Court File No. 99-31741

SUPERIOR COURT OF JUSTICE

B E T W E E N :

MICHELLE SPENCER AND DEBBIE SPENCER

Plaintiffs

- and -

DANIEL SZICSAK AND ALEX SZICSAK

Defendants

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R E A S O N S F O R R U L I N G

BEFORE THE HONOURABLE JUSTICE L.C. LEITCH
on April 14, 2005, at LONDON, Ontario

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APPEARANCES:

G. Good — Counsel for the Plaintiffs

B. Foster — Counsel for the Defendants

THURSDAY, APRIL 14, 2005

R E A S O N S F O R R U L I N G

LEITCH, J. (Orally):

Good morning counsel. Before we begin this morning I am going to provide you with my ruling with respect to the issue that arose yesterday in connection with the plaintiff's plan to call treating physicians before the injured plaintiff is called as a witness. I begin by just referring to the background facts to this point in time which are; that the trial began yesterday; with the consent of counsel, and in order to minimize inconvenience to an O.P.P. Officer who was in attendance at court when the trial began, the officer testified before I heard a motion relating to the admission of evidence for which leave was required under rule 53.08, and before I heard the plaintiff's opening statement. The plaintiff's counsel then indicated that he would be calling the injured plaintiff's friend and co-worker and thereafter one of the treating chiropractors with the intention to call the treating neurologist, Dr. Kay the next day, which would be today. Dr. Wagner, another treating chiropractor the following day, Friday. Ms. Kobyayshi, an occupational therapist also on Friday. Dr. Mc Donald, the treating psychologist on Monday. Dr. Potter, the treating physiatrist on

Tuesday. Dr. Grace, the family physician on Wednesday, and all of these witnesses would be interspersed by the testimony of numerous lay witnesses; friends, family and co-workers of the injured plaintiff. The injured plaintiff would then be called to testify on Thursday. After her testimony an economist and a vocational rehabilitation specialist would then be called as the final witnesses.

Therefore, all treating physicians who are offering their expert opinion on the plaintiff's injuries or rather I should say, all treating health practitioners who are offering their expert opinion on the plaintiff's injury; the cause of those injuries, her prognosis, and the impact of those injuries on her ability to perform her duties as a nurse, will testify before the injured plaintiff testified. This plan came as a surprise to defence counsel who had not been advised of the plaintiff's counsel's intentions. The defence objected to the proposal in so far as it related to the medical witnesses. The defence takes no issue as to the order other witnesses are called. Plaintiff's counsel advised that he had made his decision with respect to the order of witnesses based on a combination of tactics and strategy as well as scheduling issues.

Plaintiff's counsel then presented a case brief which the defence sought an opportunity to

consider before making submissions. That request was granted and I subsequently heard further submissions from counsel. During those submissions defence counsel emphasized the difficulty that this proposal created because any variance between the plaintiff's testimony and what she complained of to her treating health practitioners, and what they relied on in rendering their opinion could not be pursued on cross-examination. Put another way, the experts could not be asked their opinion or prognosis based on what the injured plaintiff testified to at trial. Plaintiff's counsel reiterated his right to present the plaintiff's case as he saw fit. He indicated the injured plaintiff could testify in the early days of the trial. There was no particular reason other than strategy that she was not being called at that time. He emphasized that a trial is an adversarial process and he was not obliged to advise or obtain the consent of defence counsel to the order of his witnesses. In terms of what I consider a scheduling problem the only witness that raises such a problem is Dr. Mc Donald. Plaintiff's counsel has advised that he is out of the province for an extended period of time commencing April 19th. It is acknowledged that the plaintiff would not be in court while the other witnesses are testifying.

After hearing submissions I asked plaintiff's counsel to make his opening statement to provide

me with some insight into this case. The action arises from a motor vehicle accident which occurred in June, 1997. It is alleged that the motor vehicle accident caused the following injuries; lacerations to her elbow, bruising to her knees, a haematoma to the right temple region. She continues to have neck pain, headaches, jaw pain, problems opening her jaw and low back pain therefore, the alleged injuries are subjective in nature.

In the case law presented by counsel there are two decisions where the court required the plaintiff to testify first; a 1992 decision of this court wherein, Madam Justice Dunnet concluded that the plaintiff as a key witness must testify before two proposed witnesses. The plaintiff contended in that case that the court would be in a better position to understand the nature of the plaintiff's injury, a closed head injury, if the expert evidence was called first. The defence contended it would be difficult to cross-examine doctors on hearsay evidence and without the evidence of the plaintiff to lay the proper foundation for opinion evidence put to doctors. In another decision of this court during a jury trial, Justice Festeryga in *Wilson vs. Quinn* followed the reasoning of Justice Dunnet and concluded that that plaintiff was a key witness because there was a long and confusing history of prior complaints. Justice Festeryga noted the jury would better understand

the plaintiff's position if the trial proceeded in that fashion.

There were three rulings where this court concluded that other witnesses could testify before the plaintiff; in *Vanderloo* a 1995 decision of this court and in rulings in a 1992 trial, *Steward* and a 1995 trial *Gervais*. The plaintiff called in the case of *Vanderloo* two medical witnesses before the plaintiff testified and in the other two rulings one medical witness before the plaintiff testified.

I take the following principles from all of these cases; there is no absolute rule that a plaintiff's evidence precede the evidence of medical experts however, in the usual course the plaintiff is called as the first witness. To use the words of Justice Haines in *Vanderloo,* "That is essentially for the purpose of setting the stage for the balance of the evidence. The issue if it arises should be considered in the particular circumstances of each case," that is what occurred in the cases that I have mentioned. In *Mizzi*, Justice Dunnet found it necessary for the medical evidence to follow the evidence of the plaintiff even though in that case the injury was an objective complex injury to the brain.

The main and perhaps only factual witness in this case is the injured plaintiff. As noted her

evidence is key to the case given the nature of her injuries. I understand that there is an issue of causation as the plaintiff's counsel indicated in his opening. The defence submitted that as in *Wilson*, there is a long and confusing history of prior complaints. Cross-examining doctors who are proffering opinions on prognosis and the impact of these injuries is difficult if the foundation for their evidence has not been laid by the plaintiffs. To use the words of Justice Zuber in *Steward*, "It really makes the process much more difficult to understand when the case is going on in almost a contingent manner, the evidence of the witness who testifies is dependant on things yet to come."

Here the plaintiff's intention is to call seven expert medical witnesses before the plaintiff. As a result these circumstances are quite distinct from those considered by the court in the cases I have referred to. In those cases at the most the plaintiff sought to call two medical witnesses before the plaintiff testified. These are not circumstances where the plaintiff is constrained by the schedule and availability of expert witnesses. As I indicated only Dr. Mc Donald poses a scheduling problem. As I have indicated to counsel and indeed made very clear to them by the fact that two days before this trial commenced I advised counsel of the days when this case would have to be interrupted by other scheduled commitments, this court will

make every effort to minimize inconvenience to medical practitioners and the public they serve. Therefore, out of respect for Dr. Mc Donald's schedule and to accomplish an efficient presentation of the plaintiff's case he will have to be called before he travels out of Ontario on April 19th.

In this case the injured plaintiff's condition is based largely, if not entirely on subjective symptoms revealed only through her statements made by her to her treating practitioners. Ultimately as the trier of fact I will have to determine the weight to be given to the opinions of the various experts and to do so the accuracy of the plaintiff's statements made to those practitioners must be considered. Under the plaintiff's proposal that assessment cannot be made as I hear the practitioners evidence. This limitation and my consideration of all of the evidence of the treating practitioners as presented in accordance with the plaintiff's proposal causes me concern. This concern and the difficulties for the defence and it's cross-examination of all treating medical practitioners as identified above, raises the issue for me as to whether a trial judge has the jurisdiction to revise the plaintiff's proposal for the presentation of the plaintiff's case, or whether because trials are an adversarial process I simply must accept what the plaintiff has proposed. Should the plaintiff be allowed to

present her case outside of the usual course as she chooses without input from the court? In my view, a trial judge has a responsibility and has a jurisdiction to manage a trial provided that a trial judge does not intervene to a point where a reasonable and informed observer would have a reasonable apprehension that a trial judge cannot consider the case impartially.

There is no basis on which I can conclude that requiring the medical witnesses, other than Dr. Mc Donald, to testify after the plaintiff is unfair to the plaintiff. There is no indication that that poses any scheduling or other problem for the plaintiff and the plaintiff has provided no other reason for doing so, other than stating his decision is strategic. I am not simply second guessing plaintiff's counsel or usurping his function. To do so would be improper. Rather I am concerned with the impact of his proposal on my ability to assess the evidence of the medical experts as they testify, and I am concerned with the cumulative impact of the difficulties for the defence in his cross-examination of all of the medical experts. It is impractical to suggest that this latter issue could be resolved if there was a potential opportunity to recall witnesses. Given the number of witnesses that are involved that is impractical and would only serve to unduly lengthen the trial.

For these reasons I am requiring that the plaintiff testify before the medical experts are called with the potential exception of Dr. Mc Donald, for whom there is a scheduling problem which I have indicated the court must accommodate.

... WHEREUPON THESE PROCEEDINGS WERE CONCLUDED.

Certification

FORM 2

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I, Marta Viglianti certify that this document is a true and accurate transcription of the recording of Spencer v. Szicsak in the Superior Court of Justice held at 80 Dundas Street, London, Ontario taken from Recording(s) No. 52/2005 which has been certified in Form 1.

June 22, 2005 M Viglianti

(Date) (Signature of authorized person)