

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Aly v. Personal Care Holdings Ltd.*, 2022 NSSC 108

**Date:** 20220414  
**Docket:** 479821  
**Registry:** Halifax

**Between:**

Ayman Ahmad Aly

Plaintiff

v.

Personal Care Holdings Ltd.

Defendant

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**DECISION**

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**Judge:** The Honourable Justice Darlene A. Jamieson

**Heard:** April 14, 2022, in Halifax, Nova Scotia

**Oral Decision:** April 14, 2022, in Halifax, Nova Scotia

**Counsel:** Farhan Raouf, for the Plaintiff

Christopher Madill and Laura Woodworth, for the Defendant

By the Court:

## **Background**

[1] This motion is brought by the Defendant, Personal Care Holdings Ltd. (“the Defendant”). It seeks an order that the independent medical examination report of Dr. Michael Gross dated July 28, 2020, be excluded from evidence at the trial of this proceeding pursuant to Rule 55 of the *Civil Procedure Rules*.

[2] This matter involves a claim for damages advanced by the Plaintiff, Ayman Ahmad Aly (“the Plaintiff”), for personal injuries following a motor vehicle accident which occurred in June of 2018. Liability and damages are both in issue. The trial is set to commence before me on April 19, 2022.

[3] The Plaintiff attended an independent medical examination with orthopedic surgeon, Dr. Michael Gross, in July of 2020 at the request of the Defendant. Dr. Gross prepared a report dated July 28, 2020 (the “Gross Report”).

[4] The Gross Report was disclosed to counsel for the Plaintiff on July 30, 2020, the date it was received by counsel for the Defendant.

[5] On October 28, 2019, the Defendant filed a Request for Date Assignment Conference indicating it intended to call 1-2 experts. On November 6, 2019, the Plaintiff filed his Memorandum for Date Assignment Judge indicating that he intended to call one Rule 55 expert, an engineer. The Plaintiff further indicated he intended to call Drs. Gerges (GP), Coady (Orthopedic Surgeon), and Coles (Orthopedic Surgeon) as treating physicians, and to adduce opinion evidence pursuant to Rule 55.14 (Treating physician’s narrative).

[6] At the Date Assignment Conference held on March 13, 2020, Justice Moir set a July 20, 2021, deadline for filing any Rule 55 expert reports. A Finish Date of January 20, 2022, was also set.

[7] Only one Rule 55 expert report was filed with the Court. On July 20, 2021, counsel for the Defendant delivered a Notice of Filing of Expert Report to counsel for the Plaintiff with respect to the report of Mr. Sam Kodsi, P. eng., (filed with the Court on July 20, 2021). The Gross Report was not filed by either party

[8] On December 16, 2021, the Plaintiff filed his Witness List. Dr. Gross was not listed as a witness.

[9] On January 20, 2022, the Defendant filed its Witness List. Dr. Gross was not listed as a witness as the Gross Report had not been filed with the court. However, Mr. Sam Kodsí whose expert report had been filed with the court was listed.

[10] On February 11, 2022, a Trial Readiness Conference was held before Justice Coughlan. The parties confirmed witness lists had been exchanged and all pre-trial procedures were completed by the finish date.

[11] Counsel for the Plaintiff says that on March 31, 2022, “the Defendant informed the Plaintiff for the first time that they had not filed the Gross IME and were disputing its admissibility.”

[12] On April 1, 2022, the date the pre-hearing briefs were filed, the Plaintiff advised the Defendant in writing that he was amending his witness list to add Dr. Michael Gross as a witness.

[13] On April 5, 2022, counsel for the Defendant wrote to the Court taking the position that the Gross Report was not filed by either party as a Rule 55 expert report, and, therefore, it was inadmissible as expert opinion evidence at trial. The Defendant sought to have this motion heard at the commencement of the trial. On April 5, 2022, the Plaintiff filed with the court what purports to be an amended witness list adding Dr. Gross. The Plaintiff did not seek the courts permission to do so. On April 6, 2022, counsel for the Plaintiff wrote to the Court and asserted that the Gross Report was admissible as expert evidence at trial. On April 6, 2022, a pre-trial conference call was held with counsel and this preliminary motion was scheduled.

### **Evidence on the Motion**

[14] The Defendant filed a solicitor’s affidavit of Ms. Laura Woodworth sworn on April 8, 2022. The Plaintiff filed a solicitor’s affidavit of Mr. Farhan Raouf sworn on April 11, 2022. There was no cross examination.

### **Law and Analysis - Expert Opinion Evidence**

[15] As a general rule, presumptively, opinion evidence is excluded. There is an exception when special expertise is needed to assist the trier of fact, for example, to appreciate technical or scientific issues. As a result, expert witnesses are often permitted to provide conclusions about facts, a domain that is normally only for the trier of fact. However, there are threshold requirements to be met before an expert

report is admissible. Justice Brothers in *3021386 NS Ltd. v. Harding*, 2021 NSSC 155, described them as follows:

11 Before it is admissible, expert opinion evidence must meet the four threshold requirements of 1) relevance; 2) necessity; 3) absence of an exclusionary rule; and 4) a properly qualified expert, and its probative value must outweigh its prejudicial effect (see *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 19). Further, in Nova Scotia, expert opinion evidence must conform to *CPR 55*.

[16] The *Civil Procedure Rules* set out the requirements that a party must meet in order to offer expert opinion at trial. Rule 55.02 says a party may not offer an expert opinion at trial unless an experts report is filed in accordance with the Rules. Rule 55.03 requires such report to be filed no less than six months before the finish date or by a deadline set by a judge. These Rules use wording that is imperative. They must be strictly followed:

#### **55.02 Report required**

A party may not offer an expert opinion at the trial of an action or hearing of an application in court unless an expert's report, or rebuttal expert's report, is filed in accordance with this Rule.

#### **55.03 Deadline for filing report**

(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.

(2) A party to an action who receives an expert's report stating an opinion the party contests, and who wishes to offer a rebuttal expert opinion, must file a rebuttal expert's report no more than three months after the day the expert's report is delivered to the party, or by a deadline set by a judge.

[17] In *Banfield v. RKO Steel Ltd.*, 2017 NSSC 315, Justice Chipman stated that Rule 55 "must be strictly adhered to". I adopt his reasoning as follows:

[30] In my view, the Nova Scotia cases considering Rule 55 offer a narrow interpretation of what is permitted under the Rules. That is to say, collectively they stand for the proposition that Rule 55 must be strictly adhered to. For example, it has been held that under the narrative rule physiotherapy reports do not qualify as physician narratives. In the matter before me there has been anything but strict adherence. The remaining question is whether Dr. Carey might somehow be permitted to give limited evidence, perhaps as identified in *Bezanson*. In my view, Justice Boudreau's decision offers a very fine distinction between medical opinion provided for the truth of its contents and opinion admitted for the fact that it was

given. In the circumstances of this case, I am of the view that it would be highly prejudicial and contrary to Rule 55 to permit Dr. Carey to give any evidence whatsoever. In this regard I am of the opinion that the evidence in question does not qualify under any statutory or common law exceptions to the rules regarding admissibility of expert opinion evidence. Even if it did, in the context of a jury trial, this would amount to providing expert opinion evidence through the "back door".

...

...

33. We have Rules for a reason. The Rules governing experts have been carefully crafted and the Plaintiff has not complied with them.

[18] In the present circumstances, no expert report has been filed with the court. The onus is on the party seeking to use opinion evidence at trial to identify the opinion and comply with the Rules. Filing an expert report with the court in accordance with Rule 55 is one of the mandatory pre-conditions to the admission of opinion evidence at trial. The specific requirements for expert evidence in the Rules are there for a reason: they are to ensure predictability, to provide consistency as to form of the opinion offered, to avoid surprise or ambush, to ensure scarce trial time is not lost due to the need for adjournments caused by late-filed expert reports and so on.

[19] The fact that the Gross Report was disclosed amongst the parties 19 months ago (but not filed), does not automatically render it admissible opinion evidence at trial. The Plaintiff must comply with the Rules. As Justice Brothers stated in *3021386 NS Ltd., supra*:

[44] Subject to limited exceptions, an expert is not permitted to be called as a witness to give direct evidence (Rule 55.13(2)). Nowhere in Rule 55 does it state that a report disclosed to a party but not filed in accordance with Rule 55 is admissible. This is consistent with the mandatory direction provided for in Rule 55.02.

[Emphasis Added]

[20] Clearly by not filing the report by the deadline of July 20, 2021, the Plaintiff has failed to comply with the strict requirements set out in Rule 55. I now turn to assess whether, despite its non compliance, the Gross Report should be admitted at trial.

[21] Rule 51 provides guidance in relation to the conduct of a trial and includes Rule 51.03 which states:

### 51.03 Exclusion of evidence for non-compliance

(1) A judge who presides at a trial must exclude evidence of the following kinds, unless the party offering the evidence satisfies the judge it would be unjust to exclude it:

- (a) evidence for which notice is required, but for which notice is not given;
- (b) evidence required to be disclosed under, but not disclosed in accordance with, Part 5 - Disclosure and Discovery;
- (c) evidence offered by a party who fails to give the evidence, or to give information leading to the evidence, in response to a direct question asked at discovery or by interrogatory, such as by answering that the party does not know the answer and failing to make disclosure when the answer becomes known or by objecting to the question on the ground of relevancy;
- (d) expert opinion not disclosed under Rule 55 - Expert Opinion.

[Emphasis Added]

[22] Again this Rule uses imperative language of ‘must exclude evidence’ although it provides the court with discretion to admit expert opinion evidence, if it would be unjust to exclude it. The party seeking to offer the opinion evidence bears the burden of satisfying the judge it would be unjust to exclude the evidence. For the following reasons, I am of the view it is a high burden.

[23] I note that exceptional circumstances have long been required both under the prior Rules and the current Rules when considering whether to admit late experts reports. Justice Saunders (as he then was), in *Corkum v. Sawatsky*, (1993), 118 N.S.R. (2d) 137, reviewed on other grounds, 1993 NSCA 201, spoke of the concept of exceptional circumstances when he refused to allow a plaintiff to introduce a late expert report. I note this decision was decided under the *Civil Procedure Rules* (1972) and specifically Rule 31.08 which stated:

31.08. (1) Unless a copy of a report containing the full opinion of an expert, including the essential facts on which the opinion is based, a summary of his qualifications and a summary of the grounds for each opinion expressed, has been

- (a) served on each opposite party and filed with the court by the party filing the notice of trial at the time the notice is filed, and
- (b) served on each opposite party by the person receiving the notice within thirty (30) days of the filing of the notice of trial, the evidence of the expert shall not be admissible on the trial without leave of the court.

[Emphasis Added]

[24] Under this prior Rule, Justice Saunders (as he then was) made it clear that it would only be in exceptional circumstances that late filing of an expert opinion would be allowed and that the burden of persuasion would be on the defaulting party.

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.

[25] Current Rule 55 is imperative. It requires strict adherence to the Rule or exclusion if the expert opinion is not disclosed as required. Rule 51.03 speaks of "must exclude evidence... unless the party offering the evidence satisfies the judge it would be unjust", whereas prior Rule 31.08 used the phrase "without leave of the court." I am of the view that the current Rules (55 and 51), when read together, speak of even stricter adherence to the requirements for expert opinions and even narrower possibilities for allowing late filed reports, than the prior Rules did.

[26] I note that Justice Wood (as he then was) in *Saturley v. CIBC World Markets Inc.*, 2012 NSSC 389, considered Rule 51.03 in the context of late admission of documentary evidence, not expert opinion. He said that when considering whether it would be unjust to exclude evidence under Rule 51.03, an assessment of various factors should be undertaken including: the significance of the evidence; when the evidence was known; the explanation for the failure to disclose earlier; the prejudice from late disclosure; and the impact on trial. In essence, these factors speak to an exceptional circumstances analysis.

[27] The Plaintiff submits that the circumstances of this case are exceptional and warrant deviation from the strict application of the Rules regarding timing of expert reports. The Plaintiff says the Gross Report is a necessary piece of medical evidence required to quantify the Plaintiff's claim for damages and establish causation for his injuries with respect to the motor vehicle accident in June of 2018. He says a judge or jury would not reach the same conclusions by drawing an inference based on available medical evidence in the absence of the Gross Report being entered at Trial.

[28] The Plaintiff submits that disallowing the report would be unjust to the Plaintiff and the interests of justice. He argues that Dr. Gross signed a declaration in accordance with Rule 55.04 (1); that Dr. Gross is a properly qualified Expert as an Orthopaedic Surgeon; that he is an unbiased and an independent Expert witness, in this case, as his services were retained by the Defendant and not the Plaintiff; and that the same evidence is not otherwise available anywhere in the medical evidence.

[29] The Plaintiff says the Defendant is simply trying to have this unfavorable opinion for the Defendant excluded. The Plaintiff says that it appears the Defendant is seeking a tactical advantage based on technicalities instead of the merits of the case. The Plaintiff further says that the probative value of the Gross Report far outweighs any prejudice to the Defendant and argues there is no prejudice to the defendant.

[30] The Plaintiff says he was under the impression that the Defendant had filed the Gross Report, but a filed copy had not yet been provided to Plaintiff's counsel. He further says that it rarely happens in the personal injury practice that a Defendant hires an expert to obtain a Rule 55.04 compliant opinion, delivers the report to the Plaintiff, and decides not to file the expert report.

[31] For the reasons that follow, I am not convinced on the evidence before me that it would be unjust in the present circumstances to exclude the evidence of Dr. Gross. It is unfortunate that the Plaintiff did not recognize the Gross Report had not been filed on July 20, 2021, but that does not raise an exceptional circumstance, making its exclusion unjust. It is the obligation of the Plaintiff to ensure all evidence upon which he intends to rely is properly before the court. He was provided with a copy of the Gross Report in July of 2020 (over 19 months ago). Plaintiff's counsel was aware all expert reports were to be filed with the court by July 20, 2021. On July 20, 2021, the Plaintiff received a copy of the Notice of Filing of Expert Report for the only expert report filed by the Defendant, that of Mr. Sam Kodsi, with certified copies to follow. Conversely, the Plaintiff did not receive a court filed copy of the



Gross Report. However, the Plaintiff did not inquire about the Gross Report prior to July 20, 2021, or even immediately thereafter.

[32] Under Rule 21.05(2), a party who receives an IME report has an obligation to deliver the report. There is no obligation on that party to file the independent medical examination report with the court. It is solely the party's choice. It is folly for a Plaintiff to rely on a Defendant to file an IME report with the court, without assurances or an undertaking to do so.

[33] There is no property or ownership in an expert witness (with some very limited exceptions). An expert opinion is for the assistance of the court. The wording of Rule 55.04 setting out the required content of an expert report, highlights this point. For example, Rule 55.04 states in part: "... the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party... the witness is prepared to testify at the trial or hearing, comply with directions of the court, and apply independent judgment when assisting the court."

[34] If the Plaintiff wished to rely on Dr. Gross' opinion, he could have inquired of Defendant's counsel to ensure the report was being filed. When it was not, the Plaintiff could have taken steps to ensure the evidence was properly before the court. He did not do so. The Plaintiff argues the evidence of Dr. Gross is crucial as it is not otherwise available from the Plaintiffs other medical evidence. If this evidence was so crucial to the Plaintiff's case, particular attention should have been paid to whether the Defendant would be filing the report with the court. It was not and the Plaintiff cannot now seek to lay the blame at the feet of the Defendant.

[35] In addition, the finish date of January 20, 2022, came and went without the Plaintiff raising the issue of the Gross Report. The Rules contain a finish date for very good reason. It serves many important purposes including to ensure that the parties have their evidence developed and disclosed well before trial. For example, the finish date is the date by which witness lists must be filed, meaning the parties must finalize the evidence upon which they intend to rely at trial by this date. This is an important step and one that must be taken seriously.

[36] Rule 4.18, dealing with witness lists, states:

**4.18 Witness list**

- (1) A party must, before the finish date, file a list of the witnesses the party intends to call at trial, except a witness the party will call only to impeach the credibility of another expected witness.

- (2) A party may only call at trial a witness named on the party's witness list, unless the witness is called only to impeach the credibility of another witness or the trial judge permits the party to call the witness in order to avoid an injustice.
- (3) A party who determines to seek permission to call a witness not on the party's witness list must immediately notify all other parties and the trial judge of the determination and the grounds for asserting that the witness must be called in order to avoid an injustice.
- (4) A judge who permits a party to call a witness not on the party's witness list may order the party to indemnify each other party for expenses resulting from the permission, including expenses resulting from an adjournment if that is a result.
- (5) A party is not required to call each person on the party's witness list, but a party who decides not to call a person on the list must immediately notify all other parties and the trial judge.

[37] Even when the Defendant's witness list was filed on January 20, 2022, not listing Dr. Gross as a witness, the Plaintiff did not come forward seeking to call Dr. Gross. Nor was the issue raised at the Trial Readiness Conference when Justice Coughlan inquired whether all pre-trial procedures had been completed by the finish date. It was not until April 1, 2022, that the Plaintiff advised the Defendant he would be filing an amended witness list to include Dr. Gross as a witness (despite the prohibition in Rule 4.18). In addition, the witness the Plaintiff was attempting to add to his witness list is an expert, whose report has not been filed with the court, contrary to Rule 55.

[38] The finish date is also the date by which a party to whom an experts report is delivered must determine whether to admit or contest the proposed qualification and admissibility of the opinion (Rule 55.13). The Plaintiff took no action in this regard, despite his belief the Gross report was essential to his case and mistaken belief it had been filed by the Defendant. The above are examples of the Plaintiff's inattention and should not be taken to mean notice by the finish date would have made a difference in the outcome.

[39] I note that neither the Gross Report, nor portions were included in the evidentiary record for this motion. However, Plaintiff's counsel did provide a copy of the Report to the court. What is clear is that the Plaintiff has long known the importance of the opinion evidence of Dr. Gross, having had the report in his possession since July of 2020. The Plaintiff had the report in his possession for approximately 19 months before indicating he wished to rely on its contents. Counsel's explanation that on March 31, 2022, "the Defendant informed the Plaintiff

for the first time that they had not filed the Gross IME and were disputing its admissibility” is simply not an excuse. A party must marshal its own evidence and not rely on another party to do so, nor blame that party when the evidence they expected is not forthcoming.

[40] Despite the Plaintiff’s argument, the significance of the opinion evidence offered by Dr. Gross, in and of itself, is insufficient to represent an exceptional circumstance justifying admittance of the late expert opinion. It is only one of the factors for consideration. If this were the only factor for consideration, parties could routinely disregard Rule 55 where the opinion evidence was said to be significant or important to their case for trial. This is contrary to the principles of trial fairness and notice, including as set out in Rule 55.

[41] Allowing this late report on the eve of trial would prohibit the Defendant’s entitlement to a rebuttal report. This is prejudicial to the Defendant. Here the Plaintiff notified the Defendant of an intention to rely on the Gross Report two weeks before trial and without any time to obtain a rebuttal report. Just because the Defendant had requested the IME, does not disentitle it to a rebuttal report, should the Plaintiff decide to advance the same expert opinion by filing it with the court. Rule 55.03 does not suggest otherwise. Had the Plaintiff arranged to file an expert opinion of Dr. Gross by the July 20, 2021 deadline for filing, the Defendant would have been entitled, under the Rules, to file a rebuttal report in the three month timeline set out in Rule 55.03. To allow this opinion evidence on the eve of trial, effectively removes this entitlement.

[42] I am of the view that Rule 51.03, when read with Rule 55, requires indisputable exceptional circumstances before concluding it would be unjust to exclude the opinion evidence. I am in agreement with Justice Ann Smith’s comments in *Conrad v. A.F.L. Manufacturing Limited*, 2018 NSSC 52, concerning the type of situations that, depending on the circumstances, could qualify as possible exceptional circumstances under the current Rules. At para. 63 she stated:

63. ... In my view, exceptional circumstances could be where facts come into the knowledge of a party which could not, with reasonable diligence, have been learned in time to be included in an expert's report. Another exceptional circumstance could be where a plaintiff in a personal injury claim has a significant change in his or her health, such that new expert evidence would be needed to properly put the plaintiff's state of health before the trial judge. There may be many more circumstances which constitute exceptional circumstances, but the mere rescheduling of a trial, in my view, is not one of them.

[43] This is not a closed list. However, exceptional circumstances are just that, exceptional. They are circumstances that are outside of ones control or unforeseen, despite reasonable diligence. In assessing such circumstances, the courts analysis should include consideration of a number of factors, such as the significance of the opinion evidence the party seeks to admit / its probative value; when this evidence became known to the party; the explanation for its failure to file the opinion evidence earlier; the prejudice from the late expert opinion; and the impact on the trial. In short, it is not an easy route to a conclusion that it would be unjust to exclude a late filed expert opinion.

[44] For the reasons set out above, I am satisfied that such exceptional circumstances do not exist here. This is an unfortunate case involving personal injuries allegedly incurred as a result of the negligence of the Defendant. However, in my view, there are no exceptional circumstances supporting the admission of this expert opinion at this late date. It would not be unjust to exclude the evidence of Dr. Gross in the current circumstances.

[45] In conclusion, the expert opinion of Dr. Gross must be excluded. The Plaintiff is directed to file a revised pre-hearing brief striking all references to the Gross Report. Costs in the amount of \$500 are payable by the Plaintiff in any event of the cause.

Jamieson, J.