CITATION: Smith v. Brockton (Municipality), 2019 ONSC 5275
COURT FILE NO.: 00-CV-192173CP
DATE: 20190911

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
JAMIE SMITH, ALANA DALTON, JAMIE McDONALD, and IRENE SALES INC., operating as THE HARTLEY HOUSE Plaintiffs	*Milena Protich* for Plan Counsel
– and –	
THE CORPORATION OF THE MUNICIPALITY OF BROCKTON, THE BRUCE-GREY-OWEN SOUND HEALTH UNIT, STAN KOEBEL, THE WALKERTON PUBLIC UTILITIES COMMISSION, and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO Defendants	*Kevin Doyle*, Self-Represented
– and –	
IAN D. WILSON ASSOCIATES LIMITED, DAVIDSON WELL DRILLING LIMITED, EARTH TECH (CANADA) INC., CONESTOGA-ROVERS & ASSOCIATES LIMITED, B.M. ROSS AND ASSOCIATES LIMITED, GAP ENVIROMICROBIAL SERVICES INC., A & L CANADA LABORATORIES EAST, INC., DAVID BIESENTHAL and CAROL BIESENTHAL Third Parties	
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: In writing

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] After the court approved the settlement in the Walkerton Class Action, the action moved into its administration phase, and Kevin Doyle, one of the Class Members, made a claim. Mr. Doyle now intends to appeal an order made by an Arbitrator under the compensation plan.

[2] In his intended appeal, Mr. Doyle now brings a preliminary motion. He seeks, among other things: the appointment of a disability law firm to represent him on the appeal; a cognitive/neuropsychological evaluation for the appeal; a bifurcated appeal; and an advance award of $40,000.

[3] For the reasons that follow, I dismiss all of Mr. Doyle's requests.

B. PROCEDURAL BACKGROUND

[4] On May 15, 2000, the Walkerton Public Utilities Commission conducted a routine sample of the town water supply, and on May 17, 2000, it received a fax from the testing lab confirming E. coli bacteria contamination in the water sample. The Commission did not notify public health officials of the contamination, and within days, the region's hospitals and clinics were inundated with patients with bloody diarrhea, vomiting, cramps, and fever.

[5] A class action was brought on behalf of the victims of the Walkerton water contamination, and in March 2001, Chief Justice LeSage approved a settlement in that class action. Under the settlement, the Province of Ontario agreed to fund all costs associated with a Compensation Plan for the Class Members. The Plan set out the process for determining compensation.

[6] Under the Compensation Plan, Class Members submit claims, and when the Administrator and the Claimant are unable to reach an agreement, the Plan provides that the Claimant may seek arbitration of his or her claim. On the arbitration, the Plan is represented by Plan Counsel. The costs of the arbitration may not be awarded against a Claimant. The Plan provides for the Claimant to recover his or her reasonable legal costs associated with the arbitration of the claim.

[7] Section 3.3.2 of the Plan provides that where a matter proceeds to arbitration, the arbitration will take place in accordance with the rules set by the court.

[8] Mr. Doyle is a Claimant under the Plan. On May 27, 2001, he submitted a Stage I Application for compensation. He indicated that he had been ill as a result of the water contamination for the period of May 27-28, 2000 to July 30, 2000 and had been unable to work as a result.

[9] Several years later, on January 31, 2005, Mr. Doyle submitted his Stage II Application. Mr. Doyle claimed damages from May 27 to June 15, 2000, fever from May 27, 2000 to June 10, 2000 and mental distress from May 30 to July 30, 2000 and recurring. He also claimed for loss of income in excess of $1.0 million, alleging that he was not able to return to his farming business from May 27, 2000 up to the time of the filing his Application.

[10] In June 2014, Mr. Doyle settled his claim for illness for $12,000 damages, plus pre-

judgment interest. Mr. Doyle's claim for loss of income was not settled. Arbitration was scheduled for October 2014. Martin Teplitsky was appointed Arbitrator to hear the matter. Patrick Kelly, a lawyer appointed by the court to be available to represent claimants under the Plan, was retained to act on Mr. Doyle's behalf.

[11] On Mr. Doyle's request, the Arbitration was adjourned shortly after the first attendance so that Mr. Doyle could have more time to obtain expert evidence in support of his claim for economic loss.

[12] Mr. Doyle discharged Mr. Kelly as counsel in December 2014.

[13] After delays and two additional changes of counsel, the Arbitration proceeded periodically throughout the spring and summer of 2016.

[14] On the last day scheduled for the hearing, Mr. Doyle asked for and was given the opportunity to make oral submissions directly to the Arbitrator, even though his counsel, Stephen Osborne would also be filing written submissions.

[15] Unfortunately, Mr. Teplitsky died before written submissions from counsel were delivered.

[16] Following Mr. Teplitsky's death, Mr. Doyle took the position that he should be entitled to an entirely new arbitration in the circumstances and that the transcripts from the proceeding before Arbitrator Teplitsky should not be available to the new arbitrator.

[17] The Administrator, however, brought a motion for directions before this court in October 2016 and on November 2, 2016, I ordered that the arbitration would be completed before Arbitrator Frank Gomberg, who would do so on the basis of his review of the record, transcripts and any additional evidence he deemed appropriate.[1]

[18] After hearing additional evidence from Mr. Doyle, the arbitration was completed in September 2018. Arbitrator Gomberg released his decision and reasons on November 7, 2018. The Arbitrator awarded Mr. Doyle $11,000 in damages for income loss from his farming business on the basis of a loss of income of $10,000 in the period May to December 2000, and damages of $1,000 for the period January 1, 2001 to December 31, 2004 for minor effects of the water consumption.

[19] Mr. Doyle has indicated his intention to appeal the Arbitrator's decision. However, before he does so, he seeks relief by way of this preliminary motion. In particular, Mr. Doyle asks for the following:

a. that he be permitted to bifurcate his appeal, so that the question of whether the arbitration was conducted fairly given his request for accommodation of his disabilities can proceed first, followed (if necessary) by an appeal based on errors of law and errors of fact and law;

b. that he be given a cognitive/neuropsychological evaluation;

c. that he be provided with a court-appointed disability law firm to represent him;

d. that the court establish a case management process for this matter;

e. that in the event that the court orders a new arbitration and in respect of his two

[1] *Smith v. Brockton (Municipality)*, 2016 ONSC 6781.

additional claims, it determines whether the arbitration will be an "information seeking" or "adversarial" process;

f. that he be permitted to make both oral and written submissions on his appeal; and

g. that he be given an advance of $40,000.

[20] Mr. Doyle has made two further claims for illness under the Plan. Those claims are currently with the Administrator for assessment and were not before Arbitrator Gomberg and they are not before this court.

C. FACTUAL BACKGROUND

[21] Mr. Doyle is a 67-year old retired professional engineer, who operated an agricultural business and who worked as an engineer for Bruce Power. Mr. Doyle says that as a result of his drinking the contaminated water in Walkerton, he suffered and continues to suffer from a multitude of physical and mental ailments that left him unable to function as he was able to before his illness.

[22] Mr. Doyle was accepted as a Claimant under the Plan and as part of a negotiated settlement, received $12,000, plus pre-judgment interest for his claim of illness. As noted above, Mr. Doyle's claim for business loss was not settled.

[23] It was, and continues to be, Mr. Doyle's position that the effects of drinking the water in May 2000 left him with the "lack of mental acuity to operate within the top 1% of the commercial competitors in the international cattle business."

[24] Mr. Doyle asserts that by the end of 2000, he was forced to begin wrapping up his agricultural business. Mr. Doyle says this resulted in business losses in the range of $1.0 million over the course of a 10-year period.

[25] In addition to the business losses, Mr. Doyle says that his ongoing and deteriorating mental and physical disabilities led to a loss of his employment with Bruce Power in 2008.

[26] Upon receipt of Mr. Doyle's Stage II Application, the Administrator referred the business loss portion of the claim to KPMG, the neutral accounting experts appointed by the court to act as evaluators under the Plan.

[27] Shortly after the referral, KPMG advised the Administrator that it had reviewed the records provided by Mr. Doyle and that there was not enough information to calculate any business loss.

[28] It appears that over the next several years, the Administrator attempted to collect the necessary records from Mr. Doyle, both with regard to his medical condition and with respect to his business losses. The Administrator, however, did not receive sufficient information from Mr. Doyle to be able to evaluate his claims and make any offer of compensation.

[29] Ultimately, following a case management meeting with the Court Monitor, the Administrator did extend an offer to Mr. Doyle of $10,000 for illness and zero for his economic loss claims. The offer was made on September 23, 2010. Mr. Doyle did not respond to the offer until June 2014, at which time his illness claim was settled for $12,000.

[30] Both before and at the time of the June 2014 settlement, Mr. Doyle was represented Mr.

Kelly.

[31] Before the settlement of his illness claim and the commencement of the Arbitration for the business loss, Mr. Doyle underwent a capacity assessment in April 2012 at the request of Mr. Kelly, who had raised concerns about Mr. Doyle's ability to instruct counsel. The capacity assessment concluded that there was insufficient evidence to rebut the presumption that Mr. Doyle was competent to be a witness, take an oath, or to instruct counsel.

[32] From April 2012 to the commencement of the Arbitration in October 2014, Arbitrator Teplitsky conducted several case management conference calls with counsel to address a number of prehearing issues, including issues in relation to the records needed to properly consider Mr. Doyle's claim for economic loss.

[33] Although Mr. Doyle provided letters from two accountants, neither was willing to testify or be cross-examined, and so the Arbitration commenced on October 30, 2014 without the participation of Mr. Doyle's accountants.

[34] While in the process of giving his evidence at the Arbitration, Mr. Doyle asked for a further opportunity to provide expert evidence in support of his business loss claim. Arbitrator Teplitsky acceded to this request. The Arbitrator adjourned the hearing to a case management telephone conference call scheduled for January 2015, peremptory on Mr. Doyle.

[35] In addition, on October 27, 2014, three days before the start of the Arbitration, Mr. Kelly wrote to Arbitrator Teplitsky to advise that Mr. Doyle had seen a psychologist, who was of the view that Mr. Doyle was under acute stress and therefore the psychologist recommended that any arbitration sessions be limited to thirty-minutes followed by a fifteen minute break, for a maximum of four such sessions a day.

[36] This correspondence appears to have been the first time that Mr. Doyle, through counsel, raised a request for accommodation during the hearing. Given that the Arbitration was adjourned, Arbitrator Teplitsky did not have to address the request at that time.

[37] Mr. Doyle asserts that in the days before the October 30th attendance, he suffered a stroke. However, at the time, he did not advise Arbitrator Teplitsky, nor did he seek any specific accommodation as a result.

[38] On December 29, 2014, Mr. Doyle advised the Administrator that he had discharged Mr. Kelly and that he did not want to participate on the telephone conference call before retaining new counsel.

[39] The Administrator put Mr. Doyle in touch with William Dermody, a lawyer appointed under the Plan to act as Independent Advice Counsel to claimants. On Mr. Doyle's behalf, Mr. Dermody wrote to the Administrator seeking its consent for an adjournment of the conference call. While the Administrator did not consent, the Arbitrator allowed the adjournment and rescheduled the conference call to March 9, 2015.

[40] Sometime shortly thereafter and before March 9, 2015, Mr. Doyle retained Heikki Cox-Kikkajoon.

[41] The March 9th conference call did not take place as the Arbitrator was not available. In any event, by the end of March 2015, Mr. Heikki Cox-Kikkajoon was no longer representing Mr. Doyle.

[42] In June 2015, the Administrator was advised that Mr. Stephen Osborne was retained to act on behalf of Mr. Doyle. Mr. Osborne remained as Mr. Doyle's counsel from June 2015 up to the completion of the arbitration.

[43] With Mr. Osborne retained, the arbitration was scheduled to resume in September 2015. Unfortunately, as a result of ongoing difficulty in marshalling the necessary medical and business records, the matter did not proceed in September 2015, and it did not resume until June 2016. In the intervening months, the Arbitrator Teplitsky presided over a number of case conference calls to assist the parties with issues regarding records and production.

[44] In early December 2015, Mr. Osborne provided the Arbitrator with a letter from Mr. Doyle's doctor advising that it was necessary for Mr. Doyle to take five-minute breaks for every thirty minutes of hearing time. The doctor advised that this was necessary whether or not Mr. Doyle was being examined or simply present and listening to the proceedings.

[45] Further, on February 23, 2016, Mr. Osborne wrote the Arbitrator to advise that Mr. Doyle had suffered a stroke on December 31, 2015 and that Mr. Osborne was in the process of obtaining medical advice as to how this stroke might affect Mr. Doyle's ability to participate at the hearing.

[46] On March 2, 2016, Mr. Osborne delivered two letters from Mr. Doyle's doctors, advising that Mr. Doyle could participate only in half-day hearing sessions and that, as suggested in early December, Mr. Doyle should be allowed a five-minute break every thirty minutes.

[47] Mr. Osborne also sought agreement that Mr. Doyle's experts be allowed to testify before Mr. Doyle was required to do so. The Administrator did not agree to this arrangement. Mr. Osborne produced a letter from one of Mr. Doyle's doctors indicating that Mr. Doyle should be allowed to testify after his experts "due to medical reasons and to minimize stress".

[48] Ultimately, in a pre-hearing call on April 5, 2016, Arbitrator Teplitsky directed as follows: (a) all evidence in chief would be given by affidavit or expert report in the case of expert witnesses; (b) Mr. Doyle would give his evidence first; (c) Mr. Doyle's cross-examination would be limited to half-day sessions, with five-minute breaks for every thirty minutes of examination time. The Arbitrator further directed that the cross examination of the other witnesses would not be subject to the same break schedule and that if Mr. Doyle required a break, he could excuse himself from the hearing room.

[49] The arbitration resumed before Arbitrator Teplitsky on June 2, 2016. It continued on June 3, 7, 8, 9, 21, 29 and 30. Mr. Doyle was cross examined on June 2 and 3.

[50] In keeping with the Arbitrator's directions, Mr. Doyle was provided with five-minute breaks for every thirty minutes of examination.

[51] According to Pam Oetting, the Plan Project Manager, neither Mr. Osborne nor Mr. Doyle complained about the manner in which the examination unfolded and Mr. Doyle generally remained in the hearing room during the examination of the other witnesses.

[52] At issue on the Arbitration was whether Mr. Doyle could satisfy the Arbitrator, on a balance of probabilities, that he suffered an economic loss and whether any such economic loss could be shown to be the result of the illness Mr. Doyle suffered having consumed the contaminated water.

[53] In addition to hearing from Mr. Doyle and several other witnesses, the Arbitrator

received extensive documentary evidence, including Mr. Doyle's medical records, University of Toronto records, and his employment records.

[54] On June 30, 2016, the last day scheduled for the hearing, Mr. Doyle asked Arbitrator Teplitsky for the opportunity to make oral submissions, even though his counsel, Mr. Osborne was present and would be providing written submissions on his behalf.

[55] Sadly, before Plan Counsel and Mr. Doyle could deliver their closing written submissions, Arbitrator Teplitsky passed away.

[56] In the circumstances, Mr. Doyle and his counsel took the position that the arbitration hearing would have to be restarted before a new arbitrator with no ability to use the transcripts of the evidence given during the hearing before Arbitrator Teplitsky.

[57] The Administrator sought directions from this court as to how to proceed with Mr. Doyle's arbitration. In a decision dated November 2, 2016, I ordered the appointment of Arbitrator Gomberg to complete the arbitration based on a review of the record that was before Arbitrator Teplitsky, including the transcripts, together with whatever further evidence Arbitrator Gomberg deemed necessary and appropriate.

[58] I also ordered the Administrator to pay $15,000.00 to Mr. Doyle on account of interim fees in this matter to ensure that he had counsel available to continue for the completion of the arbitration.

[59] A case management meeting was scheduled with Arbitrator Gomberg and the parties for April 25, 2017. On April 21, 2017, Mr. Osborne wrote to Arbitrator Gomberg to advise that he had a difference of opinion with Mr. Doyle as to how to proceed with the case and asked for leave to be removed as counsel.

[60] While Mr. Osborne sought to be removed as counsel, he did also indicate that he was prepared to assist Mr. Doyle in making submissions with respect to interim payment for disbursements.

[61] Arbitrator Gomberg dismissed Mr. Osborne's motion to be removed as counsel. He ordered the parties to provide him with written submissions on the question of the disbursements and on the further affidavit evidence Mr. Doyle proposed to give at the continuation of the arbitration.

[62] In response to the Arbitrator's request, Mr. Osborne provided a further affidavit from Mr. Doyle, together with an affidavit from Walkerton resident, Bruce Davidson. In addition, Mr. Osborne indicated that he intended to rely on a further affidavit from Mr. Doyle's family physician, but no affidavit was ever provided.

[63] In a decision dated December 19, 2017, the Arbitrator granted Mr. Doyle his request for an interim cost award in the amount of $10,000. This was in addition to the interim cost awarded by this court. Further, Arbitrator Gomberg allowed Mr. Doyle to file the affidavit evidence of Bruce Davidson and relevant portions of Mr. Doyle's further affidavit.

[64] In February 2018, Mr. Osborne wrote to the Arbitrator advising that Mr. Doyle wanted any cross examination on his further affidavit to be limited to thirty-minutes per day. Mr. Osborne indicated that Mr. Doyle was prepared to provide medical notes to support his request or submit to an independent evaluation.

[65] Shortly after Mr. Osborne made his request, he provided Arbitrator Gomberg with three medical notes prepared by Mr. Doyle's family physician, an internal medicine specialist, and a psychologist.

[66] The notes were written in August, September and October 2016, after the evidence was completed in front of Arbitrator Teplitsky, but before Mr. Osborne filed Mr. Doyle's further affidavit and before Arbitrator Gomberg ruled on its admissibility. In addition, these notes were not brought to this court's attention in October 2016 when Mr. Doyle sought a new arbitration following Arbitrator Teplitsky's death.

[67] Arbitrator Gomberg ruled that he was not convinced that the additional accommodation for Mr. Doyle was necessary. He directed that Mr. Doyle would be allowed the same accommodation he was given by Arbitrator Teplitsky in the first stage of the hearing. Mr. Doyle would be allowed five-minute breaks for every thirty minutes of examination. Arbitrator Gomberg also advised that Mr. Doyle could withdraw his further affidavit if he did not want to submit to a further cross examination. Arbitrator Gomberg granted Mr. Doyle's request that he be cross-examined in Walkerton, rather than in Toronto.

[68] Mr. Doyle was scheduled to be examined in Walkerton starting on July 11, 2018. At the outset of the hearing, Mr. Osborne once again asked the Arbitrator to limit cross-examination to thirty-minutes per day. He provided the Arbitrator with a further note from Mr. Doyle's family physician and a new letter from his psychologist.

[69] The Arbitrator denied the request and so Mr. Doyle's cross examination proceeded on July 11 and 12, 2018. He was provided with a minimum of five-minute breaks for every thirty minutes of testimony.

[70] The parties delivered their oral arguments on September 13, 2018 in Toronto. Mr. Doyle was present throughout while his counsel and Plan counsel made submissions.

[71] The Arbitrator issued his arbitration decision on November 7, 2018. He awarded Mr. Doyle $11,000 in damages for income loss from farming on the basis of a loss of income if $10,000 for the period May to December 2000 and an addition token amount of $1,000 for the period January 1, 2001 to December 31, 2004 for insignificant effects of the water consumption.

[72] Mr. Osborne remains counsel to Mr. Doyle for the purposes of addressing the issue of costs arising from the Arbitration.

[73] Mr. Doyle advises that Mr. Osborne is not prepared to assist him on his appeal.

D. DISCUSSION AND ANALYSIS

1. Issues on the Motion

[74] As set out above, Mr. Doyle has indicated his intention to appeal the Arbitrator's decision. However, before he does so, he seeks relief by way of this preliminary motion. The issues raised on this motion include the following:

a. Should this court order a bifurcation of Mr. Doyle's appeal, so that the question of whether the arbitration was conducted fairly given his request for accommodation of his disabilities can proceed first, followed (if necessary) by an appeal based on

errors of law and errors of fact and law?

b. Should this court order that the Plan arrange for and fund a cognitive/neuropsychological evaluation for Mr. Doyle?

c. Can this court appoint a disability law firm to represent Mr. Doyle on the appeal?

d. Should this court establish a case management process for this matter?

e. Should Mr. Doyle be permitted to make both oral and written submissions on his appeal; and

f. Should this court order an advance payment of an award of $40,000 to Mr. Doyle?

2. Bifurcation of Appeal

[75] Mr. Doyle seeks an order allowing him to bifurcate his appeal so that he can first appeal issues of fairness and access to justice which he says were denied to him in the arbitration process. If he is unsuccessful in this first appeal, Mr. Doyle says that he will then pursue a "regular type of appeal based on errors of law, errors of fact and law, gross misinterpretation of evidence, etc."

[76] Mr. Doyle argues that an order allowing a two-part appeal will ensure that the "major issue" with respect to access to justice and accommodation is dealt with first. He suggests that success on this first appeal would eliminate the extensive time and expense of the second appeal, which would necessarily involve a review of the hearing transcripts and evidence filed. Implicit in Mr. Doyle's argument it that an appeal limited to the questions of fairness and access to justice would not require the same level of review.

[77] The Administrator opposes Mr. Dolye's request for a bifurcated appeal. First, the Administrator notes that there is no provision for bifurcation of appeals under the Plan and that to date all appeals have been conducted in the same manner. They have been conducted as one proceeding, addressing all grounds of appeal, in writing, and without oral evidence.

[78] Second, the Administrator submits that in considering the appropriateness of bifurcating an appeal under the Plan, this Court should be guided by the principles set out in section 138 of the *Courts of Justice Act*, which discourages a multiplicity of proceedings; the language of Rule 6.1.01 of the *Rules of Civil Procedure*, which provides that "with the consent of the parties" a court may order a separate hearing on one or more issues in a proceeding; and the case law as developed prior to the enactment of Rule 6.1.01 wherein the courts make clear that while there is an inherent jurisdiction to bifurcate a non-jury trial, that power is narrowly circumscribed, should be exercised sparingly, and only in the interests of justice.[2]

[79] Third, the Administrator submits that based on the principles developed in the case law, Mr. Doyle bears the burden of satisfying this Court that his appeal is an extraordinary case such that it is fair and in the interests of justice for this Court to order a bifurcated appeal as requested.

[80] In *Air Canada v. Westjet*,[3] Justice Nordheimer identified the factors that are relevant to

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[2] *Elcano Acceptance Ltd. v. Richmond et al* (1986), 55 O.R. (2d) 56 (C.A.).
[3] [2005] O.J. No. 5512 at para. 31 (S.C.J.).

the exercise of the court's discretion as to whether to allow the bifurcation of a proceeding as follows:

a. Are the issues of liability clearly separate from the issues of remedies?

b. Is there an obvious advantage to all parties by having the liability issues tried first?

c. Will there be a substantial saving of time and expense if bifurcation is granted?

d. Will the overall timeframe of the proceeding be unduly lengthened by granting bifurcation?

e. Do the parties agree that bifurcation is appropriate?

[81] Following the enactment of Rule 6.1 (Separate Hearing) there has been some debate in the case law as to whether the Rule supplants the inherent jurisdiction of the court to order bifurcation, where the parties do not consent.[4] Rule 6.1.01 requires the consent of the parties for the court to order a separate hearing on one or more issues in a proceeding.

[82] Rule 6.1.01, however, does not govern the proceedings under the Plan nor does it apply to appeals. As such, in my view it is not necessary for this court to consider the impact of Rule 6.1.01 on the inherent jurisdiction of the court to order bifurcation. Instead, this court ought to be guided by the principles developed in the case law and by the desire to avoid a multiplicity of proceedings as far as possible.

[83] In the circumstances of the immediate case, Mr. Doyle has not satisfied this court that his appeal is so extraordinary that he should be able to have it considered in two separate appeals. His stated reason for the request is his belief that an appeal on the issue of whether he was fairly accommodated will not require a full review of the hearing transcripts and exhibits.

[84] With respect, it seems to me that any appeal will require consideration of the conduct of the hearing and a review of the transcripts and exhibits filed. It is difficult to imagine that an appeal addressing only issues of accommodation, fairness and access to justice would not require a review of the hearing transcripts.

[85] Issues of fairness and access to justice are grounds for appeal, which can be considered along with questions of errors of law and mixed fact and law. The issues are not "clearly separate" and there would not be in my view a substantial saving of time and expense if bifurcation is granted.

[86] The issues of fairness and access to justice are linked to Mr. Doyle's credibility and to the nature and extent of the accommodation afforded to Mr. Doyle during the arbitration process. It is clear from the submissions that Mr. Doyle and the Administrator have starkly different views of whether and to what extent he was accommodated in the arbitration process. To settle the issue, the court will have to consider the transcripts of the hearing.

[87] Similarly, in an appeal involving errors of law and/or errors of mixed fact and law, the court would also have to evaluate the evidence as presented in the hearing, including the Arbitrator's findings with respect to Mr. Doyle's and other witnesses' credibility.

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[4] See for example, *Bondy-Rafael v. Potrebic*, 2015 ONSC 3655 (Div. Ct.).

[88] Further, I note that while Mr. Doyle has indicated that if he fails to convince the court that the appeal should be granted on the basis of the issues of fairness and access to justice, that he intends to appeal on the multiple errors of law and mixed fact and law made by the Arbitrator, he has not identified any such grounds of appeal to date.

[89] In short, I am not satisfied that bifurcation is appropriate in the present circumstances.

3. Should Mr. Doyle be provided with a neuropsychological assessment in advance of the appeal and at the Plan's expense?

[90] Mr. Doyle asks this court to order that he be "availed of a cognitive/neuropsychological evaluation with a mutually agreed to expert on a rapid schedule". The stated reason for his request appears to be that such an evaluation is required given the Arbitrator's failure to accommodate him as recommended by his own doctors and specialists.

[91] The Administrator opposes Mr. Doyle's request. It argues that Mr. Doyle has not explained why he has not sought a referral for such an evaluation from his own doctors, who are apparently treating him following his most recent stroke. Further, the Administrator argues that it is not clear why such an evaluation is necessary in advance of an appeal from the Arbitrator's decision.

[92] It is unclear from Mr. Doyle's materials why a cognitive/neuropsychological evaluation is required ahead of the hearing of his appeal. Both Arbitrator Teplistky and Gomberg had before them significant information regarding Mr. Doyle's various medical conditions and both made their decisions regarding accommodation based on the information filed by Mr. Doyle.

[93] While on this preliminary motion this court is not deciding whether Mr. Doyle was reasonably accommodated, a new evaluation, to be completed several months after Mr. Doyle gave his evidence and participated at the arbitration hearing can be of little value on the appeal. Mr. Doyle is free to argue that the Arbitrators should have ordered an evaluation at the time it was requested. He does not need this court to order an evaluation now to advance such an argument.

[94] In these circumstances, even if I had the jurisdiction to make the order, which I rather doubt but do not decide, I decline to order a neuropsychological assessment in advance of the appeal and at the Plan's expense.

4. Should this court appoint a disability law firm to represent Mr. Doyle on the appeal?

[95] Mr. Doyle seeks the assistance of this court to provide him with a disability law firm to defend him and to presumably assist him on the appeal.

[96] Mr. Doyle states that he has been unable to find a disability law firm willing to work with the Plan at this stage of the proceedings. Mr. Doyle asserts that he has conducted exhaustive searches since 2015 with no success. He argues that his difficulty in finding a law firm with the right expertise is as a result of the Administrator's unwillingness to provide interim payments and because of the "adversarial tone" of the proceedings to date. Mr. Doyle asks this court for "assistance" in arranging meetings with potential law firms and further for an

order providing him with legal counsel.

[97] Despite Mr. Doyle's stated difficulty in finding counsel, it is important to note that he has been represented by at least four lawyers to date and that he was represented by the same lawyer throughout the Arbitration process. It is also noteworthy, that in November 2016, this court ordered that Mr. Doyle's counsel be provided with $15,000 as interim payment to ensure that he was able to continue with the arbitration and that the same counsel remains engaged as Mr. Doyle's lawyer to address the matter of costs and disbursements which are still pending before Arbitrator Gomberg. Finally, as set out above, Mr. Doyle was awarded an additional $10,000 in December 2017 for interim costs by Arbitrator Gomberg.

[98] Section 4(3) of the Compensation Plan provides that the Plan will pay reasonable legal costs for a claimant's lawyer or for independent legal advice sought. The Compensation Plan does not require claimants to have counsel nor does it impose upon the Administrator the task of finding counsel for claimants.

[99] In this case, Mr. Doyle was provided with a list of counsel who had experience assisting claimants under the Compensation Plan. It is not clear from the evidence provided whether Mr. Doyle has attempted to contact the lawyers on the list and if so, the reasons why the lawyers are unable or unwilling to assist him.

[100] The Administrator argues that there is no juridical basis in the present circumstances which permits this court to direct counsel to meet with Mr. Doyle and further direct counsel to act for him in his appeal and any further claims.

[101] Mr. Doyle has demonstrated throughout this process that he is capable of retaining counsel and capable of representing himself in circumstances where counsel is not available. He availed himself of the assistance of four different lawyers throughout the process. Further, Mr. Doyle has provided this court with no evidence to suggest that he is somehow incapable of instructing counsel or of representing himself. The Administrator points to the fact that at the time Mr. Osborne sought to be removed from the record, Mr. Doyle indicated that he was prepared to represent himself.

[102] The power of the court to appoint *amicus curiae* is undisputed.[5] This power is grounded in the court's inherent authority to control its own process and is most often invoked in circumstances where the court is in need of advice or assistance on issues of fact or law, where the court is of the view that an effective, fair and just decision cannot be made without such assistance.[6]

[103] The specific role of *amicus* can vary widely and can include situations where *amicus* is allowed to examine and cross-examine witnesses and confer with the unrepresented party, but it is clear from the case law that *amicus* is not counsel for the party.[7]

[104] Irrespective of the potential roles *amicus* can play, Mr. Doyle does not appear to be seeking an order appointing *amicus*. Instead, he is asking this court to help him select counsel of his choosing to act on his behalf on the appeal and any further claims. Presumably, Mr. Doyle wants counsel appointed not for the purpose of "assisting the court", but to provide

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[5] *Bon Hillier v. Milojevic*, 2010 ONSCO 435 at para 15,
[6] *Morwald-Benevides v. Benevides*, 2019 ONSC 1136.
[7] *Morwald-Benevides, supra* at para. 19.

him with advice and to act on his instructions. There is no case law that extends the role of *amicus* this far.

[105] If I am wrong and in fact Mr. Doyle is seeking to have *amicus* appointed, he has not provided this court with sufficient evidence that *amicus* is necessary to ensure that a fair and just decision can be made. Mr. Doyle has put together the record and legal argument before the court on this preliminary motion. He has proven capable of articulating his position and advancing his arguments. If he is unable to find counsel willing to assist him on his appeal, it is clear from the materials already filed that Mr. Doyle is able to represent himself and to set out his various arguments for the court. Finally, the Administrator notes that Mr. Doyle has represented himself in appeal proceedings on an unrelated matter.

[106] Moreover, Mr. Doyle has not provided this court with a list of potential lawyers or law firms that would satisfy his request. The only suggestion he makes is that the "lawyers to date, eliminate the further consideration of small firms, single practitioners and 'apprentices'". He has not confirmed whether there is counsel willing and able to act on his behalf or whether he has discussed the possibility with any of the lawyers he claims to have contacted. This court cannot force counsel to meet with Mr. Doyle and certainly cannot require counsel to act on his behalf.

[107] In my view, the request for assistance in selecting and retaining counsel should be denied.

[108] I note that in support of his request for the selection and appointment of new counsel, Mr. Doyle appears to raise for the first time an issue of ineffective assistance of counsel. He suggests that given the payment difficulties counsel had and in light of Mr. Doyle's "health impairment", his representation was inadequate and prevented him from effectively defending himself. It is unclear how this argument assists Mr. Doyle in his request for the appointment of new counsel, but I note that this is an argument Mr. Doyle can advance on his appeal regardless of whether new counsel is retained.

5. Should this court establish a case management process for this matter?

[109] Mr. Doyle asks this court to appoint case management and for a determination whether any subsequent arbitrations are to be "an information seeking arbitration or an adversarial arbitration or where the continuum between the two extremes it belongs".

[110] With respect to the request for case management, I agree with the Administrator that the Compensation Plan already has in place sufficient case management procedures to ensure fair and efficient evaluations of claims. Mr. Doyle, directly and through counsel, has engaged in a series of case management conferences first with Arbitrator Teplitsky and then with Arbitrator Gomberg. Further, he has access to the Court Monitor, who has to date been available to Mr. Doyle in the lead up to this preliminary motion and has provided him with administrative and procedural information as requested.

[111] Mr. Doyle has made two further claims for compensation which were not before Arbitrator Gomberg and not before this court. The process to be followed with respect to the new claims is set out in the Compensation Plan. If mediation and/or arbitration is required for their resolution, the mediator/arbitrator will be available to provide the necessary case management.

[112] With respect to Mr. Doyle's latter request, it is not clear whether he is asking for such a

determination with regard to his two new claims or whether this request relates to a possible rehearing of the original arbitration. In either case, it seems to me that questions as to how an arbitration will be conducted should be put before the arbitrator. It is premature to ask this court to direct how a future arbitration (if it is to occur at all) should proceed. Mr. Doyle's new claims have yet to be processed by the Administrator and so there is no pending arbitration to consider. Further, it is speculative to conclude at this stage that there will be a rehearing of the original arbitration.

[113] In the circumstances, the court declines to make the determination as requested.

6. Should Mr. Doyle be permitted to make both oral and written submissions on his appeal

[114] While there are no rules governing the procedure to be followed on an appeal under the Compensation Plan, historically appeals have been dealt with in writing. Mr. Doyle seeks an order from this court allowing him to be permitted to make both written and oral submissions on his appeal.

[115] Mr. Doyle argues that there is nothing in the Compensation Plan to restrict an oral hearing on an appeal and that further there is no reason why he or his future lawyers ought to be restricted in their presentation.

[116] I accept the Administrator's position that if Mr. Doyle is represented on the appeal or if he represents himself and files written material then there is no lack of fairness to the parties or other principled reason why the historical procedure should be modified in this case.

7. Should this court order an advance of $40,000 to Mr. Doyle?

[117] Mr. Doyle seeks an advance payment of $40,000, although it is unclear whether Mr. Doyle intends to use this advance to pay experts hired during the arbitration or whether he intends to use it as a retainer for new counsel.

[118] As indicated above, in November 2016, this court granted Mr. Doyle's request for an interim payment of $15,000 to be used to ensure that Mr. Doyle's counsel was in a position to continue to represent him until the completion of the arbitration. The payment was made in the context of the ongoing arbitration and in the circumstance where the original arbitrator had died before completing the hearing and rendering a decision.

[119] Arbitrator Gomberg granted Mr. Doyle's request for an additional interim payment of $10,000 in December 2017.

[120] Further, the issue of legal fees and disbursements remains outstanding before Arbitrator Gomberg. There has been no determination in that regard and so it is unclear as to why Mr. Doyle says he requires the advance at this stage.

[121] Mr. Doyle claims financial hardship as the reason for the advance, but he fails to connect such hardship with any costs or expenses relating to his appeal. While the payment of interim costs is permissible under the Compensation Plan, it would be inappropriate to make such an order absent evidence of specific expenses related to a claim or appeal. At this stage, it is unclear whether Mr. Doyle will be proceeding with his appeal at all and if he does so whether

he will be retaining counsel to assist. There is no evidence before the court that Mr. Doyle requires a further advance in order to proceed with his appeal.

E. CONCLUSION

[122] For the above reasons, I dismiss all of Mr. Doyle's requests.

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Perell, J.

Released: September 11, 2019

CITATION: Smith v. Brockton (Municipality), 2019 ONSC 5275
COURT FILE NO.: 00-CV-192173CP
DATE: 20190911

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JAMIE SMITH, ALANA DALTON, JAMIE McDONALD, and IRENE SALES INC., operating as THE HARTLEY HOUSE

Plaintiffs

– and –

THE CORPORATION OF THE MUNICIPALITY OF BROCKTON, THE BRUCE-GREY-OWEN SOUND HEALTH UNIT, STAN KOEBEL, THE WALKERTON PUBLIC UTILITIES COMMISSION, and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

– and –

IAN D. WILSON ASSOCIATES LIMITED, DAVIDSON WELL DRILLING LIMITED, EARTH TECH (CANADA) INC., CONESTOGA-ROVERS & ASSOCIATES LIMITED, B.M. ROSS AND ASSOCIATES LIMITED, GAP ENVIROMICROBIAL SERVICES INC., A & L CANADA LABORATORIES EAST, INC., DAVID BIESENTHAL and CAROL BIESENTHAL

Third Parties

REASONS FOR DECISION

PERELL J.

Released: September 11, 2019