The Liversidge *e*-Letter

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

September 28, 2004 An *Electronic Letter* for the Clients of L.A. Liversidge, LL.B. 5 pages

Occupational Disease Advisory Panel Report

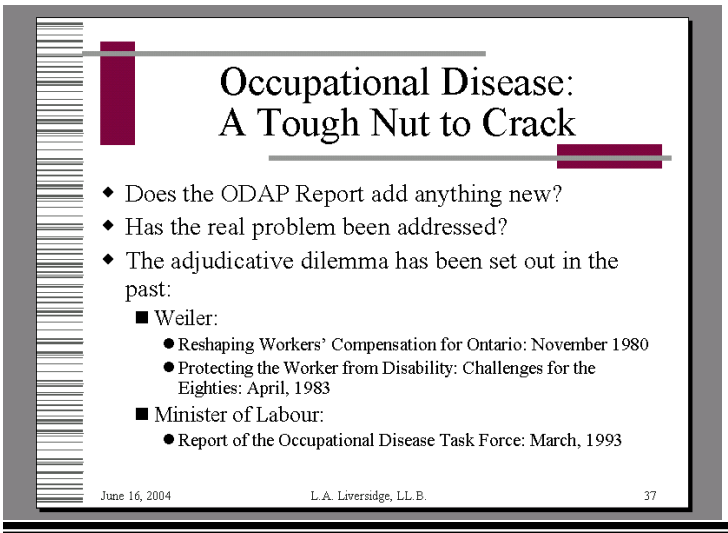
A Recommended Course of Action: Occupational Disease Requires Legislative Reform

On September 28, 2004, I appeared before the Chair of the ODAP emphasizing the need for a legislative, not a policy review of occupational disease

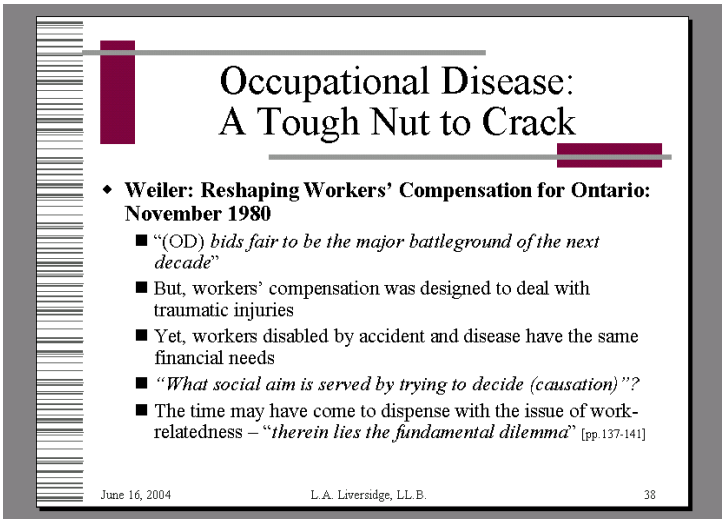
In this issue of **The Liversidge *e*-Letter**, I continue the discussion initiated in the June 28th issue. The June 28th issue provided background. This issue presents a serious recommendation – the WSIB should not tinker with occupational disease adjudication policy. **Fairness – to workers and to employers – can only be achieved if the law itself is reformed.**

Compensating occupational disease is not a debate about creating costs. Make no mistake about it - the costs already exist. The debate is about who absorbs those costs – employers, workers directly, or society at large.

Today, I appeared before Mr. Brock Smith, Chair of the Occupational Disease Advisory Panel ["ODAP"] strongly recommending that the Workplace Safety and Insurance Board ["WSIB" or "the Board"] Board of Directors ["BOD"] refer this issue where the only hope of a sustainable and fair solution lies - to the Ontario legislature.



Slide 37: The ODAP is not the first attempt to resolve the occupational disease ["OD"] dilemma. There have been several inquiries and reports addressing the very issue, and I introduce four of those: Paul C. Weiler: *Reshaping Workers' Compensation for Ontario: November 1980* ["Weiler I"]; Paul C. Weiler: *Protecting the Worker from Disability: Challenges for the Eighties: April, 1983* ["Weiler II"]; Terence G. Ison: *Compensation for Industrial Disease Under the Workers' Compensation Act of Ontario: September, 1989* ["the 1989 Ison Report"]; and, Minister of Labour: *Report of the Occupational Disease Task Force: March, 1993* ["the 1993 Task Force Report".



Slide 38: Almost a quarter century ago, Prof. Paul Weiler, released his influential first report ["Weiler I"]. Weiler I, as many readers will know, set out the policy architecture for two of the most influential reforms of the Ontario workplace safety and insurance ["WSI"] system since its inception early last century. Weiler's views were incorporated, with almost no change, in the 1985 reforms of the then Progressive Conservative Government [Bill 101], which established, *inter alia*, a representative Board of Directors and the independent appeals tribunal (then named

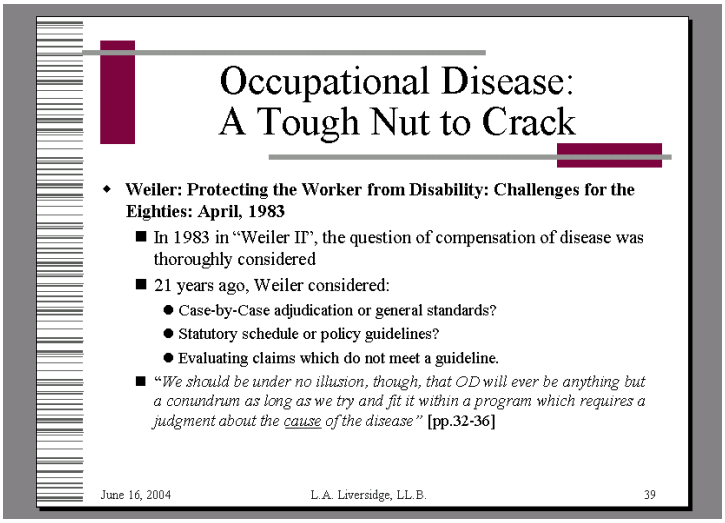
the Workers' Compensation Appeals Tribunal), and the 1990 reforms of the then Liberal Government [Bill 162], which created the wage loss system of compensation which resolved serious systemic worker inequities.

Weiler's report was remarkable in both its thoroughness and its simplicity. Complex issues which had plagued the system literally for decades, and which appeared to be without resolution, were distilled into workable policy concepts, capable of swift implementation. He addressed every leading issue facing the system, including the then (and now) perpetual dilemma – compensation for occupational disease.

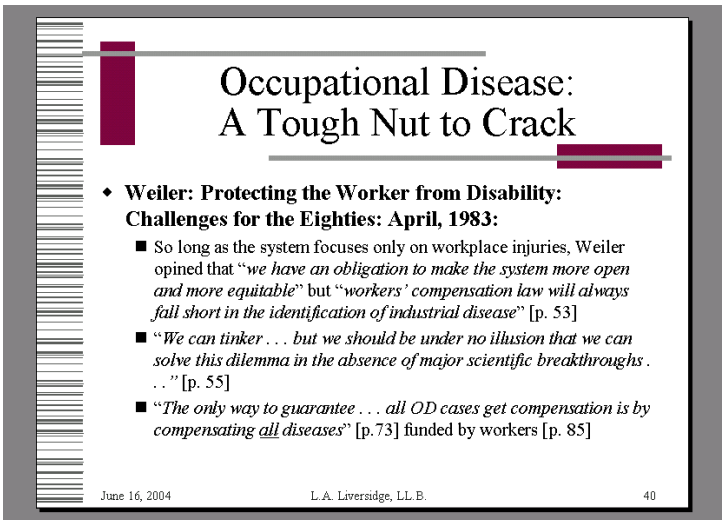
Weiler readily recognized why an OD policy solution eluded the system. He observed that the Ontario workers' compensation system was essentially established for compensation for injury arising from traumatic accident, where the requirement to establish an employment causal connection was consistent with the funding arrangements. In most instances, with respect to "accident" claims, the employment connection was clear – so long as an injury resulted from an accident arising out of and occurring in the course of the employment, entitlement was granted and compensation paid. A system 100% funded by employers for injuries arising from the employment made sense, was internally consistent and workable.

In the case of OD however, where the cause of disease was, in most instances at best uncertain, the system no longer maintained the same internal consistency. The need to establish an employment causal link, essential in a 100% employer funded scheme, was recognized to be an impossible task, in light of the potential non-occupational links to disease, or more precisely, in the absence of evidence showing a clear occupational connection.

Weiler recognized in his first report that the policy problem centered on the need to establish causality – the very issues the ODAP continues to address.

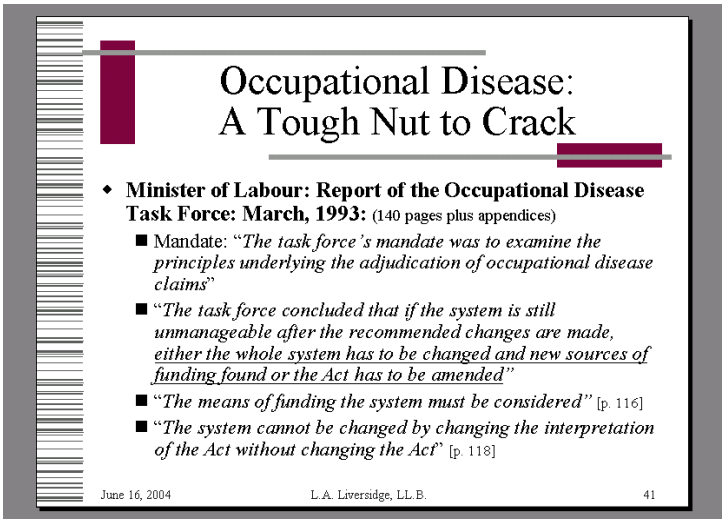


Slide 39: In his second report, three years later and now more than twenty years ago, Weiler addressed the very issues the ODAP was recently asked to investigate. In fact, the core policy questions have not changed at all over the last 25 years, in spite of the implementation of the Appeals Tribunal and the (for a time) involvement of an occupational disease standards panel. **The reason for this remains clear – fair adjudication of OD cases will remain an impossible task so long as causality is an issue. That simple reality remains ever present today.**

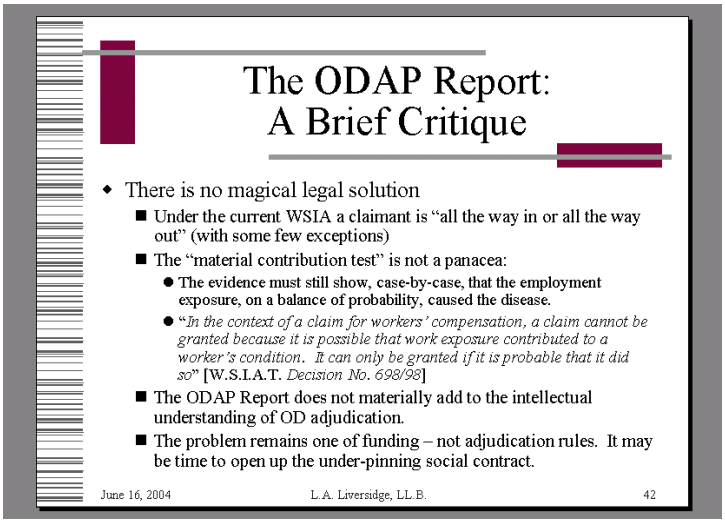


Slide 40: The efforts and recommendations of the ODAP are simple evidence of the elusive objective of full OD compensation in a 100% employer funded system. Clearly, the ODAP Report is another attempt to continually raise the "equity bar", just as was (is) in the case-by-case decisions of the (now named) Workplace Safety and Insurance Appeals Tribunal, and the (short lived) Occupational Disease Standards Panel. Weiler concluded that the only way all OD will be compensated is if *all disease* is compensated. And, the only way to compensate all disease is to change the funding formula.

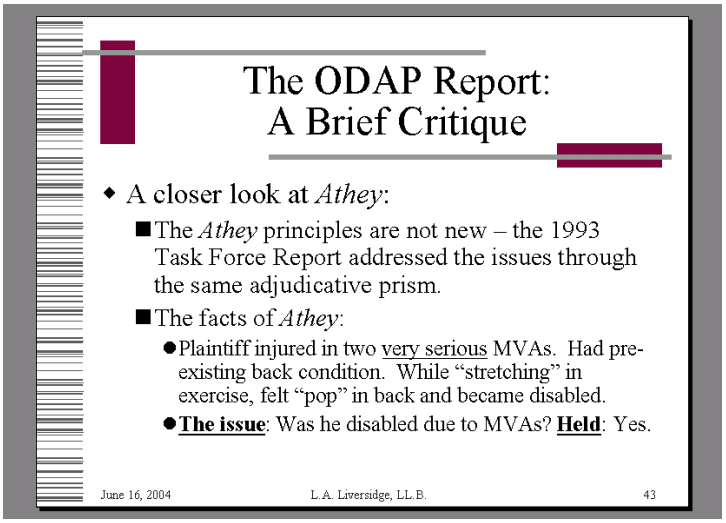
On the recommendation of Prof. Weiler (in Weiler I), an "Industrial Disease Standards Panel" ["IDSP"] was created in 1985 (later named the "Occupational Disease Standards Panel" and later still, disbanded). In 1989, the IDSP requested that Prof. Terence Ison discuss the very issues that were canvassed by the ODAP [1989 Ison Report, p. 3]. Prof. Ison concluded his analysis in a paragraph aptly entitled "The Eternal Dilemma" [at p. 38]: "*A major difficulty in the context in which the Panel (the IDSP) must work is that workers' compensation rests, and always has rested, on a false assumption. In relation to disease, the system assumes the feasibility of determining the etiology of disease, not just in general, but case by case.*" "*No system of compensation will ever work with efficiency, justice and consistency if the eligibility for benefits depends on establishing the etiology of each disablement*". Like Weiler, Ison concluded that the system itself must be changed [at p. 38].



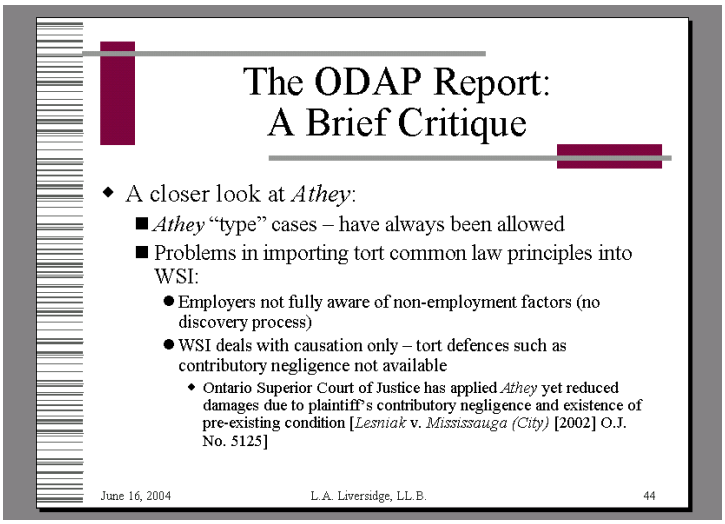
Slide 41: Ten years after Weiler II, the irresolvable dilemma of OD continued. The then Minister of Labour struck a tri-partite Task Force with essentially the identical mandate as the ODAP. The same theme persisted – fairness cannot be achieved without changing the law – the issue is ultimately one of funding, not the absence of an adjudication test for entitlement. The 1993 Task Force Report concluded that the system cannot be changed by changing the interpretation of the Act, without changing the Act. These words, ten years later, still ring loud and true.



Slide 42: If all that was needed to crack the OD nut was a better legal test, surely, such a test would have emerged with Weiler I, Weiler II, the Ison Report, or the 1993 Task Force Report, or during the legislative debates, committee hearings, and submissions throughout the 1980s and 1990s. Actually, when attention has been focused on the legal test for entitlement, a remarkable consistency is noted. The 1993 Task Force drew the same essential conclusions as that of the ODAP – even before the *Athey* case. Yet, no "magic bullet" has ever been produced. The same core issues persist today. At the end of the day, under the current system, a linkage between employment exposure and the disease must be established on a balance of probability. The problem remains as simple and as complex as that. With the exception of those cases where science allows some general certainty, the evidence must be painstakingly assessed, and the most probable conclusion reached. There is no legal short cut.



Slide 43: Much stock has been placed in the *Athey* decision, as if *Athey* somehow is the long-lost key that unlocks the elusive OD door. While I am sensitive to the desire to seek out and discover a new legal method that makes sense of a century of legal discovery, the legal equivalent of an Archimedes cry of *eureka!,* is quite premature. Firstly, the principles enunciated in *Athey* were set out in almost the precise same way in the 1993 Task Force Report. Secondly, *Athey* is of limited use except in the most general way – it provides no great legal insight into the question of employment causation of disease. *Athey* was a motor vehicle tort case – a classic "accident" type case. In fact, under the workplace safety and insurance ["WSI"] system, "*Athey* type" cases have been long accepted by the Ontario WSIB. In this respect, the WSI system was well ahead of the Supreme Court of Canada.

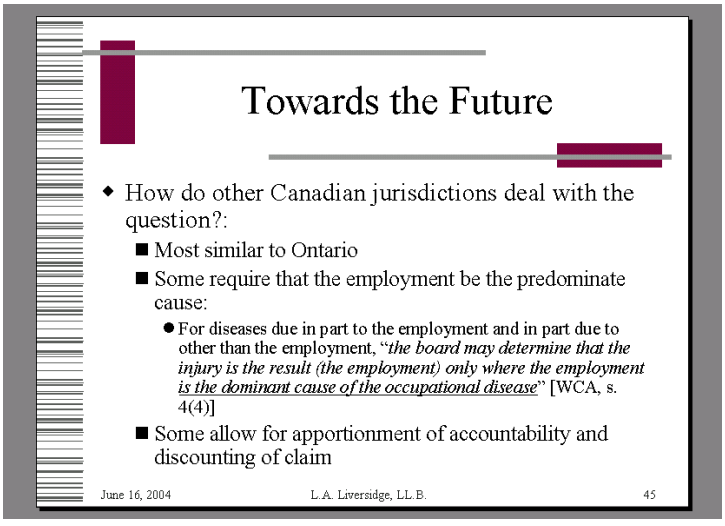


Slide 44: More troubling is the growing tendency to incorporate certain and limited elements of the tort liability scheme into the WSI scheme. This is a mistake, and provides a false confidence which will lead to unfair results. While indeed the tort and WSI systems are related, WSI long ago abandoned certain core tort principles in favour of a no negligence system. Negligence is the heart and center of tort liability. Cases like *Athey* are used to assess causation in a negligence scheme – a very different legal framework.

In tort, an evidentiary burden must be proved (or disproved) by the parties involved. As WSI is an inquisitorial process and not adversarial, the investigative process is, to a large degree, out of the control of an individual employer. This is appropriate. Not only would a "discovery" type system add to the administrative costs of each claim, increase delays and potentially limit claimant accessibility, it would add an intrusiveness presently foreign to the WSI process.

However, an avoidance of a discovery type process in WSI is only possible when the system, by design, departs as required from the tort liability scheme. Once the WSI system begins to "cherry pick" certain attributes of tort law, the scheme falls out of balance. While the ODAP report suggests that there is no burden of proof on either party in the Ontario WSI system, this remains true only if the design and administration support that founding concept. The system works only if the evidence presented or obtained by the WSIB establishes employment causation. In other words, whether there is a technical legal onus on a worker is a moot point – there is an onus on the Board to establish an employment linkage. Without that onus, the system spins apart.

If employers are expected to compensate workers for occupational diseases where there is only a tenuous relationship to the employment, employers must be provided with the same intrusive investigatory powers as we see in the tort system to explore non-occupational causation links. Establishing a clear burden to establish causality with the Board ensures legal fairness. That cannot be removed.



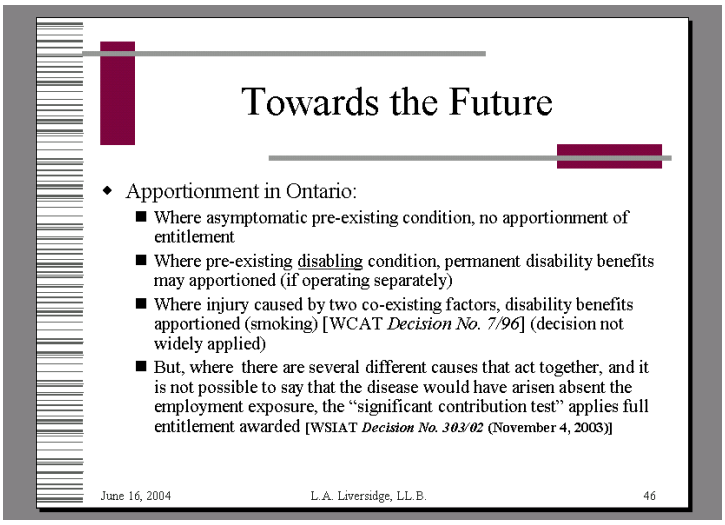
Slide 45: Most Canadian jurisdictions experience the same legal conundrum as does Ontario. Manitoba however, only compensates if the employment exposure is the predominant cause (i.e., > 50%) [*Workers Compensation Act,* C.C.S.M. c. W200, *s*.4(4)], while Prince Edward Island apportions accountability [*Worker's Compensation Act* R.S.P.E.I. 1994, c. W-7.1, s. 6].

In 1999, the British Columbia Royal Commission on Workers' Compensation rejected both the predominate cause approach [Royal Commission on Workers' Compensation in British Columbia, Final Report, Chapter 4, "Determining Work Relatedness" ("BCRC Final Report"), page 12], and the apportionment method [page 15].

This is understandable. One of the pitfalls of both predominance and apportionment is that the fundamental question of fairness, in a system design context, is not addressed. The dilemma described by Weiler 25 years ago is not resolved. Arguably, either approach allows for some legal symmetry, however, unless there is a social safety net for the cases that do not rise to the predominance test, or for which only a minimal portion of entitlement is deemed compensable, disabled workers struck down from working due to disease, whether caused by work or not, will be left to their own financial devices. As social policy, that is not progress.

On the other hand, so long as WSI for OD is funded 100% by employers, it is reasonable to expect that at least the employment was the predominate cause before significant expenditures are made.

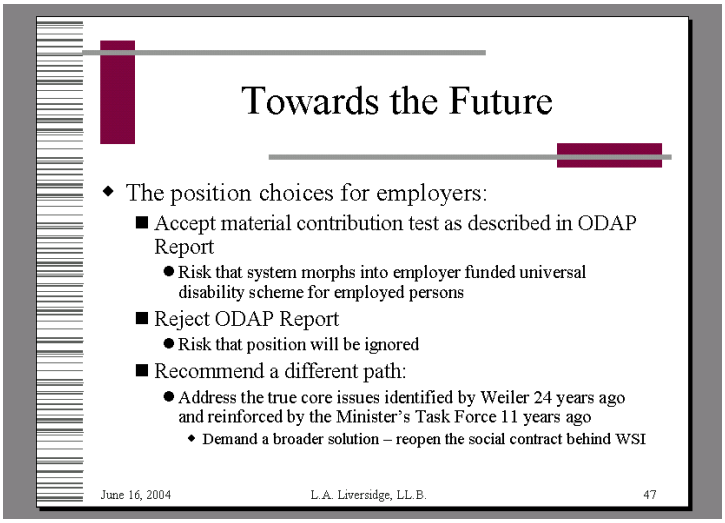
No matter the legal system and no matter the legal test, so long as employers are the exclusive funders, fairness will never be achieved.



Slide 46: Apportioning accountability and granting a 100% disabled worker only partial benefits has occurred in Ontario [WCAT *Decision No. 7/96*], although it is not the prevailing approach. In the Ontario WSI system, a claimant 100% disabled due to OD, is either all the way in or all the way out of the system. The OD is compensated completely or not at all. Unless and until there is a complimentary and

mandatory insurance regime to compensate for non-occupational loss, apportionment is not an attractive solution. However, a *de facto* employer funded universal disability scheme for OD for employed persons is equally unfair. While the weighting of loss of benefits against the cost of those benefits may not be an entirely equal comparison, and the system, if it must err, should err to the favour of the diseased worker, such a design choice is hardly sound public policy.

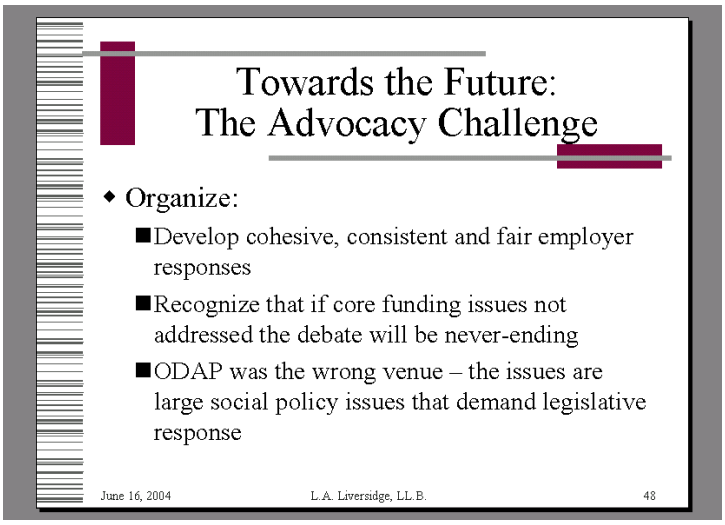
It is time to forge a new and better way.



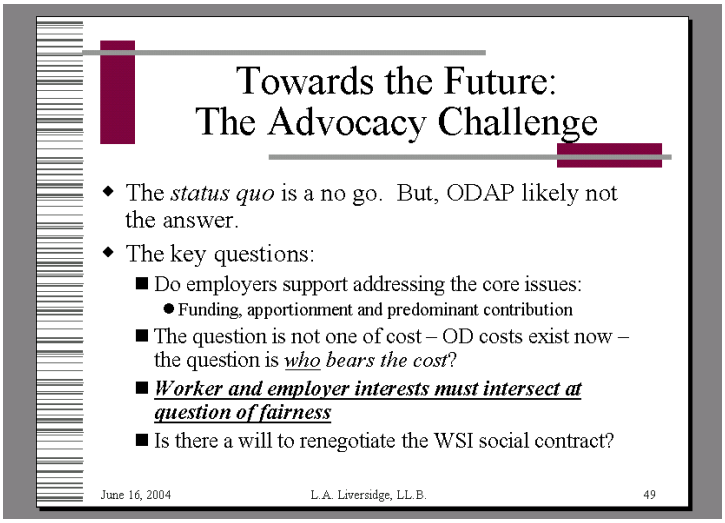
Slide 47: While I remain of the firm view that the ODAP recommendations must be rejected, the debate must continue in earnest. Acceptance of the "material" or "significant contribution test" as recommended by the ODAP presents the very real and likely risk that the system will morph into an employer funded universal disability scheme. This evolution, in my respectful view, is inevitable if the legal structures are to remain as they are. Weiler, in his first report [Weiler I], intimated as much, however suggested that no matter how inclusive the scheme became, it could never compensate for all OD.

However, a simple rejection of the ODAP Report is irresponsible, short-sighted and simply delays the true and needed debate. A call to reject the ODAP Report, without a workable alternative, will likely fall on deaf ears, and rightly so.

The modern debate on OD compensation was initiated by Weiler 24 years ago. It was briefly addressed in the early 1990s, but has been stalled over the last 10 years. Understandably, there were other priorities during that time. In the 1980s, the system was consumed with establishing a higher standard of worker equity for all cases (including OD). In the 1990s, energies were focused on system sustainability as employer premium rates sky-rocketed along with the unfunded liability. At the moment, there is neither a funding or an equity crisis. While contemplating massive policy reform is an exhaustive process, there will likely be no better time than now to get on with the real debate – the underlying social contract. The time has arrived for bold new steps.



Slide 48: The prevailing issue is one of funding, not adjudication. The WSIB, at any level, lacks the jurisdiction to resolve the dilemma of OD.



Slide 49: To repeat my opening comment – the debate is not about creating a new cost for OD compensation. Disabling diseases already cost. The debate is about who bears the cost. OD tests the limits of the Ontario WSI scheme. It is not an easy issue. There is no easy solution. However, so long as employers and workers continue to agree on the basic tenets that underlie the WSI system, worker and employer interests must, and will, intersect on issues of fairness and principle. Once it is admitted that the OD question is not resolvable under the current system, the next step becomes clearer – a new way must emerge. The *status quo* is a "no go". A process beyond Weiler was needed in 1980 and in 1983. A process beyond the Task Force was needed in 1993. And, a process beyond ODAP is needed in 2004. **The question of compensation for OD requires the leadership and stewardship that is only possible from the Government, and ultimately, from the legislature.**