Workers' Compensation for Occupational Disease: Medicolegal Challenges

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Presentation outline

- Overview of workers' compensation systems
- Provisions specific to compensation for occupational disease
- Level of evidence required for compensation
  - According to law
  - To be included in a policy?

Legal framework governing workers' compensation for occupational disease

- Workers' compensation characteristics
  - Exclusive jurisdiction of administrative body (WSIB/WSBC/CNESST) and specialized tribunals in appeal (WSIAT/WCAT/TAT)
  - Experience rating rules differ in each jurisdiction
  - Interpreted in favour of the claimant (benefit of the doubt)

Law and science: talking in silos

Law

- The Court is obliged to decide
- Preponderance of evidence is sufficient in civil cases (50%+1, or more likely than not).
- Scientific studies are not the only source of evidence
- Legal decisions apply to the individual and not to a population

Science

- Abstention is possible
- Conclusions are based on statistically significant results (.05 or .01).
  - Alpha errors reported
  - Beta errors not often reported
- Evidence required to fail to conclude on the existence of relationship is less than that required to find the relationship
- Conclusions apply to populations, not to individuals

Preponderance of evidence, not scientific certainty

- Determination of work-relatedness requires that the preponderance of evidence support the conclusion that exposure at work was a significant contributing factor in the onset of the worker's disease.
- Legislative presumptions facilitate the recognition of a claim if the associated criteria in law or policy are proven to apply in the worker's case.

Benefit of the doubt to the claimant

- In **Ontario**, s. 119 (2) of the WSIA states that:If, in connection with a claim for benefits under the insurance plan, it is not practicable to decide an issue because the evidence for or against it is approximately equal in weight, the issue should be resolved in favour of the person claiming benefits.
- In **B.C.** cited in Fraser Health: Where the evidence leads to a draw, the finding must favour the worker. This extends to deciding whether the occupational disease is "due to" the nature of employment — that is, to the issue of causation: ". . . if the weight of the evidence suggesting the disease was caused by the employment is roughly equally balanced with evidence suggesting non-employment causes, the issue of causation will be resolved in favour of the worker" (*RSCM II*, Chapter 4, policy item #26.22).

The legislative presumption in Quebec (AIAOD, s. 29)

- The diseases listed in Schedule 1 are characteristic of the work appearing opposite each of such diseases on the schedule and are directly related to the risks peculiar to that work.
- A worker having contracted a disease contemplated in Schedule 1 is presumed to have contracted an occupational disease if he has done work corresponding to that disease according to the Schedule.

Diseases related to asbestos: Schedule 1, AIAOD

- Asbestosis, lung cancer or mesothelioma caused by asbestos
- any work involving exposure to asbestos fibre

Basis for legislative presumption

- "Particularly when it comes to occupational disease, because of the variability in the available medical knowledge regarding the true causes of some diseases, it often happens that sick workers do not succeed in their claims because they can not demonstrate the causal link between their working conditions and the disease from which they are suffering, even though the frequency of that disease is notorious in their field of work. It is desirable that the legal and medical approach to these issues be made more flexible, or even specifically adapted to the circumstances." [our translation]
    - Livre Blanc sur la Santé et sécurité au travail, 1978

Law and uncertainty

- «Is it more aberrant to imagine that, in some cases, the employer be called upon to pay compensation for a disease for which he should not be liable, than to conceive that a worker be deprived of compensation he was justly entitled to, because of the complexity of a scientific controversy? In the context of social legislation, I don't think so. In any case, it's a policy choice and not a choice to be made by the judiciary.»
  - *Succession Guillemette* v. *JM Asbestos*, SCC, 1998
  - Approving this opinion of dissenting justice Forget in QCA:[1996] C.A.L.P. 1342 [our translation]

When no presumption applies

- «A worker having contracted a disease not listed in Schedule I out of or in the course of employment and not as a result of an industrial accident or of an injury or disease caused by such an accident is considered to have contracted an occupational disease if he satisfies the Commission that his disease is characteristic of work he has done or is directly related to the risks peculiar to that work.»

– S. 30, AIAOD

Legal causation

- Burden of proof: preponderance of evidence
  - Is it more likely than not that workplace exposure was a significant contributing factor to the development of the worker's illness?
- Claimant's burden of proof in civil cases: 50%+1
  - Snell v. Farrell, [1990] 2 SCR 311 – 330
  - Laferrière v. Lawson, [1991] 1 SCR 541
- Lower in workers' compensation cases where the worker has the benefit of the doubt…

British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority, 2016 CSC 25 p.32

- The expert reports concluding in their inability "to reach scientific conclusions" […] to support the causal association between workplace conditions and the workers' breast cancers, or to "find any scientific evidence for the plausibility of a laboratory work-related etiological hypothesis regarding breast cancer spoke *not* to the burden imposed upon the workers by s. 250(4), nor even to the burden imposed upon plaintiffs in a civil tort claim […], but to a standard of scientific certainty. […] In my respectful view, therefore, in relying upon the inconclusive quality of the OHSAH reports' findings as determinative of whether a causal link was established between the workers' breast cancers and their employment, the chambers judge and the majority of the Court of Appeal erred in law. »

Supreme Court of Canada, 2016

- "The presence or absence of opinion evidence from an expert positing (or refuting) a causal link is not, therefore, determinative of causation [...]. It is open to a trier of fact to consider, as this Tribunal considered, other evidence in determining whether it supported an inference that the workers' breast cancers were caused by their employment. […] causation can be inferred — even in the face of inconclusive or contrary expert evidence — from other evidence, including merely circumstantial evidence. […] par. 38

Supreme Court of Canada, 2016

- […]This does not mean that evidence of relevant historical exposures followed by a statistically significant cluster of cases will, on its own, always suffice to support a finding that a worker's breast cancer was caused by an occupational disease. It does mean, however, that it may suffice. Whether or not it does so depends on how the trier of fact, in the exercise of his or her own judgment, chooses to weigh the evidence. And, I reiterate: Subject to the applicable standard of review, that task of weighing evidence rests with the trier of fact — in this case, with the Tribunal."
- British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority, 2016 CSC 25

Lung cancer: policy and practice

- Lung cancer is presumed to be related to asbestos exposure if
  - B.C.: asbestosis or fibrosis
  - Nfld: 5 years exposure, 10 years latency
  - Ontario: 10 years exposure, 10 years latency
  - Québec: no explicit policy

- Practice: non smokers
  - Claims by non-smokers will be accepted despite absence of asbestosis
  - If asbestosis and smokers
    - Claims will be accepted when criteria are met or almost met
  - No asbestosis in smokers
    - claims have been accepted in Ontario and Québec, if there is evidence of very significant and intense exposure

Equity related concerns

- Policy and Scheduling of diseases seem to be predicated on scientific certainty with regard to exposure and latency requirements and with regard to diagnostic requirements.
  - Yet workers should be compensated if it's more likely than not that asbestos caused their disease
  - Free access to several specialists who can provide accurate diagnoses and exposure analyses is not available in all provinces.

If the criteria are not met

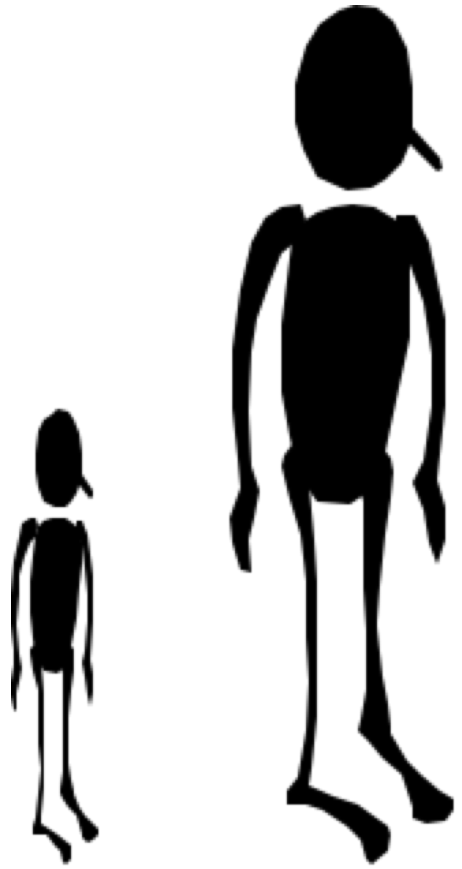
- Compensation is available on the basis of the individual merit of each case
- Decision makers in those provinces with stringent criteria in policy are often reticent to accept claims that don't meet policy requirements
- Preponderant evidence of exposure and medical evidence regarding diagnosis and disability is required for a claim to be accepted

Experience rating and Incentives to contest

- Ontario: long latency occupational diseases are not experience rated
  - Employers can contest claim but have no economic incentive to do so
- Québec: all claims, including long latency diseases, are experience rated
  - All previous employers can be experience rated and can contest claim and experience rating
- France: occupational diseases are experience rated only in relation to the most recent employer
  - Employers can contest experience rating but not the acceptance of a claim

Structural imbalance

- Misinformation is sometimes introduced by expert witnesses and lawyers.
- Structural imbalance fails to guarantee that misinformation will be corrected.



Limited presumptions in regulatory frameworks

- Québec
  - Lists have not been changed since 1985
  - Appeal tribunal has been very proactive in allowing appeals for cancer claims
  - Reform tabled in 2020: but will it introduce scientific certainty as a criteria?
- Ontario
  - More diseases listed
  - Irrefutable presumptions
  - Appeal tribunal appears to be very reticent to intervene

Challenges moving forward

- How can we ensure equitable access to exposure measures and occupational physicians
- How can we intelligently address incentives to contest claims in Canadian jurisdictions?
- How can we improve the list of illnesses presumed to be work-related in regulatory frameworks and policies?
- How can policy and practice address synergies in exposures to carcinogens?

Take home messages

- The purpose of WC law is not to find the accurate scientific answer to a question raised by a worker's claim, such as causation
- Structural imbalance must be addressed if tribunals are to be effective and fair.
- Policy should be designed to compensate for the structural imbalance by preventing the misuse of scientific data.
- Policy makers, decision makers, advocates and researchers must be made aware of the perils arising from the misinterpretation and misuse of scientific evidence.
- Access to support in tracing exposures and gathering the medical evidence should be provided to all workers

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