THE WORKPLACE SAFETY AND INSURANCE SYSTEM

EVIDENCE LAW

Text of Ron Ellis Address to the OWA Staff Conference on Advocacy in Complex Cases

December, 1998

In the original conference agenda, the title of this session was simply "Evidence" which was the subject assigned to me by the conference organizers. At an early stage in my preparation, I suggested the more ambitious title that now appears in the agenda: *THE SCIENCE AND ART OF PROVING A CASE*. Now that I have finished the preparation, it is clear to me that the new title was too ambitious for what is possible in the time available.

I have to tell you, therefore, that, as it has turned out, this session will be mainly about evidence law – which, of course, *is* an important part of the *science* of proving a case. But, as far as *art* is concerned, in this presentation, I will be more concerned with the paint and the paintbrush, then with the art.

I am aware that, in this audience, most, if not all, will be advocates with extensive experience in proving cases and dealing with evidence problems. Your conference organizers believed, however, that a 2-hour return to basics on this subject would be of value, even for experienced hands. And that view accorded with the experience I have had elsewhere that an opportunity to revisit the basics is of value even for the experts.

I was asked to do this, as I understand it, perhaps because of my background as an evidence law professor and, more importantly, because of a lecture that I had given in the past at the Tribunal and elsewhere where I had purported to teach a full, first-year law school course in evidence in one hour. The plan was to stage a reprise of that lecture. Regrettably, in the confusion of changing offices and re-organizing my files in the past months, that fabled lecture has gone missing.

I was also asked to devote the second hour of the session to a participative mode of teaching – perhaps the assignment of an evidence problem to small break-out groups followed by a discussion in plenary. However, as I worked on the research and writing required for the lecture component it became clear to me that there was too much that should be covered to permit that, and I took an executive decision to devote the full session to a lecture format – hopefully with some discussion as we go along.

Accordingly, to-day's presentation – all two hours of it – is a newly constructed attempt at Evidence 101 interwoven with Appeals Tribunal Evidence 202.

To assist in your following my presentation, I have put together a few "overheads" which I have decided not to put on the overhead machine, but to make copies for each of you so that you may follow it up close rather than having to read it from afar. These have just now been distributed and I would suggest that you take a moment now to insert them in your books under the tab reserved for this session's material.

Throughout the lecture, I will be referring from time to time to examples of evidence issues taken for the most part from a particular hypothetical case.

The description of how my hypothetical case presented itself in the first interview is the first "overhead" and I would ask you to now take a moment to read page 1 of the inserts. For the reader of this text, page 1 reads as follows:

The Esterband Case as it initially presented itself

> Marika Esterban, Korvu Esterban's widow, has come to see you. Her husband died of cancer in 1991. He had no insurance and left her with no resources to look after her three children. She has been working multiple part-time jobs ever since to keep the family together. At the time he became ill – 4 months before his death – Korvu was employed by Kordite Kemicals Inc. at its plant in Dalle Ontario. He was a pipefitter in the maintenance department. Kordite manufactures herbicides for the agricultural industry.
>
> When Korvu died, a co-worker of his had suggested that a workers' compensation claim might be worth pursuing. Mrs. Esterband then remembered an incident that Korvu had told her about in which he had been present when some liquid had been spilled at the plant. She recalls him telling her about the excitement that had been caused and all the running around by everyone and that he had saved the day by simply thinking to turn off a valve which stopped the flow. As best she can recall, this would have occurred about year or so before he became ill.
>
> Marika cannot remember how long Korvu had worked for Kordite, but thinks it may have been about twenty years. Korvu was 42 years old when he died. He had, she says, never smoked.
>
> Mrs. Esterband submitted a workers' compensation claim and she has just received the Board's final decision indicating that it had not been possible to establish any connection between the alleged spill and Mr. Esterband's cancer. The letter advised her of

> her right of appeal to the Tribunal, and she was now seeking your help with that appeal.

In this case, as with any case, the evidence challenge for the advocate may be stated, generally, as follows:

> On each material fact / the Tribunal panel [1] must be presented with evidence / which that panel is entitled and prepared to receive / and which, when considered in its entirety, / after being appropriately tested for reliability in the hearing proceedings, / is of sufficient weight / that a panel assessing it in accordance with the analytical criteria appropriate to the panel's role as a fact-finder / will be satisfied that the standard of proof applicable to that fact has been met.

Imbedded in that statement is a number of important evidence-law concepts.

I have listed the concepts in the order in which I propose to deal with them. (See page 4 of the inserts). For the reader, the list reads as follows:

1. Material facts.
2. Circumstantial evidence comprised of "testimonial" or "evidentiary" facts.
3. Direct evidence – eyewitness testimony, expert testimony and real evidence.
4. Judicial notice.
5. Admissibility.
    (a) General
    (b) Relevance
    (c) Prejudicial evidence
    (d) Improperly obtained evidence
    (e) The hearsay rule
        i. General
        ii. Oral hearsay
        iii. Admissions against interest
        iv. Proving the statement was made, not that it is true
        v. R. v. Kahn
        vi. Documents in general
        vii. Witnesses notes
        viii. Clinical notes
    (f) The Collateral Fact rule
    (g) Novel science

[1] Panel or single vice-chair – for ease of reference I will use the word panel to refer to the Tribunal adjudicative unit in each case, whether it be a tripartite panel or a vice-chair sitting alone.

(h) Character evidence
(i) Similar Fact evidence
(j) Privilege
    i. Reports prepared for litigation, and communications between solicitors and expert witnesses
    ii. Communications with mediators
    iii. The privilege against self-incrimination

6. Weight.
    a) General
    b) Assessing credibility of eye witnesses
    c) Weighing expert evidence
    d) The benefit of the doubt
7. Standard of proof.
8. Burden of proof.
9. The panel's fact-finding role
10. The analytical criteria for a fact-finder.

Through the balance of my presentation, I will be working my way down this list. You may want to take page 4 out of your book and keep it in front of you so that you can keep track of where I am.

1. Material Facts

By "material facts" I mean, of course, the facts that the law which governs the claim puts in issue. Thus, in this case (where incidentally I am, for simplicity, assuming that the claim will not be made on the basis of proving that the disease is an occupational disease but will be made under the general compensation section) the materials facts may be seen to be the following: (See Page 5 of the inserts)

1. Korvu Esterban was employed by Kordite Kemicals Inc.
2. Kordite is an employer in an industry covered by the Workplace Safety and Insurance Act.
3. Korvu Esterban died.
4. His death arose out of and in the course of his employment at Kordite.
5. Marika Esterban is his surviving spouse.

These are the material facts. (Proving 1, 2, 3 and 5 should be no problem, so we will focus on material fact No.4)

2. Circumstantial Evidence

There are, of course, a number of other facts that we know will have to be proved if the claim is to be successful. Nowhere in the list of material facts, for instance, is the fact that Mr. Esterban died of cancer. However, these other facts are not *material* facts. The law does not care that Mr. Estaban died of cancer only that his death arose out of and in the course of employment.

These other facts are what are sometimes called "testimonial" facts but which I think may be more usefully referred to as "evidentiary facts". They are the facts that constitute what is commonly referred to as *circumstantial evidence*.

Circumstantial evidence consists of a collection of *evidentiary* facts from which the existence of a *material* fact can be reasonably inferred.

Evidentiary facts that come at once to mind in contemplation of Mrs. Esterban's claim would, of course, include the following (See page 6 of the inserts):

1. Esterban died of cancer;
2. Kordite's manufacturing process involves the use of chemicals that cause cancer.
3. The kind of cancer it causes is the kind Esterban had.
4. Esterban was exposed in the course of his employment to those chemicals.

From the employer's perspective, the material fact that Kordite will want to see proved is that Esterband's death did not arise out of or in the course of his employment with them.

The evidentiary facts on which you would anticipate Kordite relying for proof of that material fact, and with which the Board would also naturally be concerned, would include these:

1. Kordite's chemicals only cause cancer if a person is directly exposed to them for a long period of time.
2. Esterband was not so exposed.
3. Where cancer is caused by such exposure, symptoms do not appear until after a certain minimum latency period.
4. Esterband's cancer was diagnosed too early relative to any possible exposure for that exposure to have been the cause.

5. The kind of cancer in question can also be caused by other things and Esterban had been exposed to such things.
6. Also, this cancer is common in the general population in the absence of known exposure to chemicals.

These are not material facts. As I have said, the law does not care how Esterban died, only that he died and that his death arose out of and in the course of employment. You will need to prove death by cancer, and by a particular kind of cancer, only for the purpose of combining those facts with the fact concerning Kordite's use of chemicals which cause such cancer, and other related facts, all for the purpose of laying the factual basis on which the panel may *infer* the existence of the material fact that the death arose out of and in the course of employment.

In television shows, circumstantial evidence is often denigrated as second-class evidence, as compared to direct evidence. However, circumstantial evidence is commonly more reliable than direct evidence, and in virtually every case it will prove impossible to prove one or more material facts through direct evidence only. Almost always such proof will be dependent to some degree or another on circumstantial evidence consisting of a number of evidentiary facts that the panel will have to find exist.

It is, in my opinion, important, when one is designing one's evidence strategy, to keep clear in one's mind the distinction between material facts, and the evidentiary facts that are to be used as part of the circumstantial evidence in your case. If you understand that you are, in point of fact, engaged in building an *edifice* of evidence – much of it circumstantial in nature – that, taken together, will persuade the adjudicator to infer the existence of the material fact, then, in my opinion, your thinking about what evidence possibilities there might be in a case will be better informed and more usefully focused.

Of course, evidentiary facts, like material facts, must also be proved by evidence. And, that evidence may also include evidentiary facts from which the existence of the evidentiary fact you are trying to prove may be reasonably inferred. There are, if you like, various levels of circumstantial evidence.

Thus in Mrs. Esterband's case, to prove the evidentiary fact that Esterband was exposed to the chemical, you will want to prove, amongst other things, the second-level evidentiary fact that a spill of that chemical occurred. To do that, you may want to prove amongst other things the third-level evidentiary fact that the plant was unexpectedly shut down on the day on which the spill is said to have occurred (thus suggesting the inference that something unusual and disruptive – like a major spill – occurred on that day).

<u>3.Direct Evidence</u>

How, then, do you prove that something you allege is an evidentiary fact *is* a fact? Of course, you have to develop and present evidence. And here I am talking about evidence that is not the evidentiary facts comprising the circumstantial evidence in your case but the *direct evidence* that will prove the existence of the evidentiary facts.

Fortunately, there are only three categories of direct evidence to think about (See page 7 of the insert. For readers of this text see below.).

Two are testimony from witnesses – first, what is called "eyewitness testimony" and second, what is called "expert testimony".

The third, is what is called "real" evidence – the thing itself: the bloodstained knife, the gun that fired the fatal bullet, the fibre left at the scene of the crime, O.J.'s gloves, etc.

There is no other kind of direct evidence – nothing else you can use to prove a fact.

Ah, you say, what about documents?

Documents will always fall into one of the three categories:

- They are a record of eyewitness testimony,
- or they are a record of expert testimony,
- or they are a mixture of the two,
- or they are real evidence – for example, the signed contract put in evidence in a breach of contract suit, Corporate by-law No. 1, etc.

Eyewitness testimony consists of an individual who typically has seen or heard the evidentiary fact, describing what he or she has seen or heard. Of course, it would also include someone describing what he or she felt or smelt.

More accurately, it should be described as the "see/hear/smell/and touch witness testimony, but for short we refer to it as eyewitness testimony.

Expert testimony is the testimony of a witness *who is not an eyewitness* about *an opinion or conclusion* he or she has reached based on the presumed existence of certain evidentiary facts.

It is only, it should be noted, with respect to issues on which *the adjudicator* – i.e., the hearing panel – is unqualified to draw his or her own conclusions from the facts or evidence in question that expert witnesses will be allowed to testify.

And, they may do so only if they are shown to possess an expertise that is relevant to the issue in question. A witness will be qualified as an expert, and thus be a person authorized to give opinion evidence on any matter within their expertise, if it can be shown that through study or experience they have acquired special knowledge of such a nature that their opinions or conclusions are likely to be especially helpful in the determination of the issue in question.

And it is only witnesses who have been qualified as experts who are entitled to offer an opinion or a conclusion. If an *eyewitness* attempts to do so, an objection ought to be made and will be successful. And this applies in Tribunal appeals as well as in the courts. Thus, the American television lawyer's classic one-word objection: "opinion", your honour; or, "conclusionary", your honour.

Also, a witness whose qualifications to give opinion testimony have been accepted is only entitled to give opinion evidence respecting issues to which his or her expertise is relevant. His or her testimony respecting other issues will be subject to the same restraints as any eyewitness. Part of your job as an advocate is to keep the other side's experts in line in that regard. For example, just because a doctor has been qualified in the proceedings as an orthopedic surgeon, may not necessarily mean that he or she is also qualified to give an opinion concerning the ergonomics of a work station. And there is nothing to be lost in challenging an expert witness as to the limits of his or her expertise.

Real evidence is admissible only if it is relevant to the proof of a material or evidentiary fact, and it can only be found to be relevant if it is supported by eyewitness testimony identifying it and authenticating it as having the relationship to the material or evidentiary fact that makes it relevant.

In preparing the evidence for a case you are presenting, and in the assessment of the evidence presented by the other side, it is very useful to have these 3 simple categories of evidence clearly in mind.

Example: (Page 8 of the inserts. Readers of this text see below.)

Take a moment to consider these concepts in the context of a simple example.

Suppose that part of Kordite's case at the Board – part of the evidentiary facts on which it relied – was that Esterband was a smoker and his cancer was caused by the smoking. Mrs. Esterband denies that her husband ever smoked. However, in Esterband's file at Kordite is the notation that two days before Esterband became sick, he was disciplined for smoking on plant premises contrary to the company's rule against smoking. The plant is not unionized so there was no grievance procedure. However, in the file, and filed with the Board

in this case, is a discipline report detailing the investigation that led to the discipline.

The material fact that had to be proved to justify the discipline was: The accused smoked on plant premises. (The disciplinary record shows that he denied smoking.)

The allegation is that he was smoking in the washroom. No one saw him smoking, so there is no *direct evidence* proving that material fact. However, there are evidentiary facts that together constitute a seemingly persuasive edifice of circumstantial evidence.

The evidentiary facts are these: Esterband entered the washroom alone at 8:55 a.m; no-one else entered the washroom until after the accused left at 9:05; at 9:06 there was cigarette smoke in the washroom and a cigarette butt in the urinal; the washroom had been clear of butts before the accused entered.

The *direct evidence* by which it was sought to prove these evidentiary facts as recorded in the file memorandum were these:

> Testimony of witness #1: I am the maintenance foreman. I was in my office in front of the washroom with a good view of the washroom door from 8:50 to 9:10. I saw Mr. Esterband enter the washroom at 8:55 and leave at 9:05. No one else entered or left during that period. John Brown entered the washroom just after Esterband left.
>
> Testimony of witness #2: I am John Brown. I smelled cigarette smoke in the washroom when I entered it that morning, I also saw a Matinee butt in the urinal.
>
> Testimony of witness #3: I am the Office Manager. The cleaning staff always cleans that washroom every morning between 8:45 and 9:00, and did so the morning in question.
>
> Document evidence: the building maintenance department's Cleaning Schedule. It shows that the washroom is scheduled to be cleaned between 8:45 and 9:00.

Whether the discipline report itself – the fact of the discipline for smoking – is evidence that should have been admitted by the Board is a question that we will come to later. In the meantime, consider the categories of direct evidence that are illustrated by this memorandum as though the witnesses were testifying before the Tribunal.

Witness #1's statement is eyewitness evidence.

Witness #2's evidence re the smell of cigarette smoke is strictly speaking a mixture of eyewitness testimony and opinion evidence – i.e., he is expressing his opinion that what he smelled was cigarette smoke - but it is the kind of conclusion that he is qualified to draw because of his experience of smelling cigarette smoke on a daily basis. Any person would be so qualified – including the adjudicator. However, only Witness 2 had the opportunity to smell the smoke.

(It is the same as a witness testifying that a car that hit a pedestrian was moving at about 40 kilometres an hour. It is useful to be attuned to oral evidence that purports to be – appears to be – eyewitness evidence but that is really opinion evidence. There is always some inherent weakness in evidence of that nature that occasionally you will want to explore.)

Witness #2's testimony that he saw a cigarette butt in the urinal is classic eyewitness testimony. But, the fact that it was a Matinee butt would seem to be irrelevant.

It would not hurt for Esterband's counsel to interrupt the testimony to ask whether counsel for the company considers the fact that the alleged butt was a Matinee butt to be relevant. It is too minor a point to formally object to. However, by asking *if* it is relevant, you may discover that counsel intends to call other evidence to prove some special tie-in with the Matinee brand. (As for instance, that someone once saw Estaband purchasing Matinee cigarettes.) I will come to the general subject of relevance in a moment.

Witness #3's evidence is eyewitness testimony. Whether it is testimony that an adjudicator ought to receive is another question that we will get to when we talk about admissibility (the problem, of course, is that, if you listen closely you will see that it is probably *hearsay* evidence – she did not say that *she* saw the cleaning staff clean that urinal that morning at that time), but there is no question about the category. The witness appears to be likely testifying about what she *heard* members of the cleaning staff say – thus eyewitness testimony.

The Maintenance Schedule document may be viewed two ways. Relative to the evidentiary fact that there is a maintenance schedule that provides for cleaning washrooms during the specified time period, it might be said to be real evidence – i.e., the thing itself. It may also be viewed as a record of eyewitness testimony – of what the unknown author had heard or seen concerning the day-to-day maintenance plans for the building. Its *admissibility* without the support of a witness testifying about it is, again, another question that we will get to.

And, if, as Esterband's counsel, you were able to establish that the urinal was the type with water sitting in it and that when the butt was seen by Brown it was not floating, you might want to call an expert witness from the tobacco

company to say how long it would take for a fresh butt to sink to the bottom. That would be a classic expert witness.

If the expert would have to examine the butt before he could give his opinion, and Mr. Brown had had the presence of mind – and the necessary commitment – to retrieve the butt, then the butt would constitute *real evidence*. Its admissibility would depend on Brown having some means of satisfying the adjudicator that the expert was examining the very butt that Brown had fished out of the urinal that morning.

In summary, then, if you need to prove a fact with direct evidence, you have only 3 possible categories with which to concern yourselves: eyewitness testimony; expert testimony; or real evidence.

What about X-Rays, you ask? Where do they fit? They are real evidence – just like the cast of a footprint taken at the scene of a crime.

4. Judicial Notice

Now, while we are talking about what we need in the way of evidence to prove material facts, and evidentiary facts, it is timely to consider that some facts do not need to be proved at all. I am referring here to facts of which the Tribunal adjudicators are entitled to take "judicial notice". If the panel will take judicial notice of a fact, no evidence proving that fact will be required.

The example always given of this type of fact is the fact that Christmas day falls on December 25th. If one of the evidentiary facts on which you propose to rely is that the day on which certain events occurred was Christmas day, you only need to prove that they occurred on December 25. You do not need to lead evidence that will prove that December 25 is Christmas day. The Tribunal adjudicators can be counted on to take what is called "judicial notice" of that fact.

The classical theory of judicial notice would limit the Tribunal's rights in that regard to taking notice only of facts that are indisputable – that is, facts that are so notoriously true as not to be subject to reasonable dispute, or facts that are capable of immediate confirmation by resort to easily accessible authorities of undisputed authority. So, December 25 is Christmas.

However, modern thought would suggest the possibility – and desirability – of more flexibility in the concept than that. And in the context of a specialized Tribunal like WSIAT, it may be that a more extended use of the concept as a modern means of avoiding unnecessary evidence and saving hearing time may be possible.

Thus, if you find yourself in the situation where you need to prove fact X, and its proof will be especially time-consuming, difficult or expensive, but it

seems to you that the existence of Fact X ought not to be the subject of serious dispute, you might consider having recourse to the principle of judicial notice. (This would presumably be a last resort after exhausting the possibilities of an agreed statement of facts with the employer.) I am thinking here of an application to the Tribunal before the hearing – and before you go to the expense of developing the evidence on the point – asking the Tribunal to agree to take judicial notice of the existence of fact X.

I am not suggesting that the Tribunal has ever done this, merely that it is something that might be worth exploring in a particular case.

For an analysis of some modern support for this kind of extended use of the principle of judicial notice, see Delisle, *Evidence, Principles and Problems*, 4th edition, published by Carswell, beginning at page 231.

That brings me then to the question of *admissibility*, or, more specifically, the identification of categories of direct evidence that *a court* would be prevented by the common law rules of evidence from receiving in proof of any fact. I say "a court" because, as we all know, neither the Board nor the Tribunal are bound by the common law rules of admissibility.

5. Admissibility

(a) General

The statutory provision respecting the Board's and the Tribunal's admission of evidence reads as follows (section 132(1)3 in the new act, 74(a) in the old Act): (See page 9 of the inserts.)

> *The Board and the Tribunal may… accept such oral or written evidence as it considers proper whether or not it would be admissible in a court.* (Emphasis added.)

In light of that provision, one might ask, why should advocates presenting cases to the Board or the Tribunal be concerned about the rules of admissibility by which the courts are bound? In the workers' compensation system is it not the case that we operate under a rule that says, effectively, admit now argue later? In this presentation, should I not just move directly to the concept of *weight*?

There are three reasons why one needs to be aware of the rules of admissibility in the courts. In the first place, some of these rules continue in fact to be generally applied by the Tribunal, and others are applied in certain circumstances.

In the second place, the court rules that are not usually applied by the Tribunal to exclude evidence are not just an arbitrary collection of obstacles to

efficient adjudication, as some might think. They reflect the courts' long experience with the *reliability* of particular forms of evidence. Accordingly, when it comes to your assessing the weight of particular forms of evidence you intend to present – or attacking the weight that should be given to evidence presented on the other side of the case – it is important that you know how that form of evidence has been treated in the courts. If the courts would not have accepted it, chances are that there is a problem with its inherent reliability to which you – and the panel – need to be sensitive.

And, finally, if you are arguing that the Tribunal panel should not consider accepting particular evidence that would not be admitted by a court – perhaps the disciplinary report of the smoking infraction – because it would not be "proper" to do so, as required by Section 132(1)3, in considering that argument the panel will obviously want to know how the courts would have dealt with that question under the rules of evidence. It is not required to follow the court's lead, but what a court would do is obviously a consideration that is relevant to the issue of whether it is "proper" for the Tribunal panel to admit particular evidence.

So, let's look at these rules of Admissibility. And, I will start with relevance.

(b) Relevance

The prerequisite that any evidence must be relevant before the Tribunal can receive it, is not, strictly, a rule of admissibility. The real position is that information which is not relevant to any issue in a case does not qualify as evidence at all. The question of admissibility arises only with respect to evidence that is, in the first place, relevant. However, if what you or the other counsel offer as evidence is found not to be relevant it cannot be received, so it amounts to the same thing.

To be relevant, direct evidence or any evidentiary fact must be logically probative of a material fact or of a relevant evidentiary fact. Evidence is logically probative of a fact if it can arguably make the existence of that fact appear more probable than it would be without that evidence.

If a panel can see a logical thread between the evidence presented and the existence of a material fact or relevant evidentiary fact, then the evidence will be considered relevant and will be admitted. It does not have to be a strong thread. To be relevant, the connection between the proffered evidence and the fact which it is intended to help prove, need only be logically arguable.

As with most rules of admissibility, as a practical matter the focus in a hearing is not on what is relevant, but only on what is *not* relevant. When a counsel introduces evidence it is assumed that it is relevant and it is up to opposing counsel – or a panel member – to raise the relevancy issue.

The law requires the Tribunal to refuse to receive evidence that is not relevant – this is one rule that survives section 132(1)3 and does not fall prey to the general rule in administrative law proceedings, of admit now and argue (the weight) later.

And, where you fail to see the relevancy of what is being offered, it is particularly important in the Tribunal's proceedings that you make an early challenge of its relevancy.

The reason for this is the absence in the Tribunal's hearings of a settled issue agenda. In the civil courts, the issue agenda has been settled by the pleadings and any question of relevancy of evidence is judged by its relevancy to the factual issues defined in the pleadings. But in a workplace safety and insurance case, the issue-agenda is not in concrete form and can be changed by the evidence that is accepted. The broken shoulder case that in the midst of the hearing turns into a chronic pain case is a example with which most of us will be familiar. Thus, the parties, without the discipline of pleadings, are rather prone to be less selective as far as the evidence they choose to present is concerned.

For example, assume in the Esterband case that in the proceedings at the Board the smoking issue had not been raised. Then, within the three-week rule, you receive notice of the employer's intention to present the disciplinary report regarding Esterban's smoking infraction in the Appeals Tribunal hearing. Now, there is more than one basis for arguing under the admissibility rules that the hearing panel should not accept this report (and we will come to those).

However, the one argument that is <u>not</u> available to you – as it would be to counsel in a court proceeding – is the argument that the evidence is not relevant to any factual issue on the issue agenda. In the Tribunal's proceedings, there is no immutable issue agenda. And, if the grievance report is accepted as evidence, that acceptance will have the practical effect of expanding the issue agenda to include the smoking issue.

Thus, in hearings at the Board or the Tribunal, when evidence is offered that seems to you not to be relevant to any factual issue that you can see to be necessary or implicit in the case, it is especially important that that evidence be challenged concerning its relevancy, at the earliest possible moment. When such an objection is made, the other party's counsel is required to articulate the reason for submitting the evidence, and thus, if nothing else, one learns something valuable about the case one will have to meet. There is also a chance of knocking that issue on the head at the outset. If that can be done, the evidence in the hearing will be less complicated, and the hearing panel's view of the case at the outset less cluttered.

In this case, for example, if you are not aware of any medical evidence that implicates smoking as a cause for the cancer from which Esterband died, an objection based on relevancy will require Kordite's counsel to say whether or not they have such evidence. If not, the report will not be admitted because it is not relevant to any issue known to be present in the case, and you and the panel can forget about the smoking issue.

Habitually thinking about the relevancy of evidence being offered by the other party is part and parcel of habitually reviewing the theory of your case. And, relevancy objections, assuming they are not frivolous, will serve to focus the panel's early attention on the nature of the issue agenda in the case and prevent it from simply allowing the issue agenda to be pushed around by every piece of evidence the parties think of presenting.

(c) Prejudicial evidence

The objection that evidence should not be admitted because it is "prejudicial" is another objection that needs to be made early. And, if accepted, it is also not an objection that is likely to be overridden by the Tribunal's inclination to admit now argue later.

Of course, the mere fact that evidence may be seen as being prejudicial to your client's case cannot be a ground for the panel refusing to admit it. All of the evidence presented by the other party is intended to be prejudicial in one way or another, otherwise why would they be presenting it?

This rule against prejudicial evidence is a rule about fairness, and it arises only with respect to otherwise admissible evidence that is, on the one hand, highly prejudicial to the other party's case, and on the other, of a nature that makes its reliability particularly questionable.

Evidence that is highly prejudicial is not confined, as some, I think, tend to believe, to evidence of morally reprehensible conduct on the part of the opposing party. We are talking here about evidence that is highly prejudicial *to a party's case* – evidence that, if believed, goes to the heart of the case, and evidence that is inherently of a dangerously persuasive nature.

I have a particularly clear example from my early experience as a defence counsel. I was defending an individual accused of attempting to rape a 3-year old child while she was sleeping in her own bed. It was a jury trial. There was evidence that the accused had broken into the home and slept on the little girl's bed, and some evidence of sexual activity while he was there.

The theory of the defence was that the accused was lost and drunk, without a coat, out late on a bitterly cold night, was familiar with the techniques of

breaking into houses, had entered the house to find shelter, had by chance happened to fall asleep on the child's bed, and had experienced some nocturnal emissions, as the saying goes. Contrary to the view of the sceptics at the time – notably the judge, the crown, the police, and my wife – there were a number of circumstances that did rather support that theory.

And I was enjoying considerable progress in making this theory believable, when on the third day of trial, the Crown called the five-year old brother of the alleged victim as a witness. After a voir dire in which he was to my surprise found competent to testify, the five-year-old testified. With, in my view, outrageous prompting from the crown, he said that on the night that the police came to the house, he had been wakened by a strange man standing over him holding a candle.

The crown asked him: Did he say anything to you?

(Now remember the theory of the defence's case. The accused was drunk, cold, seeking shelter, just happened to fall asleep on the girl's bed …..)

So, on the third day of this jury trial, the crown asked this attractive, tiny five-year old child, standing on a box in the witness stand: Did this man standing over you with a candle that night say anything to you? Yes, the little voice piped up, the man said: "where is your little sister?"

Now, *that* was prejudicial!

At the time, undue prejudice was not a ground on which evidence could be excluded. However, under current law, that testimony would have been excluded on the basis that the potential prejudice was so great and the reliability of the evidence so limited, that, in effect, fairness required that it be excluded.

In the Esterband case, if the issue of Esterband's smoking was relevant, and if Mrs. Esterband testified in the Board's proceedings that Esterband never smoked, one might want then to consider applying to have the disciplinary report excluded on these grounds. It is a highly prejudicial piece of evidence since, if believed, it will seriously undermine Mrs. Esterband's credibility on a key issue in the case. And, as to its reliability, Esterband is dead so he cannot reply, and, unless all of the witnesses, including the member of the cleaning staff who cleaned the washroom the morning in question, can be called and cross-examined, the report itself is rampant hearsay.

However, Martland J. of the SCC had occasion in *R.* v. *Wray*[2] to describe the law in this area and it is clear from that description that an exclusion order on these grounds will not be readily available. He said this:

[2] (1970), 11 D.L.R. (3d) 673 at 677.

> The allowance of admissible evidence relevant to the issue before the Court and of substantial probative value may operate *unfortunately* for the accused, but not *unfairly*. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous and whose probative force in relation to the main issue before the Court is trifling, which can be said to operate *unfairly*. (Emphasis added.)

Thus, it is not enough that the evidence if admitted will be unfortunate for your case, its admission must also be unfair.

So far, this need to balance the probative value of evidence with its prejudicial effect has been referred to by panels principally in their analysis of the evidentiary issues that arise when a worker objects to the admission of video surveillance tapes. See, for example, *Decision No. 688/87*, considered and applied in *Decision No. 918/94I*.

As far as I know, it has not been explicitly considered whether the Tribunal's authority under section 132(1)3 to refuse evidence when it considers it *improper* evidence, whether or not it would be admissible in a court, expands the scope of the Tribunal's response to applications for the exclusion of prejudicial evidence, beyond what the courts would be prepared to entertain.

(d) Improperly obtained evidence

In the same general category of admissible evidence that may be excluded, is improperly obtained evidence.

The common law rule respecting the exclusion of improperly obtained evidence has appeared in Canada only since 1982 and the enactment of the Charter. Section 24(2) of the Charter provides that in applications to a court for a remedy for the alleged infringement of any rights or freedoms guaranteed by the Charter, if it is concluded that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, such evidence will be excluded "if its admission would bring the administration of justice into disrepute".

As far as I could discover, the Tribunal has never had occasion to consider the applicability of section 24(2) of the Charter to its proceedings. And, whether or not it is a court of competent jurisdiction as contemplated by Section 24(1) would seem to be a matter of some continuing uncertainty. The Tribunal has, nonetheless, been prepared to exclude evidence where a panel considered that the admission of the evidence would be inappropriate or would bring the administration of justice into disrepute.

Thus far the concept has been applied in the following cases. Where an employer's representative obtained a copy of a medical report directly from a worker's doctor by saying that he had the worker's consent, when that was not true, the report was excluded as a "deterrent" to that type of conduct. (*Decision No 968/90R*) And, where an employer offered in evidence material taken from the worker's medical file in the plant doctor's office without the worker's consent, notwithstanding that it was relevant and otherwise admissible the evidence was excluded on the grounds that this was a serious abuse of the worker's confidentiality rights. (*Decision No. 833/93I2*). And, where the Board had taken a medical report from the widow's own WCB file without her permission and used it in evidence in the Board's adjudication of her deceased husband's claim, a Tribunal panel excluded that evidence as evidence that had been improperly obtained. (*Decision No. 15/95I2*).

Again, it would seem that additional legal support for this type of decision might well be found in the use of the word "proper" in section 132(1)3.

(e) The Rule Against the Admissibility of Hearsay Evidence

(i) General

The hearsay rule is the major exclusionary rule. And the law of evidence is dominated by decisions that define exceptions to that rule. The rule is straightforward, it is the law concerning exceptions to the rule that is complicated.

The rule, of course, is that eyewitness testimony that describes what another eyewitness has been heard to say is not admissible. Whenever, one hears counsel on the other side say to a witness, *tell the panel what she said*, the antennae should go up.

The reason for the rule is that the courts have understood that such testimony is inherently unreliable and dangerous. It is considered to be unreliable and dangerous for two reasons. First, the testimony as to what was said, may be inaccurate. The person reporting the original statement may not have heard it correctly or completely, or may have misunderstood what was intended or misinterpreted what was said. Mistakes in the repetition of oral statements are notoriously common.

The second reason that the hearsay statement is considered unreliable in an adjudicative environment is that unlike other testimony the reliability of the original statement cannot be tested. It is in the nature of hearsay evidence that the person who in fact made the original statement is not present in the hearing room and cannot be questioned.

Normally, Tribunal panels exercising their power under section 132(1)3 will not exclude hearsay evidence. As a matter of convenience, they will admit it,

leaving its inherent unreliability to be taken into account when they come to weigh the competing evidence.

However, this does not mean that in your evidence strategy you can be careless about using hearsay testimony in place of direct testimony or complacent about opposing counsel doing so.

(ii) Oral hearsay testimony

The use of hearsay evidence in the form of documents is extremely common in the workplace safety and insurance system, and I will address that matter in a moment. However, where you need to be particularly careful about hearsay evidence is with respect to oral testimony by one witness about what he or she heard someone else say.

Now, this is not a problem when the witness is testifying about what he or she heard a party to the hearing say. That is testimony that falls under the admissions-against-interest exception, to which I will refer in a moment.

However, if what a witness is going to testify about is what he or she heard a person, who is not a party, say, pay attention. If the evidence is important, and why would you or opposing counsel offer such evidence if it were not, then, *unless the person who actually made the statement is not available*, neither you nor they should be attempting to prove such a statement in hearsay form, and either should object if the other tries to do so. In my opinion, a panel should not usually hear such second-hand evidence. It would be inadmissible in a court, and in my view it will often not be *fair* to hear such evidence, and perhaps not "proper" to do so.

Consider this example. Suppose Kordite's counsel proposes to prove that on the day the spill of chemicals occurred, Esterband was not at work. He calls as a witness a former co-worker of Esterband who is still employed by Kordite. The witness testifies that he knows one Brown and that he knows him to be a friend of Esterband's, and that a few days before the hearing he had a conversation with Brown. He is asked to tell the panel what Brown said to him.

If he is allowed to testify, he will say that Brown confided in him that if the claim was based on the chemical spill, it was all wet – to coin a phrase – because on the day of the spill, he (Brown) and Esterband were away together on a fishing trip.

Now, unless Brown is dead or possibly in permanent residence in Australia, this witness should not be allowed to give that evidence. You should object.

The objection might go something like this:

> "This is hearsay, and while I understand, of course, that hearsay evidence is often admitted, in this case, if my friend thinks that what this witness heard Brown say is important to this case, then he should call Mr. Brown and have him testify himself as to what he said. Then we know the testimony will be reliable, and Mr. Brown will be available to be questioned about it. If I can anticipate that my friend might be concerned that Brown being Esterband's friend might not be prepared to be frank about what he told this witness, that problem can be addressed at the time Brown testifies, should it prove to be necessary. If Mr. Brown were to deny the statement or say that it was something else, then my friend could challenge that by resort to this witness's evidence as evidence of a prior inconsistent statement. However, the first time this panel hears of this alleged statement it should not be a second-hand version. In my submission, the hearsay rule should not be waived in a case of this kind.

(If, in response to the objection, Kordite's counsel starts to tell the panel what he expects the witness to say, at that point it would be advisable to ask the panel to have the witness leave the room while the objection to his evidence is being discussed.)

Also, from the point of view of the counsel who calls the witness, the evidence is obviously not nearly as strong as it would be if Brown had been called in the first place.

I have not been able to find a Tribunal decision in which a refusal to admit hearsay evidence of this kind is recorded in the reasons, but I am sure it happens.

(iv) <u>Admissions against interest</u>

It is not an issue – from an admissibility perspective – if what is being reported is what the witness heard *a party* to the hearing say. This falls within an acknowledged exception to the hearsay rule – admissions against interest. If *Mrs*. Esterband had the bad judgement to say to a neighbour, "I know Korvu's smoking caused his cancer, but I have nothing to lose in claiming compensation". Kordite's counsel is entitled to call the neighbour as a witness and she can testify as to what she heard Mrs. Esterband say.

Similarly, and not as obviously, if a Kordite supervisor said to a co-worker at the time of the spill, "I hope Esterband is O.K., he got a real exposure to that stuff and its dangerous". You would be entitled to call the co-worker to testify as to what he heard the supervisor say. Statements by people in authority at a

company, like foremen, have been held to be statements against the employer's interest, and admissible under the admissions-against-interest exception to the hearsay rule.

(iv) Proving the statement was made, not that it is true.

Another exception to the hearsay rule, that comes up quite often, is the exception that allows witnesses to testify about statements they have heard when the purpose for doing so is only to prove that the statements were made, not that they are necessarily true. This is known as the rule in *Subramaniam.*

Subramaniam is an ancient decision of the English Privy Council (at a time when SCC decisions could still be appealed to the Privy Council) involving a person charged with carrying a weapon for a band of terrorists. The accused's defence was that he was carrying the weapon under duress. He had been kidnapped by the terrorists and the leader of the gang had told him that if he didn't carry the gun he would be shot. The Crown objected to the accused testifying to what the terrorist leader said to him because that was hearsay evidence.

The Privy Council ruled that the testimony could not be admitted to prove that the terrorist leader's statement was true. However, it could be admitted to prove that the statement had been made. On that issue, the accused's testimony was not hearsay – he was reporting what he had heard.

Ever since, the defence to a hearsay objection: "I am only calling this evidence to prove that the statement was made, not that it is necessarily true" has become a standard in our courts.

(v) R. v. Kahn

I do not have time to begin to deal with all the exceptions to the hearsay rule, nor is it important that I do so, because there has been a modern development in the law respecting hearsay evidence, that really puts that law entirely in sinc. with the Tribunal's practice and the exercise of its statutory power to admit hearsay evidence when it considers it *proper* to do so.

I refer to the seminal 1990 decision of the Supreme Court of Canada in *R.* v. *Kahn*, 79 C.R. (3d) 1, following an earlier lead from the same court in its 1970 decision in *Ares* v. *Venner*, 14 D.L.R. (3d) 4.

These cases appear to have established that the hearsay rules will be generally subject to the overriding principle of "necessity" so long as the circumstances under which the statement has been made speaks implicitly to its inherent "reliability".

If presenting the evidence of the statement in a hearsay form is necessary because the originator of the statement is, for some compelling reason, not available, and if the original statement was made in circumstances that provide inherent assurances as to its reliability – that, for instance, the statement was made in the ordinary course of innocent activities and at a time and in circumstances when the person making the statement would have had no reason to anticipate the controversy that subsequently arose – then the evidence will be admitted, even by the courts, even though to do so would be contrary to the hearsay rule.

In short, common sense is to prevail over the rigid application of the rule. And, of course, if the courts are free to take that approach, then even more so is the Tribunal, sheltering as it does under the protection of its statutory authority in section 132(1)3.

(vi) Documents

May I turn then to the question of the admissibility of documents.

Documents are in their very nature almost always hearsay evidence. And the basic rule is that they should be excluded, unless the author of the document can be called to testify about their authenticity and their content. Obviously, the impracticality of such a rule in the modern world soon became apparent, and statutory relief from the rule was made available from early times. These provisions may be found in the Evidence Acts, and they specify the procedure that must be followed if you propose to submit documents in evidence in a court without calling their authors.

Through the blessings of section 132(1)3 – and its predecessor, section 74(a) – the Tribunal has never found it necessary to require the Evidence Act procedures respecting the admission of documents to be followed. And, of course, it and the Board routinely receive and rely on hearsay documents of many kinds – as a practical matter, their business depends on their ability to do that. For an early explanation and thorough defence of the practice in that regard see *Decision No. 2I* , (1986), 1 W.C.A.T.R. 7.

However, the practice of accepting hearsay documents, including medical reports, as a matter of course must be coupled with a wariness about their reliablity and a willingness to require the authors of documents to attend and be questioned about matters in them which counsel have substantial reason to question.

If the concern is about some statement of fact that appears in an old document, you may expect a panel to question whether the current memory of the document's author about events several years in the past is likely to be more

reliable than the document itself. However, where fairness clearly requires that you have an opportunity to question the author of a document, then you should be able to have that witness summonsed.

(vii) Witnesses Notes

Next, I want to deal with witnesses' notes. I am referring to notes made contemporaneously with the facts they are a note of. The policemen's ubiquitous notebooks are the classic example, but all kinds of people make notes of interviews and meetings – most importantly in this context, doctors and nurses. Are they admissible? Should they be?

If the notes are just to be used to refresh an eyewitness's recollection, it is generally believed that the testimony ought to suffice (and the testimony ought not to be bolstered by giving the panel a copy of the notes.) In those circumstances, opposing counsel is entitled to see the notes and to question the witness about any discrepancies he or she finds between the testimony and the notes.

There is a difference, however, between a witness who is testifying as to a refreshed, present recollection of the facts, and a witness who has no present recollection of the facts independent of the notes. In the latter case, it is the notes which are really the evidence and, as a matter of convenience, they should probably be admitted, subject to arguing later about their reliability.

For a Tribunal decision in which a panel's right to require a plant nurse's notes of a meeting with the worker to be produced was considered, see *Decision No. 935/95I* (1995), 39 W.C.A.T.R. 171.

(viii) Clinical notes

The appropriateness of a panel requiring the production of a doctor's clinical notes is an issue of some importance. Tribunal panels often do so, and they frequently examine those notes without the benefit of testimony from the doctor. However, there are confidentiality issues, and – in the absence of the doctor – there are concerns about the reliable interpretation of such notes. This is patently hearsay evidence which would not be admissible in the courts in the absence of the doctor. To receive it, a panel is exercising its section 132(1)3 powers and must be satisfied that in all the circumstances it is 'proper" to do so.

(f) The Collateral Fact Rule

Another problem of admissibility that does come up from time to time is the one involving the Collateral Fact rule.

Assume that in the Esterband case the witness Brown has been found and he testifies about what he is alleged to have said about the fishing trip on the day of the spill. To your chagrin, he confirms that Esterband and he were fishing on the day in question.

One of Esterband's friends in the hearing room, approaches you and tells you that he saw Kordite's general manager visit Brown's house one evening a few days before the hearing. You think Brown should tell the panel what transpired at that meeting, so you ask him about it. However, Brown denies that the manager ever visited his house. You now propose to call the witness who saw the manager go into Brown's house. Kordite's counsel objects that whether or not the manager visited Brown is a collateral fact and you are not entitled to call evidence concerning that fact. You are, he says, stuck with Brown's denial.

In a court, the objection would be upheld. In an attempt to impeach a witness, you would not be permitted to call evidence unless it is with respect to an issue that is so material to the case that you would have been entitled to call that evidence as part of your case, independent of the impeachment attempt. The leading case on the collateral fact rule is *Attorney General* v. *Hitchcock* (1847), 154 E.R. 38 (Exchequer Ct).

The Tribunal is not bound to adhere to this restriction, and you would argue under section 132(1)3 that it was *proper* for the panel to receive that evidence, and, indeed, a panel might decide to do so. However, the policy behind the restriction – putting practical lines around the scope of the inquiry, so that the main trial is not impeded by a series of mini trials on issues that are only collateral – seems sound, and a panel, in my view, would want to approach the opening of the inquiry to encompass such a collateral issue with some care.

(g) Novel Science

Another rule of exclusion that is implicitly of interest in this context is the rule respecting "Novel Science". For an analysis of the rules respecting the admissibility of expert evidence concerning a science whose validity is not had main-stream acceptance, see the 1994 decision of the SCC in *R.* v. *Monahan*, 29 C.R. (4^{th}) 243.

The gist of it is, if you are in court and your expert witness is proposing to espouse some novel scientific theory or technique, before he or she will be allowed to testify, you will have to find a way to satisfy the judge that the theory or technique in question meets a basic-level test of reliability. Again, the Tribunal could go ahead and hear the testimony and worry only about the weight to be given to it, but the policy behind the rule may be something the Tribunal should consider before deciding that it is "proper" to hear such evidence.

(h) Character evidence

A category of evidence that the Tribunal does usually not admit, is character evidence – that is, evidence that the worker, for instance, has a reputation of being honest and hardworking, responsible and reliable,etc. Evidence the other way is also not admitted, unless the worker has in some way put his or her character in issue. For an early decision giving reasons why the Tribunal should be slow to admit general character evidence see *Decision No. 4* (1986), 1W.C.A.T.R. 17.

However, see also *Decision No. 287/92*, where evidence of a plea of guilty on charges of fraud relating to welfare and workers' compensation claims was considered relevant and admitted on the issue of the worker's credibility with respect to certain issues.

(i) Similar fact evidence

The latter case verges into the territory of "similar fact" evidence. Normally, similar fact evidence will not be admissible for the purpose of founding the argument that because the person has done similar bad things in the past he must have done this bad thing to-day.

(j) Self-corroborating evidence

Assume that the issue is whether the present back condition is attributable to a workplace accident. The worker testifies that when he came home on the day of the accident he told his wife and his daughter and his neighbour that he had injured his back. You propose to call the wife and daughter and the neighbour to corroborate that testimony.

The Courts would not admit such evidence, because, basically, of its inherent unreliability and the ease with which evidence of that nature can be manufactured by a person with future litigation in his or her mind.

I expect a panel would probably hear that testimony. However, you and the panel need to be cognizant of the reliability – and weight – problem.

(k) Privilege

The privilege question comes up at the Tribunal typically in two situations: One is with respect to medical reports and the communication between counsel and medical experts relating to the preparation of the report. The other, is the question of privilege attaching to communications that take place during the Board's – and now the Tribunal's – mediation processes.

(i) Reports prepared in anticipation of litigation, and communications between solicitors and expert witnesses

Of course, if a *court* deems a document or communication to be protected by a solicitor-client privilege, or by the rule that without-prejudice settlement discussions are privileged against disclosure, it will not order their production.

At the Tribunal, however, the so-called solicitor-client privilege respecting medical reports prepared on the direction of counsel for purposes of the claim is not accepted. Such medical reports and the correspondence between you and your medical expert will be required to be submitted. See, as an instance, *Decision No. 469/92I*, 24 W.C.A.T.R. 268. See also *Decision No. 774/95.*

By the way, in my experience, those instruction letters are important. If they provide complete information in an unbiased manner to the doctor and ask non-leading questions, then, when they are filed with the doctor's report they add a measure of confidence as to the reliability of that report.

(ii) Communications with mediators

On the other hand, a mediation officer's notes and records will be protected against disclosure on the basis of privilege. See *Decision No. 139/92*, 24 W.C.A.T.R. 113, where the 4 conditions for recognizing privilege as a protection are set out.

(iii) The privilege against self-incrimination

Technically, this concept does not quite fit here as it is typically an issue only in criminal cases. However, it is related to the question of whether a party to an appeal can be forced to testify on his or her own behalf.

In a civil law suit, if a party chooses not to testify, it is true that he or she may be called by the other side. However, this rarely occurs. When *parties* are called as witnesses by opposing counsel they become the opposing party's witnesses. In direct examination, they can only be asked non-leading questions and they are then available to be cross-examined by their own counsel. This prospect is so unappealing that calling the other party when he or she has otherwise decided not to testify is almost unheard of in civil cases.

However, in an appeal before the Tribunal, it is important to remember that not calling your client as a witness is not a practical option.

The Tribunal has made it clear that because of the inquisitorial nature of the adjudication, it is not open to a worker – indeed, either party – to elect not to testify. Should a party to the proceedings choose not to testify, on the initiative of the panel itself or on the initiative of counsel on the other side, he or she will be

called to testify and will be open to cross-questioning by opposing counsel and to questions, as well, from members of the panel.

6. Weight

(a) General

In assessing the weight to be accorded to particular evidence, a panel is, of course, usually making a relative assessment. How weighty – or cogent – is *this* evidence as compared to *that*?

The weighing process takes into account questions of the credibility of witnesses; inherent problems with the reliability of particular pieces of evidence; with the potentially ambiguous or unclear nature of some of the evidence; with the consistency of one piece of evidence with other evidence as well as its consistency with what logic and common sense would suggest in all the circumstances.

(b) Assessing credibility of eyewitnesses

A Panel may not indicate that it disbelieves a witness, without saying why. See *Decisions No. 126* and *126R* and *Pitts* v. *Ontario (Ministry of Community & Social Services, Director of Family Benefits Branch* (1985), 51 O.R. (2d) 302 (Div. Ct.)

You may also be interested to know that the Ombudsman has taken exception to a Tribunal panel's reasons where, on the disputed question of the nature of the worker's work, the testimony of the employer was accepted without indication of why the testimony of the worker and her co-workers was not accepted. See *Decisions No. 641/90R2 and R3*

For a major review of the law and principles applicable in the assessment of credibility, see *Decision No. 846/87* quoting *Wallace* v. *Riddell* (1926), 21 O.W.N. 202, re what to look for in a credibility analysis, and see *Decision No. 307/90*, 17 W.C.A.T.R. 127.

See also *Decision No. 506/90* and its reference to O'Halloran, J.A.'s famous judgment in the B.C. Court of Appeal in *Faryna* v. *Chorny*, [1952] 2 D.L.R. 354, quoted with approval by the Ontario Court of Appeal in *Re Phillip et al* v. *Ford Motor Company of Canada, Ltd* (1971), 18 D.L.R. (3d) 641.

O'Halloran's judgment pointed out that credibility cannot be gauged simply by assessing a witness's demeanor, it requires an assessment of the "*harmony*" of his or her testimony "*with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that time and place*".

And, indeed, those who have attended recent judge-led workshops on decision-making will know that experienced judges now regard it as dangerous for a judge to base credibility calls on his or her impression of the witness's demeanor.

See also *Decision No. 210/91* re inconsistencies not always being indicative of a lack of credibility.

(c) Weighing expert testimony

Tribunal panels, of course, frequently find themselves having to choose between conflicting medical reports. Here, considerations regarding the inherent relative reliability of the reports are critical. Which doctor's qualifications are more relevant? Which doctor is better qualified than the other? Which doctor had the better opportunity to study the problem? How complete and reliable was the information the doctor was working with? Has the doctor any bias or interest in the outcome of the case? Which conclusion is more consistent with common sense? (In the latter respect, see the later discussion about the nature of the panel's role as a fact-finder.)

But, note that it has been regarded as important that panels choose between expert opinions and not substitute their own "expert" opinion. See in this respect *Decision No. 326/93,* and *Decision No. 98/94L,* 30 W.C.A.T.R. 22.

However, if the experts do not feel they can say with certainty that X caused Y, that is not necessarily the end of the matter. The S.C.C. has held in *Snell* v. *Farrell* (1990), 72 D.L.R. (4th) 291 (unanimous judgment written by the late Sopinka J.) that "an inference of a [causal relationship] may be drawn even though medical or scientific expertise cannot arrive at a definitive conclusion". It is a question of taking "a robust, and pragmatic approach to the evidence and applying common sense".

For a full review of the significance of Snell in workers' compensation occupational disease cases, see *Decision No. 549/95I2*. See also *Decision No. 473/91.*

(d) The Benefit of Doubt

For the sake of completeness, in the context of the panel's weighing of evidence I should mention the concept that the benefit of the doubt goes to the worker. Forgive me, if I make reference only to the pre-1998 Act, but I believe there has been no substantial change in this concept in the new Act.

I refer, of course to section 4(4) which says that "where it is not practicable to determine an issue because the evidence for or against the issue is

approximately equal in weight, the issue shall be resolved in favour of the claimant".

As you know it is by now well established that this provision only comes into play in those circumstances where there is substantial evidence on both sides and the panel is not satisfied that the evidence on one side is significantly more persuasive than the evidence on the other side. The fact that the evidence on both sides of an issue is approximately equal will not be enough to trigger the benefit of doubt provision if the evidence on neither side goes beyond proving a mere possibility.

7. Standard of Proof

Obviously, the standard of proof is almost always the normal civil-law standard: the balance of probabilities.

However, there is good authority for arguing that in a particular case, on a particular issue, the standard should be higher or lower – should be, as Lord Dennon has said, "commensurate with the occasion". This has been an issue at the Tribunal principally on the question of the standard that should apply to the rebuttal of presumptions. For a fulsome review of the law relating to a "floating" standard of proof, see *Decision 605/91,* 21 W.C.A.T.R. 131. See also 965/88LR, and 82/93. [The Lord Dennon quote may be found in 605/91.]

8. Burden of Proof

The Burden of bringing forward evidence is arguably on the system, but as a practical matter falls, in the first instance, on the appellant. However, the burden of proof, in the sense of who loses if at the end of the day the standard of proof has not been met, is, in benefit claims, obviously on the worker. The burden of proof issue has not, however, any practical effect in Tribunal proceedings, except on the question of who should go first in the proceedings.

Prior to the decision in *Snell* (see below), there had been an emerging new wrinkle in the burden of proof doctrine that was of particular interest to counsel for workers attempting to establish work relatedness in occupational disease cases. The seminal decision was that of the House of Lords in *McGhee* v. *National Coal Board*, [1973] 1 W.L.R. 1. *McGhee* had been taken as holding that, whenever expert evidence had reached the point of proving that the exposure to materials in the workplace had resulted in *an increased risk* that a worker would contract the disease in question, at that point the burden of proof would shift to the employer (or in our system, presumably the system) and the worker's claim would be successful unless the employer could then prove that worker's exposure had *not* caused the disease in his or her particular case.

This doctrine of the reversal of the burden of proof would, obviously, be of assistance from a worker's perspective in occupational disease cases. However, the doctrine was disapproved of by the SCC in *Snell* (see below), and is not now available. Nevertheless, worker's advocates may want to remember that in *Snell* the Supreme Court of Canada did not shut the door on McGhee forever.

In rejecting McGhee, Sopinka J., speaking for a unanimous court, said this:

> "If I were convinced that defendants [read employers] who have *a substantial connection* to the injury were escaping liability because plaintiffs [read workers] cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives." [i.e., shifting the burden of proof after an increased risk has been proved, as in *McGhee*.] (Emphasis added.)

9. The panel's fact-finding role

There are two important things to remember here. First, the Tribunal is engaged in an inquisitorial adjudicative process. And if, after the parties have completed their evidence, the panel is not satisfied that it has enough evidence to be confident as to what the right answer is, it may embark on further investigations on its own initiative. See the Tribunal's Mission Statement.

This mandate is quite different from a court's mandate.

So, one of the things you will want to consider in your final argument is whether there is any further investigation you think the panel should now undertake. There are a number of Tribunal decisions that can be found which discuss the criteria for deciding in favour of or against further investigation.

The second important thing to understand about a panel's fact-finding role in the assessment of expert evidence is that the panel – whether three-person or one – is not to function as an expert assessor but as a *lay* adjudicator *"acting as a jury"*. The SCC was very clear on this point in *Snell.* See the analysis of that aspect of the *Snell* judgment in *549/95I2*, referred to above.

10. The analytical criteria for a fact-finder

The analytical criteria by which a panel considering causation questions in the role of a fact-finding jury is to be governed were also set out in *Snell*. "[Causation]" Sopkinka J., said, "is essentially a practical question of fact which can best be answered by ordinary common sense" and a "robust and pragmatic approach" to the evidence. See, again, *Decision No. 549/95I2.*

S.R. Ellis, Toronto, Ontario
December 1998

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