall be in accordance with Form 8.

(3) Where a writ is specially endorsed in respect of any of the above claims the plaintiff may also claim in respect of any other matter, in which case,

- (a) the form of the command on the writ shall be so worded as to apply to each of such claims; and
- (b) the general endorsement shall be preceded by the words "and by way of general endorsement:"

(4) Before being issued, a writ which is specially endorsed shall be certified by the solicitor who issues it that he believes the claim is one that properly comes within this Rule.

Appendix B

ENGLISH ORDER 14

(R. S. C. 1965)

SUMMARY JUDGMENT

Application by plaintiff for summary judgment (O. 14, r. 1).

1.—(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

(2) Subject to paragraph (3), this rule applies to every action in the Queen's Bench Division or the Chancery Division begun by writ other than one which includes—

- (a) a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment or seduction,
- (b) a claim by the plaintiff based on an allegation of fraud, or
- (c) an Admiralty action *in rem*.

(3) This Order shall not apply to an action to which Order 86 applies.

Manner in which application under Rule 1 must be made (O. 14, r. 2).

2.—(1) An application under rule 1 must be made by summons supported by an affidavit verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed.

(2) Unless the Court otherwise directs, an affidavit for the purposes of this rule may contain statements of information or belief with the sources and grounds thereof.

(3) The summons, a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant not less than 10 clear days before the return day.

Judgment for plaintiff (O. 14, r. 3).

3.—(1) Unless on the hearing of an application under Rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.

(2) The Court may by order, and subject to such conditions, if any, as may be just, stay execution of any judgment given against a defendant

under this rule until after the trial of any counterclaim made or raised by the defendant in the action.

Leave to defend (O. 14, r. 4).

4.—(1) A defendant may show cause against an application under Rule 1 by affidavit or otherwise to the satisfaction of the Court.

(2) Rule 2(2) applies for the purposes of this Rule as it applies for the purposes of that rule.

(3) The Court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit.

(4) On the hearing of such an application the Court may order a defendant showing cause or, where that defendant is a body corporate, any director, manager, secretary or other similar officer thereof, or any person purporting to act in such capacity—

- (a) to produce any document:
- (b) if it appears to the Court that there are special circumstances which make it desirable that he should do so, to attend and be examined on oath.

Application for summary judgment on counterclaim (O. 14, r. 5).

5.—(1) Where a defendant to an action in the Queen's Bench Division (including the Admiralty Court) or Chancery Division begun by writ has served a counterclaim on the plaintiff, then, subject to paragraph (3), the defendant may, on the ground that the plaintiff has no defence to a claim made in the counterclaim, or to a particular part of such a claim, apply to the Court for judgment against the plaintiff on that claim or part.

(2) Rules 2, 3 and 4 shall apply in relation to an application under this Rule as they apply in relation to an application under Rule 1 but with the following modifications, that is to say—

- (a) references to the plaintiff and defendant shall be construed as references to the defendant and plaintiff respectively;
- (b) the words in Rule 3 (2) "any counterclaim made or raised by the defendant in" shall be omitted; and
- (c) the reference in Rule 4 (3) to the action shall be construed as a reference to the counterclaim to which the application under this Rule relates.

(3) This Rule shall not apply to a counterclaim which includes any such claim as is referred to in Rule 1 (2).

Directions (O. 14, r. 6).

6.—(1) Where the Court—

- (a) orders that a defendant or a plaintiff have leave (whether condi-

tional or unconditional) to defend an action or counterclaim, as the case may be, with respect to a claim or a part of a claim, or

- (b) gives judgment for a plaintiff or a defendant on a claim or part of a claim but also orders that execution of the judgment be stayed pending the trial of a counterclaim or of the action, as the case may be,

the Court shall give directions as to the further conduct of the action, and Order 25, Rules 2 to 7, shall, with the omission of so much of Rule 7 (1) as requires parties to serve a notice specifying the orders and directions which they require and with any other necessary modifications, apply as if the application under Rule 1 of this Order or Rule 5 thereof, as the case may be, on which the order was made were a summons for directions.

(2) In particular, and if the parties consent, the Court may direct that the claim in question and any other claim in the action be tried by a Master under the provisions of these Rules relating to the trial of causes or matters or questions or issues by Masters.

Costs (O. 14, r. 7).

7.—(1) If the plaintiff makes an application under Rule 1 where the case is not within this Order or if it appears to the Court that the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, then, without prejudice to Order 62, and, in particular, to Rule 4 (1) thereof, the Court may dismiss the application with costs and may, if the plaintiff is not an assisted person, require the costs to be paid by him forthwith.

(2) The Court shall have the same power to dismiss an application under Rule 5 as it has under paragraph (1) to dismiss an application under Rule 1, and that paragraph shall apply accordingly with the necessary modifications.

Right to proceed with residue of action or counterclaim (O. 14, r. 8).

8.—(1) Where on an application under Rule 1 the plaintiff obtains judgment on a claim or a part of a claim against any defendant, he may proceed with the action as respects any other claim or as respects the remainder of the claim or against any other defendant.

(2) Where on an application under Rule 5 a defendant obtains judgment on a claim or part of a claim made in a counterclaim against the plaintiff, he may proceed with the counterclaim as respects any other claim or as respects the remainder of the claim or against any other defendant to the counterclaim.

Judgment for delivery up of chattel (O. 14, r. 9).

9. Where the claim to which an application under rule 1 or rule 5 relates is for the delivery up of a specific chattel and the Court gives judgment under this Order for the applicant, it shall have the same power to order the party against whom judgment is given to deliver up the chattel without giving him an option to retain it on paying the assessed value thereof as if the judgment had been given after trial.

Relief against forfeiture (O. 14, r. 10).

10. A tenant shall have the same right to apply for relief after judgment for possession of land on the ground of forfeiture for non-payment of rent has been given under this Order as if the judgment had been given after trial.

Setting aside judgment (O. 14, r. 11).

11. Any judgment given against a party who does not appear at the hearing of an application under Rule 1 or Rule 5 may be set aside or varied by the Court on such terms as it thinks just.

Appendix C

U.S. FEDERAL RULE 56

(a) *For Claimant.* A party seeking to recover upon a claim, counter-claim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For Defending Party.* A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony; Defense Required.* Sup-

porting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Appendix D

PROPOSED ONTARIO RULE RULE 22 SUMMARY JUDGMENT

22.01 Where Available

(1) *To Plaintiff*

- (a) At any time before an action is set down for trial, the plaintiff may apply for summary judgment against a defendant who had delivered his Statement of Defence, or has served a Notice of Motion, on the ground that,
- (i) there is no defence to the action, or with respect to one or more of the claims contained therein or to the whole or part of any such claim; or
 - (ii) the only defence is to the amount claimed.
- (b) Where there is some special reason for urgency, the plaintiff may apply, without notice, for leave to serve a Notice of Motion for Summary Judgment with the Statement of Claim, and such leave may be given, subject to such directions as may seem just.

(2) *To Defendant*

At any time after he has delivered his Statement of Defence and before the action is set down for trial, a defendant may apply for summary judgment against the plaintiff on the ground that there is no merit in the action, or with respect to one or more claims therein, or to the whole or part of any such claim.

22.02 Affidavit Evidence

(1) Before any party may be heard on a motion for summary judgment, he shall have delivered his own affidavit setting forth all the material facts upon which he intends to rely to the extent that he has personal knowledge thereof, and in which he swears that he knows of no fact material to the motion which has not been disclosed.

(2) To the extent that any party does not have personal knowledge of the material facts upon which he intends to rely, he shall also deliver the affidavit of some other person having such knowledge.

(3) Where the defendant is acting in a representative capacity or where the defendant is under disability and is represented by a litigation guardian or a committee, and the defendant or his litigation guardian or a committee, as the case may be, after careful inquiry, is unable to comply with the requirements of this sub-rule, and does not feel justified in admitting the claim of the plaintiff, he may deliver an affidavit to that effect.

22.03 Cross-Examination

(1) Any party to a motion for summary judgment, who has delivered his own affidavit and the affidavit of every other person upon which he intends to rely, may cross-examine the deponent of any affidavit delivered by or on behalf of the opposite party.

(2) Where a party has cross-examined under paragraph (1), he shall not deliver any additional affidavit for use on the hearing of the motion without leave or consent; and such leave may be granted where the court is satisfied that he ought to be permitted to respond by affidavit to any matter raised on the cross-examination.

(3) The right to cross-examine under paragraph (1) shall be exercised with reasonable diligence, and the court may refuse an adjournment of the motion for the purpose of cross-examination where the party seeking the adjournment has failed to do so.

22.04 Disposition of Motion

(1) *Where No Defence or Merit to Action*

Where the applicant satisfies the court that there is no defence or merit to the action, as the case may be, or with respect to any particular claim or any part thereof, and that the applicant is entitled to judgment as a matter of law, the court may grant judgment.

(2) *Where Only Defence is to the Amount Claimed*

Where the plaintiff satisfies the court that the only defence is to the

amount claimed, the court may either direct a trial of that issue or a reference to determine that amount.

(3) *Where Only Issue is a Question of Law*

Where the court is satisfied that the only issue is a question of law, the court may determine that question and grant judgment accordingly; provided, however, that where the motion is before a master or local master, he may adjourn the motion to a judge.

(4) *Where Only Claim is for an Accounting*

Where the only claim is for an accounting and the defendant fails to satisfy the court that there is some preliminary issue to be tried, the court may grant judgment with a reference.

22.05 Where a Trial is Necessary

(1) Where summary judgment is refused, or is granted in part only, and a trial is necessary, the court may make an order specifying what material facts, if any, are not in dispute, and defining the remaining issues, unless such issues are sufficiently defined by the pleadings, and may order that the action proceed to trial by being,

- (a) placed forthwith, or within a specified time, on a list of cases requiring speedy trial; or
- (b) set down for trial in the normal course, or within a specified time.

(2) Where an action is ordered to proceed to trial, in whole or in part, the court may impose such terms and conditions as may seem just including an order,

- (a) for the payment into court of the whole or any part of the claim, and in addition thereto or in lieu thereof, an order for security for costs
- (b) that the scope of examinations for discovery be limited to matters not covered by the affidavits filed on the motion and any cross-examinations thereon, and that such affidavits and cross-examinations be used in addition to or in lieu of examinations for discovery.

(3) Where any party fails to comply with an order for payment into court or for security for costs, the opposite party may apply to the court for an order dismissing the action or striking out the Statement of Defence, as the case may be, with or without costs as may seem just. Where on such a motion the Statement of Defence is struck out, the defendant shall be deemed to be noted in default, and the plaintiff may also move for judgment in respect of any claim for relief for which he is not required by Rule 21.05 to set the action down for trial.

(4) Where it appears that the enforcement of any summary judgment ought to be stayed pending the determination of any claim in the action or in any counterclaim, cross-claim or third party claim, the court may so order upon such terms as may seem just.

22.06 Cost Sanctions for Improper Use of Rule

(1) *Where Motion Fails*

Where, on a motion for summary judgment, the applicant obtains no relief and the action as originally constituted is allowed to proceed to trial without the imposition of terms or conditions, the court shall fix the costs of the opposite party and order the applicant to pay those costs forthwith unless the court is satisfied that the motion, although unsuccessful, was nevertheless justified.

(2) *Where Affidavit Filed in Bad Faith*

Where it appears to the court that any affidavit filed on a motion under this rule was filed in bad faith or solely for the purpose of delay, the court may fix the costs of the opposite party and order the party filing the affidavit to pay those costs forthwith.

22.07 Effect of Summary Judgment

Where a plaintiff obtains summary judgment under this rule, such judgment shall be without prejudice to his right to proceed against the same defendant for any other relief or against any other defendant for the same or any other relief.

22.08 Application to Counterclaims, Cross-Claims and Third Party Claims

Subject to the provisions of Rules 28, 29 and 30, this rule shall apply, with any necessary modification, to a counterclaim, a cross-claim or a third party claim.