THORNY ISSUES REGARDING THE ADMISSABILITY AND SCOPE OF SURREBUTTAL REPORTS

By Barbara E. Cotton and Walter Kubitz [1]

Thorny issues seem to have arisen in Alberta jurisprudence regarding the admissibility and scope of surrebuttal reports, and at present these issues remain unresolved. On the one hand is the jurisprudential view that the Alberta *Rules of Court*, and more particularly Rule 218.1, do not allow for surrebuttal reports and such rules must be strictly construed. On the other hand is the more lenient view that basic principles of fairness should allow the admission of surrebuttal reports, and the courts should take a flexible approach.

Perhaps the preview to this jurisprudential debate is the Alberta Court of Appeal decision of *Lenza* v. *Alberta Motor Association Insurance Co.*[2] in which, in the context of an application for leave to call a witness late, the appellate court per Kerans J.A. gave the following guidance:[3]

> ". . . 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."

The debate as to whether surrebuttal reports can be admitted is often framed within the context of whether Rule 218.1 mandates a simultaneous exchange of expert reports, or whether such reports are to be exchanged sequentially.

The issue is framed as such in *Pocklington Foods Inc.* v. *Alberta (Provincial Treasurer)*[4] a decision of McDonald J. of the Alberta Court of Queen's Bench. In this case an application was brought by the plaintiff Pocklington Foods Inc. for an order directing that the defendant serve his expert report at the same time that the plaintiff was required to do so. At issue in the case was the value of shares originally held by Pocklington Foods Inc..

McDonald J. commenced by noting that Rule 218.1 was to be interpreted liberally and to advance the remedy for the mischief that existed before the rule was adopted. He stated:[5]

> "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 facts 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."

Counsel for the defendant had submitted that the approach to be followed under Rule 218.1 was "sequential" or "serial", in that whichever party had the legal burden of proof was required to file a "primary" expert report at least 120 days before trial if it was that party's intention to call an expert witness to testify to the existence or non-existence of a fact. The adverse party was not expected to serve a rebuttal expert report unless the proponent had first done so. The sequential approach would also allow for the filing of a surrebuttal report, notwithstanding that this was not expressly contemplated by the Rule.

This sequential approach to Rule 218.1 was disputed by counsel for the plaintiff and a "simultaneous" approach was submitted, in which all parties who intended to file "primary" expert reports must do so simultaneously under Rule 218.1 at least 120 days before the trial. It was irrelevant which party had the burden of proof. Both parties could then issue rebuttal reports in response to the primary reports. This approach did not anticipate the filing of a surrebuttal report.

McDonald J. held that, if the parties did not agree to a simultaneous approach, then whether the court should make an order requiring a simultaneous, mutual exchange of reports should remain in the discretion of the court. The discretion must be exercised in light of the mischief which Rule 218.1 was intended to remedy, *inter alia*.

In the result McDonald J. declined to exercise his discretion to order simultaneous expert reports until he had seen the particulars provided by the plaintiff.

McDonald J. also commented on the scope of a rebuttal report. In his opinion the scope of a rebuttal report would permit, although not require, the defendant's expert to assert his or her opinion that a different theory was valid and appropriate, even if the plaintiff's expert did not address that theory at all. A rebuttal would not be limited to exposure of the faults of the theory employed by the expert witness in the primary report.

A literal construction of the Alberta *Rules of Court* was taken in the next leading case of *Sherstone* v. *Westroc Industries Ltd.*[6] a decision of Rooke J. of the Alberta Court of Queen's Bench, and it was held that the surrebuttal reports were not admissible under the Rules.

In *Sherstone* the plaintiff sued as a beneficiary of a group insurance policy on the life of her deceased, estranged, husband. She sought judgment for the accidental and optional death benefits under the policy. The insurer argued that the deceased's death was due to suicide and not accident and that the deceased had amended the policy to exclude the optional benefits. The issues before the court were whether the deceased was mentally competent to make a decision to amend the policy to exclude optional group insurance coverage and whether the deceased had committed suicide and therefore his estate was precluded from the accidental death benefit under the policy.

The defendant sought to file the reports of two experts allegedly rebutting the plaintiff's primary reports. The plaintiff took the position that the reports were, in reality, late primary reports under Rule 218.1. In the result Rooke J. held that they were not

clearly rebuttal reports and that the evidence of the defendant's experts would be limited to rebutting the opinions of the plaintiff's experts.

At the outset Rooke J. decided that Rule 218.1 provided for a two-part simultaneous exchange of expert reports, rather than a three-part sequential process. He stated:[7]

> "A sequential process would have allowed for the plaintiff (or the party having the onus, if other than the plaintiff) to file expert opinions, the defendant to file reply expert opinions (setting out the defendant's experts' opinions and rebuttal of the plaintiff's experts' opinions), and then the plaintiff to file rebuttal experts opinions (solely in rebuttal to the defendant's experts' opinions). However, in the wisdom of the Alberta **Rules of Court** Committee of the day (1989-amended in detail but not in substance since that time), a simultaneous process was adopted, which means that each party who wishes to file expert opinions on an issue in dispute must file a "primary" (my term) expert opinion, and a rebuttal expert opinion may only be filed in response to an opinion advanced by the other party. The wording of the sections' specific rules is relevant in coming to this conclusion . . .
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> The **Pocklington** case allows a rebuttal opinion to provide background and incidental information to rebut a primary opinion. However, in my view, that could not be a justification for a party to "lie in the weeds" by withholding its expert opinions and then provide, in subsidence, a primary opinion, or a combination primary and rebuttal opinion (as in this case), under the guise of a rebuttal opinion, knowing that the other party properly filing a primary opinion could not reply. This is prejudicial to the party filing the primary opinion and an abuse of the simultaneous filing process. Creating an "after the deadline" sequential filing remedy is often prejudicial to the reserve trial date. The fact that this abuse happens regularly argues strongly for an "upfront" sequential filing as the better process (by agreement, or case management direction), until such time, if ever, as the rules are changed."

Rooke J. then concluded:[8] "…It is clear that in the absence of agreement of counsel or a court order, Rule 218.1 is a simultaneous exchange rule, not a sequential exchange rule."

Notwithstanding this conclusion, Rooke J. stated that he had been for a long time of the view that a sequential filing was the fairest procedure, and noted the following problems arising from the current rule:[9]

> ". . .Thus, we remain with the simultaneous rule, and the problems it causes for the parties in the Court. Under the simultaneous filing regime, each party must clearly comprehend the issues on which experts must opine, and guess at the strategy of one's opponent. If that guess is wrong, one is limited to rebuttal. And, if in the course of rebuttal, the expert goes beyond what is truly rebuttal, as in this case, the opposite party has no automatic right to respond. It is left with having to either apply to have the court deny the non-rebuttal part of the responding opinion, or to apply for the opportunity and time to provide a rebuttal to that part. The result, if the former is granted, is to limit fairness in the presentation of expert opinions. The result, if the latter is granted, is to go to a form of sequential filing, which the rule contradicts in the first place. Moreover, the necessary delay to accomplish this may delay the trial."

And further:[10]

> "The end result is, again absent agreement or a timely case management case order in advance, that Alberta is left with a simultaneous system. The Bar and Bench must realize this and govern themselves accordingly. As McDonald, J. stated [in *Pocklington Foods*], "if one party to a lawsuit is not willing to follow that course of practice [agreed sequential filing], it is the right of that party to insist on the applicable rules being followed". The applicable rule to be followed, therefore, under this system, is that each party who wishes to provide opinion evidence on an issue, must, at the 120 day limit, file the expert's opinion that is expected to be required to prove its case or refute the case of the party opposite. Thereafter, the opposite party may file rebuttal opinions to those, but only as to rebut the other's opinion, not to provide a primary opinion, for which the time has passed."

With respect to the scope of a rebuttal report, Rooke J. took issue with McDonald J.'s opinion expressed in *Pocklington Foods* that a rebuttal report could assert a different theory than that expressed in the primary report. Rooke J. was of the view that a different theory could be expressed if there was an agreed or case management ordered sequential filing. However, if the simultaneous filing requirement under Rule 218.8 was to govern

the party would have to advance their particular theory in their primary report. Otherwise, the opposite party would have no basis to reply to that theory. The rebuttal report need not be tied word for word to the primary report but it must, however, be limited to refuting the prior opinion and providing background and reasoning so as to refute – it could not provide alternate theories.

Rooke J. also disagreed with McDonald J.'s holding that a requirement for simultaneous exchange should be in the discretion of the court – in Rooke J.'s opinion simultaneous exchange was clearly required by Rule 218.1.

A more flexible approach was taken in the subsequent case of *Wade* v. *Baxter*[11], a decision of Slatter J. of the Alberta Court of Queen's Bench. This case involved a damage claim for personal injuries suffered by the plaintiff in an accident. The plaintiff filed expert reports from two orthopedic surgeons and the defendant served a rebuttal report of an orthopedic surgeon. In this rebuttal report the defendant's orthopedic surgeon suggested for the first that the plaintiff might be a candidate for a total knee replacement and that this would significantly reduce the plaintiff's pain. Neither of the plaintiff's experts had commented on the possibility or effects of a knee replacement. Ten days before trial counsel for the defendant wrote to counsel for the plaintiff indicating that an objection would be taken if the plaintiff's expert orthopedic surgeon attempted to comment on the knee replacement alternative on the basis that this prognosis was not covered in the plaintiff expert's report. Subsequently similar objections were made at trial. Counsel for the plaintiff then argued that the defendant's expert's opinion on the new issue of knee replacement was not true "rebuttal" in nature and should have been served as if a primary report.

Slatter J. commenced with a review of the purpose of Rule 218.1, and stated:[12]

> 'The purpose of Rule 218.1 is obvious. It is designed to avoid one party surprising the other with expert testimony. Such testimony is usually in a privileged form, because it is prepared in contemplation of litigation. Ordinarily, the privilege is waived before trial and the evidence is

> introduced. The rule is designed to require parties to give notice of their expert evidence (i.e., waive the privilege) in time to allow the other side a reasonable chance to respond, and to know the case he or she has to meet. This avoids unnecessary adjournments, and leads to more just results. It allows the experts to focus on what is truly in dispute. The rule was never intended to be a chess game between counsel . . ."

Slatter J. then reviewed *Pocklington Foods* and *Sherstone* and concluded that the approach in *Pocklington Foods* was the one most consistent with the purpose of the rule, although he had concerns that in *Pocklington Foods* the issue was left to be decided on a case by case basis. Slatter J. found the approach in *Sherstone* to be inefficient in that if all the parties were to file their expert reports simultaneously, this was bound to result in a certain amount of unnecessary speculation by the experts as to what the other expert would say. One of the advantages of sequential disclosure of expert evidence is that experts can focus on what is truly in dispute. Further, *Sherstone* did not discuss the desirability of the trier of fact having all the relevant evidence before it. Not only was it desirable for reasons of certainty and in order to provide incentives for counsel for the parties to comply with their obligations to disclose expert evidence, it was also desirable in that excluding relevant evidence could result in a party losing substantive rights, which was a heavy price to pay for breach of a procedural rule. "…The decision in **Sherstone** seems to have had the effect of denying the trial judge evidence on the ultimate issues before the Court. This is an undesirable result except in the case of prejudice that is irremediable."[13] Further, Slatter J. noted that our litigation system largely uses the sequential method.

Following from Slatter J.'s finding that the sequential approach was more appropriate, he also held that there was a broad scope to a rebuttal report, more akin to the scope set out in *Pocklington Foods*. A rebuttal report was not confined to merely commenting on the primary reports but could provide competing theories as well.

In the result Slatter J. concluded:[14]

" . . . In some cases the plaintiff should be permitted to file a surrebuttal report, and in all cases the plaintiff should be encouraged to disclose in advance what the surrebuttal evidence will consist of. In other cases it will be sufficient to permit the primary expert to comment on the rebuttal report during examination-in-chief…"

He summarized:[15]

"To summarize, as a practical matter one party should generally file their expert reports first. Generally it is the party who bears the burden of proof on the issue. The other party then files a rebuttal report. There is nothing wrong with that report raising new theories to explain the phenomena under discussion. The concept of a "rebuttal" report should not be so narrowly construed that the rebutting expert must accept the way the original expert has defined the question. Even if a rebuttal report raises some new information, the other party has 60 days to react. Given that by definition all parties have experts retained and briefed, it will usually be possible for the primary expert to comment on the new dimensions to the issue. At any time an adjournment is available to a party who is truly surprised, and costs are always a possible remedy as well. There will be occasions when the rebuttal report really does venture into whole new areas of discussion and explanation. In those cases they should be treated as late original reports. However, where a medical practitioner simply offers an alternative method of treatment of a known injury, that in my view does not mean it is no longer a rebuttal report.

I notice the warnings in **Pocklington Foods** that the burden of proof is not always easy to identify. I do not suggest that the rules mandate that the party with the burden of proof has to file first. This is just a practical reality in most cases. There may be cases where both parties will simultaneously file primary reports. This may happen, for example, where the defendant wants to introduce expert evidence no matter what, and the defendant is concerned that the plaintiff might not file any expert evidence at all. In such circumstances, it is not safe for the defendant to wait to file a rebuttal report. There may be other situations where the defendant has issues or theories of its own apart from what the plaintiff's experts might say. However, because there may be some cases where it is difficult to identify the exact burden of proof is not a sufficient reason to interpret the rule as universally requiring simultaneous disclosure, with rebuttal reports to be strictly confined."

For a decision anticipating this more liberal approach see *Babyn* v. *Patel* [16].

In the recent case of *Bridger* v. *Forkheim et al.* [17] Bensler J. followed the strict approach of *Sherstone* and held that there was no provision in the Rules for surrebuttal reports. She further stated, however, that this did not prevent counsel for the plaintiff from calling that evidence at trial in rebuttal, even though the report would not be allowed. Thus the approach of Madam Justice Bensler is akin to one of the approaches suggested by Slatter J. in *Wade* v. *Baxter* in his quoted passage herein where he states that it may be sufficient to permit the primary expert to comment on the rebuttal report during examination-in-chief .

Conclusion

It seems that the Alberta courts have not yet resolved whether the approach to filing expert reports under Rule 218.1 is simultaneous or sequential, and thus whether surrebuttal reports will be admissible, nor the scope of a rebuttal report. On the one hand is the literal view taken by Rooke J. in *Sherstone* which suggests that, in the absence of an agreement between counsel or a case management order, Rule 218.1 mandates a simultaneous approach, and surrebuttal reports will not be admissible. On the other hand is the more flexible view taken by Slatter J. in *Wade* v. *Baxter* that a simultaneous process is not mandated, and a sequential process allowing for the admission of surrebuttal reports may indeed be appropriate in certain cases. What does seem clear, notwithstanding this conflict, is that, even though a surrebuttal report may be ruled inadmissible, the evidence therein may be called by counsel at the trial. This practical solution may be enough to sustain counsel pending a resolution of the simultaneous/sequential debate. Until resolution of this matter, however, cautious counsel should treat the Rules as requiring a simultaneous approach with limited scope of rebuttal, in the absence of an agreement with opposing counsel for a sequential approach or a case management order to this effect.

ENDNOTES

[1] With thanks for the research assistance of Nicky Brink.

[2] (1988), 74 Alta L.R. (2d) 218

[3] At p. 219

[4] (1994), 159 A.R. 173

[5] At pp. 175, 176

[6] (2000), 269 A.R. 278

[7] At pp. 281, 282

[8] At p. 283

[9] At p. 283

[10] At p. 285

[11] (2001), 302 A.R. 1

[12] At p. 18

[13] At p. 22

[14] At p. 23

[15] At p. 23

[16] (1998), 239 A.R. 377

[17] Alberta Court of Queen's Bench Action No. 0001-18705