CASE COMMENTS AND NOTES

THE COURT EXPERT—RULE 218
GRAYSON v. *DEMERS*

I. THE CASE

The good advocate knows his strength rests in a thorough preparation of his case. The wise Judge believes he can make the best decision when he has as much of the relevant evidence before him as possible. These were some of the factors at work in the recent case of *Grayson* v. *Demers* [1975] 2 W.W.R. 289 (A.D. Alta.). The appellant had sued the respondent claiming that she suffered serious injuries as a result of being struck down while a pedestrian by the respondent who was operating his motor vehicle. In his defence and the particulars later provided, the respondent stated that "the accident occurred during a period of time during which the defendant had lapsed into an unconscious state due to medical reasons of which he had no forewarning", and further that "inasmuch as at the time of the accident, the defendant was in an unconscious state, any acts which occurred during this period were not the acts of the defendant". In the examination for discovery the respondent stated that following the accident he had been examined by doctors and had had a number of tests of his lungs, heart, nervous system and brain and for diabetes. Following this the appellant demanded that the respondent submit to an independent medical examination and the demand was refused. The only method by which the appellant could get further information about the medical problems behind the defence was to seek a court order and that application came before O'Byrne J. in Supreme Court Chambers. The appellant was asking for an order under Rule 218 which appears in Part 15 of the Alberta Rules of Court and reads as follows:

> 218. (1) The court, on its own motion or upon the application of any party in any case where independent technical evidence would appear to be required (including the evidence of an independent medical practitioner) may appoint an independent expert (herein called 'the court expert').
> (2) The court expert shall, if possible, be a person agreed between the parties and failing agreement shall be nominated by the court.
> (3) The question or the instructions submitted to or given to the court expert, failing agreement between the parties, shall be settled by the court.
> (4) The report of the court expert shall be in writing, verified by affidavit, and shall be admitted as evidence at the trial and given such weight as the court thinks fit.
> (5) Copies of the report shall be forwarded by the clerk to the parties or their solicitors.
> (6) Any party may, within 14 days after the receipt of a copy of the report or within such other time as the court directs, apply for leave to examine the court expert on his report and the court, on the application shall
> (a) order the cross-examination of the court expert prior to the trial; or
> (b) order the cross-examination of the court expert at the trial,
> or both.
> (7) The court may make such further and other directions respecting the carrying out of the instructions by the court expert, including the making of experiments and tests.
> (8) Subject to the ultimate determination by the trial judge as to who shall pay the remuneration of a court expert it shall be paid in the first instance by the opposing parties in equal portions at such time as the court directs.

(9) Where the court expert is a medical practitioner he has all the powers and duties conferred on a medical practitioner acting under Rule 217.
(10) The appointment of a court expert does not prevent the parties from calling their own expert or experts at the trial.

The application for an order appointing a court expert was refused by the learned Chambers Judge. The appellant said in her factum that he had held that the case did not fall within Rule 218 and that the order being sought would require an extension of the rule beyond the purpose for which it was intended. He stated that an independent medical practitioner would not be required in this case as the appellant could adequately examine the respondent during examinations for discovery. This refusal to grant the order was appealed to the Appellate Division of the Supreme Court of Alberta and is the decision reported. The judgment of the court was given by Allen J.A. Early in his decision he noted that there were no reported cases directly on point, a situation he attributed to the rule being unique to Alberta and of fairly recent enactment.[1] He went on to consider in some depth cases in which a "sister" rule, namely Rule 217[2], had been considered and concluded that those cases indicated a widening of the scope of medical examinations conducted under that rule or others similar to it. Rule 217 reads as follows:

217. (1) In any action brought to recover damages or other compensation for or in respect of personal injury sustained by any person, the court may order that the person in respect of whose injuries, damages or compensation are or is sought shall submit to be examined by a duly qualified medical practitioner.
(2) The examination shall be at the expense of the party seeking it.
(3) The court may order a second examination or further examinations upon such terms as to costs as may be deemed proper.
(4) The medical practitioner conducting the examination may ask the person being examined questions relating to his medical condition and medical history and the person being examined shall answer the questions but subject to the foregoing the medical practitioner shall not interrogate the person being examined.
(5) The person to be examined may nominate a medical practitioner to be present during the examination.
(6) If the person to be examined consents in writing, or failing this consent, if the court so directs, the examining medical practitioner may in a proper case take, and have analyses made of, samples of blood or body fluids of the person being examined and have other tests made recognized by medical science including, without restricting the generality of the foregoing, x-ray pictures, electro-cardiograms and electro-encephalograms.
(7) The party causing the examination to be made
(a) shall, upon request, deliver promptly to the party examined or his solicitor a copy of a detailed written report of the examining medical practitioner setting out his findings and conclusions, and
(b) is, upon request, entitled to receive promptly from the party examined a like report of every examination previously or thereafter made of the physical or mental condition of that party resulting from the injuries sustained.
(8) If a party refuses to deliver a report, the court may order delivery, and if the medical practitioner refuses to make the report in writing the court may make such order as it considers proper, one of the provisions of which may be the exclusion of the evidence of the medical practitioner if his testimony is offered at trial.

The rationale behind Rule 217 and the cases interpreting it is of course that the court should have before it all relevant evidence regarding the injuries or damage suffered by the person seeking compensation and

[1] Both Rule 217 and 218 came into force on 1 January, 1969.

[2] Rule 217 was declared *ultra vires* in *Schanz and Schanz* v. *Richards et al* (1970) 72 W.W.R. 401 by Quigley, Local Master (now Quigley J.) on the basis that it effects changes in substantive law. This decision seems to have been ignored.

that the party who faces paying the compensation should be in a position to understand and test the evidence supporting the claim. The learned Judge seemed to feel that these considerations applied equally to the case before him where the application was under Rule 218. The great difference lies of course in the fact that Rule 217 anticipates an order requiring the person claiming damages or other compensation in respect of personal injury to be examined. In the *Grayson* case, it was the person who had been injured who was applying for the order to have the other party examined. In other words Rule 217 is set up for a defendant to apply to have the plaintiff examined while in the *Grayson* case the plaintiff was applying for an order requiring the defendant to be examined. But the learned Judge found something that each situation would have in common: a party had put his health in issue. Allen J.A., said at p. 297:

> Haines J. in *Taub* v. *Noble*,[3] indicates that a person who has put his physical condition in issue in an action by him for damages should not be in a position to deny the opposite party the right to ascertain his condition by suitable examination by a medical practitioner. Surely by analogy the defendant respondent in this case who has put his physical condition in an issue by way of defence should not be in a better position than a plaintiff who does the same thing, nor should counsel for the plaintiff be forced to labour under the disadvantage of having to proceed without competent independent medical examination of the defendant to ascertain if his allegations as to his physical condition may have foundation in fact.

O'Byrne J. in chambers had raised the argument that the appellant could get all the information she needed on examinations for discovery but on appeal Allen J.A. preferred the different view expressed by Wilson J. in *Jaworski* v. *Wilkinson*[4] at p. 213:

> True, the defendants may, and no doubt will, improve their situation by way of examination-for-discovery; but there are limitations to this remedy, approached as it must be by counsel who, no matter what his stature before the court, is unlikely to be sufficiently learned in medicine to draw from the plaintiff a picture of her condition equivalent to that obtainable in more commonsense manner by a medical examination . . . conducted by a competent practitioner; likewise, the reduced effectiveness of cross-examination dependent upon the limited preparation afforded by the language of the pleadings and the chance illumination gleaned from the answers, in lay terms, tendered upon examination-for-discovery; . . .

In concluding that the case should be referred back to a Trial Division Judge to make the order for the examination of the defendant by an independent medical practitioner Allen J.A. said at p. 298:

> It should be and is of primary importance that, notwithstanding that civil litigation is conducted in our courts under what is termed "the adversary system", the courts should not be denied the right to ascertain the true facts concerning any matter relative to the questions it is asked to decide if there are means at its disposal, either on the application of an interested party or upon its own motion, to be furnished with the information which may throw light upon the factual aspects of the situation. Rule 218, in my view, may be most aptly designed in its present form to assist in attaining this objective. The defence raised is of a rather extraordinary nature and would seem difficult to deal with without recourse to an independent examination.

It seems Allen J.A. was persuaded that there was a need for the medical examination of the respondent in order for the adversary process to function so that the court hearing the case would know what it was that had so suddenly struck down the respondent. It is submitted that neither Rule 217 nor Rule 218 met the needs in the case but that

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[3] [1965] 1 O.R. 600, 49 D.L.R. (2d) 106.

[4] (1966) 58 W.W.R. 211 (Man.).

Rule 218 in its virginal state was more readily convertible to be the handmaiden of justice.

II. THE RULE

It is possible to anticipate applications for orders under Rule 218 in the following circumstances:

I. By the parties:
- (a) when the experts are split and it seems more economical and practical to have an independent expert assess the expert evidence;
- (b) when an expert is difficult to find or the calling of experts would be expensive;
- (c) when it might be in a party's best interests to have the evidence open to cross-examination.[5]

II. By the court:
- (a) when the experts are split and the Judge feels the need of some assistance from an independent expert;
- (b) when the nature of the subject matter is very technical or scientific and the Court feels the need of some assistance from an independent expert in order to understand and interpret the evidence;
- (c) when the nature of the evidence to be given is difficult to obtain without the bias of each side affecting it.

Some of these circumstances have developed and the need for a court expert has been met in the following ways:

1. In a case of the II(a) type a Quebec Judge[6] faced with a split in expert medical testimony was moved to suggest to counsel that he would appreciate an independent expert to review the evidence and give an opinion on it. Fortunately, counsel agreed and the decision in the case was based in part on the report to the court of the expert.

2. In cases of the II(b) type in England in the Admirably Division assessors have been used for more than a century and the English Law Reform Committee has recommended no modification of the practice.[7]

3. Cases of the II(c) type arise in family and domestic relations cases. It is not uncommon in Canada or England for a court to request a report from an independent expert such as a psychiatrist, or social worker before awarding custody of children. This practice was approved by the Law Reform Committee.[8]

It is worthy of note that all of the above examples involve the court moving for an independent expert. There are no examples available of an application by the parties in the circumstances outlined.

The fact that the Rule is little used in Alberta and England relates to a misunderstanding and fear of it by the Bar and Bench. Lord Denning canvassed some of the concerns in *Re Saxton*[9] at p. 95:

> Now in the present case the plaintiffs are willing to exchange the report of their expert in return for the report of the expert on the other side: but they take exception to showing the report of their expert to the other side without such an exchange. Neither side has applied for the court to appoint a court expert. It is said to be a rare thing for it to be done. I suppose that litigants realise that the court would attach great weight to the report of a court expert: and are reluctant thus to leave the decision of the case so much in his hands. If this report is against one side, that side will wish to call its own

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[5] *See* Rule 218(6)(a)(b).

[6] Demers J. in *Dame Bergstrom et Vir.* v. *G.*, [1967] C.S. 513 (Que.).

[7] Law Reform Committee, Seventeenth Report, *Evidence of Opinion and Expert Evidence*, October 1970. (Cmnd. 4489 H.M.S.O.).

[8] *Id.* at 9. *See also Phillips et al* v. *Ford Motor Co. of Canada Ltd. et al.* (1971) 18 D.L.R. (3d) 641 (C.A. Ont.).

[9] [1962] 3 All E.R. 92 (C.A.).

expert to contradict him and then the other side will wish to call one too. So it would only mean that the parties would call their own experts as well. In the circumstances the parties usually prefer to have the judge decide on the evidence of experts on either side, without resort to a court expert.

The learned Master of the Rolls concluded by expressing the hope that in future careful consideration would be given to the appointment of a court expert.

The English Rule Order 40[10] differs from Rule 218 in one important respect, namely that in England a court cannot on its own motion appoint an independent court expert. This Order was reviewed by the Law Reform Commission in the following words:[11]

Court Experts:

13. In countries whose procedure is that of the civil law, the common practice is for the court itself to refer matters of expertise to an expert to report. In these countries the courts adopt a more inquisitional role than is consonant with the adversary system upon which the practice of the English courts is based; but even under the adversary system there would appear at first sight to be merits in obtaining from an acknowledged expert appointed by the court a wholly independent opinion upon a technical matter which is in issue. Provision for the appointment of a court expert is made by Order 40 of the Rules of the Supreme Court; but little use has been made of this power in the 34 years for which it has existed and we do not recommend this course except in a particular class of case to which we refer later. Experience of the commonest kind of expert evidence adduced in civil litigation, that of doctors in accident cases, shows that, where the parties before the trial exchange reports which they have obtained from the medical experts whom they propose to call as witnesses, this often results in an agreed report or reports which obviate the need for calling oral evidence. Where agreement cannot be reached it is nearly always because there is room for genuine difference of medical opinion upon the correct diagnosis or prognosis; and this it would be the constitutional function of the judge to resolve, whatever method be adopted of adducing medical testimony.

This writer joins another[12] in criticizing this position. It is clear that factors present in admiralty cases and in divorce and custody cases appear in many others. Evidence is often technical, complicated and not easily understood by the layman, even if he be a judge. Likewise it could be said that in every law suit someone's interests are paramount just as the infant's interests are paramount in the custody case. The increasing importance of medical evidence, and especially in the very subjective area of psychiatry will see many more cases where the experts are evenly split.[13] No lawyer would deny that it is the judge who has the power to decide the case. The real question is whether we are taking a twentieth century position on the assistance he should have in reaching that decision.

III. CONCLUSION

The *Grayson* case has shown that the Alberta Rules of Court do not specifically allow a plaintiff to obtain an order for the medical examination of a defendant. The Court of Appeal has by its decision indicated that where a defendant puts his health in issue in answer to the claim of the plaintiff he should not be in a better position than a plaintiff who puts his health in issue in claiming compensation.

Rule 217 should be varied to allow a court to order any party who has

[10] Vol. I, Jacobs ed., *The Supreme Court Practice* 598 (1973).

[11] *Supra*, n. 7 at 7.

[12] P.R., *Expert Evidence and the Needs of Justice* (1970), 120 The New Law Journal 953.

[13] *Villemure* v. *l'Hopital Notre Dame & Turcot* [1973] S.C.R. 716.

put his health in issue to submit to a medical examination. Such a change would do away with the need to construe Rule 218 to cover the *Grayson* situation.

Further, it is suggested that lawyers and judges take a fresh look at Rule 218 with a view to invoking it to assist courts and to save costs in litigation.

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