IN THE MATTER OF A REFERENCE PURSUANT TO THE WALKERTON SETTLEMENT AGREEMENT

(Smith, et al. v. The Corporation of the Municipality of Brockton, et al. Court File No. 00-CV-192173 CP)

BETWEEN:

S.P.
(The Appellant)

- and -

The Administrator

(On an appeal of the decision of Martin Teplitsky, Q.C., released on March 2, 2005)

Reasons for Decision

WINKLER C.J.O.:

Nature of the Appeal

1. This is an appeal of a decision of an arbitrator made pursuant to the Settlement Agreement in the Walkerton litigation. Under this Settlement Agreement, Class Members are entitled to certain compensation for losses caused by the contamination of water delivered by Walkerton PUC from April 1, 2000 to December 5, 2000.

Facts

2. The appellant, S.P. lived in Walkerton with her two children until 2002. As a result of the contamination of the Walkerton water supply in the spring of 2000, both of the appellant's children became ill.

3. The Appellant did not suffer any illness from water consumption. However, the water contamination necessitated repairs to the Walkerton water and sewage system. In July 2000, as these repairs were being conducted, the appellant's home was flooded with water and sewage.

4. In October 2002, the appellant left her home in Walkerton and moved to Barrie, where she rented a home. She was unable to sell her Walkerton home until the spring of 2004.

5. The claims of the Appellant's children for the illness arising directly from the consumption of contaminated water were settled by the Administrator. However, the Appellant and her children also made claims in relation to illness and other losses arising

from the flooding of her Walkerton home, its subsequent sale and the family relocation to Barrie.

6. The claims were the subject of an arbitration that resulted in an award released on March 5, 2005. The arbitrator awarded compensation to the Appellant in the amounts of $65,000.00 for general damages, $63,000.00 for business losses, and $7,000.00 for the cost of carrying the home in Walkerton while renting a home in Barrie. The arbitrator also made awards to address the pain and suffering experienced by the Appellant's children.

7. Through the appeal process, the grounds of appeal were agreed upon as follows:

> a) whether the Arbitrator should have awarded compensation to the Appellant for the cost of continuing or restarting her business, to the extent that such costs are set out in the report of [redacted]
>
> b) whether the Arbitrator should have awarded compensation to the Appellant for the loss of the opportunity to accrue equity in her Walkerton home after she sold the home in 2004;
>
> c) whether the Arbitrator should have awarded compensation for a broken foot allegedly suffered by the Appellant;
>
> d) whether the Arbitrator should have awarded compensation to the Appellant relating to certain moving and miscellaneous expenses; and
>
> e) whether the Arbitrator should have awarded compensation to the Appellant for her accommodation costs in Barrie up until 2004 when the Appellant sold her home in Walkerton.

8. The Appellant subsequently withdrew her appeal in respect of ground (b) and did not pursue ground (d).

9. Both the Appellant and the Administrator have submitted extensive written submissions in support of their positions on this appeal. In the Appellant's written submissions, she alleges that she was not adequately represented by her counsel at the hearing before the arbitrator and has asked this court to treat this issue as a further ground of appeal.

Standard of Review

10. Under the Settlement Agreement, applications for compensation are initially considered by the Administrator of the settlement plan. If the Administrator declines to make a compensation offer or makes an offer that is not satisfactory to the applicant, the applicant may elect to have his or her entitlement determined by an arbitrator appointed pursuant to the Settlement Agreement. Any appeals of an arbitrator's decision are then

determined by this court.

11. It must be noted that the appeal is not a new hearing or trial *de novo*, nor is it a re-hearing of the matter. An arbitrator has an opportunity to hear the witnesses and assess the evidence that does not occur on appellate review.

12. Appeals under the Settlement Agreement are analogous to appeals from a reference. Accordingly, the appropriate standard for that review is that as set out in *Jordan v. McKenzie* (1987), 26 C.P.C. (2d) 193 (Ont. H.C., aff'd (1990), 39 C.P.C. (2d) 217 (C.A.), where Anderson J. stated that the reviewing court "ought not to interfere with the result unless there has been some error in principle demonstrated by the [initial decision maker's] reasons, some absence or excess of jurisdiction, or some patent misapprehension of the evidence."

13. In other words, to be successful on appeal, it is not enough for the Appellant to re-argue the facts of the case before the Arbitrator in attempt to have the reviewing court substitute its own opinion for that of the Arbitrator. Argument that the Arbitrator should have made a different finding or reached a different result, without more, is not sufficient to be successful.

14. In this case, there is no dispute that the Arbitrator had jurisdiction to deal with the claims made. In order for the Appellant to succeed therefore, she must establish that the Arbitrator made an error in principle or patently misapprehended the evidence before him.

The Applicable Legal Principles

15. The Appellant and her children are class members covered by the Settlement Agreement in the Walkerton water contamination class action litigation. Accordingly, they are entitled to claim for and receive, if proven, damages for losses that occurred as a result of the water contamination. Pursuant to section 2.1 of the Settlement Agreement, where damages are assessed, they are to be determined "in accordance with legal principles applied in Ontario courts without regard to issues of fault, liability or contributory negligence ...".

16. In *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, McLachlin J., as she then was, described general principles for assessing damages in tort cases:

> The general principles underlying our system of damages suggest that a plaintiff should receive full and fair compensation, calculated to place him or her in the same position as he or she would have been had the tort not been committed, in so far as this can be achieved by a monetary award. This principle suggests that in calculating damages under the pecuniary heads, the measure of

> the damages should be the plaintiff's actual loss. It is implicit in this that the plaintiff should not recover unless he can demonstrate a loss, and then only to the extent of that loss. Double recovery violates this principle. ...

17. In addition, it is well settled that losses are only compensable if they are reasonably foreseeable consequences of the wrongful conduct in question (in this case, the contamination of water in Walkerton). The Supreme Court of Canada has recently addressed this aspect of tort law in *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114. As explained by McLachlin C.J., "[t]he remoteness inquiry asks whether 'the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable' (Linden and Feldthusen, at p. 360)." The court then stated that:

> The degree of probability that would satisfy the reasonable foreseeability requirement was described in *The Wagon Mound (No. 2)* as a "real risk", i.e. "one which would occur to the mind of a reasonable man in the position of the defendant ... and which he would not brush aside as far-fetched" (*Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] A.C. 617, at p. 643).

18. In summary, subject to considerations of "remoteness" or "reasonable foreseeability", the Appellant is entitled to full and fair compensation for losses that are caused by the Walkerton water contamination.

19. I turn then to the grounds of appeal.

Analysis

Compensation for costs associated with continuing or restarting the appellant's business

20. While living in Walkerton, the Appellant worked as a commission sales agent. In this capacity, she was involved in selling various items such as gifts, clothing and other goods. The Appellant asserts that she was a self-employed contractor, not an employee.

21. The Appellant seeks compensation for the cost of continuing or restarting a new business in Barrie. At the hearing, the appellant relied on a report of [redacted] in which [redacted] estimated that the appellant suffered a business loss from 2000 to 2005 of $60,000.00 and that the appellant would require an income subsidy of $67,440.00 to help her regenerate the momentum of her business.

22. Although the quantum awarded for business loss has been set out as a ground of appeal, the Arbitrator addressed this issue in his decision by stating that "the parties agreed that the sum of $63,000.00 appropriately compensated [the Appellant's business loss] and I so award." (Emphasis added.)

23. The Appellant bases her argument on the fact that there is a dispute over what

was properly covered by the agreement. In particular, the Appellant alleges that the offer that resulted in the agreement was "presented as an offer for lost income only" and "did not include any consideration for [her] expenses to start over". The Appellant was represented by counsel at the arbitration. The Arbitrator's finding is that the Appellant had agreed with the quantum of the award for the loss claimed under this head of damages. On its face, the award covers all aspects of the claim that may be regarded as "business loss". I do not see any basis to overturn the agreement between the parties, as found by the Arbitrator. Accordingly, this ground of appeal is dismissed.

Compensation relating to the appellant's broken foot

24. The Appellant claims that she broke her foot as a result of collapsing to the ground "due to the contamination in [her] home". However, she did not provide any evidence at the hearing linking the injury to the water contamination. The Arbitrator refused to award compensation for this injury because he found no basis "to conclude that any causal connection exists between her breaking her metatarsal and the water problem." In the circumstances, I do not find that the Arbitrator was in error with respect to this issue.

Compensation for losses relating to the Appellant's accommodation costs in Barrie

25. The Appellant claimed that the cost of living in Barrie exceeds that in Walkerton, and sought compensation for certain increased costs at the hearing. The Administrator took the position that the costs to the Appellant of carrying the Walkerton house until it was sold should be compensated but not the additional expenses of living in Barrie.

26. The Arbitrator determined that:

> "...the proper measure of the loss from having to leave Walkerton is the cost of carrying the Walkerton house [until sold]. It is neither fair nor reasonable for the Administrator to pay additional accommodation costs in a different environment. Where [the Appellant] chose to live and how much she chose to spend were up to her. She cannot be criticized for her choices. But, she is not entitled to be compensated on this basis."

27. There is nothing in this part of the Arbitrator's decision that demonstrates there was an error in principle. Further, there is nothing in the record before me that demonstrates he misapprehended the evidence. In my view, the Arbitrator did not commit any error and the appeal fails on this ground.

28. In addition, I note that the arbitration was concluded prior to the Supreme Court of Canada's decision in *Mustapha v. Culligan of Canada Ltd., supra,* which clarified the law regarding the remoteness principle. I have reviewed that decision in the context of the appeal. In the circumstances of this case, it affords no assistance to the Appellant.

The Appellant's claim of ineffective assistance of counsel

29. The Appellant asserts that she was not adequately represented by her counsel at the hearing before the Arbitrator and seeks to raise this issue as a basis for appeal.

30. First, it must be understood that a claim for ineffective assistance of counsel is generally an argument that a new trial or hearing must be conducted. The decision of the Ontario Court of Appeal in *D.W. v. White* (2004), 189 O.A.C. 256 (C.A.), leave to appeal refused [2004] S.C.C.A. No. 486, is illustrative. Catzman J.A. stated at para 42 that "[t]his court encounters ineffective assistance of counsel as a ground for a new trial almost exclusively on appeals from conviction in criminal cases...". (Emphasis added.)

31. The reasons for the rarity of the use of such a ground in civil proceedings may be as explained by Catzman J.A. at para 51:

> There are other remedies in place that a losing litigant may invoke to recover the loss claimed at trial if ineffective assistance can be established. Foremost among these is a party's right to bring action against the counsel whose conduct he impugns.

32. Nonetheless, the court in *D.W. v. White* did not entirely rule out the possibility that allegations ineffective counsel could constitute a basis for appeal in civil cases. Catzman J.A. stated however, at para 55, that "I would limit the availability of that ground of appeal to the rarest of cases...". He goes on to enumerate certain examples including those cases with a public interest element or where vulnerable litigants are concerned.

33. Having considered the submissions of the Appellant and reviewed the record, I do not believe that the appeal before me qualifies as one of the rare cases in which the ineffectiveness of counsel might warrant a new hearing. The Walkerton litigation, as a class action, was of significant public interest and importance. However, the assessment of claims was meant to be a process respecting the privacy rights of each individual and dependent on the pertinent and specific facts of each case. As such, individual claims do not generally raise matters of public interest.

34. Moreover, although the claims of children were involved, the Settlement Agreement and subsequent directions from the court impose certain duties with respect to the fair assessment of claims on the Administrator. In addition, the Settlement Agreement is unique in that it does not limit claimants to a one-time settlement but rather allows for subsequent claims if new damages are discovered. This provides for an additional safeguard over and above the traditional remedies that any person engaging counsel may have in respect of the engagement. Indeed, according to the submissions filed on this appeal, the Appellant has engaged this process in making a fresh claim for additional losses subsequent to the arbitration at issue here, and has had the claim dealt with in a different proceeding.

35. In the result, this is not one of the rare cases where a new hearing should be granted on the basis of ineffective assistance of counsel and this ground of appeal is dismissed.

Result

36. In my view, the arbitrator committed no errors, either in principle, with respect to jurisdiction or by patent misapprehension of the evidence before him. Accordingly, the appeal is dismissed.

Winkler C.J.O.

Released:
December 2, 2009