

**SUPREME COURT OF NOVA SCOTIA**  
**Citation:** *Nichols v. McGillis*, 2019 NSSC 85

**Date:** 20190314  
**Docket:** Ken No. 464139  
**Registry:** Halifax

**Between:**

Scott Charles Nichols

*Plaintiff*

v.

Thomas Alex Henry McGillis

and

Catlin Rodney Xavier Reese

*Defendants*

**Motion to Admit Late Expert Report**

**Judge:** The Honourable Justice Christa M. Brothers

**Heard:** March 6, 2019, in Halifax, Nova Scotia

**Written Decision:** March 14, 2019

**Counsel:** Charles Ford, and Tom Champion for the Plaintiff  
Timothy M. Hopkins, for the Defendants

## **Overview**

[1] The *Civil Procedure Rules* clearly set out the deadlines for parties to file expert reports they intend to rely upon at trial. The court, for good reason, strictly construes such time frames and requires compliance. Parties must understand the case they must respond to well in advance of trial to avoid surprise, to avoid trial by ambush, and to ensure scarce trial time is not lost due to the need for an adjournment caused by late-filed expert reports. Despite this, there is discretion to allow the admission of late-filed expert reports in the interests of justice. This is one of those cases.

## **Background**

[2] The plaintiff brings a motion pursuant to Civil Procedure Rule 51.03(1) and 55.03(1) seeking to admit an Economic Assessment report authored by Laura J. Weir. Ms. Weir purports to be a forensic accountant. Her report is dated February 24, 2019 and was filed several months after the deadline for the filing of experts' reports. The plaintiff argues exceptional circumstances exist for the late filing of the report. Furthermore, the plaintiff argues the report has probative value which outweighs any prejudicial effect to the defendants caused by its' admission.

[3] This motion was scheduled to be heard by the Honourable Justice Patrick J. Duncan on February 19, 2019. At that time, the court allowed the plaintiff time to obtain the report of Ms. Weir so as to provide context to this motion and enable the court to determine the report's probative value in relation to any prejudice alleged by the defendants.

## **Evidence on the Motion**

[4] The following evidence is relevant for consideration of this motion.

[5] This action arises from a motor vehicle accident which occurred on December 17, 2014. The plaintiff claims that as a result of the defendants' negligence he suffered injuries and seeks compensation for same. The defendants have admitted fault for the accident. Causation and damages remain issues for determination at the trial.

[6] A Notice of Action and Statement of Claim was filed on June 2, 2017. A Notice of Defence was issued on July 18, 2017. By July 19, 2018, the parties were prepared to attend a Date Assignment Conference ("DAC") held before the Honourable Justice Gregory M. Warner. The plaintiff sought the DAC and filed a

Request for Date Assignment Conference on June 11, 2018. In this form, the plaintiff listed witnesses to be called including a “Forensic Accountant, Rule 55 Expert”.

[7] The defendants filed a Memorandum for Date Assignment Judge on June 18, 2018. In this document, the defendants note a potential expert, Mr. Jarrett Reaume, a “Forensic accountant”.

[8] The DAC proceeded before Warner, J. who completed a detailed and thorough memorandum, circulated to the parties, which refers to discussions held during the DAC. Neither party, after receipt of the memorandum, wrote to Warner, J., at any time, to take issue with what was reported in that memorandum.

[9] Based on the estimates given by counsel and the witnesses listed, 10 days were scheduled for the trial, June 10 - June 21, 2019. During the conference, the issue of expert reports and expert witnesses was discussed. The court reviewed the plaintiff’s intended opinion evidence from five or six potential experts. In addition, and directly on point, in relation to this motion, the court stated the following concerning the issue of a forensic accountant expert.

The defendant may obtain opinion evidence from two experts: a neurologist, who has not yet been retained, and a forensic accountant, Jarett Reaume. The court understands that if the defendant does not rely upon that forensic accountant, the plaintiff might.

[10] I accept the plaintiff’s representations and the unchallenged affidavit evidence of Mr. Tom F.G. Champion, who was assisting plaintiff’s counsel, Mr. Charles Ford, that the plaintiff’s intention was to retain the Forensic Accounting expert, Mr. Reaume, who was named in the defendants Memorandum for Date Assignment Conference Judge.

[11] Furthermore, the evidence of Mr. Champion, who participated along with Mr. Ford at the DAC, is consistent with the memorandum generated by the court. In his affidavit, Mr. Champion deposes:

8. At the Date Assignment Conference, when discussing the Expert Reports in this litigation, I observed Chuck Ford state to Justice Warner and to Defence Counsel that the Plaintiff would be happy to deal with any report Mr. Reaume prepares for the Defendants, as he was our preferred expert on financial losses. Mr. Ford subsequently stated that if the Defendants do not retain Mr. Reaume, that the Plaintiff would try to.

[12] Ultimately, the defendants chose not to produce a report from Mr. Reaume, or from any forensic accounting expert, by the deadline for filing experts' reports. This was their choice to make as they are entitled under the Rules.

[13] The plaintiff says that once no expert report was filed from Mr. Reaume, they contacted the expert on December 19, 2018, to determine his availability to provide a report on behalf of the plaintiff. Mr. Reaume was not available given he was in a conflict, having been retained by the defendants' counsel.

[14] On January 19, 2019, after a judicial settlement conference, held on January 14, 2019, plaintiff's counsel inquired if the defendants would consent to a late filed expert report from a forensic accountant. No consent was given, and this motion was filed.

[15] The Finish Date in this matter was determined by Warner, J. to be March 11, 2019. Any expert reports were to be filed no later than September 11, 2018. Instead of this deadline being strictly complied with, counsel agreed between themselves, signing a consent order which provided that the deadline to file expert reports would be extended to December 11, 2018. This deadline was further extended by agreement to December 18, 2018.

### **Plaintiff's Position**

[16] The plaintiff argues that the expert report of Ms. Weir should be admitted because to do otherwise would be unjust as the plaintiff's losses are complex and "an expert is warranted".

[17] The plaintiff argues that the "representations made by Mr. Hopkins in his Memorandum for Trial Judge and at the Date Assignment Conference" were relied upon. The plaintiff states a forensic expert was neither retained nor was a report filed on behalf of the plaintiff because an assumption was made that one would be filed by the defendants.

[18] The plaintiff suggests it is the defendants' fault that a forensic accountant was not retained by the plaintiff within the deadlines set. The suggestion is the presence of Mr. Reaume's name on the Memorandum for Date Assignment Judge lulled the plaintiff into not retaining any forensic accounting expert.

[19] I do not accept this argument. There is no requirement on a party to file an expert report mentioned at a DAC and it is clear neither a representation was made nor an undertaking was given by the defence counsel in this case which could have

been relied upon. It is the plaintiff who bears the burden of proving his case. It is folly to rely on a defendant to do so.

[20] The plaintiff made pointed comments throughout their written submissions and argued the defendants did something untoward here. In oral argument, counsel appropriately walked back comments made in written submissions. There is no basis for the submission that the defendants conducted the litigation, thus far, inappropriately. In fact, the defendants conducted the litigation as permitted by the *Rules*.

[21] An alternative argument was mentioned briefly in the written submissions filed on behalf of the plaintiff and was expanded in oral argument. That is, if counsel was mistaken to rely on the defendants to file such a report, their client should not be prejudiced.

### **Defendant's Position**

[22] The defendants submit that Ms. Weir's report is late and should not be allowed, as there are no exceptional circumstances that arise on the facts of this matter. The defendants further argue that the report is not probative, and its admission would cause prejudice to the defendants.

[23] The defendants submitted an affidavit from Susan Crooks, an employee of Aviva Insurance Company of Canada who is employed as a Senior Portfolio Specialists, Casualty Claims, Atlantic. It is unclear from her affidavit what role she has in this file. She deposes that Aviva is the insurer defending the defendants in this action but does not say whether she is the adjuster involved in this claim.

[24] In particular, Mr. Crooks provides evidence concerning the consequences of a late filed expert report being allowed by the court as follows:

8. I am advised by Mr. Hopkins and do verily believe to be true that:

(a) a late expert report at this stage would force him to consider obtaining a rebuttal report with unknown timelines for delivery and would further compromise trial preparation;

(b) the Defendants' trial strategy has been formulated based on evidence provided to date and in reliance on the deadlines in the rules of procedure.

[25] The defendants rightly submit that it is not because of anything they did or did not do that the plaintiff is in a circumstance requiring this motion for introduction of a late expert report.

[26] The defendants argue that there is no evidence before the court which demonstrates the probative value of the expert report. The defendants argue that courts regularly make awards for loss of valuable services, cost of care and diminution of earning capacity without any expert opinion evidence.

[27] The defendants submit they will have to radically change their trial strategy if the report is allowed. However, they do not say how this is so. The submission is that there is a timeline to prepare witnesses for cross examination, and direct, and the preparation time will be subjected to increased pressure with this report.

[28] The defendants argue the report is wrong in law, as corporate losses are equated with personal losses in the report. Put simply, the methodology is rejected by the defendants.

[29] The defendants did not know at the time of the motion whether their expert is available to prepare a report, or to testify at trial.

[30] The defendants also argue that the fact the plaintiff's expert, Ms. Weir, is in Calgary unnecessarily increases the plaintiff's disbursements.

### **Issue:**

1. Should the Court allow the Plaintiff to file a late expert report?

### **Law and Analysis**

[31] The Deadline to file expert reports is contained in *Civil Procedure Rule* 55.03(1), which provides as follows:

Deadline for filing report

**55.03 (1)** A party to an action who wishes to offer an expert opinion, other than in rebuttal of an expert opinion offered by another party, must file the expert's report no less than six months before the finish date, or by a deadline set by a judge.

[32] A judge has the ability to allow a late-filed expert report in certain circumstances.

### **Case Authorities**

[33] Several cases were referred to by the parties. I will review some of these. The cases submitted for consideration by the parties all demonstrate that Nova

Scotia courts strictly enforce deadlines imposed by Rule 55.03. Exceptional circumstances must be shown by a defaulting party in order to show that it is in the interests of justice to allow a late expert report. There is no closed list of exceptional circumstances set forth in the case law. There have been examples of exceptional circumstance given, such as the existence of new facts, or a change in a personal injury claimant's medical condition.

[34] The need to demonstrate exceptional circumstances was set forth by Saunders, J. (as he then was) in *Corkum v. Sawatsky*, (1993), 118 N.S.R. (2d) 137, reversed on other grounds 1993 126 N.S.R. (2d) 317 (NSCA). In that case, the plaintiff sought to call an actuary as an expert witness. In refusing this motion, the court stated:

43. Mr. Newton admitted that their decision to engage an expert actuary came late in the day. Ms. Gmeiner's report is dated September 10, 1992. The defendants' expert actuary was engaged in 1991. Mr. Burnell's reports are dated November 7, 1991 and June 12, 1992 and were delivered to the plaintiff in accordance with the Rules. As Mr. Miller said, had the plaintiff wished to counter this evidence, he could easily have engaged his own expert and furnished a report long before this. No mention was made of the plaintiff's intention at the first pre-trial telephone conference. When the subject was first broached by Mr. Newton at a subsequent conference, Mr. Miller objected.

44 It is not enough for the plaintiff to urge that leave be granted because defence counsel is sufficiently skilled, prepared and experienced to deal with its late introduction. The time prescribed by the Rule is there for a reason. *Margaret E. Miller v. Prest Brothers Limited* (unreported, S.H. No. 82796, November 6, 1992). Fairness and predictability demand that the Rule be applied strictly and fairly to all sides, save in exceptional circumstances.

45 There is a burden of persuasion upon the defaulting party to show that the interests of justice would merit its late reception. I heard no such submission during argument. Rather, Mr. Newton explained that it was a decision come by lately and that Ms. Gmeiner's report might be "helpful to the court". That is not reason to grant leave to waive the clear requirements of C.P.R. 31.08. The Rule is intended to avoid surprise or costly delay brought on by a request for an adjournment. Adherence to the Rule should promote settlement by giving each side sufficient time to address the content of an expert's report and obtain reasoned instructions which might lead to an early resolution. It was after all the plaintiff who pressed for trial during the term of the Supreme Court in Kentville. While much of the docket was taken with criminal jury trials I assigned the last days available to this case. In his Notice of Trial, Mr. Corkum certified his readiness and certified that all interlocutory steps had been taken. It was for all of these reasons that I rejected Ms. Gmeiner's report.

[35] In that case, the assessment of damages took place on September 29, October 6, and 13, 1992. The report of Ms. Gmeiner was not completed until September 10, 1992, some 19 days before the start of the hearing. This is a vastly different circumstance from the case before me.

[36] In *Fowler v. Schneider National Carriers Ltd.* 2000 CanLII 2286 (NSSC), the Court referred to the burden on the defaulting party and the requirement for exceptional circumstances and the weighing of probative value against prejudicial effect.

[7] Civil Procedure Rule 31.08(1) undoubtedly confers discretion on the Court to admit into evidence a late filed expert report. In exercising that discretion, the Court will first look at the circumstances and reasons for the late filing. In that respect, I refer to the decision of Justice Saunders in *Corkum v. Sawatsky* (1993), 1993 CanLII 4687 (NS SC), 118 N.S.R. (2d) 137(TD) at paras. 41 and 45 and adopt his view that there is a burden of persuasion upon the defaulting party to show that the interests of justice would merit its late reception.

[8] Also, the Court will weigh the probative value of the content of the report against the prejudicial effect to the opposing parties in determining its admissibility. In so doing, the Court must here consider whether the admission of the Daecher report is necessary to assist the jury in reaching a proper and just verdict, or whether the report is lacking in probative value in the sense that the jury can just as easily make findings of fact and draw any necessary inferences without the assistance of that expert report.

[37] It is clear the plaintiff has the labouring oar on this motion to demonstrate that the interests of justice merits the reports introduction. In considering the motion, I must weigh the probative value of the report against any the prejudicial effect. The report must be necessary to reach a just result.

[38] In *Wareham v. Ross*, 2010 NSSC 140, the court was faced with a motion to allow an expert report. The court reviewed the fact that the cases concerning late expert reports under the old Rule 31.08 were still of application. In dismissing the motion, Hood, J reviewed the burden on the party seeking leave to rely on a late-filed expert report and the factors to consider:

[4] I have to be satisfied that the interests of justice merit its late reception and that the issue of potential prejudice to the defendant about late reception has been met. In *Fowler v. Schneider National Carriers Ltd.*, [2000] N.S.J. No. 116 (N.S. S.C. [In Chambers]), Wright, J. said the previous *Rule* conferred discretion about admitting late filed reports, but that decision also went on to say that there was a



burden of persuasion upon the defaulting party to address, among other things, the weighing of probative value against prejudicial effect. In my view, there has been very little evidence of how the probative value of this report outweighs the prejudicial effect and I see substantial prejudicial effect to the defendant in admitting this report late. In my view, there are no exceptional circumstances here. It is unfortunate that there was such a long delay getting the plaintiff into the Pain Clinic. However, I cannot imagine that she did not know some time before February 1 that she was going there, particularly since it seems to have been contemplated that she was going there in July of the previous year and may in fact have gone on the wrong date. In my view, I do not see that exceptional circumstances exist for the admission of a late expert's report.

[39] *Conrad v. A.F.L. Manufacturing Limited*, 2018 NSSC 52, is the latest decision from this court on the point. In *Conrad, supra*, the court reiterated the factors to consider in deciding whether to allow a late report. The facts of that case are quite distinct from the circumstance before me and consequently, the case is distinguishable.

### **Purpose of Date Assignment Conference**

[40] Let me first address the plaintiff's argument that he relied on the fact that the defendants would file a report from Mr. Reaume.

[41] A date assignment conference is held to appoint trial dates. There are various requirements set forth in the Rules that must be met and are a precursor to a DAC being held. For non-Rule 57 cases, these are found in Rule 4.13, which states:

Request for date assignment conference

4.13 (1) A party may obtain a date assignment conference to appoint trial dates after pleadings close as provided in Rule 38 - Pleading, and after each party has done all of the following:

- (a) disclosed documents and electronic information as required;
- (b) discovered each individual party of whom discovery is required;
- (c) discovered, from each corporate party of whom discovery is required, at least the designated manager or one other officer or employee;
- (d) answer interrogatories required to be answered by or on behalf of the party.

[42] A party seeking a DAC must file a document containing the information referred to in *Rule 4.13(3)*.

[43] Only in certain circumstances can a party request a DAC without these preconditions being met and those circumstances are contained in *Rule 4.13(2)*.

[44] All of this is designed to equip the parties and the court with the information needed to best estimate the number of days of trial necessary for a matter. This is to ensure that the proper number of days are scheduled so that not only enough time is allocated for proceedings but also to ensure that not too much time is allocated. Overestimating trial time results in wasted trial dates that could have been used for other matters. Judicial resources are scarce, and the *Rules* ensure trial time is better predicted by the parties and the court.

[45] Parenthetically, the list of witnesses provided by parties at a DAC does not bind a party to actually produce a report or call witnesses at trial. This is a tool to assist the court in ensuring the correct amount of trial time is set aside for matters. A DAC does not require any party to undertake to call certain witnesses. In fact, not even a Witness List, required under Rule 4.18, binds a party to call witnesses listed therein (see *Tibbetts v. Murphy*, 2017 NSCA 35).

### **The Interests of Justice**

[46] I do not accept that exceptional circumstances arise merely because of the defendant's indication at a DAC and in a Memorandum for Date Assignment Conference that they may file a report by Mr. Reaume. Nevertheless, I do find an exceptional circumstance exists and it would be in the interests of justice to allow the late-filed expert report. The plaintiff has met his burden.

[47] Let me explain. The plaintiff's mistake or failed litigation strategy does not, on its own, result in this amounting to an exceptional circumstance. It is that at the DAC, the plaintiff stated that he would rely on the defence expert, Mr. Reaume instead of retaining his own forensic accountant expert. The plaintiff articulated that he was happy to await and deal with Mr. Reaume's report, expressing confidence in that expert. This is not usual.

[48] In most cases, particularly in personal injury, there is no consensus on an appropriate expert. A party is not usually satisfied to rely on an opposing party's expert and is not usually "happy to deal with any report... as he was our preferred expert on financial losses". This is unique. This shared view on who was the proper expert resulted in the plaintiff failing to retain their own expert.

[49] While it may be a mistake to wait and see what, if any, report will be produced by the defendants in the face of having the burden to prove one's case, this does, in this particular situation, create an exceptional circumstance. I agree that the plaintiff should not be prejudiced in advancing his claim. Also, the plaintiff filed four experts' reports by the deadline. This otherwise demonstrates diligence by the plaintiff.

### **Probative Value of the Forensic Accounting Report**

[50] The plaintiff submits that without the report, his claim cannot be advanced properly. The plaintiff argues that the report provides ready made calculations for income loss that will be necessary for the court to have in order to reach a fair and proper determination of the claim.

[51] The defendants argue that the report is of no value. The argument advanced is the report is founded on inappropriate assumptions and incorrect legal concepts concerning personal versus corporate income. The defendants argue that the report is of no value given the employed methodology.

[52] I have reviewed the report. I cannot, at this stage, make any comments on the underlying assumptions which are the foundations of the report. That will be a determination at trial after all of the evidence is heard. There are several areas in which the report is probative, if the facts and underlying assumptions of the report are found to be accurate and borne out by the evidence. These are as follows:

1. Figures concerning adjusted net income with wage inflation adjustment;
2. Multipliers to calculate future loss of income;
3. Future loss calculations;
4. Part-time work contingencies;
5. Disability and mortality contingencies; and,
6. Discounted Values for Future Cost of Care

[53] I accept that courts often provide awards for diminution and future claims without such expert reports; however, a report which is properly founded in the evidence and is based on supported assumptions is of value and such reports have been utilized by courts in Nova Scotia to reached decisions on damage assessments.

[54] It may be, after arguments and evidence, that the methodology of the report is rejected. However, at this stage the calculations, multipliers, and contingencies are probative.

### **Prejudice**

[55] In making a decision to exercise discretion and in reaching a conclusion in relation to the interests of justice, I must turn to the question of prejudice. The defendants argue there will be prejudice caused by the introduction of this late-filed report.

[56] The defendants received the report on February 28, 2019. The motion proceeded on March 6, 2019. At that time, the defendants did not know whether they would require a rebuttal report. In addition, the defendants did not say they would require an adjournment. They were no instructions yet given to counsel on these issues.

[57] The defendants argue if an adjournment is required, they will be prejudiced. The defendants submit they will be put to greater expense if they require an expert to respond to the report and will spend extra time preparing for a cross-examination and preparing a rebuttal witness. The defendants did not argue that they are ambushed by this information and could not respond to it. The difficulty is the court is left without any indication that the defendants will have trouble dealing with the admission of this report. At this time, there is no stated need for an adjournment or rebuttal report.

[58] The defendants further stated that the minimal probative value of the report is outweighed by the significant cost of responding to the report.

[59] The plaintiff argues that there is no prejudice to the defendants since the report is based on income figures and information that has long since been disclosed to the defendants. The plaintiff submits that there is still time to obtain a rebuttal report and if any rebuttal report is coming from the defendants, and filed by May 28, 2019, three months after the date of this report by Ms. Weir, February 28, 2019, the plaintiffs will deal with it and will not seek an adjournment of the trial.

[60] The defendants did not raise any potential prejudice other than an adjournment, extra time required, and costs. Costs can be readily dealt with by the court if necessary. As for an adjournment, I accept that if needed, this could cause

prejudice. Unfortunately, it is unclear if one is required and furthermore such a need can also be remedied by costs.

[61] Also, the defendants would only have had three months under the *Rules* to produce a rebuttal report. They still have this time with the plaintiff stating on the record they will not seek an adjournment and will deal with any rebuttal report.

### **Conclusion**

[62] Given all of the above, I find it is in the interests of justice to grant the plaintiff's motion and allow the late-filed report of Ms. Weir.

### **Costs**

[63] I will hear the parties on costs if an agreement can not be reached.

Brothers, J.