

**SUPREME COURT OF NOVA SCOTIA**  
**Citation:** *Stroh v. Blakeney*, 2020 NSSC 327

**Date:** 20201112  
**Docket:** Hfx No. 466956  
**Registry:** Halifax

**Between:**

Brenda Stroh, mother of Ryan Stroh, on behalf of the Estate of Ryan Stroh, Brenda Stroh, in her own right and on behalf of Jackson Lake, and Sarah Costain in her own right and on behalf of Hayden Stroh and James Stroh, and pursuant to the *Fatal Injuries Act*, R.S.N.S, 1989, c. 163

*Plaintiffs*

v.

Ward Blakeney

*Defendant*

**DECISION**

**Judge:** The Honourable Justice James L. Chipman  
**Heard:** November 12, 2020, in Halifax, Nova Scotia  
**Written Release:** November 12, 2020  
**Counsel:** Craig L. V. Arsenault, for the Plaintiffs/Applicants  
Sheree L. Conlon, Q.C. and Sarah A. Walsh, for the Defendant/Respondent

**By the Court (Orally):**

**BACKGROUND:**

[1] By Notice of Motion filed October 27, 2020 the plaintiffs/moving parties seek an order pursuant to Rule 55 to strike the defendant/responding party's expert report. On October 27<sup>th</sup> the plaintiffs' filed their Notice, brief, authorities, draft order and solicitor's affidavit. On November 3<sup>rd</sup> the defendant filed his brief and authorities along with his counsel's affidavit. The affiants were not cross-examined. Today I heard oral submissions.

[2] On January 3, 2020 I conducted the date assignment conference ("DAC"). The liability trial was scheduled before me on December 14 – 17, 2020. Three other dates were provided:

1. all expert reports "shall be filed and served on or before March 31, 2020";
2. the Finish Date ("FD") was set for September 11, 2020; and
3. the Trial Readiness Conference ("TRC") was scheduled for October 9, 2020.

[3] During the DAC the defendant advised he would be filing one to two expert reports. From his lawyer Sarah Walsh's affidavit we know that defence counsel wrote to plaintiffs' counsel on January 15<sup>th</sup>, April 22<sup>nd</sup> and June 30<sup>th</sup> before he responded on July 8, 2020. On fair reading of this correspondence it is reasonable to conclude that upon receipt of the late Mr. Stroh's hospital records from plaintiffs' counsel, the defendant was intent on filing an expert report. For example, in her April 22, 2020 letter defence counsel stated in part:

We continue to await the records required to be produced pursuant to the Consent Order for Production. They were due at the end of December 2019. Particularly, we require Mr. Stroh's hospital records following the accident, including the autopsy report and any toxicology screens. We require this in order to finalize the expert evidence. These records are long overdue and I expected them before now. Can you please provide me with an immediate status update as the hospital records are typically produced within 30 days of requesting them so I expect they have been received by your office.

Provided we receive them quickly, I expect we will be in a position to finalize the expert evidence within 30 days of receipt of the hospital records containing the autopsy report and the toxicology. [emphasis added]

[4] Plaintiffs' counsel did not finally address the expert issue until he wrote to defence counsel on July 23, 2020 emailing, as follows:

I'm following up on this matter to inquire if you intend on filing an expert report? If you are please advise when you anticipate filing a motion to the court for late filing of same as I do not have instructions to consent to the filing at this time.

[5] This was met with the following same-day reply:

Yes, as I advised when we spoke earlier this month, we are expecting it by the end of this month. Our expert was delayed by both Covid-19 and, as I have advised previously, we were waiting for the outstanding records from the Plaintiff. I will provide it to you upon receipt.

I am concerned about the potential objection being raised now, as I have flagged this issue with you a few times now, without objection, including when we last spoke regarding the appearance day. And, we have been trying to get the autopsy and toxicology reports for a long time, and only just received them. I do not think the Plaintiff can delay in producing records and then raise concerns about the timing of the report.

In any event, we can determine how to proceed once I have the report in hand.

Am I correct that the Plaintiff does not intend to rely on any expert evidence?

[6] There is nothing further until August 16 when plaintiffs' counsel advised the defence lawyer that his clients "did not obtain an expert report". Two days later defence counsel provided plaintiffs' counsel with their expert's report, stating in her covering email:

Please advise if your client is objecting to the timing of the report due to timing. As you know, the main issue was Mr. Zwicker required the autopsy report, which we have been requesting since at least the first Appearance Day notice in March, 2019. Once we finally received it on July 13, 2020, Mr. Zwicker then finalized his report as quickly as his schedule would allow. Your client can still secure a rebuttal report should they wish to do so. I would appreciate receiving your client's position on this as soon as possible. [emphasis added]

[7] Plaintiffs' counsel responded on September 1, 2020 stating: "I have received your report and am waiting on instructions from my clients. I hope to have instructions very soon".

[8] The affidavit evidence discloses no further correspondence on the topic. In his affidavit Mr. Arsenault deposes as follows at paras. 26-27:

26. At no point did I or the Plaintiffs consent to the late filing of the Defendants [Defendant's] expert report. I expected the Defendant to file a motion to allow the late filing of the report prior to it being filed.

27. The trial readiness conference was held on October 9<sup>th</sup>, 2020 at 9:00 am. During this conference I advised, when prompted if either party foresaw any pre-hearing motions, that a motion to strike the Defendant's expert report would be made.

**ISSUE:**

[9] The issue for determination on this motion is whether this Court should allow the motion to exclude the admission of the expert report authored by forensic collision reconstructionist Ken Zwicker (“the Zwicker report”) at the trial scheduled to start on December 14, 2020.

**LAW AND ANALYSIS:**

[10] The parties agree and I find that the deadline to file expert reports is set out in Civil Procedure Rule 55.03(1), which states 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.

[11] In this matter I set the filing deadline for expert reports just under six months before the FD.

[12] In *Brown v. Nova Scotia Association of Health Organizations Long Term Disability Plan*, 2020 NSSC 301, Chief Justice Smith dealt with dates set at a DAC in the context of physician narrative reports. At para. 10 the Chief Justice provided the background:

10 On July 6<sup>th</sup>, 2020 a telephone conference was held with counsel. The Defendant's solicitor advised the court that there were 34 documents in dispute as physicians' narratives totalling over one hundred pages. Mr. Hutt indicated that he objected to all of these documents being used as physicians' narratives due to the Plaintiff's failure to abide by Justice Robertson's direction. The court suggested (and counsel agreed) that it was prudent to hear a preliminary motion on whether the Plaintiff should be precluded from relying on physicians' narratives as she had missed the deadline set at the Date Assignment Conference. If the Defendant was successful with this preliminary motion, the matter would end. If the Plaintiff was

successful, a further motion would be heard to deal with the specific objections raised by the Defendant in relation to each particular document.

[13] At para. 22 Chief Justice Smith sets out the wording of Rule 55.03(1). She continues in her decision at paras. 24 and 25 by citing Rules 2.03 and 4.16 and noting that a DAC judge has the “power to set deadlines for the performance of certain functions”. At para. 26 she adds that: “The deadlines set by the Date Assignment Conference judge may be different than those set out in the Civil Procedure Rules”.

[14] At para. 28 in *Brown* the following is stated:

28 In my view, when a judge sets a clear deadline at a Date Assignment Conference, that deadline supersedes any other relevant deadline contained in the Rules. The deadline set by the judge is not aspirational. It is not a target date or a goal for counsel to attempt to achieve. It is a deadline by which a party must act. However, the effect of missing the deadline may vary depending upon the original deadline set out in the Rules. For example, a party who misses a judge's deadline in relation to physicians' narratives but who has the narratives delivered to the other side prior to the Finish Date is likely to be in a better position than a party who misses both the judge's deadline and the Finish Date. [emphasis added]

[15] In the context of this motion I adopt a similar sentiment. That is to say, a party who misses a judge’s deadline in relation to the filing of an expert report but who delivers the expert report prior to the FD is likely to be in a better position than a party who misses both the judge’s deadline and the FD.

[16] In *Brown* the Chief Justice ultimately permitted the plaintiff’s preliminary motion to rely on the physicians narratives, even though she missed the DAC deadline.

[17] In this motion we have the added wrinkle of COVID-19 and its impact on the March 31, 2020 deadline. The Nova Scotia Supreme Court went to an essential services model on March 19, 2020 and on March 28, 2020 the Court suspended all court filing deadlines for civil and family matters in the General Division, retroactive to March 19, 2020. This had the effect of suspending the deadline of production of expert evidence in this matter, originally due on March 31, 2020, to a date that was at that point unknown.

[18] On June 4, 2020, the Nova Scotia Supreme Court lifted the suspension of filing deadlines, effective 11:59 p.m. on June 5, 2020. The Nova Scotia Supreme Court Directive dated June 4, 2020 states:

Counsel and parties are advised that when calculating the time for the filing of a document or doing anything required under the Civil Procedure Rules, the period from March 19, 2020 up to and including June 5, 2020, shall not be included in the calculation.

In the result, I calculate that the deadline for expert reports in this matter moved from March 31, 2020 to June 19, 2020.

[19] Given that the Zwicker report was filed on August 19, 2020, I have determined that it was approximately two months late.

[20] The Court has discretion to allow the admission of late-filed expert reports in the interest of justice (see *Nichols v. McGillis*, 2019 NSSC 85). Both parties referred the Court to Justice Brothers' decision in *Nichols*, the most recent and relevant statement of the law as it pertains to the late admission of an expert report in Nova Scotia.

[21] In *Nichols*, Justice Brothers held at para. 33 that “exceptional circumstances” must be shown by a defaulting party in order to show that it is in the interest of justice to allow a late expert report. There is no closed list of exceptional circumstances set forth in the case law.

[22] In *Nichols*, at the DAC, the defendants indicated that they might engage a forensic accounting expert to produce a report. They ultimately chose not to produce a report from a forensic accounting expert. Nevertheless, the plaintiff stated at the DAC that they intended to rely on the defence expert (as he was also the plaintiff's preferred expert) and so did not otherwise retain their own expert.

[23] After a review of the existing jurisprudence on the issue, the Court found that there were three core considerations that must be met for a late report to be accepted:

- (a) **Probative Value:** The plaintiff asserted that the report was necessary to the proper advancement of his claim. In assessing the probative value of the report, Justice Brothers found that although she could not make comments on the appropriateness of the underlying assumptions upon which the report was constructed, if those assumptions were accurate, the information contained in the report would be on-point and probative to the issues.
- (b) **Interest of Justice:** In considering whether it was in the interest of justice to allow the report, the Court found that “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 [shared view on the proper expert and the plaintiff's satisfaction to rely on that expert] does, in this particular situation, create an exceptional circumstance". Justice Brothers also noted that where the plaintiff had properly filed four other expert reports in advance of the deadline, it showed diligence on their part. As such, it was in the interest of justice to allow the report as to not prejudice the plaintiff's claim.

- (c) **Prejudicial Effect:** The defendants argued that they would be prejudiced because they would be put to the greater expense to retain an expert in response and will spend extra time preparing for a cross-examination and preparing a rebuttal witness. Justice Brothers found that where the defendants only raised adjournment, extra time required and costs as sources of prejudice, that costs could be dealt with easily, and that it was not clear if an adjournment would even be required as the defendants still had three months under the Rules to produce a rebuttal report (and the information in the plaintiff's late report had long since been disclosed to the defendants), and any need for an adjournment could be remedied by costs.

[24] Justice Brothers ultimately found that the late-filed expert report should be admitted. The Court determined that there were exceptional circumstances and any prejudice could be remedied.

### **Probative Value**

[25] Consistent with Justice Brothers in *Nichols*, I decline, at this stage, to make any comments on the appropriateness of the underlying assumptions upon which the Zwicker report is based. If the Zwicker report assumptions are accurate, the information contained in the report will be probative to the issues.

[26] The plaintiffs argue that the Zwicker report lacks probative value because the defendant is able to use Constable Flynn's accident reconstruction report to argue the issue of liability. I do not anticipate that Constable Flynn will be qualified as an expert under Rule 55. While his report and findings will form part of the evidence before the Court, Constable Flynn is not a Rule 55 expert, he is a police officer. Accordingly, his anticipated evidence does not replace that of a Rule 55 expert opining on causation.

[27] On balance, I am of the view that the Zwicker report will be of assistance to my understanding and ultimate disposition of the matter.

### **Interests of Justice**

[28] The record reviewed above clearly shows that plaintiffs' counsel was made aware that the defendant would be filing expert evidence. Such evidence ought to have been anticipated by the plaintiffs. The suggestion that the plaintiffs believed that the defendant did not intend to rely on expert evidence is in direct contrast with the record, which shows the defendant consistently advised of his intent to rely on an accident reconstruction report at trial.

[29] Based on my review of the background set out above as well as the pre-DAC correspondence contained within the affidavits, I am of the strong view that plaintiffs' counsel would have been well aware that the defence would ultimately produce an expert report in the area of accident reconstruction.

[30] In my view it was entirely reasonable for the defendant to insist that the plaintiffs produce the late Mr. Stroh's hospital records before finalizing their expert evidence. Given the evidence, I must conclude that responsibility for the delay that resulted rests with the plaintiffs. In this regard, from the affidavit evidence it is apparent that plaintiffs' counsel was not responsive to repeated requests for the records. One is left to wonder whether he asked for them in a timely manner.

[31] I would add that Rule 55.13(1) states that any objection to the qualification or admissibility of a report must be raised by the FD:

- (1) A party to whom an expert's, or rebuttal expert's, report is delivered must determine whether to admit or contest the proposed qualification, and the admissibility of the opinion, by no later than the finish date.

[32] The defendant asked the plaintiffs if they intended to object to the Zwicker report first on April 22, 2020 and again on the day it was produced; August 17, 2020. On September 1, 2020, counsel for the plaintiffs advised he expected instructions "very soon". Unfortunately, the plaintiffs – through their lawyer – remained silent even when the FD came and went on September 11, 2020. It was not until the October 9<sup>th</sup> TRC that counsel advised that his clients were objecting to the Zwicker report.

[33] In all of the circumstances, I conclude that it is in the interest of justice that the Zwicker report be admitted.



### **Prejudicial Effect**

[34] In Mr. Arsenault's brief he summarizes the prejudicial effect as follows:

If the Expert Report is admitted, the Plaintiffs will be prejudiced by:

- a. The costs of obtaining a rebuttal expert report;
- b. The delay in trial dates to accommodate time for the rebuttal report and to accommodate time for a second expert witness examination;
- c. The change in trial strategy; and
- d. Foreseeable emotional harm to the Plaintiffs caused by the delay.

[35] Given the history from the affidavits, it is my opinion that it is not tenable for the plaintiffs to suggest, as they now do, that they formed the view that the defendant had elected not to rely on an expert report. I say this because the record confirms that the defendant repeatedly made clear his intention to secure an accident reconstruction report. Given defence counsel's April 22<sup>nd</sup> letter, plaintiffs' counsel was aware of the defendant's continued intent to secure expert evidence. As such, even if they had assumed in the intervening three weeks (with the passing of the pre-COVID March 31<sup>st</sup> deadline) that the defendant would not rely on expert evidence, they knew that was not the case by April 22<sup>nd</sup>.

[36] If they chose to, the plaintiffs could have re-engaged their retained expert to provide a rebuttal report. They had sufficient time to do so and put defence counsel on notice. Indeed, the issue was expressly raised by the defendant on August 18, 2020. Instead, plaintiffs counsel waited until the TRC, almost two months later, to raise his objection.

[37] From Mr. Arsenault's affidavit there is no explanation regarding what his clients would have done differently to advance their case and prepare for the trial had the report been received on March 31<sup>st</sup> (pre-COVID deadline) or June 19<sup>th</sup> (post-COVID deadline), versus when they actually received it on August 18<sup>th</sup>. Nor does he explain what they would have done if the April 22<sup>nd</sup> letter was received by March 31<sup>st</sup>. Given that there was no apparent intention to secure a rebuttal report, I conclude that there is no prejudice to the plaintiffs based on the late filing of the Zwicker report.

[38] Based on the motion evidence I find that there are exceptional circumstances such that it is in the interests of justice to allow the late filing of the Zwicker report.

In the result the Zwicker report shall be admitted into evidence at the upcoming trial of this matter, and the trial will proceed as scheduled.

[39] As for costs, I award \$1,000.00 to the successful party, the defendant, payable by the plaintiffs at the end of the December 14 – 17, 2020 trial.

Chipman, J.