WHEN IS A RIGHT OF ACTION EXTINGUISHED?

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Ontario Trial Lawyers Conference – Fall 2004

1. INTRODUCTION

The Worker's Compensation scheme began in 1914 with the enactment of the so-called "historic trade-off": Workers hurt in the course of their employment were entitled to benefits under the statutory scheme regardless of fault, and in return gave up any right to sue their employers. In Ontario, the statutory provisions which determine whether or not a "right of action" is extinguished are set out in sections 26 to 31 of the *Workplace Safety and Insurance Act, 1997* ("WSIA"). The Workplace Safety and Insurance Tribunal ("the Tribunal") is the sole arbiter of whether or not a right of action is extinguished – s. 31 of the Act.

2. PRELIMINARY DETERMINATIONS

Prior to commencing an action seeking damages for personal injury, Counsel are advised to undertake initial investigations to determine, as much as possible, answers to the following:

- Whether the parties involved (ie. both your client and the target Defendant) are "workers" as defined by the Act?
- Whether the parties involved are "employers"?
- Whether or not the parties involved fall within employment described in Schedule 1 or Schedule 2 to the Act?
- Whether an "Accident" occurred?
- Whether the accident involving a worker "arose out of and in the course of employment"?

3. ACTIONS BARRED BY STATUTE

i) Workers against their own Employers

A worker cannot bring action against her own employer for damages due to personal injury – s. 28 WSIA. This prohibition **only** applies to Workers employed by Employers whose industry is set out in Schedule 1 or Schedule 2; however, it applies to **both** Schedule 1 and Schedule 2 Workers – s. 28(1) and (2) WSIA.

Note the extended definition of "Worker" in s. 2 of the WSIA (reproduced in the Appendix) which includes, for example, learners, students, volunteer firefighters, "a person summoned to assist in controlling or extinguishing a fire by an authority empowered to do so", etc. – see s. 2 WSIA.

Other included Workers/Employers

*Note – similar prohibitions against suing one's Employer extend to Federal Government employees – s. 12 *Government Employees Compensation Act*.

*Note - Independent Operators, Sole Proprietors and Partners in a Partnership carrying on business in either Schedule 1 or 2 can opt into the Insurance plan (ie. optional insurance) in which case the Workplace Safety and Insurance Board ("the Board") will declare these persons to be "Workers" – s. 12 WSIA. Otherwise, these people are strangers to the Act.

Practice tip – If, after reviewing Schedule 1 and 2, you cannot determine whether a certain employment or business is listed, telephone the local office of the W.S.& I.B. and provide the name and address of the target company you are inquiring about. The local Board can tell you whether or not that employer is registered with the Board and what Schedule the Board has it listed under. Note: this can offer some guidance, but will not

necessarily be determinative of the issue as many employers breach the Act by not properly registering with the Board.

Exceptions to "Worker"

"Worker", as defined in the WSIA, does not include "casual" workers who are employed otherwise than for the purpose of the employer's industry, certain home-based workers and, subject to s. 12 of the WSIA, executive officers of a corporation – s. 11 WSIA. The rights of employees, who are excluded from the Act's definition of "Worker", to sue their own employer are set out in Part X of the WSIA. Part X of the Act modifies and reduces the most restrictive elements of common law defenses of voluntary assumption of risk and contributory negligence– ss. 113 – 116 WSIA.

ii) Workers against other Employers/Workers/directors, etc.

Schedule 1

Schedule 1 Workers cannot sue other Schedule 1 Employers, nor their directors, executive officers or workers – s. 28(1) WSIA. This prohibition will serve to negate rights of action in many typical construction and industrial settings where Workers from a number of Employers are working (ie. construction site involving a number of sub-trades). Schedule 1 includes the high-risk industries where most Accidents occur and is broken down to include the following: Class A – Forest Products, Class B – Mining and Related Industries, Class C – Other Primary Industries (mostly farming and related), Class D – Manufacturing, Class E – Transportation and Storage, Class F – Retail and Wholesale Trades, Class G – Construction, Class H – Government and Related Services and Class I – Other Services. See *Decision #70/94, Feb. 24, 1994* where the Tribunal found the injured party was not an "executive officer", as he asserted, but was in fact a

"worker" and, as such, his right of action was extinguished; he was however entitled to be considered for benefits under the Act.

Restriction

Section 28(1) of the WSIA, which extinguishes the right of civil action of a Schedule 1 worker against another Schedule 1 entity is, by virtue of 28(3) of the WSIA, restricted to apply only where both parties are "in the course of their employment" at the time of the accident.

Schedule 1 workers injured in the course of their employment have been permitted to sue Schedule 1 "Sole Proprietors" and Schedule 1 "Partners". Remember, the prohibition in s. 28(1) of the WSIA precludes a Schedule 1 "Worker" from suing his own "Employer", as well as any other Schedule 1 "Employer", "Director", "Executive Officer" or "Worker". Thus, Sole Proprietors and Partners operating in Schedule 1 industries, not being included in the list of precluded Defendants, have been found to be strangers to the Act as both Plaintiffs and Defendants and, therefore, civil claims against these entities have been permitted to proceed – see *WSIAT Decisions #372/94 & 847/93*.

Schedule 2

Schedule 2 Workers <u>can sue anyone except</u> their own Schedule 2 employer and its directors, executive officers and co-workers – s. 28(2) WSIA.

In general terms, Schedule 2 is intended to cover the business of certain governmental entities and many activities subject to direct government regulation. For instance, Schedule 2 includes any trade or business within the meaning of section 68 of the Act (ie. the trade or business of municipal corporations, including P.U.C.'s, library boards, school

boards, fire departments, police departments, etc.). It also includes the construction and operation of: railways, streetcars, telephone lines (within the legislative authority of Federal Parliament), telegraph lines, boats, ships, vessels, bridges (between Ontario and other jurisdictions), to name a few, as well as certain airlines with regularly scheduled international passenger service.

Schedule 2 also includes any employment by or under the Crown in right of Ontario or any employment by a permanent board or commission appointed there under.

Practice Tip Example – Several Chat line inquiries deal with MVA collisions involving School buses. Assume your client is driving a motor vehicle in the course of his Schedule 1 employment when he's negligently struck by a School Bus driver also in the course of his employment. If that tortious bus driver is employed by a private bus line hired to bus children to and from school, that defendant will likely be classified as a Schedule 1 employer under Class E – Transportation and Storage, para. 3, xiii "conveying passengers by automobile or trolley coach". In these circumstances, your Schedule 1 Plaintiff's claim is statute barred by the operation of s. 28(1) of WSIA. Assume the same fact scenario above, except that the defendant's bus is owned and operated directly by a municipal school board. In this second scenario, the Defendant is Schedule 2 and the Plaintiff's right of action is preserved; he can elect to receive benefits pursuant to the W.S.& I.B. Accident fund or commence civil proceedings – s. 30 WSIA.

iii) FLA Claims

Section 27 of the Act extinguishes rights of action pursuant to section 61 of the *Family Law Act.* Both dependant claims and survivorship claims are extinguished if the injured party's claim is also barred by virtue of section 28.

4. IN THE COURSE OF EMPLOYMENT

An injured party's right of action is not extinguished if his injury does not occur "in the course of employment". For day to day practice, Counsel are advised to gather as many facts about what both the client/victim and the tortfeasor were doing at the time of the injury, their respective employers and the job titles and duties. Counsel are well advised to familiarize themselves with the following Board Operational Policy Documents which outline broad principles of W.S.& I.B. adjudication:

- #03-01-02 – "Work-Relatedness" wherein the Board is directed to consider facts and circumstances surrounding "Time", "Place" and "Activity" to make initial determinations of work-relatedness of an accident;
- #03-02-02 – "On/Off Employer's Premises";
- #03-02-03 "Traveling" as these provide guidance as to the Board's decision-making process.

Although the Board's policies provide useful guidelines, the Tribunal is of course the final arbiter of whether or not an accident occurred "in the course of employment" – s. 31 WSIA. Either party to a civil action can bring an Application to the Tribunal seeking a ruling on whether or not the right of action is extinguished. Typically, Defendants bring the Application, although Plaintiffs are not barred from doing so. Regardless of which party applies, the Applicant will bear the onus of proving the right of action is lost or preserved – *Decision #259/98, 559/98I, 609/89, 942/91, 305/92, 776/92, 183/94, 699/93I, 11/93 and 1170/01.*

The Tests

The Tribunal employs a number of tests to determine the "work relatedness" of a particular activity and, in turn, whether an action is statute barred. Among these tests are:

- The "Reasonably Incidental" Test;
- The "Dual Purpose" Test (ie. where an activity is beneficial to both the Employer and the Individual in his personal capacity);
- The "Dominant Purpose" Test (which is an extension of the Dual Purpose test);
- The "But For" Test;
- The "Distinct Departure" Test; and
- The Tribunal will also examine facts to determine whether a worker, by his conduct, has "taken himself out of the course of employment".

"Reasonably Incidental" Test

No single test predominates in determining "work-relatedness" of an activity; rather the Tribunal will apply multiple tests in making its determination. The starting point of the Tribunal's inquiry should involve application of the "Reasonably Incidental" Test. That is, was the worker's activity at the time of the injury "reasonably incidental" to her work duties?

Decision #262/04, July 5, 2004, involved an injury at a golf tournament. The defendant was employed as a business development manager by a company that provided financing for the purchase or lease of commercial heavy equipment. The plaintiff was a territory sales manager for a company that manufactured and distributed heavy equipment. The plaintiff was injured in July 2001 when the golf cart, in which he was a passenger and

which was driven by the defendant, overturned. The defendant applied to determine whether the plaintiff's right of action was extinguished.

The Tribunal found that the defendant was in the course of his employment at the time of the accident. Golfing at the tournament was reasonably incidental to his employment. It was clearly a work-related activity in that it helped the defendant build relationships that could be a future source of business for him and his employer. The defendant's employer paid for the defendant and his guests to participate in the tournament, indicating the importance of this type of social activity in developing the employer's business interests.

The Tribunal found that the plaintiff was also in the course of his employment. The plaintiff's participation was of less direct benefit to his employer than that of the defendant but was, none the less, of benefit. The tournament was sponsored by an organization of which the plaintiff's employer was a member. Employees had previously attended trade shows held by this organization. The tournament provided networking opportunities to the plaintiff that would be of benefit to the employer. Although the plaintiff's customers were end-users of the equipment he sold and not the financing companies (ie. the defendant's business) used by the end-users, financing was an important part of completing deals, and it was of benefit to the plaintiff's employer that its representatives be familiar with those who could provide financing. Both the plaintiff and defendant were in the course of employment at the time of the accident and, accordingly, the plaintiff's right of action was extinguished.

Certain activities may, on their face, appear incidental to employment, however warrant further examination to determine their true "work-relatedness". In *Decision #2310/03, April 29, 2004*, the injured party was a police court case manager for the police

department in a northern Ontario town. In December 1997, the worker slipped in a parking lot while on her way to her vehicle after spending a Christmas lunch with her assistant.

The Christmas lunch was not an activity that was reasonably incidental to the worker's employment. There may have been some marginal benefit to her employer from the lunch with her assistant, but there was no evidence that the employer knew of the lunch, much less required or encouraged it. The worker submitted that she was on call throughout her lunch. However, the Panel found that the worker was not called upon during that time. The fact that her supervisor knew of her whereabouts did not mean that the supervisor was exercising control and supervision over the worker. A police officer will not be considered to be on duty 24 hours a day simply by reason of being on call. The worker was found not to be in the course of employment at the time of the accident.

Even where a worker has completed her shift when the injury occurs, she still can be found to be "in the course of her employment". In *Decision #2175/03, December 16, 2003,* the plaintiff, a part-time worker at the defendants' seasonal tourist and fishing camp, was injured in a propane explosion in her trailer at the camp. On Friday afternoons, a school bus would drop the plaintiff off at the camp. She would do some work on Friday evenings and on Saturdays from about six in the morning until three in the afternoon after which her parents would then pick her up to take her home. After completing work on a Saturday afternoon while waiting for her parents, the worker went back to the trailer where she was staying and started heating some water to wash her hands when the explosion occurred.

The Tribunal found the accident occurred during a reasonable period after completion of her work duties. The plaintiff's activities (cleaning up after work on premises controlled by the Employer) were "reasonably incidental" to her employment. The plaintiff was in the course of employment at the time of the accident and accordingly her right of action was extinguished.

"Dual Purpose" Test

Many Motor Vehicle Collision claims will arise out of circumstances where the would-be plaintiff is traveling to further both his personal interests (ie. visiting a friend) and that of his employer (making a delivery of company product). The Tribunal considered this situation in *Decision #199/94 – Sept. 25, 1994*, applied the "Dual Purpose" Test and found the injured party's trip had both a personal and business purpose. The Tribunal applied its general rule that, where a trip serves both business and personal interests, it will be considered a business trip if a special or additional trip would have been required to effect the business purpose (ie. "Did the employment create the need for the trip?"). The worker was delivering a shipment of shoes and also intended to stop and visit his sister. The accident occurred at a location on the highway that was en route to both destinations. Based on the oral testimony, the Tribunal also found the worker intended to visit his sister after delivering the shoes and thus was, in fact, engaged in the business component of his trip at the time of the collision. Consequently, the right of action was extinguished.

The "Dominant Purpose" Test

In *Decision #437/00, May 5, 2004*, the plaintiff, who generally worked from 8 am to 4 pm., case was injured in a motor vehicle accident in February 1993. The accident occurred after 4 pm. The plaintiff was asked by his supervisor to deliver a file to him at

the head office. The plaintiff picked up the file and had it in his car at the time of the accident. At the time of the collision, however, he was proceeding to a grocery store to do personal shopping. The Tribunal found that delivering the file was personal and not work-related and that the plaintiff was going to deliver it as a favour on a volunteer basis. Even if there was a dual purpose in the worker traveling at the time, the dominant purpose was to go grocery shopping. Further, the Tribunal found that the plaintiff's activity was not reasonably incidental to his employment. As the plaintiff was not in the course of employment, his right of action was not taken away. *Decision #437/00* includes a good review of the decisions involving delivery drivers whose trips involved a "dual purpose" as well as the application of Part X of the Act regarding Uninsured Employment (ie. "Casual" workers).

Application to Family Businesses

As Counsel are well aware, injured parties working in family businesses provide unique challenges in that job titles, duties and remuneration often vary and are not well papered internally. See *Decision #146/93*, *Nov. 23, 1993*, involving a woman who, two weeks prior to the date of accident, had been laid-off from the family business which was seasonal in nature. Although the woman was no longer on the company payroll, the Tribunal nonetheless found her to be a "Worker" within the meaning of the Act. The payroll records were held not determinative of the issue, particularly in the context of a family business. At the time of the accident, the plaintiff was driving to the bank. She did personal as well as business banking and was intending to do personal shopping afterwards.

The Panel applied the dual purpose test in determining whether the plaintiff was in the course of employment. In this case, the primary purpose of the plaintiff's travel activity

was personal. The plaintiff was going to do personal banking and shopping. The business banking was a secondary task which could have been done by telephone (ie. no "special trip" for business purposes was required – see *Decision #199/94* above) and, consequently, the right of action was not extinguished.

The "But For" Test

In certain limited circumstances, the Reasonably Incidental test and the Dominant Purpose test are not useful in determining whether, at the time of the injury, the worker was "in the course of employment". The Tribunal will, on rare occasion, apply the "But For" test to assist in its adjudication. *Decision #550/93, February 2, 1994,* involved a sole proprietor of a bookkeeping business who had purchased personal W.S.& I.B. coverage. The issue was whether the plaintiff was in the course of employment at the time of a motor vehicle accident.

The plaintiff was a single parent with two children living at home. During a typical day she regularly alternated between business and personal responsibilities. On the day of the accident, the plaintiff arrived at her office at 7:30 in the morning. She went to a business meeting at an industrial mall at 8:30. When the meeting concluded at 10:30, the plaintiff intended to perform a number of personal errands before going to her next business meeting at her office at 2:30. The plaintiff was involved in the collision just as she turned from the driveway of the industrial mall onto the roadway.

The "reasonably incidental" test was not helpful in this case since the plaintiff was coming from a business appointment and going to personal errands. Her intention was also not helpful since, aside from evidentiary problems, she could have been focusing on her personal errands even while clearly in the course of employment.

The Panel adopted a "but for" test. This test dovetailed with Board guidelines which require that the employment obligate the worker to be traveling at the place and time the accident occurred. In order to determine whether the plaintiff would have been at the accident site at that time "but for" her employment obligation, it was necessary to look carefully at the route traveled and anticipated to be traveled on the day in question. In this case, it was held that the plaintiff would not have been on that stretch of roadway but for her business appointment. Accordingly, the plaintiff was in the course of employment and her right of action was extinguished.

The "Distinct Departure" Test

As a general rule, Board policy and Tribunal jurisprudence holds that a worker commuting to work (in her own car) is in the course of employment when she arrives at the Employer's premises or place of work (ie. construction site) and is not in the course of employment when she leaves the premises or place of work. However, "in the course of employment" will, in certain circumstances, extend to a worker's daily commute when, for instance, she drives a vehicle provided to her by the Employer. Note however the finding in *Decision #609/94, November 2, 1995,* wherein the Tribunal ruled that use of a company vehicle is not, in and of itself, determinative of the issue of whether or not a plaintiff is "in the course of his employment" at the time of a Motor Vehicle collision.

Decision #556/02I, June 12, 2002 involved a plaintiff who worked for a company that provided automobile windshield repair, installation and maintenance. The plaintiff drove a company van which contained replacement windshields and tools. He spent about 80% of his work day in the van. The company permitted and encouraged the plaintiff to use the van to commute to and from work. This enabled the plaintiff to attend service calls

directly from home without first having to drive to the employer's premises. The plaintiff was also called occasionally to do emergency work in his off hours.

While proceeding home at the end of a work day, the worker stopped at a convenience store. He was then proceeding home when the collision occurred. The worker was in the course of his daily commute in the vehicle that was the principal tool of his employment. The use of the van by the plaintiff to commute to and from work was a benefit to the employer. The stop at the convenience store was an incidental activity in which he engaged while operating the company van. It did not constitute a distinct departure from the course of employment. The Tribunal concluded that the plaintiff was in the course of employment at the time of the accident and, consequently, the right of action was extinguished.

The Distinct Departure test will almost certainly be applied where a worker's duties require him to travel from site to site within a work day. In *Decision #62/94, May 3, 1996*, the plaintiff was required to travel on a regular basis for his employment. He went home around noon, then was driving to see his wife at her place of employment. He had no prior arrangement to drop in to see his wife. He would drop in on his wife on an irregular basis, sometimes just for a brief visit or a cup of coffee.

In arriving at its decision, the Tribunal referenced the well established rule that where a worker's employment requires that he drive most of the day, stops for coffee breaks, even if they involve minor detours, are not considered distinct departures that take the worker out of the course of employment. The same applied for lunch stops, unless a personal errand takes the worker considerably out of the way, in which case it would be considered a "distinct departure".

The Tribunal found the plaintiff could not remember his planned employment route for the afternoon, there was no other evidence to indicate his route and, accordingly, the stop to see his wife was similar to a short coffee break. In these circumstances, the Tribunal concluded that a distinct departure had not been established, the plaintiff was in the course of employment and his right of action was extinguished.

Contrast *Decision #62/94* above with the finding in *Decision #833/95, December 21, 1995* where the plaintiff was proceeding in his employer's van at lunch time from the work site to his home where he was going to have lunch with his wife. The plaintiff's job duties required him to travel to various job sites for service calls and, by agreement with the Employer, he had use of the van for work purposes and for personal use at other times. At the time of the accident, the plaintiff was not engaged in any activity to benefit the employer and the sole purpose of the trip was personal. The activity involved a distinct departure from employment-related activity, the plaintiff was not in the course of employment and his right of action was maintained.

Actions which take a worker "out of the course of employment"

As noted above, Counsel are advised to consider the criteria of "Time", "Place" and "Activity", as per Board Operational Policy Document #03-01-02, in considering the "work relatedness" of an injury. If accidents occur during work hours (Time) and at the Employer's work site (Place), a strong presumption exists that the injury occurred "in the course of employment". However, a number of Tribunal decisions set out the circumstances in which workers, due to their activity at the time an incident occurs, take themselves out of the course of their employment; intoxication, misconduct (fighting and horseplay) and sleeping on the job are several examples.

The definition of "Accident" in section 2 includes willful and intentional acts, not being the act of the worker; that is, innocent workers assaulted by co-workers can collect benefits under the W.S.& I.B. insurance plan as the injuries are considered compensable. However, such workers can also elect, pursuant to s. 30 of the Act, to sue their assailants as such conduct by defendant workers has been found to take them out of the course of their employment; recall, the prohibition against suing co-workers applies only when both parties are "in the course of employment" – s. 28(3) WSIA. In *Decision #1688/03, January 29, 2004*, the plaintiff and defendant were co-workers. The defendant assaulted the plaintiff at work during working hours as a result of a work-related discussion. The defendant applied to determine whether the plaintiff's right of action was taken away. In related criminal proceedings, the defendant was charged with assault and entered a guilty plea.

The Tribunal quoted recent Supreme Court of Canada decisions in *CUPE v. City of Toronto (2003 CLLC 220-073)* and *Ontario v. OPSEU (2003 CLLC 220-0272)* which confirmed that administrative tribunals are required to give full effect to a criminal conviction (even though estoppel is not applicable) and that the criminal conviction may not be re-litigated in the administrative law proceeding.

All Tribunal decisions in the area of assault cannot be reconciled. However, the Panel followed the dissent in Decision No. 804/89 and decisions applying it, and held that there is a point where the nature of the offending act is such that it, of itself, breaks the employment nexus. The initial focus should be on the offending or harmful activity to determine whether the activity, by its very nature, breaks the employment connection. In this case, the Panel found that the assault broke the employment nexus, the defendant took himself out of employment and accordingly the plaintiff's right of action against the co-worker was maintained.

Schedule 1 Employer not vicariously liable for its worker's assault

An interesting, related decision is found in *Decision #977/03, July 14, 2003*. Here, the plaintiff was a worker of a Schedule 1 employer. The plaintiff was assaulted by a defendant who was an executive officer, director, shareholder and worker of the same employer. The plaintiff brought an action against his own employer and the personal defendant, a co-worker. The defendants applied to determine whether the plaintiff's right of action was taken away.

The plaintiff was a worker in the course of employment at the time of the accident. The personal defendant was the aggressor. He was convicted of assault causing bodily harm for the incident. The Tribunal found that the personal defendant took himself out of the course of employment when he assaulted the plaintiff and the claim against the personal defendant could proceed.

Section 26(2) of the WSIA provides that entitlement to benefits is in lieu of all rights of action that a worker has against the worker's own employer or an executive officer of the employer. Section 28(1) provides that a worker of a Schedule 1 employer is not entitled to commence an action against any Schedule 1 employer or executive officer of any Schedule 1 employer. Section 28(3) provides that if workers of one or more employers were involved, subsection (1) applies only if the workers were acting in the course of their employment.

The plaintiff submitted that that, in accordance with s. 28(3), the right of action was not taken away against the defendants. The Tribunal noted that s. 28(3) clearly only restricts application of s. 28(1). The plaintiff's right of action against his employer was barred by s. 26(2). Section 28(1) takes away the right of action against other Schedule 1 employers.

The plaintiff was a worker in the course of employment at the time of the accident. While the personal defendant was an executive officer of the employer, the action against him was probably in his personal capacity rather than as an executive officer (note the Tribunal's finding that perpetrating the assault took the defendant out of the course of his employment). Accordingly, the action against the personal defendant was not barred but the right of action against the Employer was extinguished, not by section 28 of the Act, but by the general prohibition contained in s. 26(2). Although *Decision #977/03* does not specify the grounds for recovery pleaded in the civil action as against the Employer Defendant, presumably it was in the nature of vicarious liability in permitting a situation to exist where a co-worker was allowed to assault the plaintiff.

Products Liability Exception

Counsel are also reminded of s. 28(4) of the Act which restricts the application of the bars to action contained in sections 28(1) and (2). The so-called Products Liability exception applies where an employer, other than the injured worker's employer, supplies a motor vehicle, machinery or equipment without also supplying workers to operate the motor vehicle, machinery or equipment. A review of rights of action preserved by virtue of this provision is beyond the scope of this paper.

Conclusion

Counsel are well-advised to conduct thorough investigations at the outset of a file with a view to obtaining as much information as possible about both the client's and the tortfeasor's work activities at the time of the injury. At a minimum, Counsel are advised to determine: Whether plaintiffs are "workers" and whether defendants are "workers, directors, executive officers" as defined by the Act? Whether the defendant is an "employer"? Whether or not the parties involved fall within employment described in

Schedule 1 or Schedule 2 to the Act? Whether an "Accident" occurred? And, whether, at the time of the accident, both the plaintiff and the defendant were "in the course of employment"? Hopefully these investigations will identify, at an early stage, claims which could be barred by the provisions of the *Workplace Safety and Insurance* Act and preclude an unwarranted commitment of time and resources.

Appendices

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Excerpts from *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16

s. 2 - Definitions: "Worker", "Employer", "Accident"

s. 11, 12 - Insured Workers, Optional Insurance

ss. 26 – 28 - re. Rights of Action, Application of section & Rights Extinguished

s. 68 - "Trade" of Municipal Corporations

ss. 113 – 116 - Uninsured Employment

O. Regulation 175/98, passed pursuant to *Workplace Safety and Insurance Act, 1997*

ss. 1 – 5 - *inter alia,* Excluded industries

Schedule 1

Schedule 2

s. 12 ***Government Employees Compensation Act*** **S.C., c. G 5 (Federal)**

RESEARCH TOOLS

Workplace Safety and Insurance Board

http://www.wsib.on.ca/wsib/wsibsite.nsf/public/homepage

Workplace Safety and Insurance Appeals Tribunal Website

http://www.wsiat.on.ca/engindex.htm

re Tribunal Jurisprudence on rights of action

Definitions

2. (1) In this Act,

"worker" means a person who has entered into or is employed under a contract of service or apprenticeship and includes the following:

1. A learner.
2. A student.
3. An auxiliary member of a police force.
4. A member of a volunteer ambulance brigade.
5. A member of a municipal volunteer fire brigade whose membership has been approved by the chief of the fire department or by a person authorized to do so by the entity responsible for the brigade.
6. A person summoned to assist in controlling or extinguishing a fire by an authority empowered to do so.
7. A person who assists in a search and rescue operation at the request of and under the direction of a member of the Ontario Provincial Police.
8. A person who assists in connection with an emergency that has been declared to exist by the Premier of Ontario or the head of a municipal council.
9. A person deemed to be a worker of an employer by a direction or order of the Board.
10. A person deemed to be a worker under section 12.
11. A pupil deemed to be a worker under the *Education Act*. ("travailleur") 1997, c. 16, Sched. A, s. 2 (1); 1999, c. 6, s. 67 (2-4); 2002, c. 18, Sched. J, s. 5 (1).

"employer" means every person having in his, her or its service under a contract of service or apprenticeship another person engaged in work in or about an industry and includes,

(a) a trustee, receiver, liquidator, executor or administrator who carries on an industry,

(b) a person who authorizes or permits a learner to be in or about an industry for the purpose of undergoing training or probationary work, or

(c) a deemed employer; ("employeur")

"accident" includes,

(a) a wilful and intentional act, not being the act of the worker,

(b) a chance event occasioned by a physical or natural cause, and

(c) disablement arising out of and in the course of employment; ("accident")

Insured workers

11. (1) The insurance plan applies to every worker who is employed by a Schedule 1 employer or a Schedule 2 employer. However, it does not apply to workers who are,

(a) persons whose employment by an employer is of a casual nature and who are employed otherwise than for the purposes of the employer's industry; or

(b) persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in the person's own home or on other premises not under the control or management of the person who gave out the articles or materials.

Exception

(2) Subject to section 12, the insurance plan does not apply to workers who are executive officers of a corporation. 1997, c. 16, Sched. A, s. 11.

Deemed workers (optional insurance)

12. (1) Upon application, the Board may declare that any of the following persons is deemed to be a worker to whom the insurance plan applies:

1. An independent operator carrying on business in an industry included in Schedule 1 or Schedule 2.
2. A sole proprietor carrying on business in an industry included in Schedule 1 or Schedule 2.
3. A partner in a partnership carrying on business in an industry in Schedule 1 or Schedule 2.

Same, executive officer

(2) Upon the application of a Schedule 1 or Schedule 2 employer who is a corporation, the Board may declare that an executive officer of the corporation is deemed to be a worker to whom the insurance plan applies. The Board may make the declaration only if the executive officer consents to the application.

Conditions

(3) The Board may make a declaration subject to such conditions as it considers appropriate. The declaration may provide that the person is deemed to be a worker for only such period as is specified.

Payment in advance

(4) The Board may require the employer to pay in advance all or part of any premiums payable in respect of the person.

Revocation of status

(5) The Board may revoke a declaration that a person is a deemed worker if the employer at any time defaults in paying the required premiums in respect of the person.

Set-off

(6) If the employer defaults in paying the required premiums in respect of the person and the person or his or her survivors are entitled to receive payments under the insurance plan, the Board may deduct from the payments to the person or survivors the amount owed by the employer.

Employer

(7) For the purposes of the insurance plan, while a declaration with respect to a person is in force the following person shall be deemed to be his or her employer:

1. In the case of an independent operator or a sole proprietor, the employer is the independent operator or the sole proprietor.
2. In the case of a partner, the employer is the partnership.
3. In the case of an executive officer of a corporation, the employer is the corporation. 1997, c. 16, Sched. A, s. 12.

RIGHTS OF ACTION

No action for benefits

26. (1) No action lies to obtain benefits under the insurance plan, but all claims for benefits shall be heard and determined by the Board. 1997, c. 16, Sched. A, s. 26 (1).

Benefits in lieu of rights of action

(2) Entitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker, a worker's survivor or a worker's spouse, same-sex partner, child or dependant has or may have against the worker's employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer. 1997, c. 16, Sched. A, s. 26 (2); 1999, c. 6, s. 67 (6).

Application of certain sections

27. (1) Sections 28 to 31 apply with respect to a worker who sustains an injury or a disease that entitles him or her to benefits under the insurance plan and to the survivors of a deceased worker who are entitled to benefits under the plan. 1997, c. 16, Sched. A, s. 27 (1).

Same

(2) If a worker's right of action is taken away under section 28 or 29, the worker's spouse, same-sex partner, child, dependant or survivors are, also, not entitled to commence an action under section 61 of the *Family Law Act*. 1997, c. 16, Sched. A, s. 27 (2); 1999, c. 6, s. 67 (7).

Certain rights of action extinguished

28. (1) A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. Any Schedule 1 employer.
2. A director, executive officer or worker employed by any Schedule 1 employer.

Same, Schedule 2 employer

(2) A worker employed by a Schedule 2 employer and the worker's survivors are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. The worker's Schedule 2 employer.
2. A director, executive officer or worker employed by the worker's Schedule 2 employer.

Restriction

(3) If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.

Exception

(4) Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment. 1997, c. 16, Sched. A, s. 28.

"Trade" of municipal corporations, etc.

68. The exercise by the following entities of their powers and the performance of their duties shall be deemed to be their trade or business for the purposes of the insurance plan:

1. A municipal corporation.
2. A public utilities commission or any other commission or any board (other than a hospital board) that manages a work or service owned by or operated for a municipal corporation.
3. A public library board.
4. The board of trustees of a police village.
5. A school board. 1997, c. 16, Sched. A, s. 68.

UNINSURED EMPLOYMENT

Application

113. (1) This Part applies with respect to industries that are not included in Schedule 1 or Schedule 2 and with respect to workers employed in those industries.

Same

(2) This Part applies with respect to the following types of workers who are employed in industries that are included in Schedule 1 or Schedule 2:

1. Persons whose employment by an employer is of a casual nature and who are employed otherwise than for the purposes of the employer's industry.
2. Persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in the person's own home or on other premises not under the control or management of the person who gave out the articles or materials. 1997, c. 16, Sched. A, s. 113.

Employer's liability

114. (1) A worker may bring an action for damages against his or her employer for an injury that occurs in any of the following circumstances:

1. The worker is injured by reason of a defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises used in the employer's business or connected with or intended for that business.
2. The worker is injured by reason of the employer's negligence.

3. The worker is injured by reason of the negligence of a person in the employer's service who is acting within the scope of his or her employment.

Same, deceased worker

(2) If a worker dies as a result of an injury that occurs in a circumstance described in subsection (1), an action for damages may be brought against the employer by the worker's estate or by a person entitled to damages under Part V of the *Family Law Act*. 1997, c. 16, Sched. A, s. 114.

Liability of owner, etc.

115. (1) A worker may bring an action for damages against the person for whom work is being done under a contract and against the contractor and subcontractor, if any, for an injury that occurs in any of the following circumstances:

1. The injury occurs by reason of a defect in the condition or arrangement of any ways, works, machinery, plant, building or premises. The person for whom the work is being done owns or supplies the ways, works, machinery, plant, building or premises.
2. The injury occurs as a result of the negligence of the person for whom all or part of the work is being done.
3. The injury occurs as a result of the negligence of a person in the service of the person for whom all or part of the work is being done, and the person who was negligent was acting within the scope of his or her employment.

Same

(2) Nothing in subsection (1) affects any right or liability of the person for whom the work is being done and the contractor and subcontractor as among themselves.

Same

(3) The worker is not entitled to recover damages under this section as well as under section 114 for the same injury. 1997, c. 16, Sched. A, s. 115.

Voluntary assumption of risk

116. (1) An injured worker shall not be considered to have voluntarily incurred the risk of injury in his or her employment solely on the grounds that, before he or she was injured, he or she knew about the defect or negligence that caused the injury.

Certain common law rules abrogated

(2) An injured worker shall not be considered to have voluntarily incurred the risk of injury that results from the negligence of his or her fellow workers.

Contributory negligence

(3) In an action for damages for an injury that occurs when a worker is in the service of an employer, contributory negligence by the worker is not a bar to recovery,

(a) by the injured worker; or

(b) if the worker dies as a result of the injury, by a person entitled to damages under Part V of the *Family Law Act*.

Same

(4) The worker's contributory negligence, if any, shall be taken into account in assessing the damages in such an action. 1997, c. 16, Sched. A, s. 116.

O. Regulation 175/98

Definitions

1. In this Regulation,

"business activity" means an operation that relates to the production of a product or the provision of a service and includes the work done by domestic workers;

"farm" means premises the whole or part of which are used for agricultural purposes and, without limiting the generality of the foregoing, includes premises used for,

(a) the production of plants for the purpose of the sale of such plants, or any part thereof, and

(b) the production, including breeding, rearing or fattening of animals for the purpose of the sale of such animals, or any part thereof, or for the purpose of racing or exhibiting such animals;

"manufacturing" includes making, preparing, altering, repairing, ornamenting, printing, finishing, packing, packaging, inspecting, testing, assembling the parts of and adapting for use or sale any article, commodity or raw material;

"office building" means a building used or occupied, wholly or partly, for office purposes;

"properly segregated" in relation to a business activity or operation of an employer means that,

(a) the wage records for the payroll for the business activity or operation are segregated from the payroll for the employer's other business activities and operations, and

(b) the segregated wage records can be verified by records of the employer kept for a reason other than for verifying those segregated wage records;

"restaurant" means a cafe, cafeteria, dining room, tea room or coffee room or any place where meals or refreshments are served on order to the public. O. Reg. 175/98, s. 1; O. Reg. 444/01, s. 1.

Schedules Established

2. Schedules 1, 2, 3 and 4 to this Regulation are established as Schedules 1, 2, 3 and 4 for the purposes of the Act. O. Reg. 175/98, s. 2.

Industries Excluded from Schedules 1 and 2

3. The following industries are excluded from Schedules 1 and 2:
1. Barbering and shoe-shining establishments.

2. Educational work, veterinary work and dentistry.

3. Funeral directing and embalming.

4. The business of a photographer.

5. Taxidermy. O. Reg. 175/98, s. 3.

4. Schedules 1 and 2 of the Act do not include the permanent workers of the fire department of the City of Toronto who are under The Toronto Fire Department Superannuation and Benefit Fund. O. Reg. 175/98, s. 4.

5. Subject to section 13, anything not itself done by the employer as a business or trade or for profit or gain if, but for this section, it would be an industry included in Schedule 1, is excluded from Schedules 1 and 2, except where it is done as a part of or process in or incidentally to or for or for the purpose of an industry included in Schedule 1. O. Reg. 175/98, s. 5.

SCHEDULE 1

INDUSTRIES THE EMPLOYERS IN WHICH ARE LIABLE TO CONTRIBUTE TO THE INSURANCE FUND

***Note: it was determined Schedule 1 is too voluminous to reproduce in this paper. Set out below are the main industry sub-categories only; within each category is an extensive listing of specific industries. A full copy of Schedule 1 can be obtained by visiting the Statutes of Ontario website at http://www.e-laws.gov.on.ca/. Search for regulation 175/98 enacted pursuant to the *Workplace Safety and Insurance Act, 1997*.**

Class A - Forest Products

Class B - Mining And Related Industries

Class C - Other Primary Industries (includes farming, fishing, etc.)

Class D - Manufacturing

Class E - Transportation and Storage

Class F - Retail and Wholesale Trades

Class G - Construction

Class H - Government and Related Services (Note: a number of governmental functions are included in Schedule 2)

Class I - Other Services (is a real hodge podge of industries)

O. Reg. 175/98, Sched. 1.

SCHEDULE 2

INDUSTRIES THE EMPLOYERS IN WHICH ARE INDIVIDUALLY LIABLE TO PAY BENEFITS UNDER THE INSURANCE PLAN

1. Any trade or business within the meaning of section 68 of the Act.

2. The construction or operation of railways operated by steam, electric or other motive power, street railways and incline railways, but not their construction when constructed by any person other than the company that owns or operates the railway.

3. The construction or operation of car shops, machine shops, steam plants and power plants and other works for the purposes of any railway mentioned in paragraph 2 or used or to be used in connection with it when constructed or operated by the company that owns or operates the railway.

4. The construction or operation of telephone lines and works within the legislative authority of the Parliament of Canada, for the purposes of the business of a telephone company or used or to be used in connection with its business when constructed or operated by the company.

5. The construction or operation of telegraph lines and works for the purpose of the business of a telegraph company or used or to be used in connection with its business when constructed or operated by the company.

6. The construction or operation of boats, ships, vessels and works for the purposes of the business of a navigation company, corporation or person carrying on a navigation business or used or to be used in connection with the business when constructed or operated by the company, corporation or person, and all other navigation, towing and marine wrecking carried on as a business.

7. The operation of the business of an express company that operates on or in conjunction with a railway, or of sleeping cars, parlour cars or dining cars, whether operated by the railway company or by an express, sleeping car, parlour car or dining car company.

8. The construction or operation of a bridge connecting Ontario with an adjacent province or state, but not its construction when constructed by any person or company other than the person or company owning or operating the bridge.

9. Any employment by or under the Crown in right of Ontario and any employment by a permanent board or commission appointed by the Crown in right of Ontario.

10. An airline that has a regularly scheduled international passenger service and works constructed or operated by the airline and used or intended to be used for or in connection with the business of the airline.

11. Revoked: O. Reg. 444/01, s. 2.

12. Revoked: O. Reg. 444/01, s. 2.

13. The implementation, administration and enforcement of electrical safety standards by a corporation without share capital whose members include persons who may only be admitted as members with the prior approval of a Minister of the Crown in right of Ontario.

14. The regulation of the electricity market carried out by a corporation without share capital the members of whose Board of Directors, with the exception of the chief executive officer, are appointed by a Minister of the Crown in right of Ontario.

O. Reg. 175/98, Sched. 2; O. Reg. 561/99, s. 2; O. Reg. 444/01, s. 2.

Government Employees Compensation Act

CHAPTER G-5

An Act respecting compensation for Government employees

NO OTHER CLAIMS AGAINST CROWN

No claim against Her Majesty

12. Where an accident happens to an employee in the course of his employment under such circumstances as entitle him or his dependants to compensation under this Act, neither the employee nor any dependant of the employee has any claim against Her Majesty, or any officer, servant or agent of Her Majesty, other than for compensation under this Act.

R.S., c. G-8, s. 8.