

**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:

**L.H.
(The Appellant)**

- and -

The Administrator

(On an appeal of the decision of Martin Teplitsky, Q.C., released on June 11, 2008)

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.

The Evidence at the Arbitration

2. The Appellant worked at a store in Walkerton at the time of the water contamination crisis. She was not a resident of Walkerton.

3. The Appellant claims that she drank water in Walkerton up until a water advisory was issued. She alleges that she now suffers from constipation, bloating, nausea and diarrhea. At issue is whether the Appellant's symptoms were caused by the contaminated water.

4. The Appellant claims that she became ill at some point prior to June 1, 2000, at which time she was hospitalized to undergo arthroscopic surgery on her shoulder (the surgery was unrelated to the water contamination). Medical records relating to the surgery and post operative care show that the Appellant was ill and experienced vomiting. The Appellant apparently attended work up until the date of her surgery.

5. In 2002, the Appellant was seen by Dr. Nuri Kaal, a gastroenterologist. Dr. Kaal reported to the Appellant's family physician, Dr. R. B. Edington in a letter dated June 21,

2002, in which Dr. Kaal wrote, "I explained to [the Appellant] today that most likely her nausea as well as non-specific colitis are NSAID induced." The term NSAID is an acronym for non-steroidal anti-inflammatory drugs.

6. In a subsequent letter to Dr. Edington, dated May 1, 2002, Dr. Kaal wrote, "I do not feel that [the Appellant's] symptoms are related to the Walkerton water crisis. I believe her lower GI symptoms are compatible with Irritable Bowel Syndrome. These non-specific colitis found recently in her colonoscopy likely NSAID induced, in view of her Advil."

7. The Appellant and the Administrator both led evidence of expert witnesses during the hearing. The Appellant's expert, Dr. Gillian Allen, is a family physician. Dr. Allen prepared a 3 page report (undated) at the request of the Appellant, in which she stated:

The time frame involved in consuming Walkerton Water, the incubation period, the vomiting and extreme illness on June 1st continuing for several weeks is completely consistent with the symptoms of Ecoli. Now, with the outbreak caused by spinach it is abundantly clear that no one truly understands the implications of Ecoli or the nature of its pathology.

...

... She was taking in the neighborhood of seven percocet a day prior to surgery. The effects of the percocet would have masked the symptoms. It would have backed up her bowel, creating constipation and covered the pain symptoms related to the stomach problem. It would also mean that the only exit for the body to rid it's self of the toxins was through her mouth.

...

In my practice, I treated people who were simply coughing as a result of Ecoli, but this was from dehydration, and irritation to the toxins. This falls in line with the [Appellant] when she first went to the Hanover Hospital. She had a cough together with all the other symptoms. They told her it was the flu. No one seems to understand that the cough would be related to the Walkerton Water Ecoli.

8. Dr. Allen suggested that the Appellant "may have been in denial of the state of her illness [as of the time of her surgery] because she was so fixed that if she were ill, they would cancel her surgery". Dr. Allen disagreed with Dr. Kaal's opinion that the Appellant's symptoms were induced by Advil that the Appellant was taking to treat her shoulder bursitis. According to Dr. Allen, "Advil is only implicated if it potentiates another drug, which she is taking at that time. At this point she was not taking another drug."

9. The Administrator relied on the evidence of Dr. James L. Brunton, a specialist in internal medicine and infectious diseases. Dr. Brunton prepared a three page report dated January 30, 2007, in which he responded to Dr. Allen's report. In his report, Dr. Brunton stated:

Persistent shoulder pain, vomiting and constipation are consistently listed by a number of observers as being the main problem of the post-operative period [after the Appellant's surgery in June 2000]. Indeed she vomited blood on one occasion. The observers included the nurses and doctors that saw her on June 19, July 23 and August 1, 2000 and Dr. Edington (office records). The notes of June 19 2000 report that she complained of a sore throat, shortness of breath and vomiting when coughing. Contrary to the opinion of Dr. Gillian Allen ..., respiratory symptoms cannot be attributed to *E. coli*, and would suggest a viral respiratory tract infection or Streptococcal sore throat. The diarrhea and lower abdominal pain and tenderness that would be expected to predominate in bacterial gastroenteritis does not appear to have been a significant part of her problem and is mentioned only once (visit of Aug 1; page 84) "diarrhea Sat". Persistent vomiting and constipation as occurred in this case would not be the expected history of bacterial gastroenteritis from these organisms even in the presence of the anti-peristaltic effect of the narcotic analgesics that she required for her shoulder pain. Vomiting which is self limited and of short duration can occur as part of bacterial gastroenteritis as part of a very severe case, but the prominence of vomiting and constipation and the lack of diarrhea suggests that the diagnosis of infection with *E. coli* 0157 or *Campylobacter* is extremely unlikely and that the pain, opiate analgesics and non-steroidal anti-inflammatory agents are a much more likely cause. While Dr. Allen states that the vomiting was due to the toxins coming up because they couldn't get out, I suggest that there would have been evidence for systemic toxicity and significant lower abdominal tenderness. The clinical notes and histories taken at the time simply do not support the presence of the expected abdominal pain, or evidence of systemic inflammation. The only complaint of pain aside from the shoulder is epigastric burning, which would be related to the upper gastrointestinal tract. The history and physical findings are so consistent among various observers that I find it difficult to believe that diarrhea was a significant complaint as claimed in the statement of Dr. Allen. ...

As stated repeatedly the chronic symptoms are compatibility with irritable bowel. However, I see no evidence that [the Appellant] had complaints that were at all likely to be due to *E. coli* or *Campylobacter* infection during the time of the Walkerton outbreak, and thus I don't think that her irritable bowel complaints are related to the Walkerton outbreak other than that they started after her operation in June 2000. [emphasis original]

The Recusal Motion

10. The Appellant's claim was initially heard by the Arbitrator on October 24, 2005. He adjourned the hearing at the request of the Appellant to permit the Appellant to obtain further medical evidence.

11. Before the recommencement of the arbitration, the Appellant brought a motion seeking to have the Arbitrator recuse himself. The Appellant's Notice of Motion set out the following grounds for the motion:

1. The Arbitrator has imported his own medical knowledge, which is deficient.
2. The Arbitrator has pre-determined the issues based on his own personal experience.

3. The Arbitrator has indicated that he does not believe the plaintiff as to her symptoms. He has decided that vomiting is not a symptom of e-coli. This was based on his own personal and mistaken medical knowledge.

12. The motion was heard and dismissed by the Arbitrator on October 12, 2006. The Appellant did not appeal or otherwise seek court intervention with respect to the Arbitrator's decision on the motion.

13. The arbitration resumed in 2008. The Arbitrator released his decision on June 11, 2008, dismissing the Appellant's claims. The key finding of the Arbitrator was that the Appellant's "problems are not caused by the Walkerton water crisis". In making this finding, the Arbitrator preferred the expert medical evidence adduced by the Administrator:

I prefer the opinion of Dr. Kaal to that of Dr. Allen for two reasons. The first is that he is an expert in the relevant field. The second is he actually treated [the Appellant] on a referral from Dr. Edington at a time much closer to the relevant events than did Dr. Allen.

I also prefer the opinion of Dr. Brunton to that of Dr. Allen. Dr. Allen is not a specialist in the relevant area. She first saw [the Appellant] almost 6 years later. I accept as accurate Dr. Brunton's criticisms of Dr. Allen's statements because his opinion is supported by medical literature. As well, he is a recognized expert who is independent. I was impressed with his evidence when he testified. He appeared objective and had no axe to grind. Dr. Allen impressed me with her passionate concern for her patient but she played the role of advocate rather than the role of expert.

14. On this appeal, the Appellant seeks a new hearing before a different arbitrator or leave to take this matter to a trial. The Appellant's grounds of appeal, which are similar to the grounds raised by the Appellant on her recusal motion, are as follows:

- The arbitrator has imported his own medical knowledge, which is deficient.
- The Arbitrator has pre-determined the issues based on his own personal experience.
- The Arbitrator has indicated that he does not believe the plaintiff as to her symptoms. He has decided that vomiting is not a symptom of e-coli. This was based on his own personal and mistaken medical knowledge.
- He told the complainant that she was not vomiting blood.
- A motion was brought for a change in arbitrator. He ruled against it.
- The arbitrator's verbal reasons were not reflected in his written reasons. Particularly he stated that the timing of her illness on June 1st was outside the incubation period for e-coli.

15. The Administrator argues, among other things, that this appeal is effectively a collateral attack on the Arbitrator's decision of October 12, 2006. The Administrator submits that "where, as here, the Appellant took no steps to challenge the decision of the arbitrator of October 12, 2006, to decline to recuse himself, she may not now seek to do so in this collateral manner".

Standard of Review

16. 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.

17. An appeal from an arbitrator's decision lies to this court. 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. Accordingly, deference must be given to the arbitrator's findings in respect of the evidence.

18. 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."

19. 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 an attempt to have the reviewing court make findings and substitute them for those of the Arbitrator. Argument that the Arbitrator should have made different findings of fact, without more, is not sufficient to be successful.

Analysis and Conclusion

20. To qualify for compensation under the Settlement Agreement, the Appellant must establish, on the balance of probabilities, that she became ill as a result of consuming or using Walkerton water.

21. In reaching his conclusion that the Appellant's illness was not caused by the consumption or use of Walkerton water, the Arbitrator considered all of the evidence before him. As he stated, he accepted the evidence of Doctors Kaal and Brunton, and he rejected the evidence of Dr. Allen. I see no basis to disturb his finding in this respect.

22. Based on the record, the Appellant's argument alleging bias or a reasonable apprehension of bias on the part of the Arbitrator is unfounded. Other than the bald assertions of the Appellant, there is nothing to support the contention that he relied on anything other than the evidence that was before him. There is no basis for a new arbitration or a trial.

Result

23. The Arbitrator committed no error in principle, with respect to jurisdiction nor did he patently misapprehend the evidence before him. The Appellant's allegations of bias are unfounded. Accordingly, the Arbitrator's decision is hereby affirmed.



Winkler C.J.O.

Released: March 25, 2010