CASE LAW: HOW AND WHEN TO USE IT TO WIN YOUR ARGUMENT, DENIAL, CASE!

(A CLERK'S REFERENCE GUIDE)

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"The legislature's job is to write law. It's the executive branch's job to interpret law."

George W. Bush

1946-

43rd President of the United States, 2001 - 2009

In order to truly discuss case law and how and when to use it, it is important to know what case law is, where it comes from and why it's so important.

Case Law is reported decisions of appeals courts and other courts or tribunals (such as FSCO) which make new interpretations of the law and, therefore, can be cited as precedents. These interpretations are distinguished from "statutory law" which is the statutes and codes (laws) enacted by legislative bodies (ie *Insurance Act*), "regulatory law" which is regulations based on statutes (*Statutory Accident Benefits Schedule*), and the Common Law, which is the generally accepted law carried down from England. The rulings in trials and hearings which are not appealed and not reported are **not case law** and, therefore, not precedent or new interpretations. Case law is used to understand the application of law to facts and learn the courts/tribunals' subsequent interpretations of statutes.

It is not wisdom but Authority that makes a law.

Thomas Hobbes

English Philosopher

1588-1679

In common law legal systems, a precedent or authority is a principle or rule established in a legal case that a court or other judicial body may apply when deciding subsequent cases with similar issues or facts. Black's Law Dictionary defines "precedent" as 1. *"the making of law by a Court in recognizing and applying new rules while administering justice* and 2. *A decided case that furnishes a basis for determining later cases involving similar facts or issues.*[1]

In other words precedent can be defined as an already decided decision which furnishes the basis for later cases involving similar facts and issues.

As this paper is written for Clerks/Paralegals, I am going to assume (rightly or wrongly) that the reader is primarily arguing accident benefit matters and working with insurance adjusters. Although I may refer to “adjusters” and “AB” matters, the principals set out in this paper apply to all legal matters, all legal arguments, whether you are working with an Accident Benefit Adjuster or a BI adjuster on a tort claim or even legal counsel appointed by the Defence.

[1] Black’s Law Dictionary, 8th Edition, P 1214

Believe it or not, the AB adjuster that you are discussing your client's claim with is not the be all and end all of the decision making process. Generally speaking, the insurance adjuster you are dealing with is not the actual decision maker. That adjuster is almost always the low man on the totem pole and is accountable to several levels of higher ups. It is for this reason that it is important to *do their job for them* no matter how distasteful that may be. Insurance adjusters need justification to overturn a decision they have made or to go to their supervisors to upend a decision that has been made on a claim. The more persuasive you are in your argument the easier it is for the adjuster to seek the authority from a manager. Let's face it, no one likes to be wrong, and no one likes their decisions to be overturned without justification.

When dealing with adjusters, use case law to HELP them to understand your point, to persuade them to your way of thinking. The more authority you can give them, the more support they have for their decision and the more justification there is for the adjuster to pay you the amount you want or to do what you are asking them to do.

How to Use Case Law to Win Your Case or Make Your Point

Gathering Your Case Law – The Very, Very Beginner Basics

1. Put together a brief outline of the facts of your case. Although every case has slightly different facts, most case outlines should include information such as client gender, age, marital status; date of the accident and insurance regime; nature of the accident, pre-existing injuries, accident related injuries; the benefit the client is claiming; the issues giving rise to the termination/issue in dispute. Read the applicable statute or regulation and narrow down the applicable sections of the statute or regulation that you

are working with. You'll be looking for cases with similar facts to yours, so make each point as clear as possible and try to clarify any points you are unsure about.

2. Identify your jurisdiction and court/tribunal. Case law generally falls into two categories: "binding precedent" and "non-binding precedent." Binding precedent includes cases heard in superior courts within the same jurisdiction as the tribunal/court hearing your case. It's preferred to non-binding precedent because judges and Arbitrators are expected to follow cases already decided in their own jurisdiction.

Non-binding precedent includes cases that have similar facts to yours, but were decided in a jurisdiction that does not include your court or tribunal (ie. CPP or WSIB as opposed to FSCO). Non-binding precedent can be useful in persuading the Arbitrator that deciding in your favor is reasonable, but an Arbitrator is not expected or required to follow a non-binding precedent.

3. Find your research resources. There are numerous free on line sources such as

www.fsco.gov.on.ca – Financial Services Commission of Ontario. All reported arbitration and appeal decisions are listed on line.

www.orct-bctr.gc.ca – Canada Pension Plan – Office of the Commissioner of Review Tribunals

www.canlii.ca – maintained by the Federation of Law Societies of Canada. All reported Canadian Law is available.

www.e-laws.gov.on.ca – all Ontario Statutes and Regulations. There is no link for case law with this website.

www.guides.library.ubc.ca/cases - "Best Case" - Contains Canada Law Book, Dominion Law Reports, Labour Arbitration Cases as well as a comprehensive collection of unreported decisions dating back to 1977[2]

www.wsiat.on.ca – WSIB Appeal Tribunal website- contains access to Workplace Safety and Insurance Appeals Tribunal cases.

www.canadalegal.info/prov-ontario This is a website full of Canadian Legal Information Sources with links to all the Provincial Laws and Information services. There is not a lot of case law available but it is very useful and informative if you are looking for general Ontario Legal information.

QuickLaw through Lexis Nexis– paid service but has the largest directly of available up to the minute case law.

www.OTLA.com and Law Clerks Listserve - Also a good choice when looking for applicable case law. Login in to the OTLA website and search the archives for the topic you are looking for. If you are not able to find the reference there – you can post an email on the list serve and hopefully someone will be able to assist you in getting started with some case law. The rest is up to you – to do your own research to ensure you have found the answer you are looking for.

As well, if you have access to your local law library, most law libraries also have law librarians who can help you narrow your search for cases.

4. Perform a keyword search. Keyword searches can be performed online by using the chosen search engine or the search function on legal research websites. Keywords should be applicable to your case. For instance, if your case concerns an issue of an

[2] Valid as of September 30, 2011.

“incurred expense” some applicable keywords might be "incurred," "incurred expense” or "attendant care”.

5. Read the facts of each case carefully to see how similar they are to the facts of your case. The best cases to choose are ones in which the Arbitrator ruled for the party in your position, or against the party in your opponent's position. Even if the facts of a case don't exactly match your case, the opinion may mention similar cases that could be more helpful. You can then broaden your search into that area. Decide for yourself, how the facts of your case are like the facts in the case law precedent. For instance, say you found a case in which the plaintiff was driving through an intersection when the defendant ran a red light and hit the plaintiff's car, and the judge found in the plaintiff's favor. If you are the plaintiff in a similar case, compare the two and point out their similarities.

6. Distinguish cases that do not support your position. For example, in the red light case described in Step 1, say you find a case in which the judge found for the defendant, because even though the defendant ran a red light, the sun was in his eyes so he couldn't see the light. In this case, you would "distinguish" the case law, or explain why it is so different it should not apply to your case. You could distinguish the case law in this example by saying "in that case, the defendant couldn't see the light because of the sun. In my case, however, it was a cloudy day and the defendant could clearly see the light."

After the Beginner Basics – Points to Keep in Mind

At all times, comprehensive and flawless legal research is necessary. Make sure the case you are using is the leading decision or the best on-point decision for your situation.

Select and organize your arguments working with the stronger argument first. If you have 8 arguments, and only 3 have any force it may detract from your credibility. Start with your strongest argument and sandwich your weaker arguments ending with the statement you are making with a broad, compelling positive reason why the relief should be granted. However, sometimes arguments build on prior arguments and you may want to organize them in that manner.

Don't cite four authorities where one will do; you want to convey that you have a "slam dunk" in your initial correspondence. If need be, you can hold onto the other three and use them in subsequent correspondence.

You do not need authorities for everything. Some points are obvious and you run the risk of insulting the adjuster if you cite too much authority. You have to assume that they at least know the SAB's at little and give them some credit for knowing that.

Choose authorities wisely, often the best authority is the older decision directly on point rather than the new decision that is so distinguishable that it looks like swiss cheese.

Presenting case law in correspondence is a little like the "law section" in a Factum. This is the argument section. You should always apply the law to the facts.

Start Writing - Strategies to Win Your Case

If you have an important point to make, don't try to be subtle or clever. Use a pile driver. Hit the point once. Then come back and hit it again. Then hit it a third time - a tremendous whack.

Winston Churchill

1874-1965

Prime Minister to United Kingdom

1940-1945

1951-1955

This quote, by the Honourable Winston Churchill, former Prime Minister to the United Kingdom, is my motto for the use of case law in strategic persuasive writing. Written advocacy skills are an extremely important part of good advocacy and possibly the most underrated aspect of litigation practice.

A good advocate knows that the decision maker's decision is often well underway before the argument is presented. It is that much more important that the written advocacy skills presented, including relevant case law be persuasive – you need to change the mind of the decision maker, not assist them in making the initial decision.

If you have an important point to make, make it. Don't bury the point in a whole lot of mumbo jumbo. When you do this, the reader will be able to understand the significance of the detail you provide and make relevant connections and assessments. Avoid excessive verbiage. Short and direct statements work best. Take the reader from A to B as quickly as possible. Structure your argument to present your point, directly, simply and promptly. Do not take your reader through the side trips that will only cause your reader to lose the point you are trying to make. This is sometimes tricky to do, as your research may have led you on curves and into dead ends but this does not mean that you have to take your reader through them too. The more you do that, the more your point will be lost.

Once you have made your point, you need to hit it home. Be persuasive on three levels:

1. Convince the adjuster that if they decide in your client's favour they will be legally correct:

2. Convince the adjuster that if they decide in your client's favour they will have done the just thing;

3. Give the adjuster enough information and support for your argument to justify the decision that you hope they will make in your favour

With respect to 1 and 2 – you want to appeal to the head and the heart. You want to capture the legal high ground and the moral high ground. With respect to number 3, you want the adjuster to believe that you have thought through the problem properly and are dealing with all of the central factual and legal issues in a direct, non-evasive, clinical way. In short you want you and your client to be believed and you want the adjuster to know that should you be required to proceed to Arbitration, these are the arguments and the case law that you will be presenting to FSCO.

Make your point, provide case law. Make your point again, provide more case law. Finally, hit that point home with a further citation, and don't be afraid to take the actual wording from a case and use it in a paragraph to further hit home your point. (but be careful about claiming the wording as your own – that's plagiarism!)

State why the adjuster should agree with you (or you should win your argument) in a practical way. If the legal test is clear, just state it in a paragraph. Give that paragraph a heading to make it stand out even more. If there are conflicting lines of authority, identify them quickly, and then make your reasons about why one case is better than the other in a succinct, clear way.

Use “Buzz words” taken from case law and the legislation. Buzz words are known to catch the attention of the reader, words like “*education, training and experience”.* The adjuster knows those words, knows what they mean, and how to apply them, and he will find a kind of comfort in being presented with words that he can apply to the argument being presented.

Follow the advice of The Honourable Winston Churchill, *give it a tremendous whack!*

The following is an example of how to use case law in correspondence, to persuade the insurance adjuster to change her mind about payment of a Post 104 income replacement benefit to an untrained, uneducated client who earned $78,000.00 per year as a laborer in General Motors. In this example, only two cases are being cited, however the references made in the cases are used to get the points across throughout the argument.

> Other jobs are listed for Mickey Mouse , such as a factory superintendant, a crane operator, school bus driver, limousine driver and a fork lift operator, however, it is indicated in the IME reports that Mickey Mouse requires **additional training to perform these jobs and as such, these jobs are not commiserate with his education or his training.** Mickey Mouse was employed as a tow motor operator (fork lift operator) prior to the accident and he can no longer do that job as a result of his injuries.
>
> Further, Dr. Duck specifically states that:
>
> “*He is not able to work in heavy industrial activity which requires heavy lifting, repetitive lifting, repetitive bending or twisting of his back. He should be able to work at sedentary or light level work.”*
>
> **What then, does Disney World expect Mickey Mouse to do?** What sedentary work is he reasonably suited for by education, training or experience? None.
>
> The Financial Services Commission of Ontario has long established that occupations for which insured’s are reasonably

suited by education, training or experience, must also meet the second criteria of suitability.

In *Howden and Pembridge* FSCO A01-B 000333, Arbitrator Wilson states that employment must "… *also meet the secondary criterion that the work in question relates somewhat to previous job experience in terms of status and reward. Positions and work that, in light of experience and/or education are trivial or inconsequential, should not be included"*

A parking lot attendant, mail sorter, inventory clerk, security guard, service station attendant and a parking lot attendant to Mickey Mouse are exactly that, trivial and inconsequential and are completely unsuitable.

In effect, Disney World has thrown Mickey Mouse back into the work force suggesting that he has the education, training and experience to obtain employment when in fact, he has no education, training or experience beyond that of a factory worker.

The meaning of "complete inability" has been reviewed and considered in numerous FSCO decisions. In *Terry and Wawanesa Mutual Insurance Company"* A00-000017 Arbitrator Palmer stated that real world jobs should not be broken down into their component parts such that if an insured person is able to do little more than 50% of any suitable job that he should be found to be able to work at any job for which he is reasonably suited by education, training or experience.

It is not appropriate to simply identify a discrete series of employment competencies that Mickey Mouse may be able to do under artificial testing situations and then put all of these tasks together to theorize that he is able to engage in employment. **(wording is taken out of case)**

Employment is a living relationship between the employer and the employee. The SAB's refer to an ability to "engage in employment" not simply to perform discrete job tasks but to "engage in employment" is to participate actively in the work relationship over some reasonable period of time. **(wording is taken out of the case)**

As well, the employee must be able to meet normal employer expectations such as the very basic, common sense

> expectations, such as reliably showing up for and remaining at work, as well as being able to concentrate and focus sufficiently on the tasks at hand and to do the essential duties of that job with some acceptable level of competence. No reasonable employer would expect anything less and no employee should expect to do any less. **(wording taken right out of the case)**

In this case, the arguments that were presented were successful and the insurer reinstated the client's benefits pending a retraining program.

One thing to remember is that the harder you argue, the less persuasive you are. The reason is simple. The more you press, the more you hype, and the more you wheedle and urge, the more resistance you create and the more you start to sound like a used car salesman. Real persuasion takes place when the reader thinks the conclusion is his or her own.

Feel free to provide copies of each case that support your position to the adjuster that you are dealing with. Feel free to highlight the information in the case that supports your position.

There are no hard and fast rules for use of case law. I find it intuitive. This paper has attempted to provide the reader with some guidance on how any statements of fact and law in civil litigation can be prepare. It is also a matter of personal preference and personal style. Whatever style you choose to follow, whether that is a formal style or an informal style is your choice. The comments in this paper and presented to you today are meant as a guideline only.

Thank you for the opportunity of speaking to you today.