

SUPERIOR COURT OF JUSTICE

MARIE GIORDANO

Plaintiff

- and -

CHENG LI AND FANG ZHI LI

Defendants

BEFORE THE HONOURABLE JUSTICE SHAUGHNESSY,
AT THE COURTHOUSE, 150 BOND ST. E., OSHAWA, ONTARIO,
ON FRIDAY, NOVEMBER 21, 2014.

RULING ON MOTION FOR LEAVE TO CALL
MORE THAN THREE EXPERT WITNESSES AT TRIAL

APPEARANCES:

T. Charney Counsel for the Plaintiff.
A. Eckart

T. McCarthy Counsel for the Defendant.

1 FRIDAY, NOVEMBER 21, 2014

2
3 NEUTRAL CASE CITATION NO. 6824

4
5 RULING ON MOTION FOR LEAVE TO CALL
6 MORE THAN THREE EXPERT WITNESSES AT TRIAL

7
8 SHAUGHNESSY J. (Orally)

9 The plaintiff has brought an application for
10 leave to call more than three experts witnesses
11 at trial pursuant to s. 12 of the *Evidence Act*.
12 The application has been somewhat expanded by the
13 position taken by the defence, which I will
14 explain.

15
16 The defence objection to the application, as I
17 have narrowed it and framed it as a result of
18 hearing submissions, is as follows:

- 19 1. The family doctor, Dr. Barrettara ought to
20 be permitted to testify in relation to the
21 treatment of the plaintiff but he cannot
22 testify as an expert in relation to such
23 issues as causal connection, employability
24 or prognosis for the plaintiff.

25
26 It is apparent then that the issue is really a
27 defence application to limit the scope of the
28 family doctor's evidence based on existing case
29 law presented and is a separate and distinct
30 issue from the plaintiff's application. However,
31 I propose to deal with it at this stage. The
32 defence position, alternatively, is that the

1 family doctor cannot be qualified as an expert to
2 give evidence in dispute.

3
4 2. Counsel for the defendant has no objection
5 to the plaintiff calling Dr. Pilowsky, a
6 treating psychologist, or Dr. Zakaria, the
7 treating psychiatrist. However, the defence
8 objects to the plaintiff calling
9 Dr. Zohar Waisman, a psychiatrist who
10 authored a reported dated October 5, 2014.
11 Now that position has been altered as a
12 result of submissions that I heard whereby
13 the defence states that the plaintiff can
14 choose to call Dr. Zakaria or Dr. Waisman
15 but not both.

16
17 The defence objection in relation to this issue
18 is:

19 1. That Dr. Waisman's report of October 5, 2014
20 was not served with the appropriate notice
21 of 90 days. This trial commenced on
22 November 17, 2014. Alternatively, the
23 defence argues that Dr. Waisman's report,
24 which is the third expert report dealing
25 with the plaintiff's psychological issues,
26 is repetitive of the other psychological
27 reports. In framing issues, I would note
28 that the defence medical expert,
29 Dr. Monte Bail, who is a psychiatrist, has
30 been able to review and provide a responding
31 report to Dr. Waisman's report dated
32 October 5, 2014.

1 Plaintiff's counsel advises that the treating
2 psychiatrist, Dr. Muhammed Zakaria, while
3 furnishing medical reports, refused to sign a
4 Form 53 and objects that he is not an expert
5 witness and therefore, is not providing opinion
6 evidence to this court.

7
8 2. Defence counsel, Mr. McCarthy, has advised
9 this court that he has no objection to the
10 other experts of the plaintiff being called
11 to testify. However, Mr. McCarthy has now
12 put the court on notice that he will be
13 objecting to the plaintiff's medical expert
14 opinion of Dr. Ogilvie-Harris providing what
15 defence counsel describes as "biomechanical
16 evidence" relating to the neck, shoulder,
17 back injury, which the defence contends he
18 is not qualified to opine. Again, this will
19 be the subject of an application to be
20 brought by the defence with a factum when Dr.
21 Ogilvie-Harris testifies and is not the
22 subject of the present application.

23
24 **ISSUE 1:**

25 **The Evidence of the Family Doctor, Dr. Barrettara**

26 An analysis of this issue begins with the
27 decision of the Divisional Court in *Westerhof v. Gee*,
28 2012 ONSC 2093. Counsel for the plaintiff
29 submits that in this decision, the court held
30 that in order for a treating physician to provide
31 a diagnosis or express an opinion on the cause of
32 certain injuries sustained by the plaintiff, it

1 is necessary for the physician's evidence to
2 comply with Rule 53.03 of the *Rules of Civil*
3 *Procedure*.

4
5 Plaintiff's counsel submits that it intends to
6 call the family physician and have him explain
7 his diagnosis of the plaintiff's injuries at
8 various material times since the accident
9 happened and express an opinion on the cause of
10 her injuries and on her ability to return to work.
11 The family doctor, I would note, has delivered
12 reports and he has completed the Form 53 so to
13 that extent, he is in compliance with what I will
14 call the procedural requirements of the *Westerhof*
15 case.

16
17 Prior to the *Westerhof* decision, treating physicians
18 testified and provided their diagnosis without
19 having to be called as experts. Section 12 of the
20 *Evidence Act* predates Rule 53 and the ruling in
21 *Westerhof*. I am advised by counsel, however, that
22 the *Westerhof* case was heard by the Ontario Court of
23 Appeal and their decision is under reserve. The
24 plaintiff submits that the current practice is
25 that treating physicians have to be qualified as
26 experts to provide their diagnosis and prognosis
27 pending the decision of the Ontario Court of
28 Appeal in *Westerhof*.

29
30 I have been provided with a number of cases by
31 both counsel in addition to the *Westerhof* decision.

1 I do not find it necessary to do a substantive
2 review of all the case law as this has been done
3 several times over not only in the *Westerhof* case
4 but *Gaudet v. Grewal*, 2014 ONSC 3542, *Hoang v. Vicentini*,
5 2012 ONSC 1066, *Gutbir v. University Health Network*, 2010
6 ONSC 6394 and *Kusnierz v. Economical Mutual Insurance Company*,
7 2010 ONSC 5749.

8
9 As I have indicated, the analysis then centers
10 around this *Westerhof* case and other cases which I
11 referred to. In brief compass, however,
12 paragraph 21 of the *Westerhof* case states:

13
14 [21] *The important distinction is not in the*
15 *role or involvement of the witness, but in the*
16 *type of evidence sought to be admitted. If it*
17 *is opinion evidence, compliance with rule*
18 *53.03 is required; if it is factual evidence,*
19 *it is not.*

20
21 [22] *Based on this distinction, it is not*
22 *difficult to see that, where the expert has*
23 *not been qualified to give the opinions to be*
24 *tendered or where the report relied on to*
25 *advance the opinion does not comply with rule*
26 *53.03, it is correct for the trial judge to*
27 *refuse to admit the evidence.*

28
29 The issue then that is before me, and obviously
30 without the advantage of having the Court of
31 Appeal's decision in *Westerhof*, is whether a

Ruling re: Number of Experts - Shaughnessy J.

1 treating physician can provide opinion evidence.
2 Looking back over the case law over many years, I
3 find as follows:

- 4 • Typically family doctors or treating doctors
5 do not provide expert reports to the court.
6 Their evidence is set out in a letter or a
7 very brief report sent to counsel. Their
8 evidence is clearly relevant, material and
9 probative.
- 10
11 • Are the treating doctors capable of being
12 experts within the meaning of s. 4.1.01 and
13 Rule 53.03 and given their intensive roles,
14 are they capable of impartiality?
- 15
16 • For practical purposes, treating physicians
17 have always been allowed to give evidence
18 and have been allowed, within limits, to
19 give opinion evidence, and I emphasize
20 "within limits", and have been allowed to
21 give opinion evidence. Treating physicians
22 use their expertise to form opinions
23 routinely in the examination of patients, in
24 the assessment of patients and in their
25 treatment. They utilize both working
26 diagnosis and working prognosis that respond
27 to changes in the patient. It follows that
28 this involves the exercise of professional
29 opinion and as Justice Moore recognized in
30 *Beasley v. Barrant*, treating physicians do fall
31 into a different category.

1 The more common approach to treating doctors is
2 found in the decision of Justice Rocco in
3 *Williams (Litigation Guardian of) v. Bowler*, [2005]
4 O.J. No.3323 at paragraph 222, and I quote:

5 *A medical witness who "wears two hats" and who*
6 *testifies both as a treating physician and as*
7 *an expert may, depending on the circumstances*
8 *of the case, be in the best position to offer*
9 *firsthand observations as to the patient's*
10 *condition over the course of medical history;*
11 *however, to the extent that the physician has*
12 *any personal interest in the outcome of the*
13 *case or lacks the objectivity and independence*
14 *essential to the medical expert, this may*
15 *adversely affect the weight to be given to the*
16 *expert testimony.*

17
18 Also I have considered and reviewed *Chrappa v. Ohm*
19 [1996] O.J. No. 1663, paragraph 27. Justice Lax
20 stated:

21 *...it is my view that, in general, the*
22 *evidence of a family physician who has*
23 *followed a patient over a long period of time*
24 *can often be the most helpful evidence in*
25 *sorting out the predictably differing views of*
26 *medical experts who are assembled for the*
27 *purposes of litigation.*

28
29 In dealing with this particular issue, I am not
30 for a moment suggesting - and indeed, I am
31 emphasizing - that the requirements in *R. v. Mohan*
32 [1994] 2 S.C.R. 9 must be satisfied. Suffice to

1 say, however that the *Westerhof* decision has created
2 confusion on the appropriate scope of treating
3 physicians' testimony. However, I will leave that
4 to the Court of Appeal to enlighten us.

5 I find that the treating family doctor cannot
6 sign a Form 53, deliver a report and thereby meet
7 the requirements of the rule, nor is it desirable
8 for him or her to do so. However, that does not
9 end the matter. I find that the family doctor
10 will be permitted to give evidence of his
11 findings and diagnosis, which admittedly involves
12 elements of opinion. He will also be able to
13 testify about the treatment plan for the
14 plaintiff and how the plaintiff presented at each
15 appointment over several years up to the present.
16 I also find that in giving his evidence, he may
17 also provide a prognosis to which he and the
18 plaintiff were working.

19
20 The family doctor in this case has relevant and
21 reliable information to provide the court
22 relating to the plaintiff's injury, diagnosis and
23 prognosis. I have reviewed his reports, which
24 have been provided to me.

25
26 For what it is worth, in the debate that is now
27 going on in the courts of Ontario, Rule 53 and
28 Form 53, in my opinion, are for the medico-legal
29 experts or the so-called "hired guns" as they are
30 referred to in the case law and this is not the
31 requirement for treating physicians.
32

1 But of course, that issue is moot in the present
2 matter because the requirements of *Westerhof* have
3 been met by the plaintiff.

4
5 Central to this case, as is apparent to me, is
6 the causation and return to work issues. They are
7 the live issues the defence obviously is
8 concerned about and wishes to advance. In *Moore v.*
9 *Getahun*, 2014 ONSC 237, at paragraphs 43 and 45,
10 Justice Wilson did not permit the treating
11 physician to testify on causation while
12 permitting testimony on a diagnosis even though
13 it was "somewhat blurred" with the issue of
14 causation. I would note that the diagnosis was
15 not a contentious issue among the experts.
16 However, it is illustrative of the conundrum that
17 we find ourselves now in light of all the case
18 law.

19
20 After reviewing the medical reports of the family
21 doctor and taking into account the extensive
22 number of times he has treated the plaintiff, not
23 only in relation to the motor vehicle accident,
24 the subject matter of this proceeding but also a
25 prior and post motor vehicle accident, in
26 addition to injuries related to falling down
27 stairs and other health issues, I rule that the
28 family doctor ought not to be limited to just his
29 findings or even just the diagnosis or prognosis
30 based on his numerous visits with the plaintiff
31 over a number of years.

1 This type of evidence necessarily intersects with
2 the issue of causation. Accordingly, the issue of
3 causation naturally flows from the other areas in
4 which Dr. Barrettara will testify. He will be
5 permitted to testify to the extent that
6 Dr. Barrettara's ability to testify on a number
7 of issues is demonstrated. Again, I reiterate
8 this does not mean that the *Mohan* or *Abbey* tests
9 are not still in play. If I have not made it
10 clear, the doctor will be permitted, provided he
11 is properly qualified, to testify on when or to
12 what extent the plaintiff can return to work.

13
14 As an aside, I note that in insurance law, in the
15 application for accident benefits, the insurers
16 seek the family doctor's diagnosis and prognosis,
17 including an ability to work, on medical
18 certificate forms. So, rhetorically, I ask why
19 should there be any difference in a tort action?

20
21 Moving on to the second issue related to
22 Dr. Zakaria giving evidence, I note that there is
23 significant case law to the effect that the trial
24 judge can weigh strict compliance with Rule 53.03
25 in the interests of justice, as well as the
26 *Evidence Act*. I would refer to *Brandiferri v. Wawanesa*,
27 [2011] O.J. No. 2723, as but one case on this
28 point.

29
30 Further, as stated in the *Westerhof* case, paragraph
31 25, citing *Beasley v. Barrand*, there may be
32 circumstances where an expert may be

1 unco-operative. Such appears to be the case in
2 the present case where the treating psychiatrist,
3 Dr. Zakaria, refuses to sign the Form 53 and
4 provide opinion evidence. I should expand that
5 to say that apparently he does not consider
6 himself to be an expert. However, I rule that
7 there are unique circumstances, which would
8 permit him to testify as an expert,
9 notwithstanding non-compliance with Rule 53.03.

10
11 Also, exercising the discretion I have, I find
12 that Dr. Waisman may also testify as an expert,
13 notwithstanding the late delivery of his report.
14 The rule relating to the times for delivery of
15 expert reports was developed so that responding
16 experts would have time to prepare a responding
17 report. In this case, the defence psychiatrist,
18 Dr. Monte Bail, has responded to the report of
19 Dr. Waisman and accordingly, there is no
20 prejudice to the defence if Dr. Waisman testifies.

21
22 However, the issue remains as to whether the
23 plaintiff ought to be able to call both
24 Dr. Zakaria and Dr. Waisman as expert witnesses,
25 in addition to the other experts relating to the
26 alleged psychological component of the
27 plaintiff's injury.

28
29 I note that Mr. McCarthy takes the position the
30 plaintiff can choose which expert to call,
31 Dr. Zakaria or Dr. Waisman, but not both.
32 Mr. McCarthy suggests there is a piling on of

1 experts if both Dr. Zakaria and Dr. Waisman are
2 able to testify. However, I find that there are
3 some very unique circumstances and difficulties
4 in this case, which I find, require that both
5 psychiatrists be permitted to testify.

6
7 The threshold issue is not addressed by
8 Dr. Zakaria. Of course the threshold issue is one
9 for the court to decide while the jury is
10 deliberating. Mr. McCarthy proposes that Dr.
11 Waisman's report could be provided to me solely
12 for the threshold issue but such evidence should
13 not go to the jury.

14
15 The difficulty with this suggestion or submission
16 by Mr. McCarthy is that in deciding the threshold
17 issue, I am required to consider all of the
18 evidence at trial. The suggestion that
19 Dr. Waisman's report be considered separately and
20 apart from the other evidence speaks volumes as
21 to its relevance. The defence medical expert,
22 Dr. Bail, has challenged Dr. Waisman, as has
23 Dr. Waisman challenged Dr. Bail, in their
24 respective findings, diagnosis and prognosis.
25 They have each commented on the other's report.
26 Dr. Zakaria refuses to enter the debate. It would
27 not be fair to exclude Dr. Waisman's report and
28 yet have Dr. Bail testifying unchallenged.

29
30 Dr. Zakaria has not and, as I understand it,
31 refuses to deal with the diagnosis and mechanism
32 of chronic pain, as well as the new DSM-IV

1 guidelines. Dr. Waisman does deal with these
2 issues, which strike to the very heart of the
3 plaintiff's case. Dr. Zakaria's rather unique
4 position that he is a treating psychiatrist and
5 not an expert leaves the plaintiff in an
6 unenviable position of challenging the defence
7 expert psychiatrist, Dr. Bail. This may well lead
8 to an unfair result when the jury is assessing
9 competing experts.

10
11 Dr. Zakaria has not responded to any aspects of
12 Dr. Bail's report, which, of itself, creates a
13 conundrum at trial and again the potential for an
14 inability of the jury to adequately assess and
15 weigh the evidence. While there will be come
16 overlap of evidence of Dr. Zakaria and
17 Dr. Waisman in relation to patient visits and
18 complaints, it is not so significant as to add
19 much additional time to this trial, now scheduled
20 for three weeks. I make a specific finding that
21 this is not a case where there is a piling on of
22 experts to the detriment of the defence.

23
24 I accept the submissions of both counsel that the
25 *Westerhof* case is binding on me. The mindset of
26 Dr. Zakaria, namely that he is not an expert, is
27 disturbing, particularly since this is a trial by
28 a jury. In light of this mindset of Dr. Zakaria,
29 it is hard to accept that his evidence
30 constitutes a piling on of experts, as argued by
31 Mr. McCarthy, nor is it particularly duplication.
32 In the result, I rule that the plaintiff will be

1 permitted to call Dr. Zakaria and Dr. Waisman to
2 testify at trial.

3
4 **FORM 2**

5 **Certificate of Transcript**

6 **Evidence Act, subsection 5(2)**

7 I, Maxine Newell, certify that this document is a true and
8 accurate transcript of the recordings of Maxine Newell in
9 *Giordano v. Li* in the Superior Court of Justice held at 150 Bond
10 St. E., Oshawa, Ontario, taken from Recording number 2812-
11 202-20141121-090844=10-SHAUGHB, which has been certified in
12 Form 1.

13
14 23 November, 2014

15 _____
16 Maxine Newell, C.C.R.

17 **Released Nov. 24, 2014