FEATURE

PUBLIC INTEREST IN THE DEVELOPMENT OF OCCUPATIONAL DISEASE POLICY FOR THE ONTARIO WORKERS' COMPENSATION SYSTEM

by James G. Heller

Occupational disease (OD) was recognized and compensated in Ontario on May 1, 1914, when the province's workers' compensation system was established by the *Workmen's Compensation Act* ("the Act").[1] Wording of the legislation was virtually unchanged from a draft version appearing in the 1913 final report of the Meredith Royal Commission on Laws Relating to the Liability of Employers.[2] Meredith's legislative recommendations were based on four principles:

Meredith's Four Principles for Ontario's Workers' Compensation System

1. *No-fault:* Negligence was disregarded entirely (unless injury solely attributable to serious and wilful misconduct of workman)
2. *Income replacement:* Based on need – inability to earn full wages for more than seven days
3. *Employers' liability:* Cost of compensation absorbed by all employers who were collectively liable – exception: municipal corporations were individually liable
4. *Non-political, independent administration:* Sole jurisdiction of Workmen's Compensation Board ("the Board") – non-political, independent body – no appeal to courts.

Through the 20th century, those principles have provided a just and equitable foundation for the compensation of injuries, accidents and diseases in Ontario's workplaces. While the initial legislation recognized six ODs at first (anthrax; lead, mercury, phosphorus and arsenic poisoning or their sequelae; and ankylostomiasis), this number steadily grew with time, as did the number and size of OD awards.

An amendment to the Act in 1947 expanded the definition of OD and access to compensation. As the 1984 report of the Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario (RCA) pointed out, "This [1947] amendment greatly liberalized industrial disease compensation policy in Ontario. It also vested the Board with the broad discretion it possesses to the present day."[3]

From that time onward, the Board rather than the legislature enjoyed the power to recognize and compensate OD in the province. During the 1970s and '80s, the Ontario government responded to growing concerns about historical problems in uranium mining and asbestos manufacturing by establishing two royal commissions. The 1976 landmark report of the Royal Commission on the Health and Safety of Workers in Mines[4] spurred passage of the province's first occupational health and safety (OH&S) legislation. A recommendation in the 1984 RCA report[5] called for the creation of the Industrial Disease Standards Panel, an arm's-length agency of the Board with the mandate to investigate OD in the province and make policy recommendations to the Board. The 1983 report on workers' disability by Professor Paul Wieler of Harvard University made a similar recommendation.[6]

Major legislative reforms to workers' compensation in 1985 led to the creation of the panel and another arm's-length agency of the Board, the Workers' Compensation Appeals Tribunal, later renamed the Workers' Safety and Insurance Appeals Tribunal. The tribunal provides an independent

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and final level of appeal of claims for workers' compensation previously adjudicated by the Board.

The panel's independence was assured under the stewardship of its first two chairs, who had also chaired the above-noted royal commissions on mining and asbestos. Its policy recommendations to the Board from 1985–1990 exemplified not only the best internationally available scientific evidence, but also a recognition of the uncertainties in investigating historical ODs with little available exposure data. Its reports also reflected lively dissenting opinions, usually arising from the panel's labour members.

In the early 1990s, however, a reconstituted panel issued a succession of OD findings and recommendations for compensation that immediately raised concern in the employer community for their lack of scientific credibility. One report in particular called for compensation by scheduling of all lung cancer claims in Ontario hard-rock mining, despite the consistently high levels of smoking in this workforce. It appeared that the panel was now advocating compensation for chronic diseases relatable to lifestyle risk factors (i.e., smoking, obesity and diet, lack of exercise, etc.).

In 1994, the Ontario Mining Association estimated the impact of a policy to compensate all lung cancer cases in the Ontario hard-rock mining industry at just under $1 billion dollars.[7] The costs to all Ontario employers of compensating smoking-related diseases were even more staggering and threatened industry shut-downs. At the same time, parties of interest called upon government to initiate discussions on universal disability insurance coverage of benefits for all manner of disabled people (including not only workers' compensation, but also unemployment insurance sickness, CPP disability, veterans' disabilities, automobile insurance accidents, group weekly and long-term sickness and accident indemnity, private sickness and accident, retirement pension plans, criminal injuries, life insurance, tort liability and welfare).[8]

The Board's independence came into question when a panel member, who was also the director of OH&S for the Ontario Federation of Labour, was appointed vice-president of policy at the Board. This issue was magnified by the government's concurrent appointment to the Board of another panel member. These appointments represented a clear conflict of interest because the two agencies responsible for OD policy had a statutory arm's-length relationship. Also, a notable Canadian academic abruptly withdrew from the field of OH&S research because of constant interference with his work. A chill descended on other competent OH&S academics. This had the effect of further depleting an already small roster of Canadian expertise available to conduct independent scientific studies on occupational risk.

Some within the province's workers' compensation system argued that criticism of the panel's recommendations during this period was confined to a few industries only, and that the silence from most employers signaled their passive acceptance of the panel's scientific judgments. The reality was quite different. In the public sector, municipal corporations who were affected by these reports did not have the capacity to offer scientifically factual objections to OD findings. The combination of municipal cutbacks and individual, rather than collective, liability forced public corporations to simply pass the added costs along to their property-tax bases.

In the private sector, affected industries with control over their end prices passed the added costs along to their customers by raising prices, and they remained silent to avoid labour tensions in the workplace. As a result, the only serious criticism of panel reports came from industries whose prices were determined by global markets and for whom new workers' compensation costs would have to be taken out of a narrowed profit margin. Thus, the collective impact of the panel's recommendations at this time became an additional financial burden on Ontario's industries, already suffering from the economic downturn of the early 1990s. Erosion of the independence of its workers' compensation system had magnified the crisis in the province's economic competitiveness.

The claims adjudication system is based upon a "balance of probabilities." This is the same standard that the civil justice system uses in a tort action. The one significant difference, however, is imposed by s. 119(2) of the *Workplace Safety and Insurance Act* (the current Act),[9] which states that if there is a "tie" on the probability of workplace causation, the tie goes to the worker.

The 1985 legislative reforms conferred the power to the tribunal to interpret the Board's policy and general law of the Act in its decisions.[10] This latitude in its decision-making permitted Tribunal Hearing Panels to introduce jurisprudence from the courts. This led to the adoption of the Supreme Court of Canada's reasoning in the case of *Athey v. Leonati*.[11] The issue here, of course, was "significant contribution." This particular case has given the insurance industry nightmares. It means that where the accident has played some causative role, which is deemed to be significant, the *tort feasor* is responsible for all the damages that flow therefrom. The court's line of reasoning began with the idea that "the general, but not conclusive, test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant. Where the "but for" test is unworkable, the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury."

Furthermore, a contributing factor is material if it falls outside the *de minimis* (minimum) range. In summary, a 25 per cent probability of causation was sufficient for a full award for injuries to the plaintiff. The court's decision makes reference to a defendant's liability for any injuries caused or contributed to by his negligence, and to the presence of non-tortious contributing causes as not reducing the extent of that liability. Importing the significant contribution test for causation in tort law with the *de minimis* standard into the no-fault context of workers' compensation would inevitably lead to much lower probabilities of causation of work relatedness for an injury, accident or OD.

In 1997, following the change of government, the panel was abolished, as were the tribunal's policy interpretive powers.[12] The new legislation meant that the tribunal would be required to follow applicable Board policy. Where questions of interpretation arose, it was required to refer any questions in writing to the Board for resolution before making any decision.

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The new government and the passage of time also resolved the issues raised earlier concerning Board appointees and senior staff. The significant contribution test remained and continued to play a role in a number of adjudicated claims. Currently, the Board's management as, well as a group of stakeholders nominated by the labour and employer communities, are in the process of developing a report of advice on OD issues.

What is the public interest in policy development at the Board? Surely, it resides in a reaffirmation of Meredith's principles for a just and equitable workers' compensation system. He rejected the common laws of negligence that were the only recourse previously available to working people to obtain fair settlements for their workplace injuries. A tort- or negligence-based model of compensation is a model steeped in fault and

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blame. If an employer is in compliance with the provisions of the province's *Occupational Health and Safety Act*, he or she should not be considered negligent for an injury, accident or disease related to the workplace.

Importing tort-based precedents into a no-fault workers' compensation system will lower the standard (probability of causation) and create a flood of claims for compensation for ODs that have little or no bearing on the workplace.

In fairness, Ontario employers should not be held to account for these costs. The workplace should be the primary – and not merely a significant or material – contributor to injuries, accidents and diseases to trigger fair and equitable compensation.

In addition, the Board of Directors of the Workplace Safety and Insurance Board must reassert its responsibility for active leadership in the development of OD policy for the province and not await stakeholder approval before acting. Furthermore, the Board's policy staff must be swift and diligent in executing corporate directives. Both directors and staff will need courage and resilience to retain the independence of the Board, so essential to a fair and equitable workers' compensation system. Today as before, Meredith's founding principles continue to provide an affirmative vision of Ontario's public interest in this contentious field.

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