

**IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE MAPLE LEAF FOODS SETTLEMENT AGREEMENT**

Elizabeth Morosky
Claimant

COUNSEL:

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Claimant Counsel

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Class Counsel

COURT APPOINTED ARBITRATOR:

Reva Devins

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DECISION

1. The Claimant, Elizabeth Morosky, by her litigation guardian, David Morosky, submitted a Claim for compensation under the Maple Leaf Foods Class Action Settlement Agreement¹. Grid Level 7 was selected, indicating that Mrs. Morosky sustained physical symptoms consistent with Listeriosis accompanied by secondary complications involving the central nervous system resulting in serious and permanent impairment of physical and/or mental function. Counsel elected to pursue the claim by Arbitration in Person.

Settlement Agreement and Claims Administration and Arbitration Protocol

2. In the summer of 2008, Maple Leaf Foods recalled a series of meat products due to possible contamination with listeria monocytogenes. Listeriosis, the illness caused by this bacterium, is typically accompanied by symptoms of nausea, vomiting, cramps, diarrhea, headache, constipation and fever. In rare cases, it can lead to secondary infections, serious complications and death.
3. Class actions were commenced across Canada. On December 17, 2008, the parties to these actions entered into a Settlement Agreement that provides a

¹ Approved in *Bilodeau et al v. Maple Leaf Foods et al.*, Court File No. CV-08-361464CP in the Ontario Superior Court of Justice by Order of Justice Perell, March 16, 2009; *Melvin and Option Conommateurs et al. v. Maple Leaf Foods et al.*, Court File No 500-06-445-086, in the Superior Court of Quebec by Order of Justice Castonguay, April 2, 2009; and *Bishay Estate et al. v. Maple Leaf Foods et al.*, Court File No. QB 1173 in the Court of Queen's Bench of Saskatchewan by Order of Justice Barclay, March 10, 2009.

comprehensive process to determine damage awards arising from the purchase or consumption of recalled products. The Agreement was approved by the courts in Ontario, Quebec and Saskatchewan after it was determined that the settlement was fair, reasonable and in the best interests of the class members.²

4. Generally, the Settlement Agreement provides that claims for compensation will be determined in accordance with a Court approved Compensation Grid (“the Grid”). The Grid defines the criteria for each level of harm and the corresponding amount of damages payable to eligible claimants. It includes a detailed description of several levels of claims, categorized by the degree of physical or psychological harm. The Grid also sets out the required documentation to establish a claim. Claimants can elect to have their damages assessed by the Claims Administrator in strict compliance with the Grid, or, if they are advancing a claim at Level 4-8 or 11-12, they can choose to have their damages assessed at Arbitration.
5. At Arbitration, the Arbitrator is governed by the following principles:
 - a. The amount payable to an Eligible Claimant must be based on the relevant legal principles in the jurisdiction in which the claimant resides³.
 - b. The Arbitrator shall make her determination on a balance of probabilities⁴.
 - c. The burden of proof is on the Claimant, but the Arbitrator’s decision shall be based on all of the materials before her⁵.

6. Grid Level 7 is described as follows:

INJURY LEVEL:

Class Members who consumed Recalled Product and sustained physical symptoms consistent with Listeriosis accompanied by secondary complications involving the central nervous system (including, but not limited to meningoencephalitis or cerebritis, rhomboencephalitis, brain abscess, septic shock) and/or focal infections (including, but not limited to ocuglandular syndrome,

² *Supra.*

³ Distribution Protocol, paragraph 22.

⁴ Distribution Protocol, paragraph 4.

⁵ *Ibid.*

lymphadenitis, pneumonia, empyema, myocarditis, endocarditis, septic arthritis, osteomyelitis, prosthetic joint infection, arteritis, prosthetic graft infections, spinal and brain abscess and cholecystitis, acute hepatitis, and peritonitis among others) resulting in serious and permanent impairment of physical and/or mental function.

QUALIFYING CRITERIA AND REQUIRED DOCUMENTATION:

1. Declaration attesting to consumption of Recalled Product; and
2. Supporting contemporaneous medical documentation of physical illness (with or without psychological harm) showing illness was caused by or consistent with physical symptoms of Listeriosis; and
3. If the claimant was the purchaser of the consumed Recalled Product, proof of purchase or retained packaging or proof of returned product OR declaration attesting to purchase if any of these documents are not available.

COMPENSATION:

\$125,000.00 per Class Member

+ **\$10,000** to each FLA claimant(s) claiming in relation to the same Class Member

+ **\$750.00** per day of **hospitalization**

+ special damages (including loss of income and cost of past and future care) supported by sworn statement and supporting documentation, including medical documentation

+ subrogated provincial insurer payments

OR, ALTERNATIVELY

Arbitration is available for claimants falling into Level 7 Physical Harm at the request of the claimant.

Facts

7. Mrs. Morosky is 79 years old and a resident of Toronto, Ontario. In an affidavit sworn February 28, 2009, her son confirmed that from May to August 2008 he

purchased several products that were subsequently recalled by Maple Leaf Foods, including Bittners/Schneider's Turkey Breast and Maple Leaf All Beef Bologna. Mr. Morosky further confirmed that his mother, Elizabeth Morosky, consumed these products.

8. According to Mr. Morosky, his mother's appetite decreased in late July or early August 2008. Starting in mid August, she began to complain of stomach cramps and appeared weak. She did not see a doctor for these complaints. On the morning of August 26, 2008, Mr. Morosky found his mother in the kitchen, slumped over the table; she had been there since the previous night. She appeared conscious but was breathing heavily and was not responsive.
9. Mrs. Morosky was taken by ambulance to Sunnybrook Hospital where she was tested and eventually diagnosed with Listeriosis. She was given IV fluids and was treated with a 21-day course of antibiotics. Mrs. Morosky had previously been diagnosed with Type II Diabetes and her blood sugar was out of control upon admission to hospital. Hospital records from Sunnybrook Emergency Room document that on arrival at hospital Mrs. Morosky's blood sugar was 21.9; her blood pressure ranged from 140 to 160 over 65, with a respiratory rate of 20 to 27. Mrs. Morosky fell into a diabetic coma and remained in intensive care for approximately one week.
10. While in hospital, Mrs. Morosky was variously diagnosed as diabetic keto-acidosis and non-acidotic hyposmolar non-ketotic coma. She had a markedly diminished level of consciousness, remaining confused and delirious for a prolonged period. Mrs. Morosky's acute care in hospital was for a period of 45 days, from August 26th through October 10, 2008. During this entire period, Mrs. Morosky was confined to her bed and periodically required restraints. She did not regain her former level of mental acuity and remains severely demented, wheel chair bound and totally dependant on others for her care.

11. A Physician's Order for Alternate Level of Care, dated October 15, 2008, indicated that Mrs. Morosky was ready for transfer from Sunnybrook Hospital to an Extended Care facility as of October 10, 2008. Mr. Morosky filed applications for long-term care for his mother, however it took several weeks to find a suitable location. A number of facilities were canvassed, but were unable to meet Mrs. Morosky's needs. Eventually, by letter dated November 25, 2008, the Ukrainian Canadian Care Center ("UCCC") advised that Mrs. Morosky met their criteria for admission to the Special Care Unit, which provides 24-hour care and is designed to care for patients with dementia. Mrs. Morosky was placed on a waiting list for admission and was finally discharged from hospital on February 2, 2009 and transferred to UCCC.
12. Records from UCCC confirm that Mrs. Morosky suffers from severe dementia, is wheel chair bound and incontinent for bowel and bladder. She is able to feed herself with supervision, but is totally dependant for personal hygiene, toileting, self-care and transfers. Mrs. Morosky is disoriented to time, place and person and impaired in short and long-term memory, judgment and decision-making. She was thought to be delusional at times, but did not appear to be distressed, agitated or abusive. On February 10, 2010, the Recreation Therapist at the UCCC noted that Mrs. Morosky was unable to follow verbal directions, focus attention or identify objects. She cannot carry on a conversation or express choice. She does not initiate conversation or social interaction, and responds poorly to others.
13. Prior to admission in August 2008, Mrs. Morosky had been diagnosed with early onset Alzheimer's. Mrs. Morosky was first documented as suffering cognitive impairment in September 2004. Health care professionals in Manitoba evaluated her mental status in February 2005 and again in April 2005. Her score on the Mini-Mental Status Exam (MMSE) was found to be markedly lower in April 2005; her MMSE scores were 22 or 23/30 in February and 17/30 in April. A mental status assessment and home visit in October 2006 revealed major impairment in short-term memory, insight and judgment were very poor and she

was oriented only to herself. Her decline, since April 2005 was assessed at a slower rate, with a score of 14/30 on the MMSE.

14. In 2006 Mrs. Morosky left Manitoba and came to Ontario to live with her son, David Morosky. Mr. Morosky described his mother's dementia as having been relatively mild in 2006 through August 2008. She was able to manage living with him with modest assistance, was fairly mobile and was able to take care of her own toileting and hygiene needs. David would leave his mom at home, unattended during the day when he was at work. He would prepare her breakfast and lunch before leaving for work and she would feed herself in his absence.
15. Mrs. Morosky had a pet dog to keep her company, but otherwise she was alone during the day. David would call to check up on her and the landlady upstairs would also keep an eye out for Mrs. Morosky. Mrs. Morosky was able to follow instructions, understand what David was saying when he phoned from work and respond appropriately. She enjoyed watching television and reading religious magazines and Reader's Digest. Roughly 2 months before August 26, 2008, Mrs. Morosky began to experience incontinence at night and began to wear adult diapers overnight. She subsequently started to have accidents during the day as well and agreed to wear adult diapers all of the time.
16. When Mrs. Morosky first moved to Ontario from Manitoba, she did not have a valid OHIP card. Her son tried to get one for her, however he was unsuccessful due to inconsistencies in the required documents. An OHIP card was not issued for Mrs. Morosky until after she was hospitalized in August 2008 and was obtained with the assistance of medical staff at the hospital. Mrs. Morosky's medications had been sent from Manitoba for the first year that she was in Ontario. Mr. Morosky tried to renew her prescriptions after that, but without a valid OHIP card, Mr. Morosky could only get a doctor to renew the prescriptions for one month. From December 2007 until August 2008 Mrs. Morosky did not take any prescription medication. Mr. Morosky believed that his mother's

diabetes could be controlled by diet and he did not notice any significant changes after she stopped her medication.

17. A Social Work Assessment, dated August 28, 2008, documented that on admission to hospital Mrs. Morosky had a bruise on her forehead, cellulitis on her feet and legs, hypokalemia, electrolyte imbalance, blood in her stool and that she was extremely malnourished. In both the Social Work Assessment and in the Ambulance Call Report, she was further noted to have been off of her medications for the past year. Mr. Morosky did not believe that his mother was malnourished prior to her hospitalization. He did testify that she had not been eating well for several weeks and then completely lost her appetite 5 days before he called the ambulance. He acknowledged that she had not been taking her medications for several months.
18. David Morosky also testified to his personal relationship with his mother. Mr. Morosky is 51 years old, single and has no children. He currently lives alone; his brother and sister reside in Manitoba. His mother had lived in Manitoba with his brother, however she became increasingly unhappy and moved to Toronto to live with him at the end of November 2006. After she moved in with him, he would see her briefly every morning before he left for work and spend the evening with her after he got home at 7:30 or 8:00 p.m. They would also spend all day together on Saturday and Sunday, unless he had to work. David and his mother shared a small, one bedroom apartment; he slept on the couch and his mom slept in the bedroom.
19. David and his mother enjoyed simple activities together. In the evenings they would chat a bit, eat together and watch television. They would play cards occasionally. Sometimes, Mrs. Morosky would help with cleaning up after dinner, either sweeping or doing the dishes. On the weekends Mr. Morosky would call his mother's friends and family so that she could talk to them. David would take his mom outside while he played with their dog in the backyard, or they would go for

- a short walk in the neighborhood or to the park. Sometimes they would do errands together. Despite her dementia, his mother was aware of her surroundings, engaged in conversation, and they took pleasure in each other's company.
20. Since her illness at the end of August 2008, Mr. Morosky has continued to see his mother regularly: he visited her virtually every day when she was in Sunnybrook Hospital and usually sees her twice on the weekend now that she has moved to UCCC. Her current condition makes it very difficult to interact. Her speech is hard to understand, she only speaks one or two words at a time, speaks slowly and slurs her words. David spent a full week with his mother in October 2010 and found that her ability to interact improved noticeably. He believes that his mother recognizes him when he visits; she cries when she sees him and when he leaves. He would like to have her visit him in his home, but feels this would only be advisable in the late spring, summer and early fall.
21. Mr. Morosky stated that his mother was an important part of his life and that they were good companions before her illness. Their relationship now is very limited as she is unable to meaningfully respond to him. He misses her and hopes that one day she will improve so that their relationship can "get back to where it was".
22. Dr. Goldenberg, a specialist in Geriatric Internal Medicine, reviewed Mrs. Morosky's medical history and provided a detailed summary of her medical condition before and after August 2008. He also provided his expert opinion⁶ on the impact that Listeriosis had on her mental and physical status. Dr. Goldenberg provided a detailed review of Mrs. Morosky's cognitive status prior to August

⁶ Dr. Goldenberg has been an Assistant Professor in Internal Medicine and Geriatric Medicine since 1981 at the Faculty of Medicine, University of Toronto. He is currently the Medical Director at the Walking Mobility Clinics in Ontario and holds a consulting appointment in Geriatric Medicine at several hospitals in Toronto. Previous positions include Programmed Director of Ambulatory services and the Geriatric Day Hospital at the Baycrest Hospital and Center for Geriatric Care in Toronto, Head of the Division of Geriatric Medicine at the Scarborough Grace Hospital and Director of the Geriatric Assessment and Treatment Inpatient Unit, Consultative and Outreach Service and Day Hospital. His expertise in the area of geriatric assessment was not challenged.

2008, her period of hospitalization thereafter and her cognitive and physical status after she was transferred to UCCC.

23. After reviewing her medical history and current condition, Dr. Goldenberg made a number of observations. He offered the following opinions:
- a. Upon admission to hospital in August 2008, there was evidence of a prior stroke and Mrs. Morosky had multiple risk factors for cerebrovascular disease including age, poorly controlled high blood pressure, poorly controlled diabetes and hyperlipidemia that does not appear to have been treated.
 - b. Her nutritional status, diabetic control and medication compliance was extremely poor in the months before her admission to hospital. Her blood sugars were grossly out of control and obviously so for several months.
 - c. Mrs. Morosky's course of dementia was consistent with a slowly progressive dementia already moderate at the time of her first assessment in 2005. Her subsequent episode of rapid decline in 2005 is consistent with a mixed cerebrovascular and degenerative dementia. Although her mixed degenerative-vascular dementia would be expected to deteriorate with the passage of time, she did show the ability to remain stable for long periods. Optimal care in a light nursing-care facility would have ensured nutritional and drug compliance so one "might then expect even better performance status and slower deterioration ... where she would still be continent ... independent in ambulation ... and benefiting from appropriate social stimulation ...".
 - d. With respect to her likely prognosis absent the intervening injury, Dr. Goldenberg was of the view that it is possible that "she might have gone another year before requiring institutional care had the septicemia not intervened. It is unlikely, however, given the nature of her limited support, withdrawal from her medications and poor diabetes control, that she would have remained reasonably stable for more than a year in the absence of the listeriosis unless she had been placed in a care-giving facility."
 - e. With respect to the relationship between Listeriosis and Mrs. Morosky's current cognitive state, Dr. Goldenberg refers to her hyperosmolar non-ketotic delirium from hyperglycemia, noting that unlike most patients, she never recovers from her delirium. In his view, her Listeriosis with sepsis and hyperosmolar hypoglycemic

state represents the “coup de gras in her deterioration in her organic brain function.” He went on to conclude:

Acute medical illness such as septicemia, which Mrs. Morosky experienced, typically precipitate severe delirium and acute confusional and behavioural states in patients who have moderate pre-existing dementia, whether it be on a cerebrovascular, degenerative or mixed basis, as was the case here.

Frequently in frail acute illness survivors, a cascading sequence of adverse events may lead to both stepwise deterioration and irreversible deterioration as was seen here. In her case, long periods of physical restraint with immobilization, bed-related pressure sores and sensory deprivation along with nutritional insufficiency and protracted poor blood sugar control all contributed to irreversible deterioration in her neurologic, cognitive and behavioural function, ...

... her susceptibilities were such that the Listeria septicemia and cascading events created an acute catastrophic and irreversible deterioration in her neurologic status with extreme metabolic perturbation and progression of neurologic disease.

- f. Dr. Goldenberg ultimately concluded that Mrs. Morosky’s “catastrophic deterioration from severe metabolic disorder and septicemia immediately plunged her to an irreversible severely reduced level of function. ... Attaining 82 to 83 years of age would be reasonable and realistic. ... The sudden irreversible deterioration precipitated by the listeriosis has condemned Mrs. Morosky to a more rapid trajectory of deterioration and a shorter life expectancy with much higher cost of care and with much reduced quality of residual life.”

24. Counsel for Mrs. Morosky asked Michelle Voorberg, Occupational Therapist, to prepare a report of future care needs and costs. Ms. Voorberg based her recommendations on the following principles: providing the clinical and physical environment for optimal recovery; to improve and maintain the clinical/functional state of the client; to prevent secondary complications; to provide support for the family; and to optimize Mrs. Morosky’s quality of life. Ms. Voorberg reviewed

Mrs. Morosky's medical file, and spoke to David Morosky, Dr. Jerry Zownir, Mrs. Morosky's treating physician, and a nurse at UCCC.

25. Ms. Voorberg reported that Mrs. Morosky currently resides in a single room in a secure unit, with constant staffing of 1 RN and 3 Personal Support Workers ("PSW"s). Group social/recreational activities are provided on the unit several times per week, but 1:1 social/personal programming is not available. Physiotherapy is available 1-2 times per week, which Dr. Zownir indicated was sufficient to meet Mrs. Morosky's physiotherapy needs. Currently, Mrs. Morosky is completely dependant for self-care, unable to propel her wheel chair, direct her care, unable to initiate or maintain social conversation and appeared not to recognize her son, David.
26. Ms. Voorberg recommended that a personal care attendant be made available on a daily basis to improve Mrs. Morosky's social stimulation, increase her ability to get off the unit to go outside for fresh air and occasionally visit her son, and to attend to her daily needs on a 1:1 basis. Ms. Voorberg recommended that a PSW be hired at a rate of \$27.32 per hour, 8 hours a day, 7 days per week, for an annual cost of \$79,774.40. In an addendum to her initial report, Ms. Voorberg confirmed her opinion that attendant care should be provided by a qualified PSW in order to respond to Mrs. Morosky's heavy physical care needs. Furthermore, that the PSW should be provided by a commercial provider to ensure continuity of care and guarantee no gap in service. Finally, when asked for further detail of the services that a PSW could provide, Ms. Voorberg answered as follows:

While Mrs. Morosky's basic needs are met within the long term care facility, additional supports are required to provide some degree of quality of life beyond the **very basic** needs. The purpose of the Personal Support Worker is intended to provide: hands-on assistance with daily tasks in an immediate and responsive manner, provide one-on-one social stimulation, and to engage the client in quality of life activity. Without such support, Mrs. Morosky is left sitting in her wheelchair all day, unless one of the four staff (to 30 residents with similar needs) are available to her. ...

... there are needs that go beyond the basic – to provide stimulation through social contact and communication, to change/adapt her environment for interest (to go outdoors, to transfer to another surface periodically e.g. to a chair or a bed, to go to other areas within the residence), to provide comfort and security at all times, to anticipate and meet her needs as they arise spontaneously throughout the day. The support that facilitates existence “beyond the basics” is what the PSW would provide to Mrs. Morosky.

27. Ms. Voorberg also recommended that wheelchair accessible transportation be provided 1-2 times per month so that Mrs. Morosky could visit her son, David. The round trip cost of transportation was estimated at \$80.00, with an annual cost of \$1440.00, based on 18 trips per year. An allowance of \$25.00 per month for a Chiropodist, at an annual rate of \$300 per annum, was also included in the Table of Costs, although not otherwise discussed in the Report. Ms. Voorberg made some further recommendations regarding the costs associated with Mrs. Morosky’s wheelchair, however, at arbitration counsel conceded that these costs were not being pursued based on the life expectancy report of Dr. Day.
28. Dr. Goldenberg reviewed Ms. Voorberg’s Future Care Cost report and offered the following opinion: “The most critical recommendation, I think, really does relate to the residual limited quality of social life and the availability of attendant care as well as a Ukrainian-speaking sitter, one-on-one attention, communication in Ukrainian and facilitation of short excursions in and out of the centre is well warranted.”
29. Dr. Peter Derkach, Medical Director at UCCC, also provided his opinion on Ms. Voorberg’s recommendations. Dr. Derkach does not provide primary care to Mrs. Morosky, however, he spoke to her primary care physician and a staff nurse, and visited and assessed Mrs. Morosky onsite. He also reviewed Mrs. Morosky’s admission papers and Dr. Goldenberg’s report. Dr. Derkach “strongly supports” the recommendation that Mrs. Morosky have eight hours of care from a PSW to improve her quality of life and sustain her remaining cognitive and social abilities. He notes that there are a number of activities that a PSW can carry out,

- including “programs such as ‘simple pleasures’, aromatherapy, music therapy, massage therapy and sensory stimulation. Participating in social events that occur inside and outside the LTC facility would be of great benefit.” Attendant care would also assist in reducing the risks associated with severe dementia and mobility restrictions such as bedsores, falls, depression, restraint use and incontinence.
30. Dr. Derkach further observed that present provincial funding is basic and adequate, but not optimal. In his view, a PSW would ensure a reliable source of one on one care for Mrs. Morosky. In conclusion, Dr. Derkach notes that a resident’s waking hours would amount to roughly 12 hours per day. Ms. Voorberg recommended attendant care for 8 hours each day, which Dr. Derkach considers a “reasonable compromise”.
31. Stephen Day, PhD, a principal researcher with the Life Expectancy Project, a research team whose focus is on statistical and epidemiological studies of children and adults with developmental disabilities, traumatic brain injuries, spinal cord injuries and other medical conditions, prepared a life expectancy report. He reviewed Mrs. Morosky’s medical conditions and noted risk factors of current age; Diabetes mellitus; Alzheimer’s type degenerative dementia, moderately advanced in 2005, currently severe; Left occipital stroke of unknown severity or date of occurrence; Non ambulatory; History of atrial fibrillation; Hypothyroidism; Hypertension; Life-long non-smoker; Acute infection with Listeria bacteria in 2008. Accounting for these risk factors, Dr. Day estimates Mrs. Morosky’s life expectancy to be 3 additional years from November 2010, to age 82.7. Dr. Day also provided a life table corresponding to Mrs. Morosky’s life expectancy to age 109.
32. Mr. Morosky provided receipts for a number of out of pocket expenses including additional costs for his mother’s alternate level care at Sunnybrook Hospital (\$5,088.91); wheelchair expenses (\$962.50); residential fees for care at UCCC,

including Chiropracist fees and hairdressing charges, up to July 31, 2009 (8,600.91); disbursements for expert reports, obtaining medical files and printing costs associated with arbitration (\$18,083.49); and his own expenses for transportation, parking and loss of income while caring for his mother (\$4,406.50).

Submissions

33. Class Counsel provided an assessment of Mrs. Morosky's claim and suggested that the medical documentation supports a finding that she had an illness caused by or consistent with Listeriosis, which contributed to her ongoing and permanent impairment of function. Class Counsel was of the view that Mrs. Morosky is therefore an eligible claimant and qualifies for an arbitrated review of her damages.
34. With respect to the appropriate level of compensation, Class Counsel submitted that the following factors should be taken into account in determining an appropriate level of general damages: Mrs. Morosky's age and life expectancy; her pre-existing level of cognitive impairment and the extent to which her current health status is not attributable to consumption of Recalled Products. Counsel also accepted that the Grid might provide a useful guide for the determination of general damages, but submitted that it was not binding.
35. In assessing the comparable Grid award, Counsel maintained that a claimant would not necessarily be entitled to \$750 for each day of hospitalization. This amount relates to increased pain and suffering and should only be available for days of hospitalization due to acute illness, not the period waiting for an extended care placement. With respect to quantum, Class Counsel submitted that \$240,000, the sum requested on behalf of Mrs. Morosky, was at the high end of the spectrum for Mrs. Morosky's level of injury.

36. Regarding special damages, Class Counsel submits that all of Mrs. Morosky's claimed out of pocket expenses are reasonable and recoverable. With respect to future care costs, Class Counsel was of the opinion that there was sufficient medical evidence to support the need for a PSW to provide attendant care. The issue for the arbitrator to determine is the number of hours and days that are reasonably necessary. It was further submitted that it is appropriate to consider the likelihood that Mrs. Morosky would have required additional care in any event.
37. Lastly, Class Counsel submitted that in considering Mr. Morosky's FLA claim, Mrs. Morosky's pre-existing condition should be taken into account. Further, that \$35,000 to \$40,000 was at the top end of the range awarded to children for loss of care, guidance and companionship. Mr. Morosky's claim for transportation, parking and loss of income are reasonable and recoverable.
38. Counsel for Mrs. Morosky submits says that Mrs. Morosky was medically fragile when she tested positive for Listeria at the end of August 2008. Previously, she had been diagnosed with a number of health conditions, however, her condition had been relatively stable and her dementia was progressing slowly. She subsequently suffered a catastrophic injury that rendered her severely demented, immobile and totally dependant on others for her care. Dr. Goldenberg reviewed all of her medical records and, in his expert opinion, Listeriosis caused an acute catastrophic and irreversible deterioration in her physical and mental status. In counsel's submission, the medical evidence supports a claim at Level 7.
39. With respect to general damages, counsel submitted that Mrs. Morosky should be awarded \$240,000 – 245,000⁷, which is 75% of the current cap of \$320,000. Mrs. Morosky has suffered a catastrophic injury, has lost all bodily and mental function and has a reduced life expectancy. She is aware of her condition and that she has suffered a drastic change in living conditions. An award of \$240,000 - 245,000 is supported by precedent and corresponds with the amount that Mrs. Morosky

⁷ Counsel referred to both amounts at various times and I have therefore included both sums.

would be entitled to under the Grid: \$125,000 at Level 7, plus \$750 per day of hospitalization, for 161 days.

40. Mrs. Morosky also claimed out of pocket expenses for the cost of a wheelchair; long-term care costs at Sunnybrook; and the cost of disbursements to pursue her claim for compensation. Counsel accepted Dr. Goldenberg's opinion that Mrs. Morosky was not likely to have remained at home beyond July 31, 2009, therefore, expenses related to cost of care at UCCC were only pursued for the period February 2, 2009 through July 31, 2009.
41. Counsel further requested future care costs in accordance with the recommendations made by Ms. Voorberg: cost of a PSW at \$27.32 per hour, 8 hours per day, 7 days per week and the cost for transportation to and from David Morosky's home, twice a month. Counsel suggested that Drs. Goldenberg and Derkach supported these recommendations and that the evidence establishes that they are reasonably necessary to provide adequate care for Mrs. Morosky. Counsel also submitted that Dr. Day's report should be accepted and that future care costs should be awarded on the basis that Mrs. Morosky's life expectancy is to age 82.7, November 2013.
42. Lastly, counsel submitted that David Morosky was entitled to FLA damages for loss of companionship and his out of pocket expenses while caring for his mother. It was suggested that Mr. Morosky should be awarded \$40,000 for loss of companionship given his close relationship with his mother and her shortened lifespan. Mr. Morosky was also seeking reimbursement for his expenses while caring for his mother, including parking, transportation and 2 days of lost income.

Eligibility

43. Claimants seeking compensation for illness related to consumption of Maple Leaf meat have two routes available to them. They can have their claim assessed by the Claims Administrator, in which case they accept a pre-determined amount for

general damages for their pain and suffering, plus payment of any special damages. Or, they can choose to have their damages assessed in accordance with their individual circumstances at Arbitration. Claimants with physical injuries are only eligible for Arbitration if they can establish a claim at Level 4 or higher.

44. In my view, I do not have jurisdiction to consider the specific facts pertaining to individual claimants unless they have satisfied the qualifying conditions for an arbitrated assessment. Therefore, I must first determine that a claimant is entitled to have their damages assessed by Arbitration before I can order payment of an award that is different than the amount contained in the Grid. Once a claimant has established that they are eligible to proceed by Arbitration, it is open to me to decide that they are entitled to a greater award of general damages than the amount provided under the Grid, or I can decide that their circumstances warrant a lesser award. Although I am clearly not bound by the amounts payable under the Grid, they do provide a useful guide and I also consider it helpful to determine the applicable Grid Level for the purpose of damage assessment.
45. Mrs. Morosky is seeking compensation at Grid Level 7. Injury at this level requires contemporaneous medical evidence of physical symptoms consistent with Listeriosis accompanied by a secondary complication involving the central nervous system or a focal infection that results in serious and permanent impairment of function.
46. Mr. Morosky has attested to his mother's consumption of Recalled Products. He provided specific product names that are on the Recall List and Mrs. Morosky was diagnosed with Listeriosis in August 2008, at the height of the outbreak related to Recalled Products. On the basis of all the evidence, including a diagnosis of Listeriosis, I am satisfied that Mrs. Morosky consumed Recalled Products.

47. I am also satisfied that Mrs. Morosky has provided contemporaneous medical documentation to establish that she experienced physical symptoms consistent with Listeriosis, accompanied by a secondary complication involving the central nervous system that resulted in serious and permanent impairment of mental and physical function.
48. Mrs. Morosky was positively diagnosed with Listeriosis and septicemia. She was medically frail at the time of infection, with a number of pre-morbid conditions, including poorly controlled diabetes. She subsequently suffered complications related to her diabetes and has never fully recovered to her pre-illness level of health. She is severely demented, wheel chair bound and totally dependant for all care. Although there is evidence that she did not maintain her medication regime for several months prior to her illness, there was no serious dispute with respect to the issue of causation. In any event, I accept the opinion of Dr. Goldenberg that “the Listeria septicemia and cascading events created an acute catastrophic and irreversible deterioration in her neurologic status”.
49. I find that Mrs. Morosky has established that she had physical symptoms consistent with Listeriosis accompanied by a secondary complication involving the central nervous system (brain). Medical records further establish that she has suffered a dramatic decline in cognitive and physical function resulting in serious and permanent impairment. Her symptoms were confirmed in contemporaneous medical documents and were consistent with Listeriosis following consumption of Recalled Products. She is therefore an Eligible Claimant at Level 7 and is entitled to have her damages assessed in accordance with her unique circumstances

Damage Assessment

50. Mrs. Morosky has suffered a debilitating injury. She was treated in hospital for a significant period of time, only to be released as a full time resident at a long-term care facility. She is now totally dependent for all of her needs and has not returned home since becoming ill in August 2008. She is confined to a wheel chair, is

barely communicative and requires assistance with dressing, toileting, transfers and all manner of activity. She was previously able to live somewhat independently in the company of her son, was relatively mobile, and found pleasure in her son's company and in that of her pet dog. She enjoyed watching television, going for short walks and talking to her friends and family on the telephone. She has lost all of that and has undoubtedly suffered a dramatic decline in her quality of life.

51. Dr. Day and Dr. Goldenberg have both provided opinions that Mrs. Morosky life expectancy has been shortened. I accept the expert opinion of Dr. Day that Mrs. Morosky is likely to live for a relatively short period, until November 2013, attaining an age of roughly 82.7 years. This conclusion was not seriously challenged and is consistent with the evidence of Dr. Goldenberg, the only other source of expert evidence regarding anticipated life expectancy.
52. In assessing Mrs. Morosky's general damages, I must contrast her existing circumstances with her pre-existing health and quality of life. I must also consider her likely living conditions if she had not been ill with Listeriosis. I accept the evidence of Dr. Goldenberg that Mrs. Morosky was unlikely to remain at home for longer than an additional year before requiring institutional care. Consequently, some of the independence and enjoyment of life that she has lost, notably the companionship of her son and dog, would have been lost to her within a year's time in any event.
53. Mrs. Morosky had been living with Alzheimer's, a progressive form of dementia, for several years. I accept the evidence of Dr. Goldenberg that she would have continued to decline without her intervening illness. I also accept his assessment that her decline had previously progressed at a modest rate and that she likely would have become even more stable with proper nursing care. Nonetheless, Mrs. Morosky demonstrated evidence of ongoing decline substantially before she became ill with symptoms of listeriosis. For example, she began to have issues of

urinary incontinence that required that she wear adult diapers night and day. Although I accept that she may never have deteriorated to her current level of impairment, I nonetheless consider it appropriate to take into account that there would have been some inevitable deterioration in her mental and physical condition.

54. According to Dr. Goldenberg, Mrs. Morosky also had evidence of a previous stroke, which was followed by significant cognitive decline. Moreover, he noted that she had multiple risk factors for cerebrovascular disease. On admission to hospital, medical personnel observed that Mrs. Morosky was malnourished, with extremely poor diabetic control and medication compliance. Her blood sugars were grossly out of control and Dr. Goldenberg was of the view that this had likely been true for several months. Mr. Morosky acknowledged that his mother had not been taking her medication for several months, although he thought that she was managing.
55. Based on all of the available medical evidence, I find that Mrs. Morosky's diabetes was poorly controlled and her nutritional status was deficient prior to her admission to hospital in August 2008. Mr. Morosky testified that his mother exhibited some initial symptoms of illness but did not see a doctor or receive medical attention until after she was in acute distress. Mr. Morosky was candid in his evidence and acknowledged that he experienced a great deal of difficulty obtaining Ontario health care coverage for his mom. It was only after she was admitted to hospital and doctors intervened that she received OHIP coverage.
56. David Morosky's dedication to his mother is obvious and I do not question his sincere desire to care for his mother. Unfortunately, he experienced some notable difficulty in managing her care. Dr. Goldenberg expressed the opinion that Mrs. Morosky was unlikely to have remained reasonably stable for more than a year *unless* she had been placed in a care-giving facility, even in the absence of listeriosis. David has demonstrated real reluctance to place his mother in

institutional care. I do not doubt that this is a reflection of his devotion to his mother. Nonetheless, given this reluctance, I find that there was a real likelihood that Mrs. Morosky would not have been placed in a care giving facility and that she therefore would not have remained stable. Mrs. Morosky had a number of very serious medical conditions that were poorly controlled and not properly medicated. Although Listeriosis accelerated her decline, I find that she was also at risk for other major medical emergencies that would likely have led to significant cognitive and physical impairment. I must take all of these factors into account in assessing Mrs. Morosky's damages.

57. Counsel for Mrs. Morosky relied on a number of cases in support of his submission that Mrs. Morosky should be awarded \$240,000 – 245,000, representing 75% of the current cap, as general damages⁸. In my view, the facts in these cases are distinguishable from Mrs. Morosky's circumstances. The plaintiffs in both *Musselman* and *Arce* had been in reasonably good health prior to their injury and enjoyed an active, fully independent life. They were subsequently rendered quadriplegic, and Mr. Arce was also dependant on a ventilator. In *Matthews Estate*, Mr. Matthews had a number of pre-existing conditions, but was nonetheless leading a productive life, fully engaged professionally and personally.
58. Mrs. Morosky was neither independent nor in good health prior to her illness. She had a number of serious conditions that were poorly controlled and a progressive form of dementia. She was at significant risk for other medical emergencies and was unlikely to have remained at home for longer than an additional year. In all these circumstances, I consider \$200,000 to be an appropriate award of non-pecuniary damages.
59. I also consider an award of \$200,000 for general damages to be in excess of the amount that she would be awarded under the Grid. I do not accept Counsel's

⁸ *Musselman v. 875667 Ontario Inc. (c.o.b. Cities Bistro)*, [2010] O.J. No. 2325; *Arce (Guardian ad litem) v. Simon Fraser Health Region* [2003] B.C.J. No. 1516; and *Matthews Estate v. Hamilton Civic Hospitals (Hamilton General Division)*, [2008] O.J. No. 3972.

submission that Mrs. Morosky would be entitled to \$125,000 plus \$750 per day of hospitalization, for 161 days, from August 26, 2008 to the date of her discharge on February 2, 2009.

60. Under the settlement Grid, every claimant is entitled to a fixed amount of non-pecuniary damages based on their particular level of injury. Where their illness included admission to hospital, they are entitled to a further \$750 per day of hospitalization. In my view, the additional payment of \$750 per day was intended to recognize that acute illness that requires hospitalization is likely to represent a period of heightened pain and suffering. The set amount awarded at a given level of injury is meant to compensate for the general impact of the injury, whereas the further award for a period of hospitalization provides compensation for the additional physical and mental pain that would accompany treatment for acute illness in hospital.
61. The medical evidence in this case establishes that doctors determined that Mrs. Morosky was medically fit to be discharged from hospital on October 10, 2008, 45 days after she was admitted. Notwithstanding the treating physician's orders that Mrs. Morosky could be transferred to an extended care facility, she remained in hospital until a suitable long-term care placement could be arranged.
62. I do not consider the circumstances of Mrs. Morosky's stay after October 10, 2008 as warranting additional non-pecuniary damages under the Grid. Once Mrs. Morosky was cleared for discharge, although still technically in hospital, she no longer required hospitalization and could have been transferred at any time. For all intents and purposes, the period that she remained in hospital was not meaningfully distinguishable from her life after she was transferred to a long-term care facility. In my view, her need for long-term care, whether at Sunnybrook or elsewhere, would be compensated as part of her global award of general damages. It does not justify special recognition merely because some of this care was offered at Sunnybrook.

63. Based on my view of the proper interpretation of the Grid, Mrs. Morosky would only be entitled to \$33,750 for 45 days of acute treatment in hospital, plus \$125,000 for a total of \$158,750. I have already found that I am not bound by the amount of damages set out in the Grid, but I do consider it a useful guide in determining an appropriate award of compensation. In this case, I have determined that the Grid amount, as I have calculated it, would not adequately compensate Mrs. Morosky for her non-pecuniary losses and I have awarded a larger amount to reflect this inadequacy.
64. I turn now to the issue of future care costs. Ms. Voorberg recommended that a Personal Care Worker provide Mrs. Morosky with attendant care for 8 hours per day, 7 days per week. The recommendation for attendant care was endorsed by Dr. Goldenberg as “well warranted” and Dr. Derkach, the medical director at the facility where Mrs. Morosky resides, “strongly supported” the recommendation and considered 8 hours of care a “reasonable compromise”.
65. In awarding future care costs I must determine what expenses Mrs. Morosky would incur in order to be adequately cared for in the future. She is entitled to be fully compensated for her losses, however her expenses must be reasonable. Mrs. Morosky does not have to establish that she will actually incur specific expenses, it is sufficient to demonstrate that they are ‘reasonably necessary’ in her particular circumstances. Where appropriate, deductions for negative contingencies should be applied and the final amount must be discounted to reflect present value⁹.
66. Bearing these principles in mind, counsel for Mrs. Morosky argued that full time attendant care was reasonably necessary to provide Mrs. Morosky with adequate care of her physical and mental needs. Class Counsel suggested that there was

⁹ See Ken Cooper-Stephenson, *Personal Injury damages in Canada*, 2nd Edition. (Toronto: Carswell, 1996); *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; and *Graham v. Rourke*, [1990] O.J. No. 2314.

sufficient evidence to warrant some attendant care, however, that the amount of care should be carefully considered.

67. In making my determination I am mindful of the atypical nature of these proceedings. They are not adversarial in the traditional sense and the expert recommendations provided on behalf of the claimant have not been tested in the usual manner. There was no rigorous analysis of the level of care that was provided by the full time staff at Mrs. Morosky's residence or much precision in the calculation of how many hours Mrs. Morosky requires attendant care. Indeed, the report suggests that attendant care would be beneficial but does not provide much detail of the relative benefit of providing 8 hours care, as opposed to a lesser or greater amount.
68. In any event, I accept that Mrs. Morosky is totally dependant on others for all of her needs and that they might not always be fully met in a timely manner by the permanent staff at her residence. I also accept the opinion of Ms. Voorberg, and Drs. Goldenberg and Derkach that Mrs. Morosky would benefit from one on one stimulation, from the ability to go outside and to occasionally visit her son David. Hiring a Personal Care Worker to attend to Mrs. Morosky is necessary to achieve these objectives.
69. The difficult question is determining how many hours of attendant care is reasonable. I am not satisfied that 8 hours, 7 days per week is reasonably necessary. The evidence established that Mrs. Morosky was likely to be awake for 12 hours and that full time staff met all of her basic needs, including assistance as required at meals, toileting, dressing, bathing and administering medication. There was also some capacity onsite to provide recreational therapy, although only in a group setting, and physiotherapy. A full time attendant was recommended to provide social stimulation, access to brief offsite excursions and some measure of immediate, 1:1 personal care. Having regard to the level of care that Mrs. Morosky is already receiving, her level of cognitive awareness and the

- purpose of providing attendant care, I consider 5 hours of care, 7 days per week, to be appropriate. In my view, this is reasonable and will provide the additional opportunities for stimulation, excursions and additional care as recommended by Ms. Voorberg.
70. I would also permit an amount for transportation so that Mrs. Morosky can visit her son. Ms. Voorberg recommended 1-2 visits per year for a total of 18 visits at a cost of \$80.00. Mr. Morosky has said that he thinks it would not be practical for his mother to visit him in the late fall, winter or early spring. I would therefore allow recovery for 9 visits per year, from late spring through the early fall, at a rate of \$80.00 per round-trip.
71. In light of Mrs. Morosky's care prior to August 2008, I find that it is unlikely that Mr. Morosky would have placed Mrs. Morosky in long-term care unless she experienced a dramatic decline. I have also determined that there was a real possibility that Mrs. Morosky would have experienced a medical emergency as a result of her poorly controlled diabetes and hypertension, her pharmaceutical non-compliance and poor nutritional status. I would reduce the amount of future care costs by 10% to account for these negative contingencies.
72. I would allow all of Mrs. Morosky's claims for out of pocket expenses, including those that were incurred to assist me in the determination of her claim. The current total of receipted expenses in this regard is \$18, 083.49, which is allowed in full. At arbitration counsel suggested that the present value of my award for future care costs should be determined by the experts previously retained in this matter. I agree and would allow the cost of that expert assessment to be added to my award for out of pocket expenses.
73. I further allow the receipted amounts for the cost of Mrs. Morosky's wheelchair, the cost of long-term care at Sunnybrook hospital and the cost associated with the initial monthly residence fees at the Ukrainian Canadian Care Center, which

- included fees for chiropody. Dr. Goldenberg has provided his opinion that Mrs. Morosky would likely have required full time residential care within one year of her illness, even if she had not contracted Listeriosis, and I therefore limit her recovery accordingly. I would not allow any additional cost for residential care, including the cost of a chiropodist, beyond July 31, 2009.
74. David Morosky is also entitled to compensation for his loss of companionship as a result of his mother's illness. In assessing Mr. Morosky's claim, I note that his claim is restricted to damages for loss of companionship. Given his mother's limited cognitive abilities before her illness in August 2008, counsel has conceded that she was not providing David with care or guidance. Nonetheless, David's loss is significant. He and his mother had lived alone together for approximately 2 years before her death and she was a major source of companionship for him.
75. The cases provided to me¹⁰ have focused largely on the loss of care, guidance and companionship that an adult child suffered upon the death of their parent. I appreciate that Mrs. Morosky's ability to provide companionship for her son has been dramatically compromised, however, it has not been eliminated. David still spends time with his mom, wishes to have her visit him and obtains some measure, albeit limited, of continued companionship from their ongoing relationship. Consequently, I do not consider it appropriate to award damages in the same range as would be awarded upon the death of a parent.
76. Counsel for Mr. Morosky suggested that I should award \$40,0000 to Mr. Morosky for his loss of companionship. In my view, this exceeds the range that would be awarded in similar cases. Although there are cases where adult children have been awarded an amount comparable to that suggested by counsel, they have by and large been in circumstances where the parent has died, the parent was relatively young and would have provided many years of future care, guidance

¹⁰ *Musselman, supra, Plourde v. Steele*, [2003 O.J. No. 3711; *Singleton v. Leisureworld Inc. (c.o.b. Leisureworld Caregiving Centres)*, [2008] O.J. No. 1447; *Fish v. Stainhouse*, [2005] O.J. No.4575; *Hechavarria v. Reale*, [2000] O.J. No. 4228; and *Robinson Estate v. Hogg*, [2005] O.J. No. 2658.

and companionship or had previously provided an exceptional degree of care, guidance and companionship. I am also mindful that the Grid amount in these circumstances would be \$10,000 for loss of care, guidance and companionship and that \$30,000 is awarded under the Grid to children of claimants who died.

77. In assessing Mr. Morosky's claim, I consider a number of factors to be relevant to his loss. He is single, without children or siblings in Toronto and he and his mother spent considerable time together before her illness. She was the focus of his non-working life and her dramatic decline affected him deeply. He continued to visit her daily while she was in the hospital and has continued to regularly visit her after she was transferred to UCCC. He believes that she recognizes him, however, their current level of interaction is extremely limited. There was some question as to whether Mrs. Morosky actually recognizes her son, but there is no doubt that she no longer provides much meaningful companionship.
78. I must also take into account that David and his mother were only likely to have continued to live together, and therefore enjoyed daily companionship, for another year. Mrs. Morosky was likely to have moved to a long-term care facility by 2009 and would have continued to experience some cognitive decline. She was also medically frail and at risk for greater deterioration.
79. Taking into account all of these factors, I consider it appropriate to award Mr. Morosky an amount greater than that provided under the Grid, however, I do not consider his circumstances to be analogous to those where adult children received an award in the range that his counsel has requested. I would award \$20,000 to David Morosky for loss of companionship arising from the complications that his mother sustained after contracting Listeriosis. I would also allow recovery of all of his out of pocket expenses. The amount claimed was \$4406.50, for parking expenses at Sunnybrook hospital¹¹, two days of lost income¹² and mileage for visits to his mother up to July 31, 2009¹³.

¹¹ \$924.50, as claimed.

Order

80. I therefore find that compensation is payable as follows:

- a. \$200,000 as general damages for pain and suffering;
- b. Present value, to be determined by experts retained by counsel, of Mrs. Morosky's future care costs based on 35 hours per week of attendant care from a Personal Support Worker at the rate of \$27.32 per hour and 9 round trips to David's home, at an annual cost of \$720. Future care costs are to be calculated from the date of this award until November 1, 2013, less 10% for negative contingencies;
- c. \$5088.91, for the long term care cost at Sunnybrook hospital;
- d. \$18,083.49 for costs associated with arbitration, plus reasonable, additional costs to determine the present value of Mrs. Morosky's future care costs;
- e. \$8600.91, for the monthly cost at Ukrainian Canadian Care Center from February 2, 2008 to July 31, 2009;
- f. \$986.50, for wheelchair expenses;
- g. \$20,000 for loss of companionship for David Morosky;
- h. \$4,406.50, to David Morosky for his additional expenses.

81. The above noted award of compensation is inclusive of all pre or post judgment interest. I will remain seized in the event that an issue arises with respect to the subrogated claim of the applicable provincial health authority.

Dated February 15, 2011:



Reva E. Devins, Arbitrator

¹² 16 hours at \$23.94 per hour = \$383.04.

¹³ \$2503.66, as claimed for transport to Sunnybrook and \$595.30, (21.2 km @ .54 from February through July 31, 2009), for transport to UCCC.