

NOVA SCOTIA COURT OF APPEAL

Citation: *G.M. v. Nova Scotia (Utility and Review Board)*, 2003 NSCA 3

Date: 20030108

Docket: CA 181857

Registry: Halifax

Between:

G. M.

Appellant

v.

Nova Scotia Utility and Review Board

Respondent

Restriction on publication: Publishers of this case please take note that s. 486(3) of the *Criminal Code* applies and may require editing of this judgment or its heading before publication.

Judges: Roscoe; Freeman and Bateman, JJ.A.

Appeal Heard: December 9, 2002, in Halifax, Nova Scotia

Held: Appeal allowed with costs per reasons for judgment of Freeman, J.A.; Roscoe and Bateman, JJ.A. concurring.

Counsel: Appellant in person
Edward A. Gores, for the Respondent

Reasons for judgment:

- [1] This is an appeal by a victim of childhood sexual abuse from a decision of the Nova Scotia Utility and Review Board limiting her future recovery under the *Victims' Rights and Services Act*, RS.N.S. 1989, c. 14 to payment of gymnasium fees found to be a necessary means of improving her seriously impaired health. She is self-represented on this appeal in which she is seeking other health related services, primarily massage therapy in the form of physical massage and hydro massage or colonics.
- [2] The *Victims' Rights and Services Act* was substantially amended in 2000 and now provides only a limited right to counseling. The application of the appellant, G. M., was made before the amendments when the *Act* provided a much broader range of victims' services, which were supported financially by a surtax on fines for criminal offences. The *Act* provides for a right of appeal from a decision of the Director of Victims' Services to a person or tribunal empowered by s. 11L(3) to "make any decision that the Director could have made." *Regulations* under the *Act* require that the appeal be heard by the Nova Scotia Utility and Review Board, which has broad powers under s. 7 to receive evidence not necessarily admissible in a court of law and to determine its own procedure. An appeal to the Board is therefore essentially a trial *de novo*. Ms. M.'s appeal from the Director's decisions was heard by Board Member Wayne D. Cochrane. This appeal from his decision is limited to questions of law alone by s. 11L (4) of the *Victims' Rights and Services Act*. A similar right on questions of law and jurisdiction is provided by s. 26 of the *Utility and Review Board Act*.
- [3] The appellant was sexually assaulted by her stepmother's brother while living in her father's home between the ages of nine and 14. She had repressed the experiences and was a student living on her own when she encountered her younger half-brother who was then living in the street; she took him home with her and attempted to protect him. The ensuing investigation brought the sexual abuse to light and the perpetrator was eventually convicted and sentenced as the result of court proceedings between 1992 and 1996. The long proceedings had a devastating effect on Ms. M.'s health, although she successfully completed university and began a career in social work as a counselor.
- [4] A lengthy correspondence between Ms. M. and the Victims' Services Division of the Criminal Injuries Compensation Program of the Department of Justice, its counsel, and the Board, appears to have begun with a letter to her from Joanne Mariott-Thorne, Acting Director of Victims' Services dated

November 26, 1996. In that letter Ms. Mariott-Thorne denied her request of compensation for physiotherapy for neck problems, citing lack of evidence, and advised her of her right to appeal to the Board.

- [5] Ms. M. made a number of requests and appeals, meeting with limited overall success, during which she built up a dossier with Victims' Services including letters of medical and related opinion and copies of published articles. The present appeal is the culmination of her whole relationship with Victims' Services, for the Board took jurisdiction over her entire file in addition to the several specific issues under appeal in an attempt to bring it to a conclusion.
- [6] A consistent theme of the evidence Ms. M. assembled is that the childhood trauma of sexual abuse commonly finds expression in both psychological and physiological symptoms in later life. In a "Statement of Support for G. M." prepared by Timothy R. Walker, Ph.D. dated July 17, 1997, the psychological understanding of the relationship between trauma and symptoms was explained in some depth. In brief excerpt, he stated:

One stressor which would very likely bring back the extraordinarily tense muscles of the original trauma is the fear and anticipation of confronting the perpetrator in a court of law.

. . . I assessed that her reaction to the trauma of childhood sexual abuse included this kind of somatic reaction especially occurring in the postural muscles supporting her spine. . . . Since Victim Services provides the victim with psychological counseling for the negative aftereffects of the abuse it seems only natural that they could also provide for physiotherapy and massage therapy to correct the effects of trauma in the physical body.

- [7] The medical evidence assembled by Ms. M. included several letters from Dr. G. L. R., her family physician of some years' standing. In a letter dated August 9, 1999, he reviewed his relationship with her and Victims' Services and stated his diagnosis and conclusions as follows:

You have requested from G., a letter from her physician in regards to injuries that have resulted from her past sexual abuse. G. has been a patient of mine, as you know, for a number of years and we have gone through the process of review by the Criminal Injuries Compensation Program and I had been interviewed in 1997. Through that process, it had been found that G. had injuries that had resulted directly from her sexual abuse as a child, and the services that she required through physiotherapy and massage therapy were required because of this past sexual abuse. It is my feeling, however, that G. had continued to suffer neck and

back problems stemming from this and I had requested that she continue on with some physiotherapy or gym program along with massage therapy as needed in order to cope with, and to get along to a functional level in society. . . .

With the treatment program of massage therapy and an active gym program, I do feel G. can continue to do her best at all aspects of activity.

- [8] Dr. R. summarized his views in a letter dated November 14, 2000, following which counsel for the Director required independent evaluations in mid-2001. These were conducted by Dr. Judith H. Gold, a psychiatrist, and Dr. Donald Haigh, an occupational health consultant. Their conclusions were consistent with Dr. R.'s.
- [9] Dr. Gold diagnosed her in a report dated July 6, 2001, with post-traumatic stress disorder, dysthymia-chronic, with reported multiple allergies and sensitivities, fibromyalgia, headaches and weight gain. Stressors included the ongoing dispute over payment for her treatments and the symptoms of post traumatic stress disorder.
- [10] Dr. Gold stated:

In my opinion, Miss M.'s condition is related directly to the sexual assault. Her presentation of post-traumatic stress disorder (PTSD) is a result of the childhood sexual abuse and such a clinical presentation is well and widely documented in the professional literature.

Furthermore, such a presentation is not uncommon when a survivor of sexual assault is involved in legal proceedings before having dealt fully psychologically with the effects of the sexual abuse. . . . In my opinion, this legal proceeding and the concomitant revelation publically and personally of the details of the abuse was premature psychologically for her and lead (sic) to the development of anxiety, muscular tension, and now PTSD. Until then, her history and the documentation reveal that she had used denial and dissociation as defense mecha[n]isms that allowed her to function as a student, parent and worker. The court case removed these defenses as she could no longer deny or ignore the abuse as she had to disclose it publically. Having to talk about the abuse also no longer allowed her to dissociate herself from the experience and she then experienced severe anxiety as the feelings associated with her experiences of sexual abuse flooded her consciousness. When this occurs, a person must develop other defenses in order to deal with the emotional pain of the memories being experienced. Physical symptoms are frequently then manifested as expressions of this pain and the mind's unconscious efforts to contain the pain.

- [11] Dr. Haigh also examined Ms. M. at the Director's request and provided an independent medical evaluation dated September 21, 2001. He too

diagnosed fibromyalgia, and linked it causally with the childhood sexual abuse. He also diagnosed Multiple Chemical Sensitivity/Idiopathic Environmental Intolerance, which he described as a “poorly defined clinical entity” and found it more difficult to link to the sexual abuse.

[12] The Board found as a fact that a causal connection had been proved between the childhood sexual abuse and both fibromyalgia and the environmental illness.

[13] With respect to treatment, Dr. Gold stated:

In my opinion, she must continue with the psychotherapeutic treatment she is receiving. This is primary. The physical therapies are concomitant and necessary for treatment of her physical symptoms of tension. I cannot comment on the naturopathic remedies being used”

Treatment of PTSD following sexual abuse is successful but usually lengthy. It seems that G. is beginning to respond to psychotherapeutic treatment and will probably, in my opinion, require such therapy for several more years. Her need for concomitant physical therapies should begin to decrease as she comes to terms with her abuse. I cannot predict how long this will take. However, a decision about financial responsibility for the treatments will play a role in the situation as this matter is an additional and prominent stressor that interferes with her psychological treatment. [Emphasis added.]

[14] Dr. Haigh said he deferred to Dr. Gold’s opinion concerning the psychiatric treatment, and stated:

The best treatment for fibromyalgia is physical activity. Ms. M.’s current gym program is ideal therapy and should be continued for at least the next 12 months. Massage may be beneficial, but is not strongly supported by scientific research into the treatment of fibromyalgia. The decision for massotherapy should be made on a case-to-case basis. In Ms. M.’s case the greatest therapeutic benefit seems to come from her gym program and her counseling sessions; massotherapy should be considered as a secondary treatment modality.

I will offer no opinion as to the required treatment of MCS/IEI. . . .

Ms. M. has been off of work for approximately 3 years. The probability of a successful return to work regardless of the medical reason for absence is well below 50%. Her prognosis will depend on her response to joint physical/psychological therapy over the next 12 months. If she succeeds in dealing with her current appeal and starts “moving on” with her life, then the prospect of recovery becomes better.

- [15] Ms. M. is obviously an intelligent person who recognizes that ultimate responsibility for her recovery rests in her own hands, but she considers herself entitled to more help than she has received, specifically from Victims' Services with respect to massage therapy. She has seen this in personal terms as a contest between herself and the Acting Director and her representatives, which has added to her stress level.
- [16] Since her illnesses developed she has placed much reliance on unproven alternative remedies, many related to her environmental sensitivity. Neither Dr. Gold nor Dr. Haigh offered opinions on these. However she has developed a dependency on physical massage for pain throughout her body. She considers physical massage important to condition her for getting the most out of her gymnasium exercises.
- [17] It appears that Ms. M. includes hydro massage or colonics in the term "massage therapy" and considers this necessary to provide her with bowel function. However there is little medical or psychological evidence in support of this modality, and I would agree with the Board that its necessity has not been proven. References to massage therapy in the expert opinions is consistently confined to physical massage, and I would adopt this terminology.
- [18] Mr. Cochrane found she had received \$1,000 for counseling from the Director in 1994 and a further \$1,000 in 1996, "bringing the total award to \$2,000 – which the Director stated was the maximum for counselling." In a 1997 appeal to the Board from the Director's refusal of certain of her requests the Board ordered that she be reimbursed \$2,168 for past expenses of physiotherapy services and some massage therapy, and for the cost of a gymnasium membership:

The order required the payment of the gymnasium expense, with two conditions: first, that her physician agrees that it is of help to her; second, that it is to terminate when her son reaches the age of 19 years, leaves her care, or dies, whichever occurs first. Her son will be 19 in 2002, meaning that the compensation for the gymnasium membership ordered by the 1997 Board decision will terminate at that time.

The Director took the view that the 1997 order did not provide for payments for continued massage therapy into the future, a position which Ms. M appealed to the Board. That appeal was dismissed (in 1999).

- [19] It is not clear why the benefits she received were contingent on her son living with her, but that decision is not under appeal to this court.

- [20] In addition to the compensation she has received for counseling, massage therapy, and gymnasium fees, the Acting Director has offered Ms. M. \$12,000 as a lump sum for lost employment income. She had not worked for the three years preceding the Board hearing in May, 2002. She acknowledged her acceptance of that amount, but it had not been paid prior to the Board hearing and was not an issue on appeal. In the course of the appeal hearing counsel for the respondent, in consultation with the Acting Director of Victims' Services, confirmed that the \$12,000 is still available and that the offer was not made, as Ms. M. thought, conditional upon her abandoning her appeal.
- [21] The Board found that she receives "just under" \$700 per month from a social assistance disability allowance from the Department of Community Services from which she must pay her rent, food and other expenses. In the course of her submissions Ms. M. placed the figure considerably lower. Community Services also pays for her medical services not covered under the federal and provincial medical plan. Presumably this would include psychiatric counseling, but it does not include massage therapies. With rare exceptions, the Department does not pay for the alternate therapies and remedies which Ms. M. considers essential with respect to her environmental sensitivity. However when her health permitted the Department allowed her to accept several brief periods of low-paying employment specifically to raise funds for paying for some therapies.
- [22] At one point she worked three months in exchange for massage therapy and colonics, living in T. in the home of the woman who provided them and helping with her business. This ended because her son had to remain in Halifax attending high school.
- [23] At one point Ms. M.'s father made an undemanding position for her in his ... office (*editorial note- term removed to protect identity*) and provided her with use of a vehicle she needed for her massage treatments, but Ms. M. harboured resentment against him from the period when the sexual abuse occurred in his home, and the arrangement was discontinued.
- [24] The Board stated that it viewed Ms. M.'s case in the context of the legislation prior to the amendments in 2000. It cited *Flynn v. Nova Scotia (Criminal Injuries Compensation Board)*, [1988] N.S.J. No. 104 (N.S.C.A.) (Q.L) as authority that the burden of proof the appellant must meet is the balance of probabilities. *Sutherland v. Nova Scotia (Director of Victims' Services)*, [1998] N.S.J. No. 287 (N.S.C.A.) (Q.L) was cited as authority for

the broad discretionary authority exercised by the director. Mr. Cochrane stated:

The fact, then, that a person may have been injured by a crime does not automatically mean that the person is thereby “entitled” to compensation which may be available under the **Act**. . . .

- [25] He noted that Ms. M. had appealed from specific decisions of the Director but found that:

. . . [T]he Act permits the Director (and therefore the Board) to vary an award as it thinks appropriate, on the basis of new evidence or a change in circumstances, and also on the basis of “any other matter” it considers relevant: **s. 11J(2)**. In the present case, this means, in the Board’s judgment, that it can consider the possibility of making an award in relation to matters other than those raised explicitly, or even impliedly, in Ms. M’s appeals, including (for example) the costs of colonics or of the gymnasium membership.

- [26] Having concluded that a crime had been committed which was causally related to Ms. M.’s symptoms, but that this did not automatically entitle the appellant to compensation under the *Act*, Mr. Cochrane stated the issue as follows:

Instead, the Board concludes it “must” – not just “may” – take into account all such circumstances as it considers relevant in making its decision with respect to an award. Having done so, the Board then has the duty to exercise its discretion (within the overall scope of the **Act**) to decide whether or not to make an award at all (the Board *may*, rather than *must*, award compensation, as the court in **Sutherland** put it), and, if so, to decide the type and amount of award.

Analysis

- [27] In the *Sutherland* case Justice Cromwell drew attention to the distinction between the role of the Board and of this court in Victims’ Services appeals:

. . . [T]he appeal to the Board provides a broad review of the Director’s decision. For the purposes of this appeal, it has been assumed that the Board possesses the same powers on appeal as the Director had in considering the claim.

This broad review on appeal to the Board is to be contrasted with the narrow scope of the further appeal from the Board to this Court. This appeal, provided for by s. 30 of the Utilities and Review Board Act, S.N.S. 1992, c. 11, is limited to questions of law and jurisdiction. Findings of fact by the Board within its jurisdiction are “binding and conclusive”: s. 26. The Board must be correct on

questions of law or jurisdiction, but the role of this Court in relation to its factual findings is limited to errors of fact that are “. . . so egregious as to amount to errors of law”: *Nova Scotia v. Research Island AG* (1994), 132 N.S.R. (2d) 156 at 158.

- [28] There appears to be little practical distinction between errors so egregious as to amount to errors of law and the more familiar standard of patent unreasonableness. Findings of fact by the Board are by either description of the standard entitled to a high level of deference.
- [29] The broad discretion enjoyed by the Director, and in appeals such as this, by the Board, is not an unfettered discretion. It must be exercised judicially, not arbitrarily, and responsively to the evidence.
- [30] In *Sutherland Cromwell, J.A.* dealt with the disallowance of future medical costs as follows:

The medical and pharmaceutical award includes an amount for certain medical costs [suppositories, ducolax and cranberry pills] for a period when they were not covered. The Applicant is seeking an award to cover these costs in the future. The Acting Director’s position is that they are costs which may be recoverable from the Department of Community Affairs (sic).

As noted, s. 11E(b) of the Act requires deductions for any benefit “received or to be received . . . in respect of the injury.” The Board did not address this question further in its reasons, but did not make an award for these items. Although not stated very clearly, the Board must have concluded from the material before it that these costs were recoverable from another source. This is a question of fact on which the Board’s determination is protected by the privative clause in s. 26 of the Utility & Review Board Act. I am not persuaded that the Board’s conclusion on this factual determination was so egregious as to amount to an error of law. If in fact these amounts are no longer recoverable, the applicant may apply to the Director to vary the award pursuant to s. 11(J) of the Act. (Emphasis added)

- [31] It is clear from that passage that this court in *Sutherland* did not recognize that the Board’s discretion was so broad as to permit it to refuse proven medical expenses without reasons. That is, upon proof of the necessity of medical expenses, the Board should have exercised its discretion and ordered that they be paid for, unless there were clear reasons for not doing so. The court assumed, despite the Board’s unclear language, that medical expenses were declined because they were recoverable from another source, the Department of Community Services.
- [32] Section 3(1) of the *Victims’ Rights and Services Act* provides:

3(1) A victim has

(a) the right to be treated with courtesy, compassion and dignity and with respect for the privacy of the victim;

(b) the right to access to social, legal, medical and mental health services that are responsive to the needs of the victim . . .

[33] Section 11A(1) creates the discretionary authority of the Director:

11A(1) . . . [T]he Director, on application to the Director in accordance with the regulations and on consideration of such evidence as the Director may require, may, as the Director considers proper, award compensation to

(d) the person killed or injured or that person's estate.

[34] Section 11C provides

11C Compensation may be awarded for

(a) expenses actually and reasonably incurred or to be incurred as a result of the injury or death of a person;

(b) pecuniary loss or damages incurred by an injured person as a result of total or partial disability affecting the person's capacity for work. . . .

[35] Section 11G caps the award for the injury or death of one person at:

(a) in the case of lump sum payments, thirty thousand dollars; and

(b) in the case of periodic payments, one thousand dollars per month.

[36] Awards are subject to *Regulations* made under the *Act*:

2(3) An application for compensation shall be accompanied by receipts for expenses and other documentation or reports as the Director may require to substantiate the claim.

5(1) For the purpose of S.11C of the Act, the amount of compensation awarded shall be in accordance with the Table of Prescribed Compensation in Appendix "A" of these regulations.

Appendix "A"

Table of Prescribed Compensation

1. Medical and pharmaceutical expenses – actual cost for necessary services not covered by medical or supplementary medical insurance plans.

...

3(1) Individual counselling – \$65.00 per hour for counselling to a maximum of \$2,000.00 by a counsellor approved by the Director over a maximum period of five years from the time of award or as specified by the Director.

...

4. Travel costs for attending medical appointments or counselling shall be paid in accordance with policy guidelines established by the Director.

...

7. For the purpose of calculating compensation pursuant to Section 11C(b) of the Act, compensation for loss of income, wages or salary up to a maximum loss of \$1,000.00 per month less any income or income supplement, salary insurance, sick leave benefits, social assistance or payment of a similar nature received from any source and the maximum amount payable by periodic payments for loss of income shall not exceed \$12,000.00 in total periodic payments to any one applicant.

- [37] The *Regulations* establish a necessity test for providing compensation for medical services such as massage therapy. Necessity must be considered in the context of the *Act*, which in s. 3(1)(b) establishes a right to compensation for medical and mental health services responsive to the needs of the victim. In this case the victim is struggling with symptoms of post traumatic stress syndrome found by the Board to have been caused by childhood sexual abuse, and it is the mandate of Victims' Services to make available to her the treatments she needs to help her get better. Necessity in the context of the *Act* is made out to the civil standard.
- [38] If the test were merely a subjective one, her evidence before the Board and her submissions to this court were both eloquent and passionate on the point. She considers her ongoing therapies urgently necessary to her recovery, and a matter of "life and death" when her symptoms lead her to contemplate suicide. I have no doubt as to her sincerity.
- [39] Unfortunately for her, many of her therapies, including colonics, are not supported by medical evidence before the Board because they are

scientifically unproven. Before accepting a treatment as necessary, the Board, and the Acting Director, did not err in requiring objective evidence in the form of opinions of duly qualified medical practitioners. However with respect to physical massage, that evidence was provided by Drs. R., Gold and Haigh. The Board clearly accepted the evidence of Drs. Gold and Haigh and made no finding adverse to the credibility of Dr. R..

- [40] While the Board did not specifically refer to Dr. R.'s evidence in its decision, he was Ms. M.'s family doctor for many years and he was familiar with her problems. His report is the principal evidence by a duly qualified medical practitioner submitted to Victims' Services by Ms. M. acting on her own behalf. His letter to Victims' Services Division dated November 14, 2000, preceding by a number of months the Director's referral of Ms. M. to Drs. Gold and Haigh for independent medical evaluations, clearly and concisely stated Ms. M.'s need for physical massage. Dr. R.'s letter states in its entirety:

G. has continued to be seen by myself and Dr. Beresford and continues to struggle with fibromyalgia. The fibromyalgia has certainly stemmed from her childhood sexual abuse problem and it has been asked of me to give further medical evidence that she continues to have problems and would continue to require massage therapy in order to help this out. I am not sure what kind of evidence is required in order to convince you that G. continues to have this problem. Her fibromyalgia certainly is present and fibromyalgia usually is precipitated by an event which, in G.'s case, is her childhood sexual abuse. Fibromyalgia is also an ongoing problem and because of this G. will continue to suffer into the future from the fibromyalgia. The only thing that appears to help her through these situations is massage therapy and continuing to be active.

G. certainly continues to be active and I have recommended that she continue to pursue her massage therapy. I have no doubt that this will continue to go on for the rest of G.'s life. I am not sure what further information you require from me but it is my opinion that G. will continue to require these treatments.

- [41] His views were not contradicted but broadly concurred with in the two independent evaluations. The need for massage therapy was confirmed by Dr. Gold in the passage from her report quoted above. I will repeat the relevant portion here for convenience:

In my opinion, she must continue with the psychotherapeutic treatment she is receiving. This is primary. The physical therapies are concomitant and necessary

for treatment of her physical symptoms of tension. I cannot comment on the naturopathic remedies being used

Treatment of PTSD following sexual abuse is successful but usually lengthy. It seems that G. is beginning to respond to psychotherapeutic treatment and will probably, in my opinion, require such therapy for several more years. Her need for concomitant physical therapies should begin to decrease as she comes to terms with her abuse.

- [42] Dr. Haigh expressed his support for massage therapy more conservatively in the portion of his report quoted above, which I will also repeat here for convenience of reference.

Massage may be beneficial, but is not strongly supported by scientific research into the treatment of fibromyalgia. The decision for massotherapy should be made on a case-to-case basis. In Ms. M.'s case the greatest therapeutic benefit seems to come from her gym program and her counseling sessions; massotherapy should be considered as a secondary treatment modality.

- [43] In the context of the *Act* it is my view that the medical evidence proves that physical massage is a necessary response to the needs of Ms. M. beyond a balance of probabilities. It is reasonable and remarkably consistent. Importantly, there is no finding of fact by the Board that the civil standard of proof is not met on this issue.
- [44] Only when the issue is stripped to its barest essentials can massage be considered merely as a specific response to fibromyalgia. It is intended to relieve stress so other treatments, including the important gymnasium exercise, can be more effective. It is clear from the evidence that post-traumatic stress syndrome, when the trauma is childhood sexual abuse, presents a galaxy of interrelated symptoms requiring a multi-disciplinary approach and a variety of potentially overlapping therapies. Unlike many of the other therapies tried by Ms. M., physical massage comes with sound, if not scientifically impeccable, medical credentials and recommendations. Because both psychology and physiology are involved I would consider the evidence of Dr. Gold, a psychiatrist, entitled to as much weight on the question of the necessity of massage therapy as Dr. Haigh or a specialist in physical medicine.
- [45] The physical massage services in question have therefore, in my view, been shown to the civil standard to be "medical and mental health services that are responsive to the needs of the victim" pursuant to s. 3(1)(b) of the *Act* and to be "necessary" pursuant to s. 1 on the "Table of Prescribed

Compensation” under the *Regulations*. The Board did not make a finding of fact at variance with this statement, and in my view it could not have done so without ignoring or misapprehending the evidence. The necessary foundation for the exercise of the Board’s discretion to order compensation for Ms. M.’s massage treatment was therefore established by the evidence.

[46] The Board’s discretion is broad and it may refuse compensation for services when it is reasonable to do so, but, as counsel for the Acting Director conceded, it cannot exercise its discretion arbitrarily. Its reasons must be stated, and they will be entitled to deference from this court unless they are so insubstantial that they are egregiously erroneous.

[47] In explaining how he decided to exercise his discretion Mr. Cochrane stated:

The Board sees little evidence to persuade it to exercise its discretion to order the Director to pay for colonics. It does see more evidence in favour of massage therapy, but not sufficient in the circumstances of this case to, in the Board’s judgment, exercise its discretion to order payment for it. With respect to future treatment, Dr. G says that continuing with psychotherapeutic treatment is primary. Dr. G does say that the physical therapies which Ms. M wants are “necessary” to relieve physical tension, also saying that granting Ms. M’s wish that the Director be ordered to pay for these alternative therapies – i.e., allowing Ms. M to win her “ego” fight with the Director – would help reduce Ms. M’s psychological stress. Not just the report of Dr. G, but the report of Dr. H as well (however angered by that document Ms. M may have been) contain parts which could be used to justify the Board’s ordering compensation for further sessions of massage therapy.

While the Board is not unmindful of these and the other varying opinions found in the large amount of documentation filed with the Board in this matter, it notes, once again, that it is the Board which must, after taking into account the law, and all the circumstances which it considers relevant, exercise its discretion in the manner it considers just, in the somewhat unusual circumstances of this case. Ms. M has received extensive massage therapy and many colonics in the past. While these treatments have sometimes been sporadic, their frequency has also sometimes been quite high, and the cost not insignificant, with the results in the end being what Ms. M calls “pain free moments.” The Board considers that Ms. M sincerely believes that these therapies keep her alive; it also considers she very much wants to see the Director ordered to pay this compensation. . . .

Having reflected at length on the evidence before it (both oral and written), the legislation and the case law, the Board exercises its discretion as follows: the Board declines the appellant’s request for compensation respecting colonic treatment and massage therapy, and her request for compensation for expenses,

including travel, relating to the Environmental Health Centre; the Board grants the appellant's request that the Director continue to compensate her for the cost of a membership at a gymnasium.

- [48] It is not clear what standard of proof the Board was seeking when it concluded:

It does see more evidence in favour of massage therapy, but not sufficient in the circumstances of this case to, in the Board's judgment, exercise its discretion to order payment for it.

- [49] The Board did not conduct an analysis of the medical evidence respecting physical massage to determine whether it meets the civil standard for necessity, although in my view it does meet that standard. The Board's conclusion that the evidence does not permit exercise of its discretion in order to pay for the treatment is in my view wrong in law. If the Board is requiring that Ms. M. meet a higher standard in order to trigger the exercise of its discretion in her favour, this too would be an error of law. In any event, the body of evidence the Board has recognized in favour of massage therapy is nevertheless sufficiently massive as to require the Board to state reasons for ignoring it in order not to exercise its discretion in Ms. M.'s favour.

- [50] The Board frequently expressed concern that allowing Ms. M. compensation for massage therapy would allow her to "win her 'ego' fight with the Director." If that was among the Board's reasons for refusing compensation, I would reject it as irrelevant.

- [51] The following are the reasons given by the Board:

[I]t is the Board which must, after taking into account the law, and all the circumstances which it considers relevant, exercise its discretion in the manner it considers just, in the somewhat unusual circumstances of this case. Ms. M has received extensive massage therapy and many colonics in the past. While these treatments have sometimes been sporadic, their frequency has also sometimes been quite high, and the cost not insignificant, with the results in the end being what Ms. M calls "pain free moments."

- [52] The Board's repeated references to the breadth of its own discretion suggest that if it had not indeed decided its discretion was unfettered, it was dangerously close to adopting an arbitrary standard. In my view, given the evidence before it, the Board did err by exercising its discretion arbitrarily.
- [53] After ruling the necessity of colonics had not been proved, causing it to move on to a consideration of physical massage, colonics should not have

been reintroduced to colour consideration of the efficacy of physical massage. Doubts as to past effectiveness which resulted only in “pain free moments” have little relevance to the context of the issue before the Board, the need for physical massage as part of future treatment involving interrelated physiological and psychological approaches aimed at eventually overcoming post-traumatic stress syndrome. The cost of treatments is not stated in either the *Act* or the *Regulations* as a criterion to be considered, at least until the limit of compensation for one individual has been reached. In short, I would consider the reasons given by the Board to be mere comments on aspects of the evidence rather than reasons entitled to deference by this court. They are so insubstantial as to be egregiously erroneous, and do not support a judicial exercise of discretion that runs counter to the weight of evidence before the Board.

- [54] I would allow the appeal and return the matter to the Acting Director with the direction that in addition to the gymnasium fees ordered by the Board, Ms. M. be compensated for the reasonable future cost of physical massage therapy on a twice-weekly basis, together with the reasonable cost of travel expenses necessary to give her access to such treatment. This compensation shall begin as of January 23, 2002, the date Ms. M.’s appeal was heard by the Board. Compensation for gymnasium fees, physical massage and reasonable necessary travel shall continue so long as it is supported by medical evidence that such services are responsive to her needs from a duly qualified medical doctor acceptable to both the Director or Acting Director and Ms. M.. Total compensation shall not exceed the limits of compensation established by the *Act* and *Regulations* prior to the 2000 amendments, and all compensation claimed shall be supported by receipts or other documentation in accordance with the *Regulations*. This is a tribunal appeal in which costs are not as a rule awarded. However Ms. M., virtually without means, was self-represented and without the assistance of appointed counsel. I would fix her costs in the nominal amount of \$500 plus disbursements.

Freeman, J.A.

Concurred in:

Roscoe, J.A.

Bateman, J.A.