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Late-Breaking Expert Reports: Deadlines and Prejudice

When will considerations of prejudice trump strict adherence to time requirements in the submission of expert reports?

Where the prejudicial effect of the late service of expert reports can be mitigated by an adjournment and a cost order, Ontario courts have shown a willingness to admit evidence to further the truth-seeking function of the trial.

In *Talluto v Marcus,* Justice McKelvey ruled in favour of allowing a plaintiff in a personal injury action to admit expert evidence despite the plaintiff's failure to meet the time requirements under Rule 53.03 of the Ontario *Rules of Civil Procedure* and s. 52 of the *Evidence Act*.

Over the objection of the defendant driver, the plaintiff sought to admit, after late service of reports: opinion evidence by an economic loss expert as to an alleged pension loss (which was added to the expert's report shortly before trial); a second report from a treating family physician on whether the accident impacted the plaintiff's pre-existing medical condition (the first report was unchallenged by the defendant); and two reports from a treating psychiatrist suggesting the persistence of the plaintiff's psychiatric issues.

Justice McKelvey found that the late service of the reports was neither "trivial or of no consequence" and "unfairly put (the defendant) in a position where it has had almost no time to respond."

Nevertheless, Justice McKelvey held that the economic loss expert and the treating psychiatrist would be permitted to give opinion evidence at trial. He relied upon the decision of the Court of Appeal for Ontario in *Marchand (Litigation Guardian of) v The Public General Hospital Society of Chatham* and the Court's interpretation of Rule 53.08, which grants leave to the trial judge to admit evidence "on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial."

Justice McKelvey's over-riding concern was reflected in his reference to the decision in *Gardner v Hann*: "anytime a court excludes relevant evidence the court's ability to reach a just verdict is compromised…. Relevant evidence should not be

excluded on technical grounds such as a lack of timely delivery of a report….". He held that the prejudicial effect of admitting the evidence could be sufficiently offset by an adjournment coupled with a cost order against the plaintiff.

Significantly, Justice McKelvey also applied the Ontario Court of Appeal's decision in *Westerfhoff v Gee Estate* to exclude the evidence of the treating physician expert on the issue of causation for failure to follow the requirements in Rule 53.03. The defendant had argued that the treating physician's report extended beyond the acceptable scope of a "participant expert" providing an opinion in the ordinary course of treatment and observation and was, rather, a legal causation opinion created for the purposes of litigation. In considering this argument, Justice McKelvey noted a letter from the plaintiff's counsel to the treating physician requesting a "medical legal report" and found the treating physician's report crossed the threshold into expert evidence for the purposes of litigation.

With Notes from Jonathan Langley