I see many comments on the OTLA Chatline and field many telephone calls from OTLA members inquiring as to whether their client's potential right of action is removed by virtue of the provision of the *Workplace Safety & Insurance Act* ("the Act"). I've also been consulted on several matters where counsel have started actions, proceeded to Discoveries, expended considerable resources on background and expert medical reports and *then*, in response to Defense counsel's section 31 Application, have only begun to closely examine whether their client's cause of action is statute barred by virtue of s. 28 of the Act. While any party to an action can bring Application to the Workplace Safety & Insurance Tribunal ("the Tribunal") for a ruling on whether or not a right of action is taken away, and while that Application can be brought at any stage of a civil action, there are steps Plaintiff's counsel can take to, at a minimum, educate themselves and "weed out" at an early stage any potential civil claims which are clearly statute-barred by virtue of the Act.

Determining whether a cause of action is extinguished means first and foremost identifying the players involved. At a minimum, 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 Plaintiff is a "worker", a "sole proprietor" or "Independent Operator" as defined by the Act? If the Plaintiff is one of the latter two, has he purchased optional insurance under the Act in which case he's deemed to be a "worker"?
- Whether the target Defendant(s) are "workers", "employers", or "Executive Officers" or "Directors" employed by an "employer"?
- Whether or not the parties involved fall within employment described in Schedule 1 or Schedule 2 to the Act, which Schedules are established via Ontario

Regulation 175/98, or whether the employment is not listed in either Schedule in which case they are a "stranger" to the Act?

- Whether the accident involving a worker "arose out of and in the course of employment"?

Counsel are well advised to familiarize themselves with sections 28 to 31 of the Act which establishes those actions that are statute-barred and the procedure for bringing an Application to the Tribunal for a determination of whether a right of action is taken away. If reading dry statutory provisions is not your thing, get Butterworths' "Worker's Compensation in Ontario Service, by Dee, McCombie and Newhouse, from your local Law Library. This contains a good overview of these provisions of the Act as well as Tribunal decisions interpreting same.

Broadly speaking, counsel should be aware of the following potential limitations to their rights of actions:

i) Workers cannot sue their own Employers

A worker cannot bring action against her own employer for damages due to personal injury, be it a Schedule 1 or Schedule 2 employer – s. 28 WSIA. Determine whether the employment your client was engaged in at the time of injury falls within Schedule 1 or 2. 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. While this can offer some guidance, it will not necessarily be

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

ii) Schedule 1 Workers cannot sue <u>any</u> Schedule 1 entity

In addition to the prohibition against suing his own employer, a Schedule 1 worker also 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 includes: Forestry, Mining and Related Industries, Other Primary Industries such as farming and related Manufacturing, Transportation and Storage, Retail and Wholesale Trades, Construction, Government and Related Services and Other Services.

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*.

iii) Schedule 2 Workers are only prohibited from suing their own Schedule 2 employer

Schedule 2 Workers can sue anyone except 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.

I have seen 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.

iv) Rights of action are only extinguished where injury occur "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?

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.

On the other hand, 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 <u>after</u> 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).

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 "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.

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".

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 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.

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 identities and 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 a "worker", "employer", or "Executive Officer" or "Director" employed by an "employer"? Whether or not the parties involved fall within employment described in Schedule 1 or Schedule 2 to the Act? 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.