LATE ADMISSION OF EXPERT REPORTS

By Bill McNally and Barb Cotton

Introduction

Counsel sometimes find themselves in a situation where they seek to admit an expert report, but Rule 218.1 of the Alberta *Rules of Court* will not have been complied with. This article will review the case law regarding late admission of expert reports, and how can it be argued that there is no prejudice.

The leading case in this regard is *Wade* v. *Baxter*,[1] and this case holds that, assuming that non-compliance with Rule 218.1 does not amount to an abuse of process, and the evidence is relevant and material, there should be a presumption in favour of having all of the evidence before the trier of fact.

In *Wade* v. *Baxter* the expert report was sought to be admitted late because of lawyer's error, and it was admitted.

Wade v. *Baxter* also holds that a report should be admitted if the prejudice caused to the other party can be neutralized by an adjournment or costs.

In summary, a review of the case law suggests that the following arguments can be made in favour of late admission:

- There is a presumption in favour of hearing all of the evidence (*Wade* v. *Baxter* [2]; *Hopper* v. *Hopper* [3]);
- There would be severe prejudice to the plaintiff if the report is not admitted (*Hardy* v. *Prince George Hotel Ltd.* [4]);
- The report is relevant and material/useful evidence (*Wade* v. *Baxter*[5]; *Schuttler* v. *Anderson*[6] ; *Pryde* v. *Borkent* [7]);

- The expert opinion is not complex (*Chalinor* v. *Brown* [8]);
- The expert opinion is based on facts which are not really in issue (*Chalinor* v. *Brown*[9]);
- The report raises no major new factual issues (*Schuttler* v. *Anderson*[10]);
- Late notice remains adequate notice in terms of preparation (*Lenza* v. *Alberta Motor Association Insurance Co.*[11]); and
- The prejudice can be neutralized by an adjournment, an award of costs, the calling of rebuttal evidence etc. (*Wade* v. *Baxter* [12]).

A Review of the Case Law

The leading case on when expert reports can be admitted late is *Wade* v. *Baxter* [13], a decision of Slatter J. of the Alberta Court of Queen's Bench. This was a personal injury action and, with respect to the loss of income claim, the plaintiff sought to adduce evidence that she had intended to open a bed and breakfast after she was 65, and she was precluded by her injuries from doing so. The plaintiff sought to adduce a report which would estimate the type of help she would require to operate a bed and breakfast with her injuries, and then quantify these losses.

The only excuse given for the late filing of the report was solicitor's error. Per Slatter J.[14]:

> "Counsel for the Plaintiff acknowledged that the reports were late. The only explanation given was that during preparation for the trial, he noted that a part of the damage claim was not quantified. This was the cost of replacement help to operate a bed and breakfast. In my view, it must have been obvious to the Plaintiff, at least from the time of discoveries, that this claim had to be quantified. She could either quantify it herself, or call an expert. There was really no excuse for the lateness of these reports; the plaintiff simply failed to prepare her case in a timely manner."

Slatter J. found that there was an element of surprise involved in the report sought to be filed late, in that there was new information in the report.

He then stated[15]:

> "*Lenza* [*Lenza* v. *Alberta Motor Association Insurance Co.*[16]] confirms that there are strong policy reasons for admitting all relevant and material evidence. An examination of the other decisions discloses that R. 218.1 is still prejudiced-based. Evidence should only be excluded under the Rule if there is prejudice that could not be negated by an adjournment or some other mechanism . . .
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> On reviewing these cases, I conclude that a helpful approach to the admission of expert evidence notwithstanding late compliance with R. 218.1 is as follows:
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>> "(a) The facts should be analyzed to see if the delay or non-compliance is so egregious and inexcusable that it undermines the workability of the system. In such cases the evidence can be refused, although some balancing of prejudice based on the importance of the evidence might still be called for.
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>> (b) Assuming that the non-compliance does not amount to an abuse of process, and the evidence is relevant and material, there should then be a presumption in favour of having all of the evidence before the trier of fact. The issue then becomes whether there is prejudice to the opposite party that cannot be neutralized by an adjournment, costs, the calling of rebuttal evidence, or some other mechanism.
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>> (c) Once a decision has been made to admit the evidence, then the other parties should be given an opportunity to seek an adjournment. The adjournment might be immediate, or the opposing party might apply for the adjournment after the expert has testified, or after the plaintiff's case is entered, or at the conclusion of the trial. The adjournment might be short, for example an overnight adjournment to permit the preparation of cross-examination as happened in *Chalinor* v. *Brown*, *supra*.
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>> (d) Whether an adjournment is granted or not, costs and disbursements related to the late evidence may be granted or denied depending on the particular circumstances.
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> In this case the excuse provided for tendering the expert reports late was weak. Nevertheless the evidence appeared to be relevant and material to the Plaintiff's theory of the case. The late admission of the evidence would cause some inconvenience to the Defendant and his expert witnesses, but that prejudice could

> be neutralized by an adjournment or costs. I accordingly admitted the late expert reports."

Wade v. *Baxter* was applied in *Pryde* v. *Borkent*, [17] a decision of Veit J. of the Alberta Court of Queen's Bench. In this case the plaintiffs applied for leave to call an economist to give expert evidence at trial. They had failed to comply with Rule 218.1 and instead provided the report 24 days prior to trial. Jenkins, the economist, was to give evidence of the loss of earning capacity by the infant plaintiff.

In the result the application was allowed. Veit J. reviewed *Wade* v. *Baxter* in detail. She concluded that the delay was in fact egregious, but she had given some notice of the proposed evidence. The defendant had approximately three weeks notice of the specific evidence and was able to obtain assistance in dealing with the evidence from an expert. Further, the expert evidence was relevant and material. Thus, although the delay was "flagrant", the prejudice to the defendant could be dealt with otherwise then by denying leave. The evidence was admitted subject to the right of the defendant to apply for an adjournment prior to cross-examining the expert and subject to the defendant's right to call a rebuttal report without compliance with Rule 218.12.

Similarly, in *Hopper* v. *Hopper*,[18] a decision of McMahon J. of the Alberta Court of Queen's Bench, which involved an issue of spousal support, the applicant Mrs. Hopper was allowed to adduce evidence of a psychologist notwithstanding non-compliance with Rule 218.1 as there was "not sufficient prejudice arising from (the) non-compliance and late compliance to warrant exclusion of the two reports . . ." McMahon J. stated: "Where reasonable, a Court should strive to hear all relevant evidence. See *Wade* v. *Baxter* . . ." [19]

In *Hardy* v. *Prince George Hotel Ltd.*[20], a decision of Murphy J. of the Nova Scotia Supreme Court, *Wade* v. *Baxter* was also applied and an expert report allowed to be filed late because the prejudice to the plaintiff if the medical reports were not allowed in was severe. The defendant

was given the right to file reports in response, and conduct further discovery evidence of the doctors and of the plaintiff, at the plaintiff's expense.

There is extensive case law before *Wade* v. *Baxter* that has discussed the policy behind Rule 218.1.

The purpose of Rule 218.1 was reviewed by Purvis J. of the Alberta Court of Queen's Bench in *Commonwealth Construction Co.* v. *Syncrude Canada Ltd.*[21]. The Rule had apparently come into effect approximately one month before the trial in the case. Purvis J. stated:[22]

> "What is the mischief to be suppressed and the remedy affected by this Rule?
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> The Rule was formulated for the purpose of preventing disruption of the trial process which occurs when litigants are taken by surprise. If the parties know ahead of time what expert opinions they will encounter they can adjust to meet the evidence without asking for adjournment.
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> In some cases settlement might be encouraged. In any event, costs and time will be saved and the judicial process will be simplified if there is full disclosure."

In the leading case of *Chalinor* v. *Brown*[23], a decision of the Alberta Court of Appeal per Stevenson J.A., he stated:

> "This is not the case to decide what is an adequate statement under the Rule. The expert's opinion was not complex and was based upon facts which were really not in issue . . . We can see no prejudice to the appellant by what was done here." (p. 2 Q.L.)

In *Lenza* v. *Alberta Motor Association Insurance Co.*[24], a decision of Kerans J.A. of the Alberta Court of Appeal, he stated:

> "Rule 218.1 of course gives a Court authority to grant leave to call a witness late. In our view, leave should be granted in a case where late notice remains adequate

> notice in terms of preparation. Wherever possible it is best that the trier of fact hear all relevant evidence. But that ideal must be tempered by the recognition that we must have a workable system."[25]

In *Pocklington Foods Inc.* v. *Alberta (Provincial Treasurer)*,[26] a decision of McDonald J. of the Alberta Court of Queen's Bench, he stated:[27]

> "The mischief was that before Rule 218.1 was adopted trials often became trial by expert ambush. A surprise expert witness, or an unanticipated position put forward by an expert witness at trial, could devastate the adversary, who might be unable to produce expert evidence to the contrary without applying for an adjournment. The trial judge, fearful of the chaos that can be produced in the administration of judicial assignments by the fragmentation of trials that could result from granting an adjournment in a number of cases, might reasonably refuse the adjournment. The adversary system was carried to its extreme in such a regime. It was commonly felt that the result could often be to drive the judge to arrive at his findings of fact on the basis of one-sided evidence. If the party caught by surprise found that judgment was given against him or her on the basis of that surprise expert evidence, to which his or her counsel had not had an opportunity to respond in an informed way, that party might well feel that the system had worked an injustice against him or her."

And further:[28]

> "I accept that, as stated in *Commonwealth Construction Company Ltd.* v. *Syncrude Canada Ltd.* . . ., the purposes of Rule 218.1 (this was before the addition of subrule 218.1(1.1)) are as follows:
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> 1. The avoidance of surprise at trial;
> 2. The need to avoid amendments at trial;
> 3. Promoting settlement; and
> 4. "helping the experts themselves to prepare their evidence in a more thorough and helpful manner"

In *Schuttler* v. *Anderson*,[29] a decision of Lee J. of the Alberta Court of Queen's Bench, it was stated that the onus is upon the plaintiff to explain why the report could not have been available

120 days before trial and if the plaintiff was unable to provide a satisfactory explanation, the report should be excluded. Note that this conclusion was distinguished in *Wade* v. *Baxter*, in that Slatter J. held that it did not give sufficient weight to the need to find prejudice.

In *Schuttler* v. *Anderson* the medical report was allowed in even though it was provided to the defendant only five days before trial as it was served in sufficient time to allow for the defendant's witness preparation and cross-examination purposes. Further, the defendant did not choose to ask for an adjournment in order to engage expert medical rebuttal evidence and he acknowledged that he suffered no real prejudice. As the admission of the report did not prejudice the defendant in his preparations for trial, raised no major new factual issues, and was relevant and useful evidence for the plaintiff, it was admitted.

In *Edmonton (City)* v. *Lovat Tunnel Equipment Inc.*,[30] a decision of Lee J. of the Alberta Court of Queen's Bench, an expert report was not admitted late because the evidence sought to be elicited was opinion evidence on a new issue, possibly a new theory of causation. It was not simply a situation where the expert has modified his opinion to account for fact which he may have overlooked and misinterpreted, nor could the opinion evidence of question be characterized as an amplification of prior opinions.

In *Lowe* v. *Larue*,[31] a decision of the Alberta Court of Appeal *per curiam,* expert reports of psychologists and a physiotherapist were allowed to be admitted late as there was no prejudice to the appellants that could not have been addressed in costs or by an adjournment. Appellant's counsel was given the clinical notes of the physiotherapist well in advance of the trial.

<u>Conclusion</u>

Thus it can be seen that there are many circumstances in which the courts may allow a late filing of an expert report, and the key will be to show that the opposite party will not be prejudiced,

and that there will be prejudice to the plaintiff if the report is not admitted. Of significant assistance to plaintiff's counsel is the presumption in favour of admitting all relevant evidence.

ENDNOTES

[1] (2001), 302 A.R. 1
[2] Ibid
[3] [2005] A.J. No. 1825
[4] (2004), 226 N.S.R. (2d) 11
[5] Supra, note 1
[6] (1999), 243 A.R. 109
[7] [2004] A.J. No. 815
[8] (1989), 98 A.R. 225
[9] Ibid
[10] Supra, note 6
[11] (1990), 74 Alta L.R. (2d) 218
[12] Supra, note 1
[13] Ibid
[14] at para. 38
[15] at paras. 42-46
[16] Supra, note 11
[17] Supra, note 7
[18] Supra, note 3
[19] at para. 33
[20] Supra, note 4
[21] (1985), 64 A.R. 132
[22] at paras. 7-9
[23] Supra, note 8
[24] Supra, note 11
[25] p. 2 Q.L.
[26] [1994] A.J. No. 550
[27] at para. 11
[28] at para. 25
[29] Supra, note 6
[30] (2000), 262 A.R. 215
[31] (2000), 250 A.A. 220