The Liversidge *e*-Letter

An *Executive Briefing* on Emerging Workplace Safety and Insurance Issues

June 29, 2004 **An *Electronic Letter* for the Clients of L.A. Liversidge, LL.B.** **10 pages**

Occupational Disease Advisory Panel Report

An Executive Overview

On June 16th L.A. Liversidge presented an overview of the ODAP Report to clients and interested trade association representatives

PowerPoint Presentation with Commentary

What follows is a summary of the recently released report of the WSIB's Occupational Disease Advisory Panel, Chair's Report ["the ODAP Report"]. Many clients have been requesting an executive briefing on the ODAP Report. **If you would like a personal briefing on the ODAP Report, please contact L.A. Liversidge by e-mail at lal@laliversidge.com or call 416-590-7890.**

If accepted into policy, the recommendations of the ODAP Report will have a profound impact on the adjudication of occupational disease ["OD"] claims in Ontario, and will very likely lessen the requirements for the WSIB Board of Directors to codify, in policy, entitlement parameters before adjudication. The ODAP Report and the ODAP process was well intentioned, and clearly sought a very appropriate objective – the establishment of a sound, legally cohesive manner to adjudicate OD claims. The thesis which I advance is that this task itself was an impossible mission under current law.

I have long held the view that the Ontario workplace safety and insurance ["WSI"] system, while performing well fairness-wise with respect to the adjudication of "accident claims", is unable to be as fair, for workers and employers, in the context of OD claims. This "fairness shortfall" is not through want of effort – it is through system design. The legal and funding paradigm under which such cases must be decided, with few exceptions, is unable to fairly establish work-relatedness for occupational diseases that are jointly caused by occupational and non-occupational exposures.

For almost a quarter century now, it has been recognized that the scheme, presently structured and presently funded, will never fairly compensate all OD. The problem does not lie in the absence of a sound legal method through which to determine work-relatedness; *the problem lies with the very need to do so*. (continued page 2)

Early Notice: Fall 2004 L.A. Liversidge Client Update and Executive Briefing:

October 19, 2004

Set aside October 19, 2004 (morning) in your calendar now.

You do not want to miss this update

Over the next few months the following will happen:

- ✓ **A new Chair *and* a new President will be appointed to the WSIB.**
- ✓ **A new WSIB Board of Directors will be in place.**
- ✓ **The WSIB will have consulted on 2005 premium rates and premium levels likely will be set.**
- ✓ **The WSIB funding strategy will be reviewed.**
- ✓ **Direction set for experience rating reform.**
- ✓ **Consultation on the ODAP Report completed.**
- ✓ **The Minister's audit will continue its impacts, as the Board becomes more accountable.**

In short, the system will be transformed from what we see today.

2004 will prove to be a milestone year.

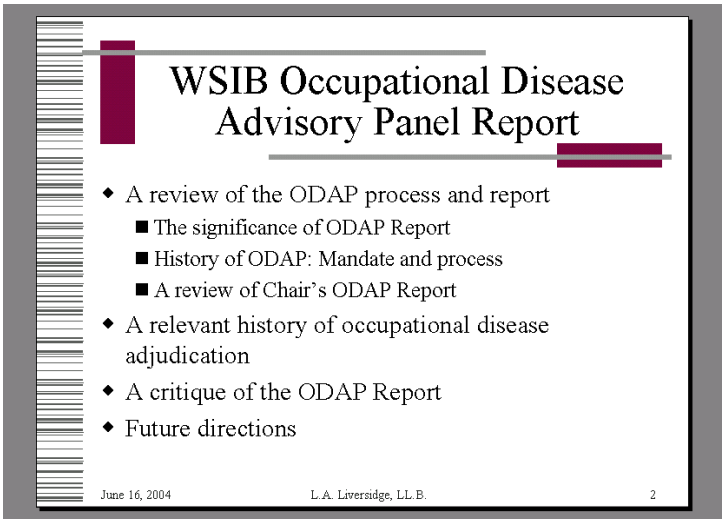
To ensure you stay up-to-date, attend this briefing, exclusive and complimentary to L.A. Liversidge clients.

10 Centre Ave., Willowdale, ON M2M 2L3 Tel: (416) 590-7890 Fax: (416) 590-9601 E-mail: lal@laliversidge.com **ISSN 1710-5757**

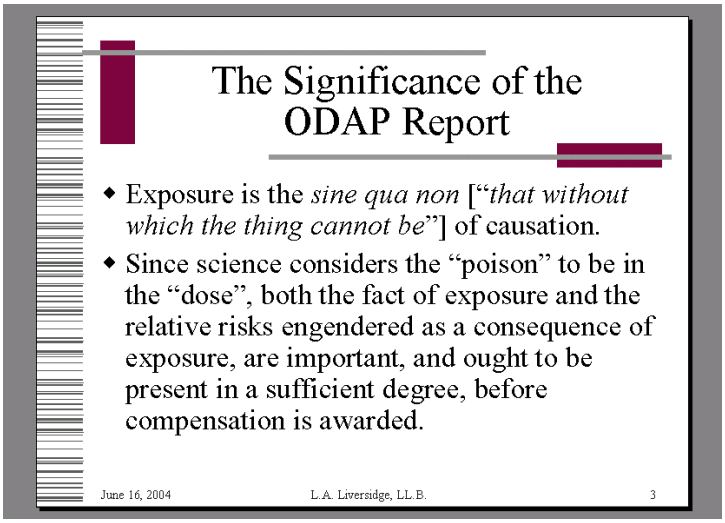
This proposition has been advanced time and time again, by learned individuals, by employer trade associations, by labour, and by government sponsored studies commissioned to deal with this very question. Yet, the analysis perpetually returns to try to formulate a new legal test for entitlement.

Only through a re-engineering of the underpinning social contract will a fairer scheme be possible. It was early last century when management and labour, spearheaded by government, effectively negotiated what certainly was a brilliant and novel social contract that gave rise to the modern workers' compensation system we have before us today. The essence of that social contract has remained in effective pristine condition for almost 100 years. It may be time to re-open this social contract to ensure that those most in need, workers struck down by disease, receive full compensation, efficiently and compassionately delivered, all the while funded in a way sensitive to the multi-causal nature of most diseases, without all of the legal wrangling more akin to tort civil actions.

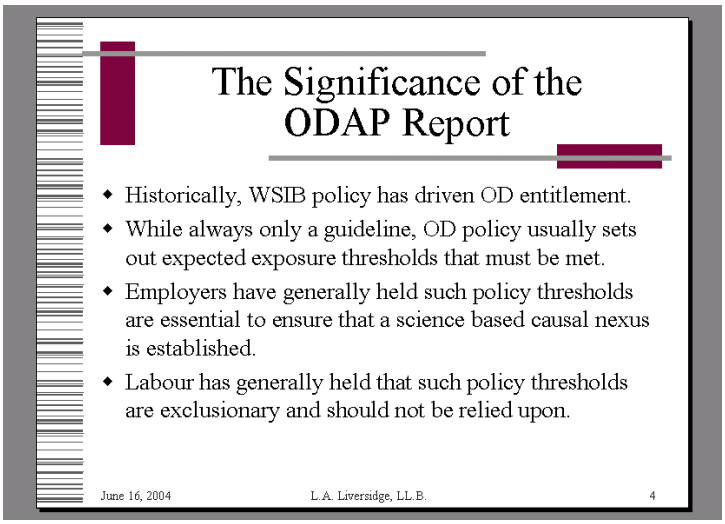
What follows is a brief overview of the ODAP Chair's Report. In a future issue of **The Liversidge *e*-Letter**, I will be presenting a comprehensive analysis of the ODAP Report, which will include a critique of some of the legal approaches reflected in the report.



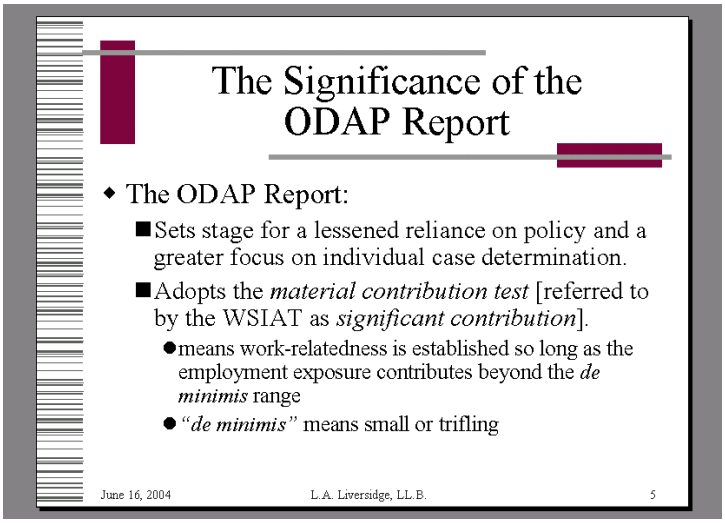
Slide 2: The agenda for the presentation. Overall, the ODAP process, which set out an ambitious task of cultivating a consensus between labour and management on how to treat occupational disease cases within the context of the existing workplace safety and insurance scheme, failed to reach a consensus. But, it did not fail because one side was right and one side was wrong. It did not fail because neither side respected or valued the position of the other. It did not fail because of insufficient effort to reach a consensus. It failed, in my respectful view, because the task itself was an impossible one.



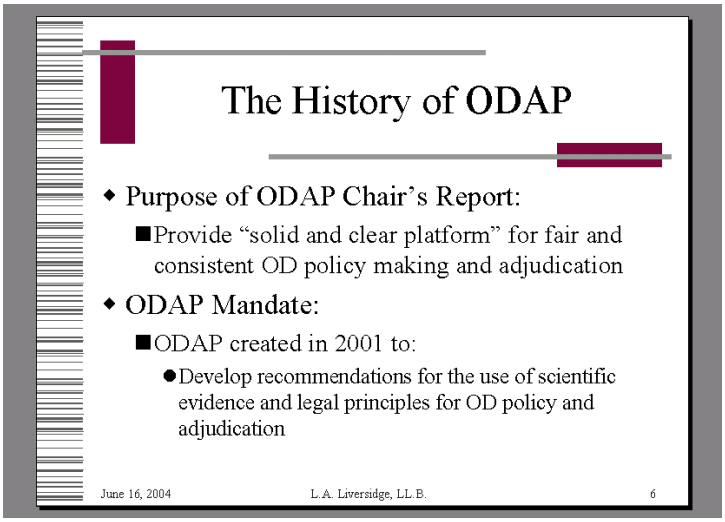
Slide 3: Exposure is the key to occupational disease entitlement. The adjudicative dilemma focuses on the difficult question as to whether or not there was sufficient exposure to cause the disease being claimed.



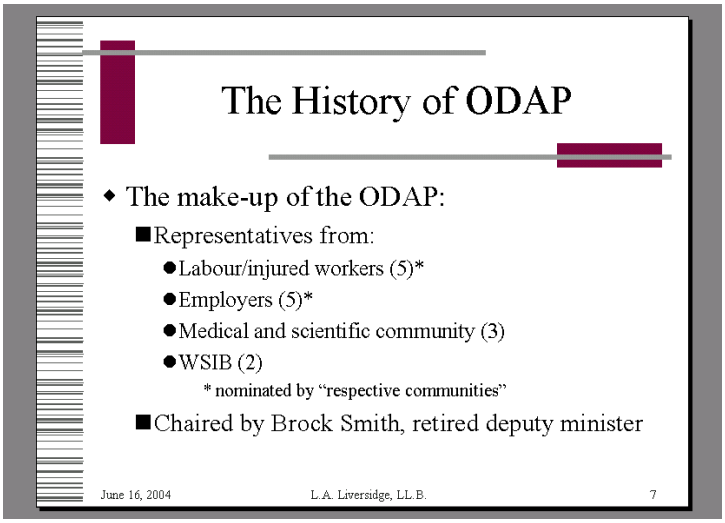
Slide 4: While a broad generalization is risky, this captures the structural conflict between workers and employers. Employers generally want strict guidelines applied to ensure there is certainty, consistency, and predictability. Workers on the other hand, argue that the mere presence of guidelines, let alone a strict adherence to them by decision-makers, is exclusionary. The ODAP report leans towards moving away from guidelines, and opens the door for more case-by-case adjudication.



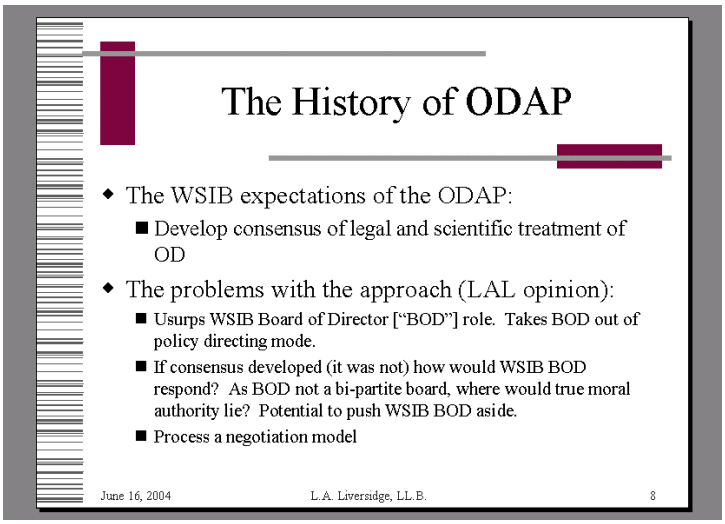
Slide 5: Adoption of the "material contribution test" is the core recommendation of the ODAP Report.



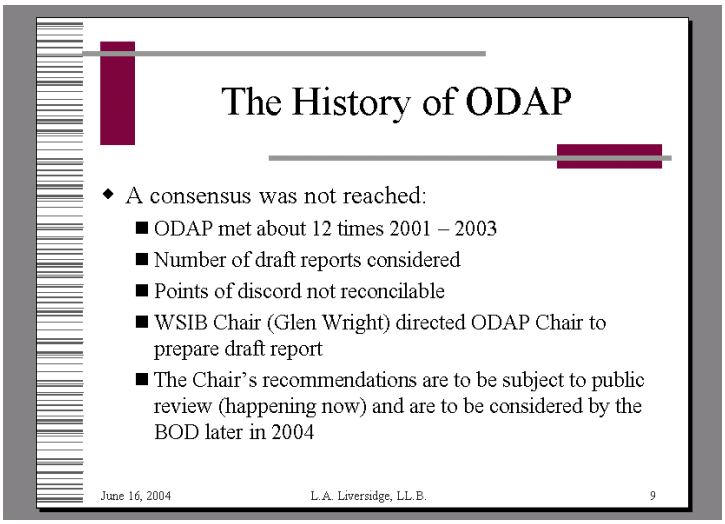
Slide 6: The purpose is a noble one, *albeit* not a new one, nor the first time that such an objective has been officially and formally sought.



Slide 7: This was an archetypical tripartite structure, not uncommonly used in WSI policy consultation.

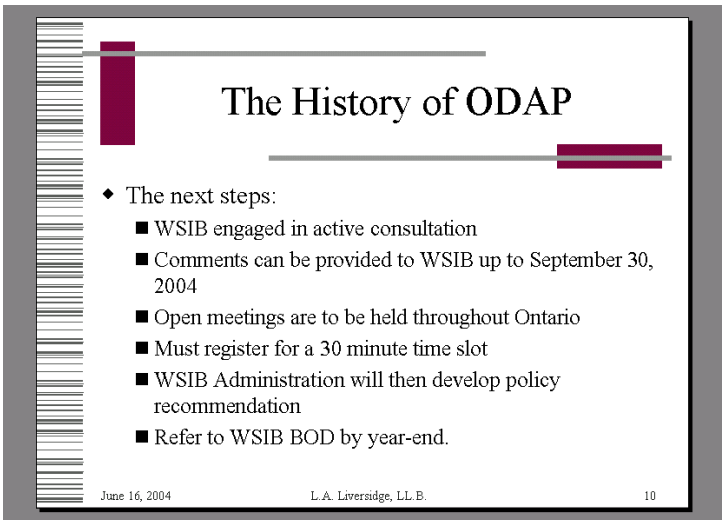


Slide 8: It was clear that the WSIB hoped that such a model would, by its very design, result in a consensus agreement among the key participants – labour and management. However, it is my opinion that such an approach presented the unacceptable risk of usurping the moral authority of the WSIB Board of Directors ["BOD"]. While unquestionably the BOD retains the legal authority to decide policy, if presented with a powerful labour/management consensus, in reality, the BOD would be powerless to disagree, especially since the overall objective of the Board was to cultivate such an agreement. The process, therefore, at the outset presented some serious problems. The BOD, in my respectful view, must maintain an uncompromised capacity to set policy. If the BOD itself maintained control of the process with representative BOD members being directly involved in the ODAP process, then an agreement, if reached, would have both moral and legal clout.

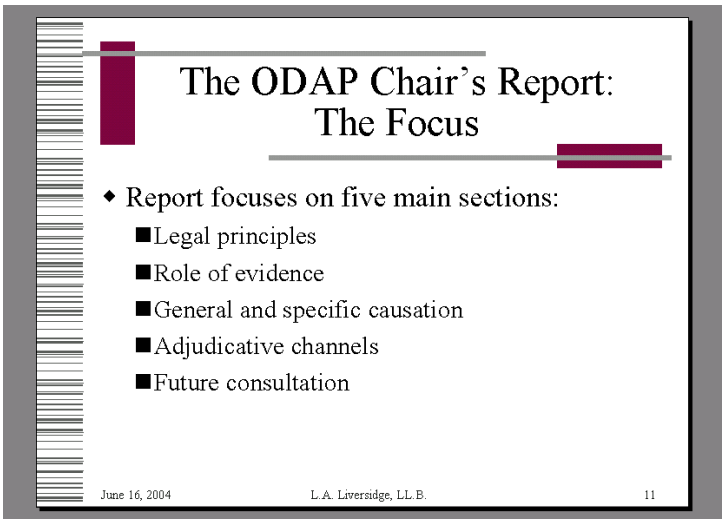


Slide 9: As it turned out, a consensus was not reached. However, the inability to reach a consensus had nothing to do with a lack of effort by all involved. From all accounts that I have received, all members of the ODAP tried in earnest to reach an accord. The

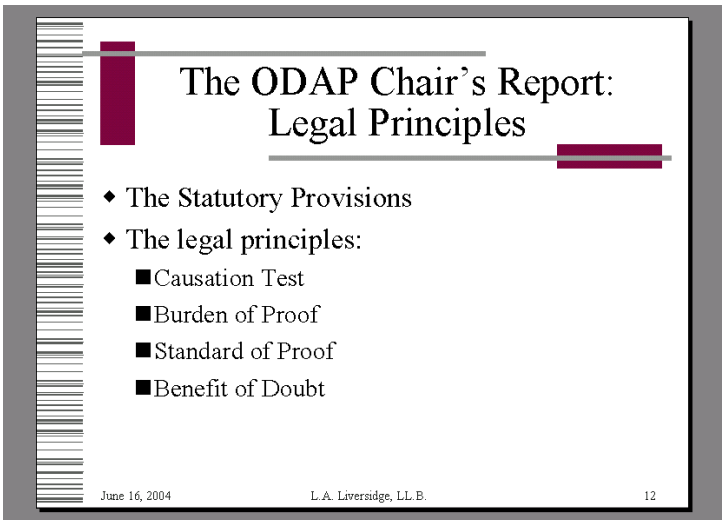
task itself, as will be discussed in a later issue of **The Liversidge e-Letter**, was an impossible one. A labour/management agreement on compensation for occupational disease has never materialized in the Ontario workers' compensation regime. The reason is not because management is offering too little and labour is asking too much – the reason is because system design itself is the largest impediment to a consensus.



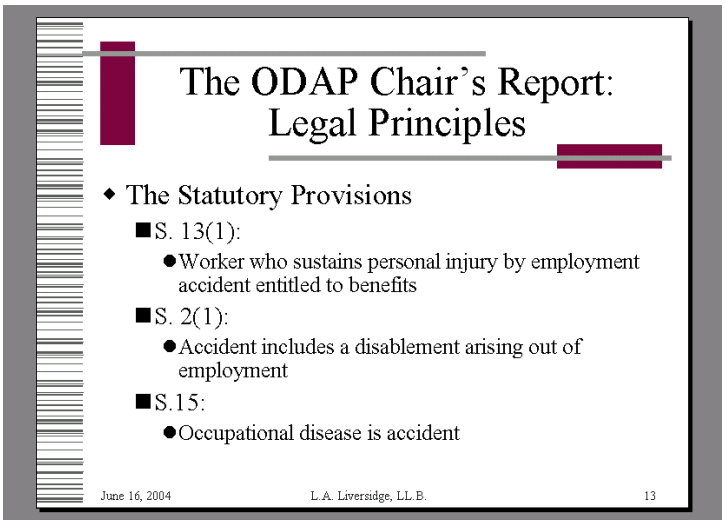
Slide 10: Typically, when there are public meetings of this type for an issue of this nature, labour is exceptionally well organized, whereas management is neither as involved or as organized. This was evident when the (then named) Workers' Compensation Board, BOD toured the province in the early 1990s in an attempt to consult on setting policy for compensation for chronic occupational stress. That process failed. Not only did a consensus not emerge, the BOD itself, which readers may recall was a *de facto* bi-partite BOD at the time, became deadlocked on this issue. That entrenched deadlock was received as a loud signal that the Board's inability to develop a consensus policy reflected a deficiency in the legislation, and the law was changed in 1998. The lesson from that experience is clear – policy cannot correct a statutory deficiency.



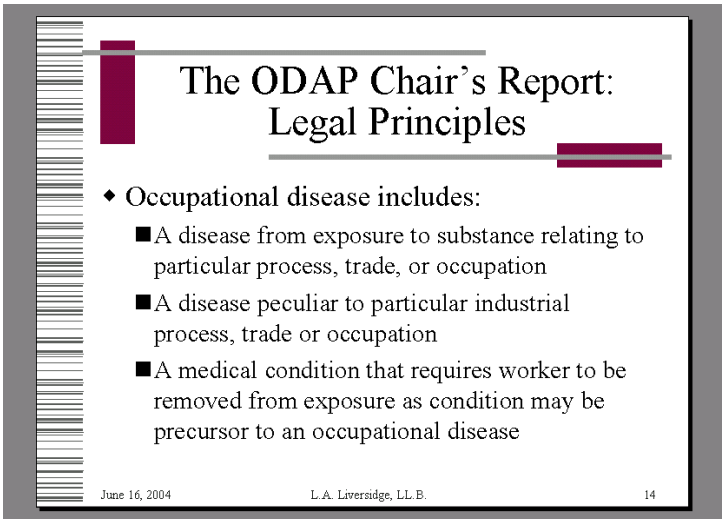
Slide 11: The ODAP Report addresses the appropriate questions (and ones that have been addressed in the past).



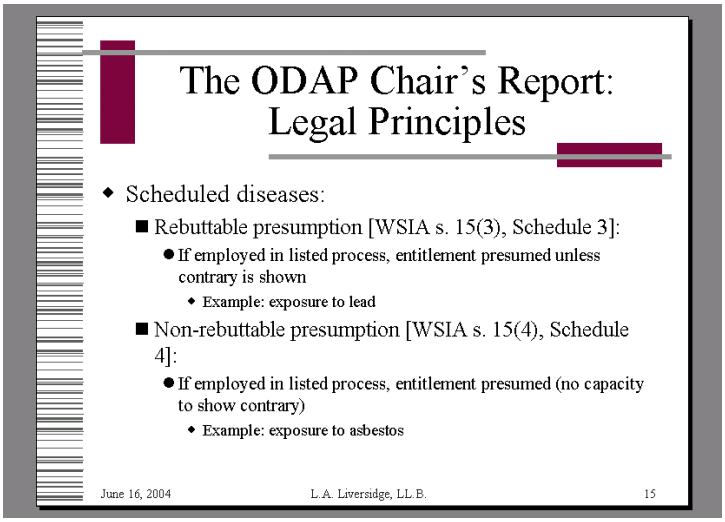
Slide 12: The legal principles are the key which the ODAP Chair clearly hopes will unlock the perpetual conflict ever present in occupational disease compensation cases. However, it must be noted that the questions posed have been asked before, and the answers have been substantially the same.



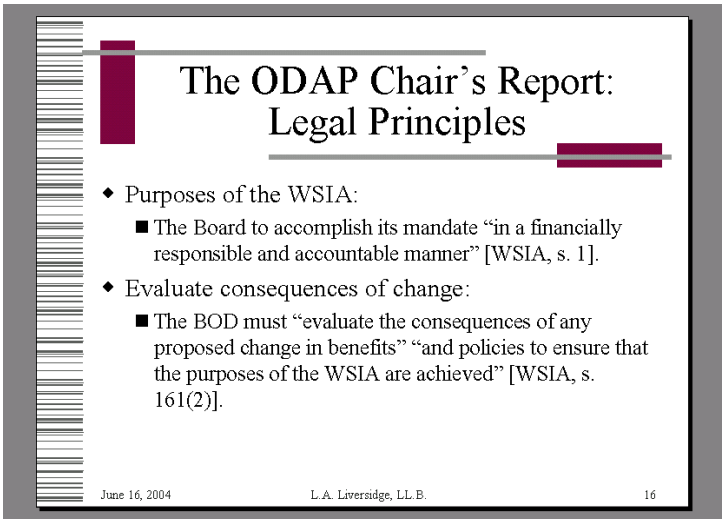
Slide 13: Under the *Workplace Safety and Insurance Act*, S.O. 1997, c. 16, Sch. A., as amended [the "WSIA"], an occupational disease receives the same basic legal treatment as an "injury by accident". Therefore, the same evidentiary principles apply, as do of course, the same funding principles. It is necessary, in all cases, to establish work-relatedness, an insurmountable challenge for occupational disease cases.



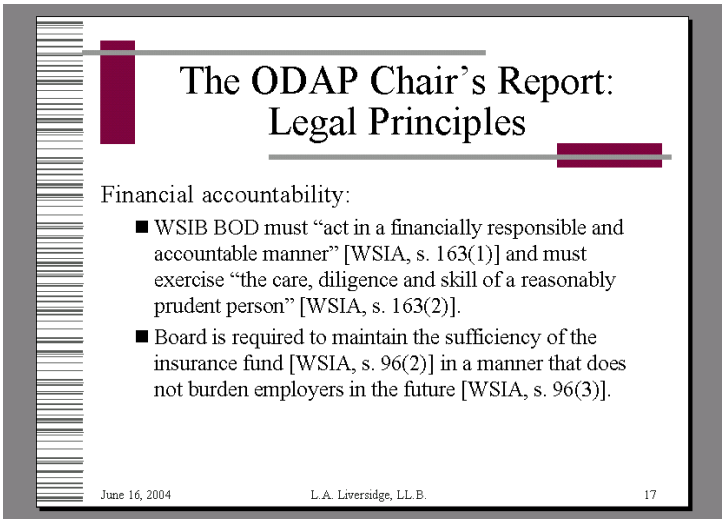
Slide 14: The question as to what occupational disease includes is a less onerous one than what it does not include.



Slide 15: The operation of the "presumptions" is core to compensating occupational disease claims. In instances where the science is clear, notwithstanding the always tragic facts surrounding any individual case, adjudication is simplified and expedited. Once science establishes a clear and convincing relationship between exposure to a substance or process and the development of a disease, the fact finding exercise is usually limited to establishing the exposure. For "scheduled diseases" as a function of law, so long as the prescribed exposure is met, a worker is entitled. In the case of "Schedule 3" diseases, entitlement can be dislodged only if, on a balance of probability, a non-employment cause is clearly established, a very difficult and onerous standard to meet. For "Schedule 4" diseases, there is no ability to dislodge the presumption. The background science is so persuasive in establishing employment causation that, in all cases, entitlement will be extended, so long as exposure is established.

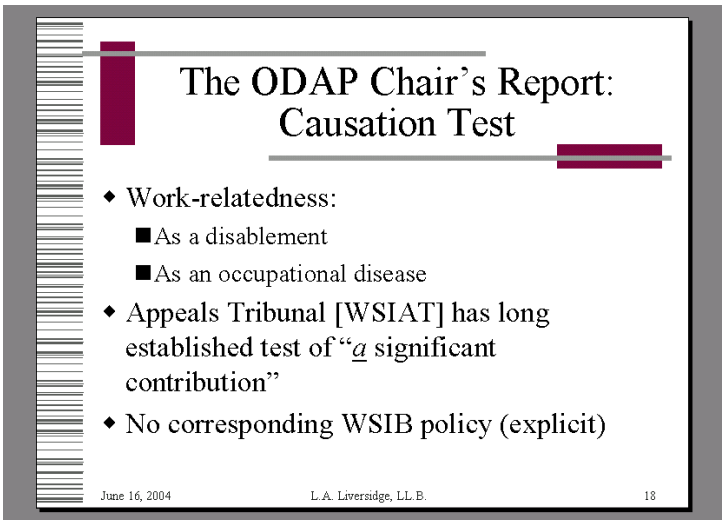


Slide 16: Other statutory principles advanced in the WSIA though were not discussed in the ODAP Report. Set out in its opening paragraphs are the objects of the WSIA. The Board must act in a financially responsible manner and be accountable (all the more important noting the findings of the recent third party audit conducted on the WSIB. See the June 16, 2004 issue of **The Liversidge *e*-Letter** which introduces the audit report. Stay tuned for a future issue which will address the report in greater depth). The BOD must as well be aware of all of the consequences of any proposed change in benefits. Therefore, beyond the ODAP process there is an equally important process involving the WSIB BOD.

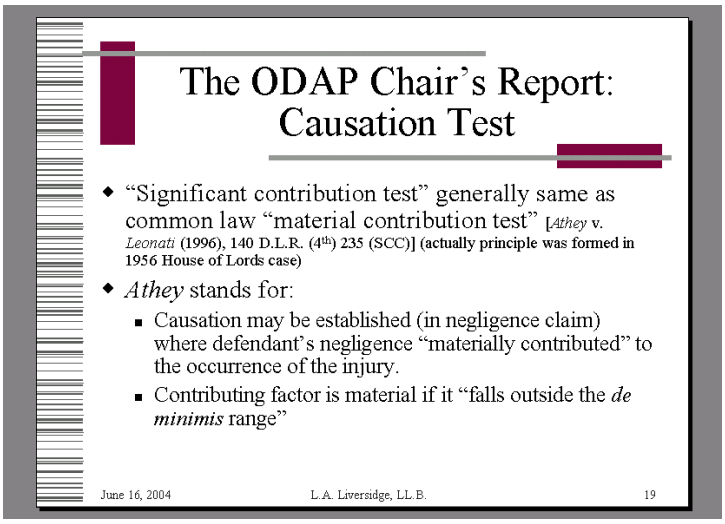


Slide 17: Not only do the objects of the WSIA set out the expectations of the WSIB, a specific section of the statute reinforces the BOD's requirement to act in a fiscally responsible manner. The WSIA also provides explicit instructions for the Board to maintain the sufficiency of the insurance fund. Historically, occupational disease has not been funded in the same manner as accident claims. As readers are aware, the Ontario WSI scheme is a "funded" system as opposed to a "pay-as-you go" scheme. In simple terms, this means that when the BOD approves a policy change that will increase the future liabilities of the WSIB

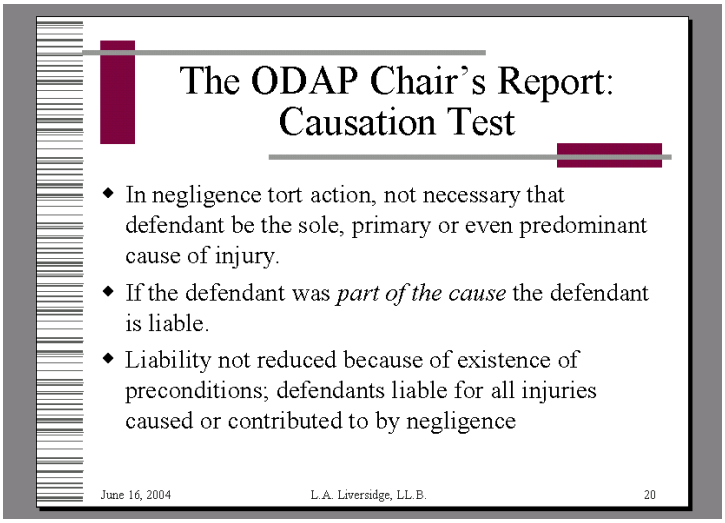
in a measurable and predictable manner, the Board likely has a legal obligation to collect sufficient premiums to fund that liability.



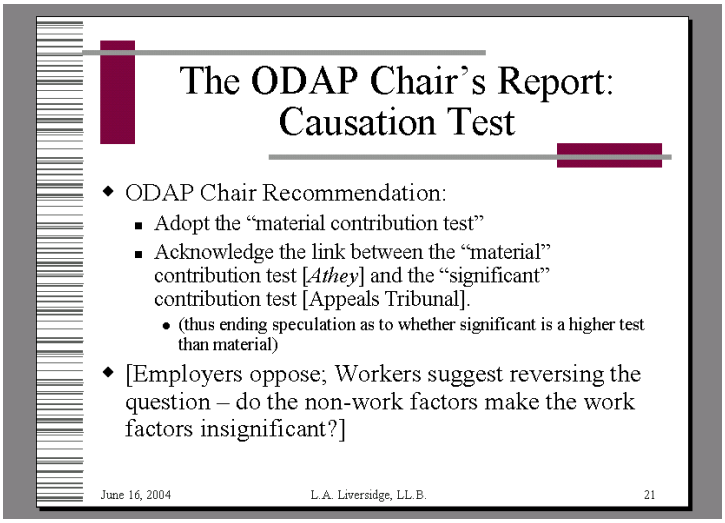
Slide 18: Work-relatedness can be established as an occupational disease or as a disablement arising out of the employment. With respect to the former, a disease is categorized as an "occupational disease" usually only after an exhaustive scientific analysis establishes a causative link with a high degree of certainty. However, not all cases for disease rise to that level of certainty. It is the cases that are considered as a "disablement arising out of the employment" that are the most difficult to adjudicate.



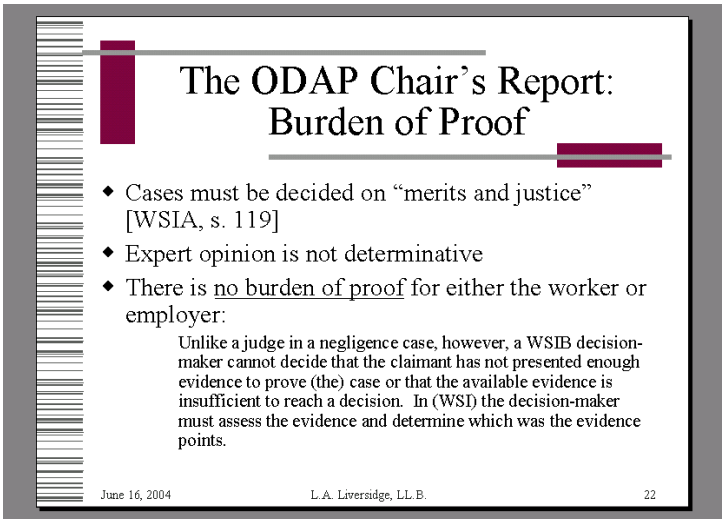
Slide 19: The causation test is the essence of the ODAP Report.



Slide 20: The principles described in the *Athey* case have long been applied in the context of "accident" claims in the Ontario WSI scheme.



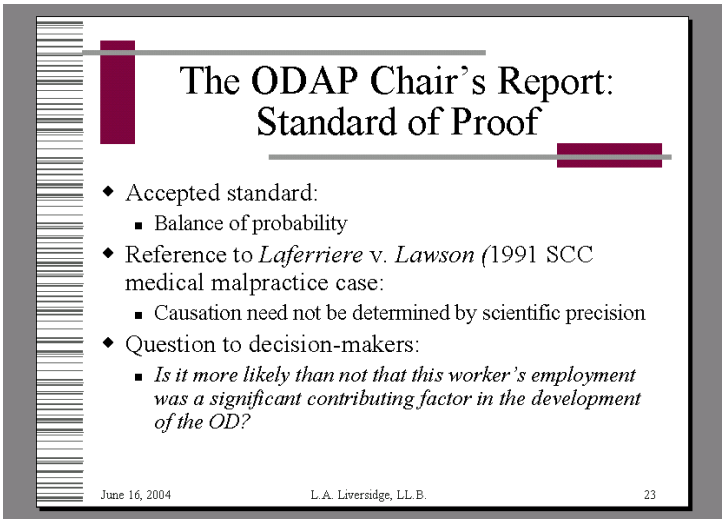
Slide 21: This is the core of the ODAP Report – the adoption of the "material contribution test".



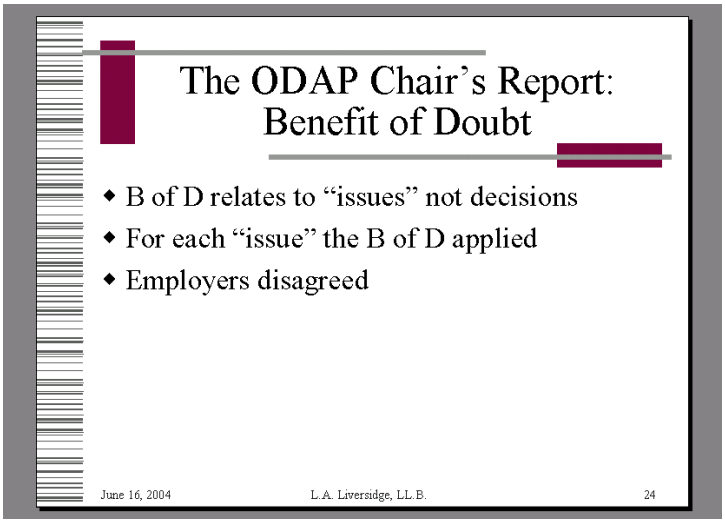
Slide 22: While the ODAP report suggests that there is no burden of proof for either party, and while this is legally correct, such a recognition does not at all change the essence of the adjudicative analysis. While in a civil action, a defendant could move for summary judgment where there is not a *prima facie* case established, under the WSI scheme, of course, such legal recourse does not technically present itself.

The inescapable reality is though, that within the context of the WSI system, if an individual case does not present enough evidence to establish the claim on the balance of probability, the claim will fail. The simple distinction between the WSI approach and the civil approach is that under the WSI system, the decision will be on the merits of the entire case presented. The case will not be summarily decided. Under such circumstances, in the WSI case, a respondent employer would fully participate, whereas, in a civil case, a defendant could move for summary judgment.

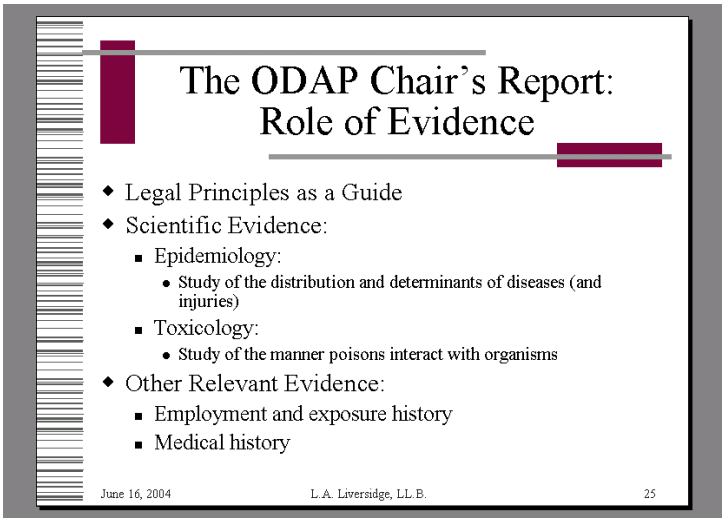
At the end of the day, other than the procedural distinctions, there is little difference. The absence of there being a "burden of proof" for either side is not at all legally significant in an adjudicative model that does not place an onus on a worker (plaintiff). However, if a worker is unable to marshal evidence that rises to the level of at least establishing a *prima facie* case, the WSIB case will fail as much as the civil case.



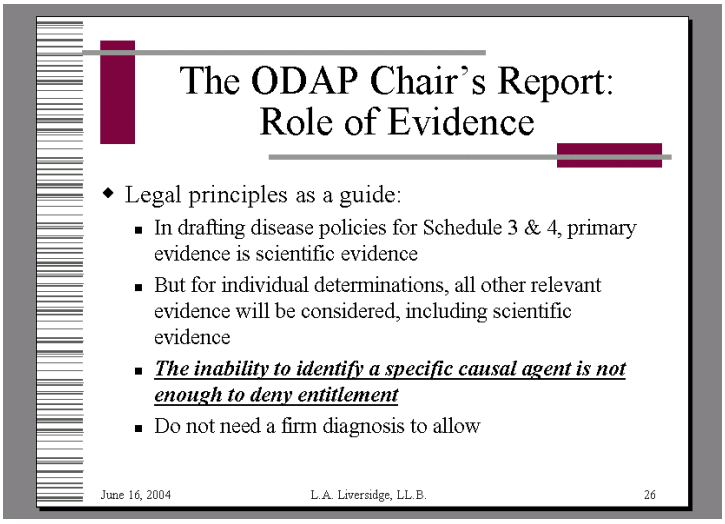
Slide 23: While causation need not be determined with scientific precision, a *probable* case, rationally connected, must still be presented.



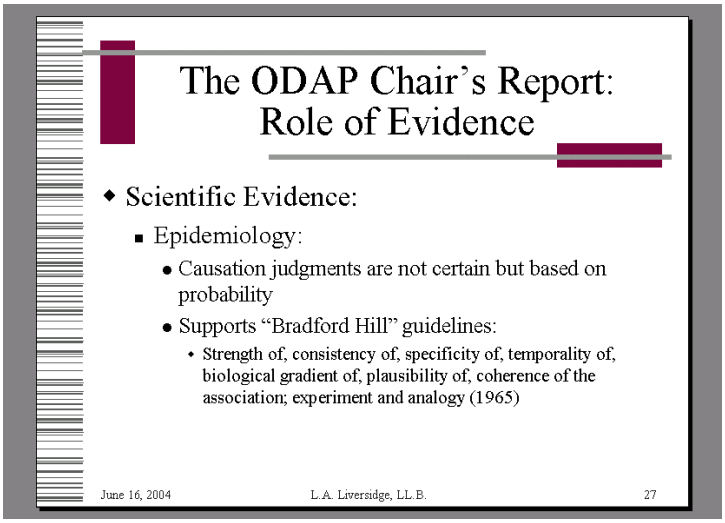
Slide 24: The approach of the ODAP Report with respect to the benefit of doubt is troubling. The benefit of doubt provisions are not applied until all of the evidence is in, and the "issue" to be considered must certainly be the issue of entitlement.



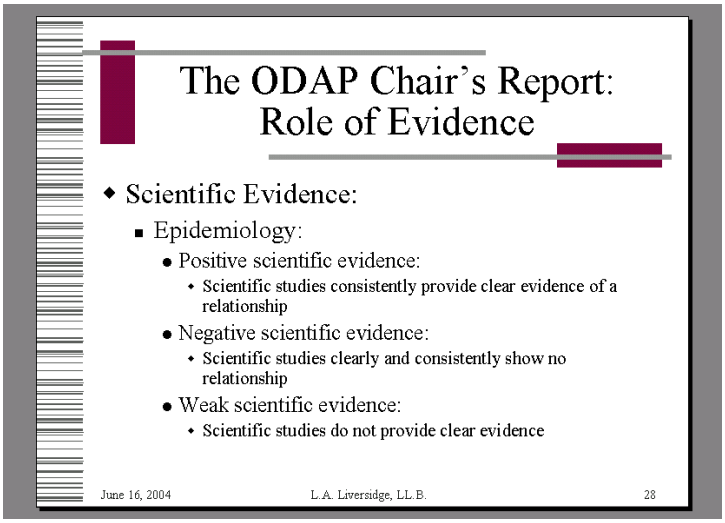
Slide 25: Even in the context of considering scientific evidence, the "legal principles" are the interpretive prism.



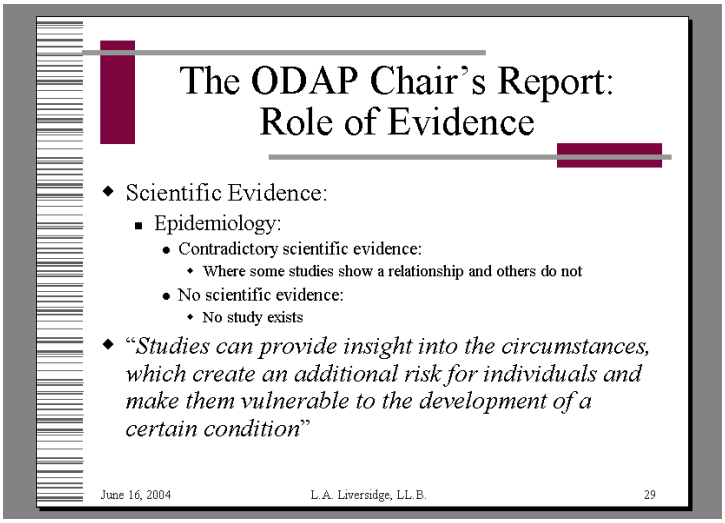
Slide 26: If, as the ODAP Report suggests, policy will not establish a requirement to identify a causal agent, and will have no requirement to establish a firm diagnosis, the entitlement provisions may be loosely applied.



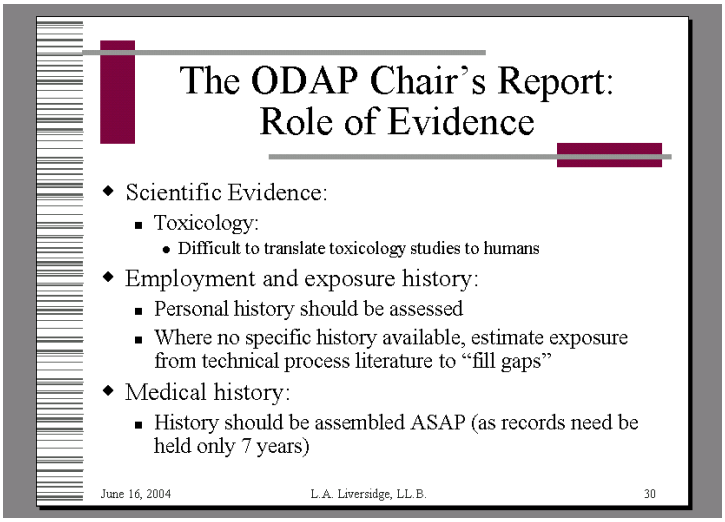
Slide 27: The "Bradford Hill" guidelines are long recognized as the appropriate analytical framework.



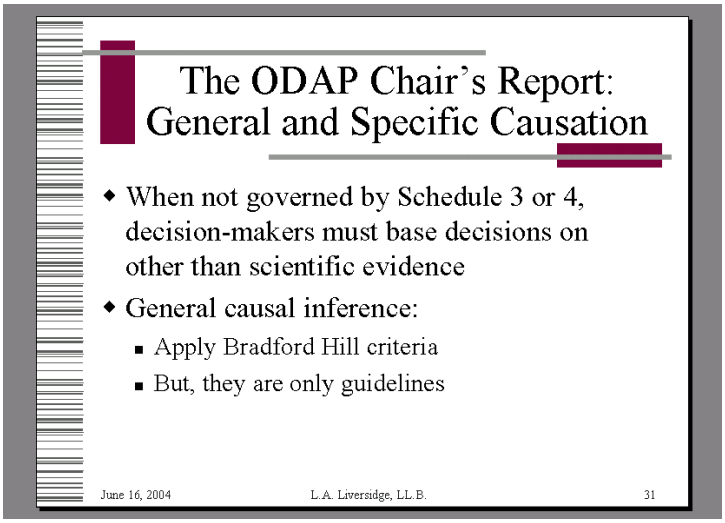
Slide 28: Cases involving either "positive" scientific evidence or "negative" scientific evidence, while still posing significant adjudicative challenges, are amongst the "easiest" for the system to address.



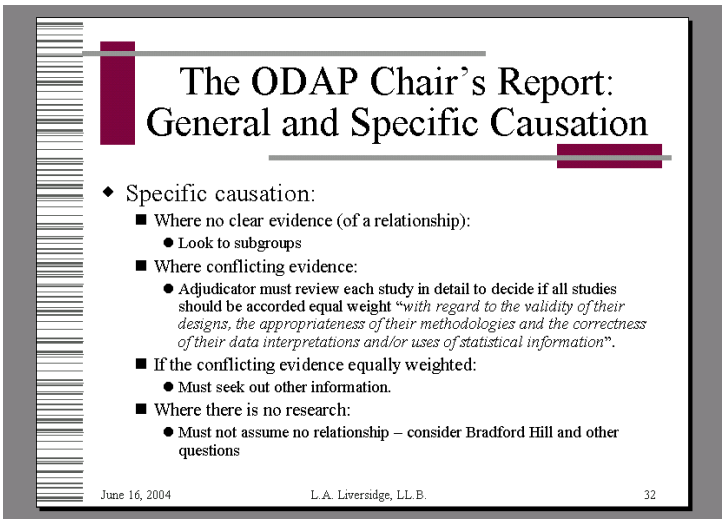
Slide 29: It is the cases for which there is weak, contradictory or no scientific evidence that pose the most difficult adjudicative challenges. The WSI system cannot reject those cases outright simply because the scientific community remains uninvolved in the particular causal issue, or has not yet determinatively pronounced on the issue, one way or the other. Just as the absence of evidence to the contrary (except in "scheduled diseases") cannot carry significant weight to grant a claim, the absence of scientific evidence that establishes cause, cannot on its own weight, determine the result. This is the heart of the dilemma.



Slide 30: Where the scientific evidence is not determinative, the investigation must focus on all other relevant factors, not the least of which is, of course, the claimant's entire employment and medical history. It is in this area that the uncertain occupational disease case becomes very intrusive from an information gathering viewpoint, far more so than the typical "accident" claim.



Slide 31: These are amongst the most difficult of cases.



Slide 32: This analysis, it is respectfully suggested, rises to the level of a policy analysis, and must be left to the rigours, the discipline *and authority structures* afforded to policy determinations. It is sensible to recall the pressures which were the catalyst to the 1997 statutory reforms (Bill 99). One of the principal concerns focused on the need to contain the capacity for individual case adjudication to acquire policy significance. Specifically, the lawful jurisdiction of the (then named) Workers' Compensation Appeals Tribunal ["WCAT"] was significantly curtailed to require adherence to Board policy.

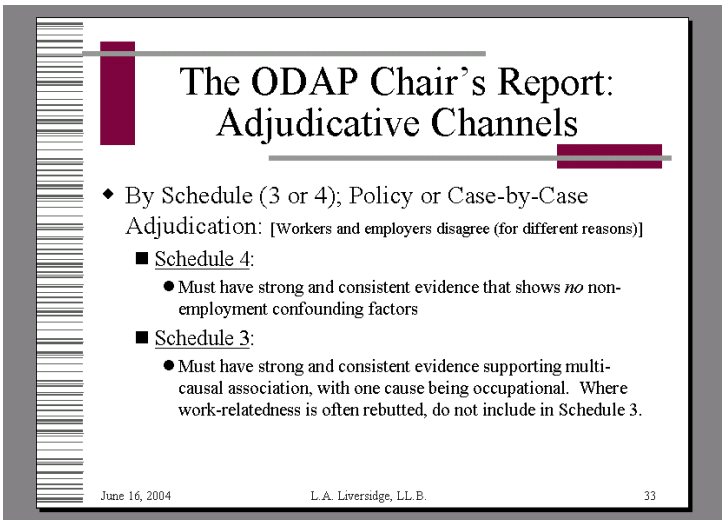
Several years after the inception of the WCAT (in 1985), the ability (or *perception*) of the Tribunal to make *de facto* policy determinations, especially with respect to occupational disease cases, led to changes in the current WSIA, requiring the Tribunal to apply Board policy [WSIA, s. 126(1)].

The reasons for this change were clear. The prevailing objective of WSIB BOD control ensures the development and application of consistent policies, predictable outcomes, and system stability. These attributes were considered to trump individual case-by-case decision making.

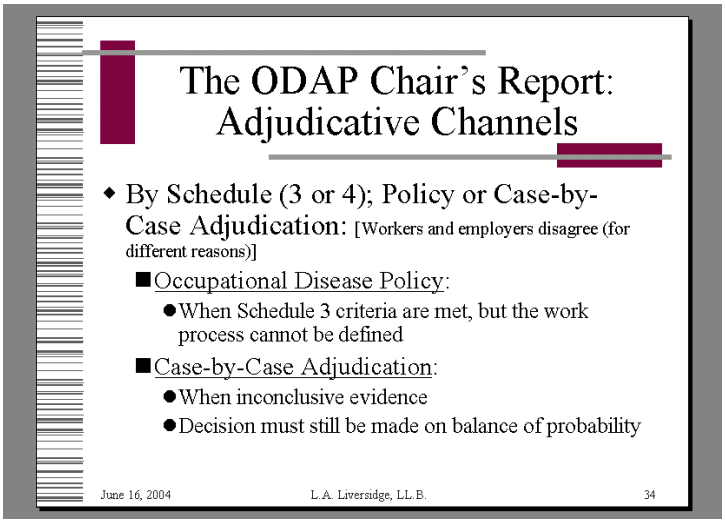
In the instance of the Tribunal, cases were decided, it must be noted, in a tri-partite setting, after an extensive fact finding exercise, followed with a reasoned analysis, publicly distributed. Still, that process was thought to be insufficient to be entrusted with setting the boundaries of entitlement.

If this proposal is accepted (if it is not already in force), in dealing with occupational disease cases (clearly the most difficult cases facing the system), decisions *with policy significance* will be made in the absence of approved policy, without the participation of the WSIB BOD, and in the absence of a complete public awareness of the nature of the analysis accepted.

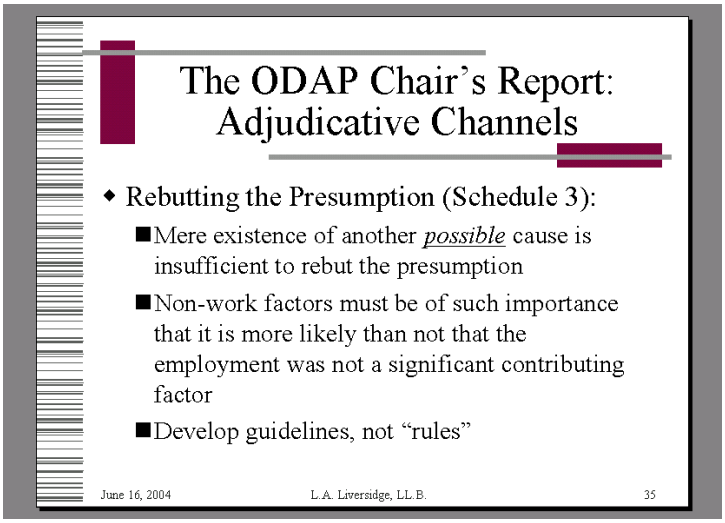
It is ironic that the policy objective behind one of the significant statutory reforms in Bill 99 which was designed to integrate more controls into the system, is potentially thwarted by this recommendation.



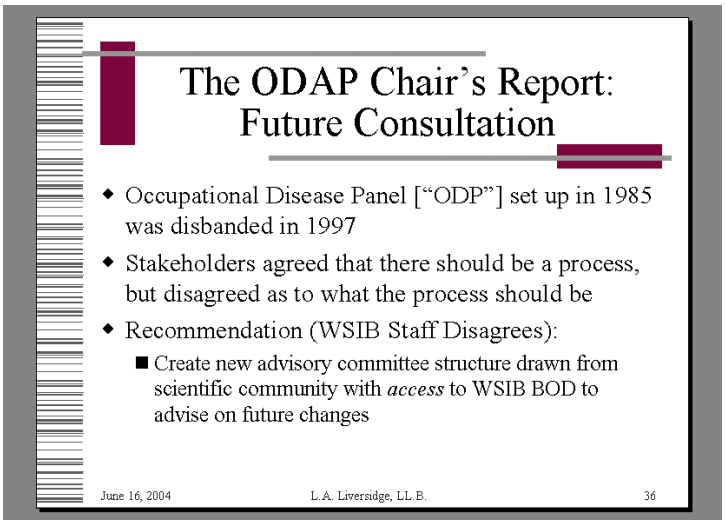
Slide 33: The science behind Schedule 3 and 4 should be reaching to almost the same standard.



Slide 34: It is of course the "case-by-case" determinations that are the most problematic.



Slide 35: This is a sufficient standard. I will go further and suggest that the evidence should rise to the level of "clear and convincing" to rebut the presumption.



Slide 36: The ODAP Chair went past the prescribed mandate with this recommendation, and advanced a proposition with which labour, management and the Board apparently did not agree. There seems to be no sound structural reason for the "advisory committee" to operate independent of the WSIB. In the past, of course, the "Occupational Disease Advisory Panel" (later re-named to "Occupational Disease Panel"), assumed this very role. It was disbanded for very complex reasons.

From the WSIB Website: Occupational Disease Consultation

The Workplace Safety and Insurance Board (WSIB) is inviting comments from the public on all sections of the Draft Report of the Chair of the Occupational Disease Advisory Panel. The WSIB is interested in feedback on other questions, such as the following:

1. Are there any additional issues that remain to be addressed?
2. Are there other types of evidence that should be considered in developing policies or deciding occupational disease claims?
3. Please comment on the recommendations that have been identified in bold text in the draft report.

Submission of Public Comments:

Public comments on the Chair's draft report can be submitted in writing by e-mail or mail until September 30, 2004. Comments can also be presented in person at open meetings to be held in various locations throughout the province in September 2004. For those unable to attend in person, conference call arrangements can be made to ensure there is an opportunity to submit comments during an open meeting.

Dates and locations for open meetings, to be held from 9 a.m. to approximately 5 p.m. are as follows:

- **September 13, 2004 – Sudbury** - Howard Johnson Plaza Hotel, 1696 Regent St., Sudbury
- **September 14, 2004 – Timmins** – Days Inn and Conference Centre, 14 Mountjoy St. South, Timmins
- **September 16, 2004 – Thunder Bay** - Valhalla Inn, 1 Valhalla Inn Rd., Thunder Bay
- **September 20, 2004 – Sarnia** – Best Western Guildwood Inn, 1400 Venetian Boulevard, Sarnia
- **September 23, 2004 – Windsor** – Cleary International Convention Centre, 201 Riverside Drive West, Windsor
- **September 24, 2004 – Hamilton** – Sheraton Hamilton Hotel, 116 King St., Hamilton
- **September 27 & 28, 2004 - Toronto** - WSIB, Simcoe Place, 200 Front St. West, Toronto

Registration for a 30-minute time slot (to present in person or by conference call) will be required. This allows 15 to 20 minutes for the presentation and 10 to 15 minutes for questions or comments from the Consultation Chair.

Please note: Open meetings will be held in English only. Should you require French language services, a sign language interpreter, or other language assistance, please indicate this when registering. Open meetings will be conducted informally, and presenters will sit at a table with the Consultation Chair while they make their presentation.

Please note that oral presentations may be recorded and transcribed. Written or oral submissions in the form of transcripts may be disclosed to a requestor (if requested) under the *Freedom of Information and Protection of Privacy Act*.

***Remember*: Mark Your Calendar:**

Fall 2004
L.A. Liversidge Client Update and Executive Briefing:
October 19, 2004