[redacted]

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE WALKERTON SETTLEMENT AGREEMENT

(Smith, et at. v. The Corporation of the Municipality of Brockton, et al. Court File No. 00-CV492173 CP)

BETWEEN:

[redacted]

(The Appellants)

and

The Administrator

(On an appeal of the decision of Martin Teplitsky, Q.C., released June 13, 2011)

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 Walkerton Compensation Plan. Under the Compensation Plan, Class Members are entitled to certain compensation for losses caused by the contamination of the Walkerton water supply for the period April 1, 2000 to December 5, 2000.

Facts

2. The Appellants, four brothers, were minors at the time of their applications for compensation under the Compensation Plan. They were not ordinarily residents of the Town of Walkerton, but lived in the area and visited the Town on occasion. In doing so, the Appellants evidently consumed contaminated water, which has been claimed as the cause of a variety of ailments.

[redacted]

3. [redacted]'s Stage 2 Application, dated March 1, 2004, claimed compensation for diarrhea, cramps, fever, vomiting, mental distress, sore hips, sore mid-back, and limping. As of the time of the Stage 2 Application, [redacted]'s hip issues had apparently resolved, but his other complaints continued to recur periodically.

4. On June 30, 2004, [redacted], who by then was an adult, accepted an offer of compensation in the amount of $3,000.00 for his complaints of cramps, fever, vomiting, diarrhea and mental distress. No offer was made in relation to [redacted]'s claimed sore mid-back, hips or limping, as the Administrator had determined that their relationship to the consumption of contaminated water

had not been demonstrated on a balance of probabilities.

5. [redacted] subsequently accepted additional compensation in the amount of $2,500.00 on July 27, 2005 in satisfaction of FLA claims.

[redacted]

6. [redacted]'s Stage 2 Application, dated August 13, 2003, claimed compensation for diarrhea, cramps, mental distress, swollen lymph nodes, pain in the feet and heels, periodic bruising, ongoing night sweats, stress, worry and nausea.

7. On July 6, 2004, [redacted]'s father accepted an offer of compensation on [redacted]'s behalf in the amount of $5,000.00 for his complaints of cramps, diarrhea and mental distress. No offer was made in relation to [redacted]'s claimed swollen lymph nodes, foot and heel pain, bruising, night sweats, stress, worry or nausea, as the Administrator had determined that their relationship to the consumption of contaminated water had not been demonstrated on a balance of probabilities.

8. [redacted]'s father subsequently accepted additional compensation on [redacted]'s behalf in the amount of $2,500.00 on July 27, 2005 in satisfaction of FLA claims.

9. As [redacted] was a minor at the time of both settlements, all compensation funds were paid into court to the credit of [redacted].

10. On December 5, 2006, another Stage 2 Application was submitted on [redacted]'s behalf, claiming compensation for diarrhea, cramps, mental distress, joint pains of the feet, heels and knees described as "arthritis", albuminuria, and swollen lymph nodes. The section of the Stage 2 Application requiring details of medical professionals consulted in relation to the ailments claimed contained only the notation "As per Initial Stage 2".

[redacted]

11. [redacted]'s Stage 2 Application, dated August 13, 2003, claimed compensation for diarrhea, cramps, mental distress, arrhythmia, swollen and sore joints in the ankles, feet and legs, shortness of breath, high blood pressure and nausea.

12. On July 6, 2004, [redacted]'s father accepted an offer of compensation on [redacted]'s behalf in the amount of $5,000.00 for his complaints of cramps, diarrhea and mental distress. No offer was made in regard to [redacted]'s claimed arrhythmia, swollen and sore joints in the ankles, feet and legs, shortness of breath, high blood pressure or nausea, as the Administrator had determined that their relationship to the consumption of contaminated water had not been demonstrated on a balance of probabilities.

13. [redacted]'s father subsequently accepted additional compensation on [redacted]'s behalf in the amount of $2,500.00 on July 27, 2005 in satisfaction of FLA claims.

14. As [redacted]. was a minor at the time of both settlements, all compensation funds were paid into court to the credit of [redacted]

15. On December 5, 2006, another Stage 2 Application was submitted on [redacted]'s behalf, claiming compensation for diarrhea, cramps, mental distress, hypertension, swollen or sore joints in the ankles, legs and feet, and arrhythmia. The sections of the Stage 2 Application requiring details of the symptoms of the ailments complained of and details of medical professionals consulted in relation to the ailments claimed contained identical notations of "As per Initial Stage 2".

[redacted]

16. [redacted]s Stage 2 Application, dated August 27, 2003, claimed compensation for diarrhea, cramps, mental distress, joint problems in his right knee and feet, and nose bleeds.

17. On July 6, 2004, [redacted]'s father accepted an offer of compensation on [redacted]'s behalf in the amount of $4,000.00 for his complaints of cramps, diarrhea and mental distress. No offer was made in relation to [redacted]'s claimed joint problems or nosebleeds, as the Administrator had determined that their relationship to the consumption of contaminated water had not been demonstrated on a balance of probabilities.

18. [redacted]'s father subsequently accepted additional compensation on [redacted]'s behalf in the amount of $2,500.00 on January 13, 2006 in satisfaction of FLA claims.

19. As [redacted]. was a minor at the time of both settlements, all compensation funds were paid into court to the credit of [redacted].

The November 2008 Letters

20. By correspondence dated November 20, 2008 and thereafter, claims were advanced by the Appellants' father on the Appellants' behalf regarding "health items included in the original Stage 2 claim and not taken into consideration of compensation offer as stated in letter dated June 30, 2004, from your office." These health items were subsequently enumerated in correspondence with the Administrator dated April 28, 2009 as the complaints which were advanced prior to the initial settlements with the Appellants, but for which no offers were made by the Administrator.

Medical Evidence

21. No medical records were provided to the Administrator in support of the claims by the Appellants other than those submitted in support of their initial Stage 2 Applications, with the exception of laboratory reports purporting to relate to [redacted]'s albuminuria claim. These laboratory reports were not accompanied by any medical documentation diagnosing [redacted] with

albuminuria or supporting the existence of any relationship to the contamination of Walkerton's water supply.

22. The record also contains correspondence between the Appellants' father and Dr. W.C., a nephrologist. In response to a request from the Appellants' father, Dr. W.C. wrote as follows on August 30, 2010:

> This is an email to confirm that it is possible that your boys may have suffered a reactive arthritis following the development of gastroenteritis from Walkerton water contamination. [...] I think the reactive arthritis [...] could be a likely consequence of the water contamination and hope that [the Administrator] can be encouraged to reach a more timely solution to your ongoing travails.

23. Nothing in the record indicates that Dr. W.C. actually examined or diagnosed any of the Appellants; if he did, no notes or records were provided to substantiate the conclusion set out in his August 30, 2010 email.

Administrator's Response and Arbitration

24. By correspondence dated October 4, 2010, the Administrator indicated that no offers of compensation would be made for the Appellants' claims, noting that no causal connection had been demonstrated between the Appellants' ailments and the contamination of Walkerton's water supply, and that the claims did not meet the requirements of s. 2.3 of the Compensation Plan.

25. The Appellants filed elections to arbitrate the decision of the Administrator on October 31, 2010.

26. On November 8, 2010, counsel for the Appellants advised that the claims to which the arbitrations related were not further claims pursuant to s. 2.3, but, rather, were unfinished items from previous claims.

27. The Appellants' claims were heard by arbitrator Martin Teplitsky on December 10, 2010. At the hearing, the Appellants each requested additional time to produce evidence in support of their claims. Both [redacted] indicated at the December 10, 2010 hearing, through their father, that they would rely on the conclusions of an article published in the British Medical Journal in 2010, *Long term risk for hypertension, renal impairment, and cardiovascular disease after gastroenteritis from drinking water contaminated with Escherichia coli 0157:H7: a prospective cohort study*, in support of their claims relating to albuminuria, arrhythmia and hypertension. Mr. Teplitsky's order dated December 10, 2010 granted adjournments to a later date, and indicated that, although claims in relation to juvenile arthritis or joint pain were possible, the evidence before him at that time did not satisfy the burden of proof for any of the Appellants' claims.

28. After a case conference held by telephone on February 7, 2011, the arbitrations in these matters were scheduled for June 13, 2011.

29. On that date, Mr. Teplitsky denied the Appellants' claims on the basis that there was no evidence to support the claims advanced. Mr. Teplitsky wrote as follows:

> I issued an award on December 10, 2010 in which I acknowledged the potential for juvenile arthritis and joint pain to have been caused by contaminated water. However, no evidence had been presented to meet the burden of proof. I adjourned these matters to allow a 'final opportunity' to proceed with these claims. June 13, 2011 was the scheduled date for hearing. Counsel attended. The claimants did not. No supporting evidence is available. Accordingly, these claims are dismissed.

Appeal Submissions

30. Each of the Appellants' pre-arbitration summaries note that the earlier settlements were "only for the ailments the Administrator was prepared to deal with at that time," such that the Appellants, therefore, were not compensated for the ailments now complained of. The Appellants' joint appeal submissions also indicated that:

> No claim was ever being made under S. 2.3 of the Plan. The Claimants father wrote the Administrator on Nov 20/08 to which they replied in a letter dated Apr 23/09. This was the **first** response from the Administrator stating the yet uncompensated for ailments were not causally related to Walkerton as far as they were concerned.

31. It must be noted that, according to the November 20, 2008 correspondence, these 'health items' were "included in the original Stage 2 claim," which were advanced on behalf of all of the Appellants prior to the 2004 settlements. The Appellants assert that Mr. Teplitsky's failure to address the causal connection between the health items complained of in the November 20, 2008 correspondence and the Walkerton water contamination crisis constitutes a reviewable error.

32. The sole issue on this appeal is whether Mr. Teplitsky in fact erred in dismissing the Appellants' claims.

Standard of Review

33. As noted in several previous appeals from the arbitrator, the appeal process and standard of review to be applied therein is clear. Under the Compensation Plan, applications for compensation are initially considered by the Administrator. 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 Compensation Plan. Any appeals of an arbitrator's decision are then determined by this court.

34. 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.

35. Appeals under the Compensation Plan 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."

36. In other words, to be successful on appeal, it is not enough for the Appellants to re-argue the facts of the case before the Arbitrator in an 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.

Analysis

37. Issues similar to those raised in this appeal were addressed in the reasons of this court in [redacted] *v. The Administrator*, dated August 25, 2011. In [redacted], the appellant had accepted two offers of compensation, foreclosing all claims but for those allowed pursuant to s. 2.3 of the Compensation Plan.

38. Counsel for the Appellants argued that the claims before Mr. Teplitsky were not s. 2.3 claims, but were rather claims not addressed by the original settlements. The relevant portions of the Compensation Plan provide as follows:

> **2.2.1 Class Members Who Became Ill Or Died**
>
> A Class Member who became ill or died may apply for compensation arising from any injury or loss for which an Ontario court would award damages, not paid or payable pursuant to any other plan or program, including the following:
>
> (a) pain and suffering, including physical injury, nervous shock or mental distress;
> (b) past and future lost income;
> (c) past and future health expenses which are not Insured Services; and
> (d) pecuniary losses;
>
> caused by the Contamination.

2.2.4 Family Class Members

A Family Class Member may apply for compensation for pecuniary losses, other than those paid or payable pursuant to any other plan or program, resulting from an injury to or death of a Class Member caused by the Contamination, including, as set out in subsection 61(2) of the Family Law Act:

(a) actual expenses reasonably incurred for the benefit of the Class Member who was injured or who has died;
(b) actual funeral expenses reasonably incurred as a result of the death of the Class Member and not otherwise reimbursed to the Estate of the Class Member under this Plan;
(c) a reasonable allowance for travel expenses actually incurred in visiting the Class Member during his or her treatment or recovery;
(d) a reasonable allowance for loss of income or for the value of services where, as a result of the injury, the Family Class Member provides nursing, housekeeping or other services for the Class Member; and
(e) an amount to compensate for the loss of guidance, care and companionship that the Family Class Member might reasonably have expected to receive from the Class Member if the injury or death had not occurred.

2.3 Further Applications To This Plan Permitted

A Class Member or Family Class Member who receives a payment under this Plan may make further applications and seek further damages if he, she or it suffers damages occurring or materializing after, or not reasonably discovered before, the date of the latest prior application, for which compensation has not previously been assessed or paid.

Section 2.3 Analysis

39. The clear intent of s. 2.3 of the Compensation Plan is to conclude a Class Member's right to compensation pursuant to ss. 2.2.1 through 2.2.4 once payment in accordance with those sections has been made to a Class Member, unless the conditions set out in s. 2.3 can be satisfied.

40. Each of the Appellants has accepted two settlements, concluding their entitlements pursuant to ss. 2.2.1 and 2.2.4 of the Compensation Plan. No other head of entitlement provided for by the Compensation Plan is applicable to the Appellants' complaints. As a result, the only claims to further compensation which remain available to the Appellants are pursuant to s. 2.3 of the Compensation Plan.

41. In [redacted], s. 2.3 was interpreted as allowing additional compensation in two specific circumstances: a) where the ailment for which compensation is sought either materializes after the latest prior application for compensation; or b) was not reasonably discovered prior to that date. In addition, on either basis, the claim must be one for which no compensation has yet been paid, and it goes without saying that the claim must be one for which the Compensation Plan would allow compensation pursuant to ss. 2.2.1 through 2.2.4.

42. The Appellants made no submissions as to the s. 2.3 criteria for further claims, nor did they provide any evidence supporting their eligibility pursuant to that section of the Compensation Plan. Evidence would be required, as noted by Mr. Teplitsky in his December 10, 2010 order, to establish that claims for juvenile arthritis would be tenable pursuant to that section. As the eligibility for additional compensation is strictly limited by s. 2.3, the claims for juvenile arthritis could only be advanced if the s. 2.3 evidentiary threshold was met.

43. The Appellants did not meet that threshold. In dismissing the Appellants' claims on June 13, 2011, Mr. Teplitsky stated that the Appellants had not discharged their burden of proof.

44. In my view, Mr. Teplitsky's dismissal of the Appellants' claims for failure to discharge the burden of proof required by s. 2.3 was reasonable, as the Appellants provided no evidence and made no submissions supporting their eligibility for compensation under that section. Nothing in the record indicates that any of the claims advanced by the Appellants were unknown to them or undiscoverable by them as of the date each accepted their settlement in regard to claims pursuant to s. 2.2.1. In fact, each of the claims in question are expressly noted in the November 2008 correspondence as having been advanced in the original Stage 2 Applications. Furthermore, in the "new" Stage 2 Applications submitted on behalf of [redacted], details regarding the ailments for which compensation was sought were noted "As per Initial Stage 2." As such, each of the claims advanced before Mr. Teplitsky were, by the Appellants' own admission, known to them prior to their first Stage 2 Applications, and are not eligible for compensation pursuant to s. 2.3.

Causation Analysis

45. Although my conclusion on the threshold issue of eligibility under s. 2.3 is determinative of the issues in appeal, the Appellants' arguments on causation are addressed for the sake of completeness.

46. The Appellants submit that their claims should not require a causal link to the Walkerton contamination to be established with scientific precision in order to be eligible for compensation pursuant to the Compensation Plan, and rely on the decision of the Supreme Court of Canada in *Snell v. Farrell*, [1990] 2 S.C.R. 311 for that proposition.

47. In *Snell*, the Supreme Court addressed its comments to a factual scenario in which, as often occurs in medical malpractice actions, the facts of the matter in issue are entirely (or almost so) in the control of the defendant medical professional. In such cases, the trier of fact may, in

the absence of evidence to the contrary provided by the defendant, draw an adverse inference from the evidence placed before the court by the plaintiff on questions of causation. Such cases typically turn on questions of causation, as the ailments complained of might arise from multiple contributory factors; as a result, expert medical evidence can seldom arrive at conclusive determinations of causality.

48. Having reviewed these considerations, the Supreme Court in *Snell* stated as follows:

> The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced.

49. It is clear that the decision in *Snell* was not intended to diminish the burden of proof a plaintiff must discharge to the demonstration of a basic temporal relationship; it is not enough, therefore, for a claimant to baldly state that, as the effect complained of occurred after the alleged cause, causation has been made out. It is clear that credible evidence of a causal link between the two must still be put forward, even if that causal link cannot be established with scientific certainty.

50. The Court of Appeal for Ontario reached this conclusion in *Barker v. Montfort Hospital*, 2007 ONCA 282, where Rouleau J.A., writing for the majority, stated as follows:

> Under [the *Snell*] approach the respondents nonetheless have to provide an evidentiary foundation for finding that there is a substantial connection between the injury and the defendant's conduct. As I have noted in the earlier portion of this decision, no such foundation was laid in the present case. There is a complete absence of medical or other evidence from which to infer that, but for the delay in operating, the section of the bowel would likely have been saved.

51. The only evidence put forward by the Appellants in support of a causal link between their complaints and the Walkerton water contamination is the email from Dr. W.C., who does not appear to have actually examined the Appellants at any time. Aside from this email, the Appellants suggest that the occurrence of the Walkerton water contamination event prior to the occurrence of the issues complained of should give rise to an inference of a causal link in the absence of evidence to the contrary.

52. It is clear that this cannot be the case. The Supreme Court's decision in *Snell*, if it has any application here, cannot operate so as to relieve the Appellants of the obligation to provide evidence of the causal link required by both ss. 2.2.1 and 2.2.4. The *Snell* inference of causation will not arise of its own accord; rather, it arises only where the claimant adduces credible, albeit inconclusive, evidence of a causal link, and where the defendant adduces no contradictory evidence.

53. In this appeal, the Appellants have adduced no probative evidence of a causal relationship between their ailments and the Walkerton water contamination event. No weight can be given to Dr. W.C.'s email, as he at no time actually examined the Appellants or diagnosed them with the ailments from which they are alleged to suffer. As such, the court can draw no inference as to a causal link between the Appellants' ailments and the contamination of Walkerton's water supply.

54. Given the Appellants' failure to demonstrate their eligibility for compensation pursuant to s. 2.3, Mr. Teplitsky was not required to turn his mind to the question of causation. As such, Mr. Teplitsky made no reviewable error in dismissing the Appellants' claims.

Result

55. In my view, the appeals cannot succeed. The Arbitrator committed no errors, either in principle, with respect to jurisdiction or by patent misapprehension of the evidence before him. Accordingly, his decision is hereby affirmed.

Winkler C.J.O.

Released: July 23, 2013