The Liversidge *e*-Letter

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

February 28, 2014 An *Electronic Letter* for the Clients of L.A. Liversidge, LL.B. 3 pages

Bill 67 Received Impassioned Unanimous Support Yesterday:

All parties agree with the intent of Bill 67

Bill 67 received impassioned all-party support to proceed to committee

In yesterday's issue of **The Liversidge *e*-Letter**, while strongly supportive of the intent of ***Bill 67: An Act to amend the Workplace Safety & Insurance Act, 1997 with respect to post-traumatic stress disorder***, introduced by NDP MPP Cheri DiNovo (MPP for Parkdale-High Park), I cautioned against the use of "reverse-onus" or "presumption" provisions, suggesting that there may be serious unintended consequences for those that the bill attempts to help. I said:

> **I respect the intent - however - Bill 67 just isn't needed**
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> While I respect the intent of the bill, not only am I of the view that Bill 67 is unnecessary, it may well lead to many unfortunate unintended consequences that will actually work against the interests of those the bill purports to help.

I still hold to that caution. I fear that the real problem (and based on yesterday's debate I am convinced there is one) has not been identified. This will be my focus today.

I noted that Bill 67 is very narrow and its objectives are simple enough – to make it easier for **Emergency Response Workers** ["ERWs"] to claim for **post-traumatic stress disability** ["PTSD"]. I also noted that "*Ms. DiNovo is a tireless advocate for worker and injured worker rights and Bill 67 fits right in with that well earned reputation*". As suggested yesterday, it is clear that that passion is rightly shared by every single member of the Ontario legislature. Every speaker, no matter party, no matter background, spoke with passion, with conviction and with an eloquence not always heard on the floor of the Ontario legislature. The strong passionate speeches from Queens' Park yesterday mirror every Ontarian's personal bond with ERWs. I said this yesterday:

> Support for ERWs *is* universal. Support is equal in all political parties, and from every corner of this society. Literally everyone has an innate sense of commitment and a special relationship with ERWs. While the word "hero" is overused in today's lexicon, there can be no depreciation of the word as it applies to ERWs. They *are* today's heroes. Each and every day.

So, if I agree with the intent of Bill 67 and I support those that spoke in favour of it, why don't I support Bill 67?

That is a very good question. The fact remains I don't support Bill 67. I however most certainly understand the deep and impassioned support for the bill. Moreover, no one should interpret my lack of support for Bill 67 in a manner that suggests that I am of the view that ERWs should not receive workplace safety and insurance ["WSI"] benefits for PTSD. They should. ***I am of the firm, long-held view that they should have their claims allowed quickly***. I remain convinced though that it is ill-advised to rely on a presumption clause to achieve what is clearly universally supported - expeditious case determination for ERWs experiencing PTSD. That this debate will now proceed to legislative committee (the **Standing Committee on General Government**) is an excellent next step. After yesterday's debate it is clear to me that much discussion is needed around the entire question of PTSD and ERWs and the WSIB's treatment of those cases. ***Most importantly, the WSIB must come forward and carefully and clearly explain how it currently deals with these cases and how the Board can and will improve its internal processes for PTSD claim determination.***

Yesterday I suggested that there was not a proper policy motivation behind Bill 67. After reading yesterday's debate, based on some of the examples presented to illustrate the need for the bill, I have changed my view. I am convinced that there are problems with the determination of these cases. ***But, I don't think that Bill 67 will solve those.*** The Board can. And must. I will explain.

The 2nd reading legislative debate

I will select and highlight what I consider to be some important elements of yesterday's debate. I encourage readers to read the entire debate at: http://www.ontla.on.ca. As there was strong universal support for Bill 67 and as every member speaking spoke with equal passion and commitment for the bill, I will not name the speakers in the following excerpts. I will not be including excerpts from all speakers

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and do not wish to inadvertently leave the impression that some spoke in favour while others did not. It is clear that on this issue, every member of the Ontario legislature spoke with an equal mind. ***The support was strong and universal.***

The need for the bill was described in this fashion:

> The reason we need this bill is that we need to accord dignity and support to those first responders who rush into danger when we rush out, who look after us. We need to begin to look after them today.

The "*need to look after them today*" comment underscores the essence of the need for this bill. **This infers, strongly and succinctly, that they are not currently being looked after**. The universal and impassioned support for this bill shown yesterday can be interpreted in no other fashion. Yet, as I explained in yesterday's issue of **The Liversidge *e*-Letter**, the law, the policy and an impressive body of decisions, places no obstacles whatsoever in the path of prompt determination of these cases, *especially* for ERWs. The work-related PTSD triggering events experienced by ERWs are the quintessential, if not the prototypical, scenarios for case acceptance. ***So, what is really happening? If current protocols are built for these very cases, and yet they are not being fairly or quickly decided, where is the Board falling down?*** If there are problems today, and it seems there are, there is nothing in the current law or policy that drives these problems.

Let's also be clear about another important point – nothing in Bill 67 alters the ultimate test for entitlement. Ultimately, there must be personal injury (in this case PTSD) arising out of the employment. Bill 67 alters the process, that's all. Linkage will be presumed. But, Bill 67 is not designed to allow cases for PTSD not connected to the employment (and thus the inclusion of the *rebuttable presumption* clause). ***Therefore, there is no solid reason why a valid case that will be accepted under Bill 67 would not and should not be accepted today***. And, accepted quickly. Yet, the basis for Bill 67 seems to be that they are not. If this is the case, that legitimate cases are being denied, or are taking too long to be accepted, assess and fix *that* problem. After all, the same WSIB will be adjudicating PTSD claims under Bill 67 than is adjudicating PTSD cases now. If the real problem is with the Board, start there.

During yesterday's debate several moving, compelling and heart-rending cases were brought forward to illustrate the need for Bill 67.

> This is what our first responders do for us. This is what they do for us. It's incumbent upon us, I feel, that we should protect them when they succumb to post-traumatic stress disorder.

In every instance, those cases reflected the very type of facts that ought to spur immediate claim acceptance under the current rules. If they are not, or did not, then that is the real issue. What is going on today with these cases hopefully will form a large part of the committee debate.

The current process seems to be the primary concern:

> We heard on the panel this morning about the long and gruelling mechanism of having to prove you actually acquired post-traumatic stress disorder from your job—virtually impossible to do, by the way, but in the process you have to provide names and dates, breach confidences. You have to bring into play all of the events that brought on your PTSD in the first place. This is not the way to treat our first responders.

If real life experiences driving real life cases are requiring a "*long and gruelling mechanism of having to prove you actually acquired post-traumatic stress disorder from your job*" and this is considered to be "*virtually impossible to do*" there certainly is something remiss. The Board should be given the opportunity to carefully and completely address these concerns in committee.

It seems that there is no expectation that Bill 67 will increase the number of cases accepted by the Board:

> I want to say a few things, too, about maybe some of the concerns members might be having. One of the concerns that was brought to my attention was the possible cost to the municipalities about this, and I can tell you, there is an answer to that question.
>
> First of all, Alberta has had this legislation in place as law since 2012. My constituency assistant phoned all the cities in Alberta and asked them, "*Has this added to your expense?*" They all said, "*Absolutely not*." In some cases, they say it streamlines it, because you can imagine that the whole diagnostic process and assessment process that WSIB has to go through and that employers have to go through with them takes time. That would be eliminated because, again, we're presuming that somebody who gets PTSD and who's a first responder gets it from the job.
>
> "*Did the cases go up?*" we asked them. *They said absolutely not; the same number of cases, really, they said, as before*. The difference was the dignity and support with which those who made claims were dealt with. These are important items to keep in mind. I know the government has put in place a panel to look at post-traumatic stress disorder, but that's really in the Ministry of Labour, to look at prevention and awareness. I think we've come to the point in Ontario where we understand that post-traumatic stress disorder, in fact, all mental illness—we understand it's truly an illness. These are not folk who are malingering.

Let's accept those comments on their face. If the Ontario experience is expected to mirror the Alberta experience and neither cases or costs will increase, then the real issue is not with the number of cases that are accepted but with the process to get them accepted. Speakers made it clear that Bill 67 will fix the process and "*once the diagnosis is in place*" acceptance will be automatic. I agree that that is what Bill 67 will do. ***The real question though is this – why is it currently taking so long to consider these cases?***

A government member speaking in support for the bill said this:

> I think it's important to note that the WSIB currently provides compensation for traumatic mental stress when there is a clear link between the work and the injury or illness. Claims for post-traumatic stress disorder, PTSD, are adjudicated by a specialized team of case managers on a case-by-case basis according to WSIB policy. By using this specialized team, the WSIB has significantly reduced their adjudication time. In

2006, the average time it took for a decision relating to a police officer's claim for PTSD was just over 150 days. In 2011, the average was 70 days.

The "clear link" comment may have been inadvertent or may have been a "*Freudian slip*" reflecting the current standard employed by the WSIB in PTSD cases. But a "clear link" does not, or at least should not, have to be established today to deal with PTSD cases. Under WSI law, as I explained yesterday, PTSD cases, as most cases, are decided on "*a balance of probability*". While not every WSI issue is considered under the same test (for example, employers must present "*clear and convincing*" evidence to rebut reemployment presumptions (*Decision 605/91*) and workers were once required to present "*especially clear*" (*Decision 918*) evidence in the case of occupational induced stress (as opposed to PTSD)), cases addressed under the Board PTSD policy are considered on a balance of probability. Standard of proof has been discussed certainly hundreds if not thousands of times in Appeals Tribunal decisions. See for example, this from *Decision No. 605/91*:

> Questions concerning the standard of proof are questions about how satisfied an adjudicator must be before the law permits him or her to conclude that the fact has been proven, or, in the case of a presumption, that the presumed fact has been disproven - i.e., how convincing must the evidence be? The law's normal standard of proof in a civil case requires an adjudicator to be satisfied "on a balance of probabilities", whereas in a criminal case the standard is higher and an adjudicator must be satisfied "beyond a reasonable doubt".

In fact, the qualifying criteria set out in **WSIB Policy Document 15-03-02, Traumatic Mental Stress**, of a "*sudden and unexpected traumatic event*" (see the February 27, 2014 issue of **The Liversidge *e*-Letter** for a complete outline of this policy), is an attempt to pave-the-way for prompt acceptance where these criteria are present in the face of a diagnosis of PTSD. Another way to look at is this – by defining a "*sudden and unexpected traumatic event*" the Board is employing a *de facto* presumptive approach to case determination already. Otherwise, there seems to be no purpose behind the policy.

I find it interesting that there is very little assistance in Board policy on the standard of proof needed in any case let alone in PTSD cases. **It may well be that this is where WSIB policy and decision-making is deficient**. If this is the case, this is easily remedied. Board policy should clearly and carefully delineate the standard of proof required in PTSD cases. If evidence must currently rise to a level of a "*clear link*" this should be immediately changed. This may be the problem. The earlier inference that an average reduction in decision-making time from 150 days in 2006 (*shockingly high in my opinion*) to 70 days in 2011 (*still shockingly high*) is something to laud . . . *well . . . I differ*.

I am of the strong view that, if properly assessed under the "*balance of probability test*" most of the PTSD cases for ERWs can be decided immediately, and allowed, based on the employer report of injury once the PTSD medical diagnosis is received by the Board. That they take an average of 70 days to determine suggests to me that the Board may in fact be setting too high a standard of proof.

As said, while I interpret Board policy as setting in motion a *de facto* presumption in its design of PTSD policy, in practice, it may in fact be trying to "*prove the contrary*" and not satisfied until it does or it doesn't. 70 days for an average decision-making period is, in my respectful view, way, way out of whack. It suggests to me that something else is at play here.

The same government speaker said that:

> The WSIB is looking at ways to increase PTSD education and awareness among individual police officers.

Frankly, I don't understand that statement in the context of the Bill 67 debate, unless there is much more to it than said. ***The problem here does not seem to be police officer education***. If it is taking on average 70 days to decide police officer PTSD cases, which should be the *easiest* type of PTSD case to decide in my view, I become suspicious that the real culprit giving rise to concerns is WSIB practice. Another speaker gave a hint that this may in fact be the problem (excerpt abridged):

> Instead of supporting first responders to seek the help they need and to access treatment for PTSD, Ontario has re-victimized those who stepped forward, by forcing them to go through a lengthy, exhausting and intrusive process to prove that their illness is work-related in order to establish their right to be compensated.

And another:

> If you're a front-line emergency services worker with PTSD, you shouldn't have to spend years fighting the WSIB bureaucracy to prove it.

And another:

> I've heard from first responders that they have been turned down simply because they had a divorce in their past, and they can't prove that their post-traumatic stress disorder didn't come from the divorce, even though they're running into burning buildings or saving children or watching colleagues be killed. This is patently absurd, and it's patently wrong.

This latter example, if accurate, supports my earlier comment (that the Board may be attempting to "*prove the contrary*"). I am only speculating, but it is a theory that is consistent with the demand for Bill 67. If the Board is demanding, as outlined above, proof that non-employment events *were not* the cause of the PTSD, this is wrong at so many levels. This is certainly an improper application of the "*significant contribution test*" which requires that the employment events be "*a*" significant contribution, not "*the*" or "*the most*" significant contribution. **After yesterday's debate, I am convinced there is a problem. But, Bill 67 is not the solution. *Board policy and practice is*. The committee hearings will be a good forum to explore this further. *Change is needed. I am convinced change will happen. It's just a matter of where and when*.**

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