Admission of Participant Expert Evidence on Motions: Rule 20.2 of the *Family Law Rules*

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Among the 2019 amendments to the *Family Law Rules* were changes to Rule 20.2 which now distinguishes between four types of experts, namely "joint litigation experts", "litigation experts", "participant experts" and "court appointed experts."

Rule 20.2 of the *Family Law Rules* incorporates the distinction between litigation and participant expert witnesses recognized by the Ontario Court of Appeal in *Westerhof v. Gee Estate*, 2014 ONCA 206. Rule 20.2(1) defines "litigation expert" and "participation expert" as follows:

> "litigation expert" means a person engaged for the purposes of litigation to provide expert opinion evidence;
>
> "participant expert" means a person who is not engaged to provide expert opinion evidence for the purposes of litigation, but who provides expert opinion evidence based on the exercise of his or her skills, knowledge, training or experience while observing or participating in the events at issue.

In *Westerhof*, the Court of Appeal characterized a participant expert at paragraph 70 as follows:

> "Put another way, Dr. Tithecott, a treating physician, was permitted to testify about opinions that arose directly from his treatment of his patient, the plaintiff in the case. He was not required to comply with rule 53.03, and his opinion evidence was admitted for the

> truth of its contents. This was because he formed his opinions relevant to the matters at issue while participating in the events and as part of the ordinary exercise of his expertise. Accordingly, rather than being a stranger to the underlying events who gave an opinion based on a review of documents or statements from others concerning what had taken place, Dr. Tithecott formed his opinion based on direct knowledge of the underlying facts. He was therefore a "fact witness", or, as I have referred to such witnesses in these reasons, a "participant expert".

Rule 20.2 has different requirements for expert reports from litigation experts and participant experts. Rule 20.1(2) contains a list of formal requirements for litigation expert reports that is nearly identical to the requirements of Rule 53.03(2.1) of the *Rules of Civil Procedure*.

A party who wishes to call a litigation expert at trial must serve and file a report signed by the expert which also contains, among other things, the expert's qualifications, the instructions provided to the expert, the reasons for his or her opinion, and an acknowledgement of expert's duty signed by the expert. Further, copies of any written statement of facts and/or documents relied upon by the litigation expert are required to be provided to the other party concurrent with the delivery of the expert report.

Participant experts may give opinion evidence without complying with Rule 20.1(2). Instead, Rule 20.2(14) applies to participant experts, and sets out much less onerous requirements. A party who wishes to call a participant expert at trial must serve notice of the fact on all other parties, but there is no obligation to provide a written report from the expert.

Specifically, Rule 20.2 provides that:

EXPERT WITNESS REPORTS

(2) A party who wishes to call a litigation expert as a witness at trial shall, at least six days before the settlement conference, serve on all other parties and file a report signed by the expert and containing, at a minimum, the following:

1. The expert's name, address and area of expertise.
2. The expert's qualifications, including his or her employment and educational experiences in his or her area of expertise.
3. The nature of the opinion being sought and each issue in the case to which the opinion relates.
4. The instructions provided to the expert in relation to the case.
5. The expert's opinion on each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,

    i. a description of the factual assumptions on which the opinion is based,

    ii. a description of any research or test conducted by or for the expert, or of any independent observations made by the expert, that led him or her to form the opinion, and, for each test,

        A. an explanation of the scientific principles underlying the test and of the meaning of the test results, and

        B. a description of any substantial influence a person's gender, socio-economic status, culture or race had or may have had on the test results or on the expert's assessment of the test results, and

    iii. a description and explanation of every document or other source of information directly relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 20.2) signed by the expert. […]

(5) **DOCUMENTS TO ACOMPANY REPORT** – The following documents shall accompany a report when it is served on a party under subrule (2), (3) or (4), unless the documents have already been served on the party:

1. A copy of any written statement of facts on which the litigation expert opinion is based.
2. A copy of any document relied on by the litigation expert in forming his or her opinion.

PARTICIPANT EXPERT

(14) A party who wishes to call a participant expert as a witness at trial shall,

(a) at least six days before the settlement conference,

(i) serve notice of the fact on all other parties, and

(ii) if the party wishes to submit any written opinion prepared by the expert as evidence in the trial, serve the written opinion on all other parties and file it; and

(b) serve on any other party, at that party's request, a copy of any documents supporting the opinion evidence the participant expert plans to provide.

APPLICATION TO MOTIONS FOR TEMPORARY ORDERS OR FOR SUMMARY JUDGMENT

(15) Unless the court orders otherwise, this rule applies, with the following modifications, to the use of expert opinion evidence on a motion for a temporary order under rule 14 or a motion for summary judgment under rule 16:

1. Expert witness reports and any supplementary reports shall be served and filed as evidence on the motion in accordance with the requirements of subrules 14 (11), (11.3), (13) and (20), as applicable.
2. Any other necessary modifications.

Pursuant to Rule. 20.2(15), Rule 20.2 applies to expert evidence on interim motions and summary judgment motions. While Rule 20.2 governs how to call a litigation expert or participant expert at trial, it does not address the requirements for introducing evidence from the expert on a motion.

Simply put, there is no requirement that the evidence of a participant expert be sworn for a motion. However, if a party seeks to tender a litigation expert's evidence on a motion, the litigation expert is required to swear an Affidavit setting out the substance of the opinion or appending the report as an exhibit, and the litigation expert must comply with Rule 20.2(2).

In *J.K.L.D. v. W.J.A.,* 2020 ONCJ 335, Justice Finlayson dealt in depth with the question of whether unsworn evidence from a treating family physician was admissible on an interim parenting motion. In *J.K.L.D*., a party attached as an exhibit to an Affidavit a report from the family doctor who was providing follow up and evaluation regarding that party`s mental health. The family doctor did not swear an Affidavit attaching the report or setting out the substance of the report in an Affidavit.

In holding that the report was admissible on the motion, Justice Finlayson relied on Section 52 of the *Evidence Act* which governs the admissibility of evidence from medical practitioners. Justice Finlayson also considered the application of Section 52 of the *Evidence Act* to permit oral evidence to be given on a motion under Rule 14(17) of the *Family Law Rules*.

Section 52 of the *Evidence Act* permits the Court to allow a medical report to be admitted into evidence without the need to call the practitioner to testify. However, the trial judge must, at the request of a party, oblige the medical practitioner to testify in order to permit cross-examination.[1]

The parties in *J.K.L.D.* were engaged in a parenting dispute involving allegations about the mother's mental health. In response to these allegations, the mother relied on two reports from her family doctor which were attached as exhibits to the mother's affidavit. The father challenged the admissibility of the reports, arguing they were unsworn and did not comply with Rule 20.2. The issue before the court was whether the family doctor's reports were properly before the court although the doctor had not provided a sworn statement, and more generally, how expert opinion evidence is admitted on a motion.

The court first looked to rule 20.2(15) and noted that it permitted expert evidence on both an interim motion and summary judgment motion. Further, there was no requirement in the rule that the evidence be sworn.

[1] *Giraou v. Cunningham*, 2020 ONCA 260 at para. 45

Although the rule did not explicitly require sworn expert evidence, the father relied on case law which he argued showed that unsworn letters are insufficient evidence on a motion, particularly where they relate to an issue of central concern. In distinguishing the father's cases (which all pre-dated the enactment of Rule 20.2), Justice Finlayson noted that none of them dealt with expert reports that were otherwise admissible under Section 52 of the *Evidence Act*.

Justice Finlayson also reviewed the Ontario Court of Appeal decision of *Sanzone v. Schecter*, 2016 ONCA 566, which considered how expert evidence is to be introduced on a summary judgment motion in a civil proceeding. In *Sanzone*, the expert evidence for use on the motion needed to comply with Rule 53.03 of the *Rules of Civil Procedure* and be in the form of an affidavit from the expert containing his or her opinion or an affidavit from the expert with the report attached because the expert was a litigation expert as opposed to a participant expert. The Court of Appeal held that a party can either file an affidavit from the litigation expert containing his or her opinion, or an affidavit from the expert with the report attached. Importantly, the Court of Appeal noted that these requirements did not apply to participant experts but did not elaborate on how the opinion of a participant expert should be introduced on a motion.

The expert evidence in *Sanzone* was from a dentist who provided evidence about the standard of care and not about any particular care that the dentist had provided to the patient. As such, the dentist's report was that of a litigation expert and not participant expert. A further distinguishing feature of *Sanzone* was that it was a summary judgment motion. As Justice Finlayson notes, Rule 16(5) of the *Family Law Rules* as well as several Ontario Court of Appeal decisions (*see Drummond v. Cadillac Fairview Corporation Limited, 2019 ONCA 447,* 21-33; *and see Kawartha-Haliburton Children's Aid Society v. M.W., 2019 ONCA 316*), caution against

relying on hearsay and other less than trial worthy evidence on a summary judgment motion, but the same caution does not apply on an interim motion. Justice Finlayson noted the laxer approach to evidence on interim motions outlined in Rule 14(19) of the *Family Law Rules*, which permits hearsay evidence in affidavits.

As noted by Justice Finlayson, *Sanzone v. Schechter* did not address whether litigation expert evidence needs to be sworn for all interim motions or only summary judgment motions. The doctor's report before Justice Finlayson was that of a participant expert, not a litigation expert, and was introduced on an interim motion, not a summary judgment motion. Therefore, it did not come within the scope of the Court of Appeal's holding in *Sanzone* and Justice Finlayson did not need to however address that question. Arguably, the holding in *Sanzone v. Schechter* is of more general application and in order to rely on the opinion of a litigation expert on a motion, the litigation expert must be made a witness, which permits the opinion to be probed through cross-examination.

Justice Finlayson was left with the issue of whether the doctor's unsworn report on the interim motion should be admitted. To resolve this question, Justice Finlayson turned to Section 52 of the *Evidence Act*, which provides that a report obtained by a party and signed by a practitioner is admissible evidence in an action with leave of the court and after at least 10 days' notice to all other parties. Section 52 provides as follows:

> **52** (1) In this section,
>
> "practitioner" means,
>
> (a) a member of a College as defined in subsection 1 (1) of the *Regulated Health Professions Act, 1991*,
>
> (b) a drugless practitioner registered under the *Drugless Practitioners Act*,

(c) a person licensed or registered to practise in another part of Canada under an Act that is similar to an Act referred to in clause (a) or (b).

(2) A report obtained by or prepared for a party to an action and signed by a practitioner and any other report of the practitioner that relates to the action are, with leave of the court and after at least ten days notice has been given to all other parties, admissible in evidence in the action.

(3) Unless otherwise ordered by the court, a party to an action is entitled, at the time that notice is given under subsection (2), to a copy of the report together with any other report of the practitioner that relates to the action.

(4) Except by leave of the judge presiding at the trial, a practitioner who signs a report with respect to a party shall not give evidence at the trial unless the report is given to all other parties in accordance with subsection (2).

(5) If a practitioner is required to give evidence in person in an action and the court is of the opinion that the evidence could have been produced as effectively by way of a report, the court may order the party that required the attendance of the practitioner to pay as costs therefor such sum as the court considers appropriate.

The court reasoned that if a letter from a practitioner would be admissible at trial, then it would be illogical to require a sworn Affidavit from the practitioner on an interim motion. As stated at paragraphs 74 to 76 of the decision:

74 Pursuant to section 52 of the *Evidence Act*, a report obtained by or prepared for a party to an action and signed by a practitioner are, with leave of the court and after at least ten days notice has been given to all other parties, admissible in evidence in the action. In the family law context, rule 20.2(15) of the *Family Law Rules* now governs their use on a motion, too, but with necessary modifications.

75 As an exception to the hearsay rule, a practitioner's report would be able to be admitted at a trial without the need to call the practitioner to testify, let alone at an interim motion. See *Girao v. Cunningham* ¶ *45*. I agree with Ellies R.S.J. where he said, at ¶ 33 of*LaRoche v. Lynn*, Ellies R.S.J., that **"[i]t seems illogical that a party would be required to obtain an affidavit in a paper-based proceeding such as a summary judgment motion, when a simple letter will suffice in a trial."**

76 I find that Ellies R.S.J.'s comments apply equally regarding an interim motion.

Although not referred to in *J.K.L.D. v. W.J.A*., Rule 14(17) of the *Family Law Rules* specifically outlines the methods in which evidence may be received on a motion:

> **14.** (17) Evidence on a motion may be given by any one or more of the following methods:
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> 1. An affidavit or **other admissible evidence** in writing.
>
> 2. A transcript of the questions and answers on a questioning under rule 20.
>
> 3. With the court's permission, oral evidence.

"Other admissible evidence in writing" pursuant to Rule 14(17)(1.) includes evidence filed under Sections 35 and 52 of the *Evidence Act*. The Ontario Court of Appeal in *Chilman v. Dimitrijevic*, [1996] O.J. No. 1533 recognized that Sections 35 and 52 of the *Evidence Act* are not limited in their application to trials. Section 35(2) states that a defined record "is admissible in evidence" and Section 52(2) provides that certain reports "are . . . admissible in evidence". The Court of Appeal in *Chilman v. Dimitrijevic* noted that Sections 35 of 52 of the *Evidence Act* should not present any real obstacle to the admission of medical records or reports on motions.

After determining that a practitioner's unsworn report is admissible on an interim motion, Justice Finlayson went on to analyze whether the doctor in the case was a participant expert under Rule 20.2 and concluded in the affirmative. The reports were largely confined to first-hand treatment of the mother. As such, the reports did not have to comply with rule 20.2(2) requirements for litigation experts.

The Court next considered whether the reports were practitioner reports as defined in Section 52 of the *Evidence Act* and held that they were. There was no serious dispute about the first requirement, as the medical doctor met the definition of practitioner. The reports also met the second requirement as they were signed.

Finally, Justice Finlayson considered the notice requirement. The mother failed to provide any formal notice and had instead merely attached the reports to her affidavit. Despite the lack of formal notice, however, Justice Finlayson held that in effect, the father had well over 10 days' notice. As a matter of best practice, the mother was ordered to serve the required notice under the *Evidence Act* but held that this requirement had still been met.

Oral Evidence on Motion

Rule 14(17) of the *Family Law Rules* permits oral evidence on a motion with the Court's permission, which is the exception and not the rule. In *Riss v. Greenough*, 2002 CarswellOnt 2326, Quinn J. applied a "special circumstances" test for leave to permit oral evidence on a motion. Quinn J. found special circumstances when three witnesses with information relevant to issues on

the motions had refused to provide affidavits. The outcome turned on the inability to present that evidence before the Court via other means.

The need for a *voir dire* to introduce expert evidence on a motion could be a "special circumstance" under which oral evidence might be permitted.[2]

In *J.K.L.D. v. W.J.A.*, Justice Finlayson permitted oral evidence to be heard from the family doctor given that the medical report was admitted under Section 52 of the *Evidence Act*, which obliges there to be cross-examination at the request of a party. A summons was required to be served on the doctor for the motion. The Court specifically cautioned the parties to be mindful of proportionality, Rule 2 of the *Family Law Rules* and the cost consequences in Section 52(5) of the *Evidence Act* when deciding whether to ultimately pursue viva voce evidence.

In determining whether to permit oral evidence on a motion, the Court will consider such factors as time, expense and proportionality. Out-of-court questioning under Rule 20(5) will normally be an alternative to a request for oral evidence on a motion and Rule 14(17)(2.) permits the filing of transcripts from questioning as admissible evidence on a motion.

[2] *L.D. v. A.E.*, 2020 ONCJ 417