

WSIB Interface
Issues:
Automobile
Reparation Schemes
and Tort

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Introduction to the Interaction of Reparation Schemes

- Insurers of commercial operations face complicated and inter-related issues arising from the interactions between:
 - the Workplace Safety and Insurance Board (“WSIB”); scheme
 - the first party automobile reparation scheme (“SABs”); and
 - the Tort (auto and otherwise) scheme.
- Adjusters of Tort, accident benefits and commercial general liability (“CGL”) claims can benefit from a better understanding of the interaction between the reparation schemes affecting commercial vehicles and commercial operations.
- The general underlying concept is simple:
no worker can sue another worker or employer
but different issues and the different forums for resolving those issues complicate matters.

Outline

WSIA Benefits Background:

- The range of benefits
- Timelines for applications and appeals
- Identifying Schedule I employers

The basic worker vs. worker/employer bar

The related impact on first party auto scheme (SABs)

The related and complicating issues of:

- Worker vs. independent contractor
- “Course and scope” of employment
- The right to “elect” out of WSIB and the *bona fides* of any such election
- Pay pending and “assignment” protocols
- Derivative nature of *FLA* wrongful death claims
- Conflicts of law: insureds/accidents outside of Ontario

Range of WSIB Benefits

Benefit for Loss of Earnings

- Eligibility
 - Payable if time at work is missed because of a work related injury or illness.
 - This scheme combines temporary and long-term benefits.
 - Benefits begin from the date of injury and continue until:
 - the worker is no longer impaired,
 - the worker no longer has loss of earnings, or
 - the worker reaches age of 65.
 - There is not a clear test for long-term entitlement.
 - Some tribunal decision makers use the terminology “competitive unemployability” and others consider entitlement as a question of “whether the worker is capable of earning any income in suitable employment.”
 - The board may review payments to a worker every year, and confirm, vary, or discontinue payments.
- Amount
 - 85% of net pay, with an annual wage ceiling of \$84,100 (2014)
 - Partial benefits are available where there has been a return to work at a lower wage.
 - For accidents occurring in 2014:
 - minimum annual payment is the lesser of \$17,213.56 or the worker’s net average earnings for the year before
 - maximum annual payment is \$71,485
 - Different rates and calculations will apply depending on the year in which the accident occurred

Range of WSIB Benefits

Benefit for Non-Economic Loss

- Compensation for the physical, functional or psychological loss that is caused by a permanent impairment
- The benefit is paid in a lump sum unless the amount is over a threshold, in which case the worker can choose to receive monthly installments for the rest of his or her life.
- The amount is calculated by expressing the impairment as a percentage, and based on:
 - A legislated base number determined by the year the worker reached maximum medical recovery (MMR)
 - The severity of the impairment as determined by a doctor
 - Age - amounts are added or subtracted if the worker is below or above 45 years old
- The maximum annualized benefits for a person who reaches maximum medical recovery in 2014 is \$83,675.28, with a lump sum cut-threshold of \$12,872.94.
- These payments are meant to compensate for the impairment caused by an injury, not for the injury itself. It is not meant to compensate for pain and suffering.

Range of WSIB Benefits

Loss of Retirement Income Benefit

- When a worker receives Loss of Earnings benefits for 12 continuous months, the WSIB sets aside an additional amount equal to 5% of subsequent Loss of Earnings benefits to pay for a Loss of Retirement Income Benefit.
- Workers can choose to make additional contributions by having the WSIB deduct 5% from Loss of Earnings payments.
- The amount of the benefit when the worker reaches the age of 65 is based on the amount the WSIB set aside, amounts contributed by the worker, and investment income that contributions earned.

Compensation Amounts for Survivors

- Lump sum awards for spouses based on spouse's age.
 - For 2014, amounts range from \$38,612.96 to \$115,838.93.
- Periodic payments based on deceased spouse's income and number of dependents.
 - The current minimum for spouse and child is \$21,925 annually.
- Burial awards
 - Minimum payable is \$ 2895.97. There is no maximum.

The Occupational Disease & Survivor Benefits Program

- Services for workers affected by serious occupational illnesses such as cancer, asthma, asbestosis, and noise-induced hearing loss.

Range of WSIB Benefits

Health Care Benefits

“necessary, appropriate, and sufficient as a result of the injury”

- prescription drugs and medical marijuana
- personal care allowance (skilled, personal, and basic/supervisory, max \$20.76/hour)
- home and vehicle modifications
- independent living allowance (annual max \$3,834.61)
- independent living devices
- clothing allowance
- travel expenses
- dental services
- chiropractic treatment
- physiotherapy
- acupuncture
- services of a registered massage therapist
- hospital treatment

Some Limits on Physiotherapy

- limited to 12 weeks, after which it must be pre-authorized by the WSIB
- limited to one treatment per day except in exceptional circumstances

Health Care Equipment & Supplies

- three preferred suppliers
- equipment such as canes, crutches, supports, orthotics, transcutaneous electrical nerve stimulator
- supplies such as incontinence and ostomy supplies, wound and skin care supplies

Applying for Benefits

To make a claim to the WSIB, a worker or survivor must:

- File **Form 6** within **6 months** of the accident.
- In the case of a disease, the deadline is 6 months after learning of the disease.

A worker has a fresh 6 months to apply for benefits after a WSIAT decision.

The WSIB can extend the deadline where the worker can show “exceptional circumstances” and it is just to do so. For example, the deadline may be extended for compelling personal reasons such as serious health problems, leaving the province due to illness or death of a family member, or an inability to understand the time limit requirements.

The deadline will be waived if a change in law or policy expanded areas of entitlement for claims previously denied, or if the employer did not report the accident.

If the WSIB refuses to extend the deadline, an appeal can be brought to the Appeals Resolution Officer and then the WSIAT.

Appeal a Board Decision

To appeal a decision of the Board, a worker or survivor must file a Notice of Objection within:

- 30 days of decision about return to work or work transition issues, or
- 6 months of a decision made about anything else.

The Board can extend the deadline.

Payments required by a decision that is under appeal must continue pending the outcome of the appeal. This can lead to a disconnect with the SABs for Attendant Care where reimbursements are made between schemes.

Schedule 1 Employers

Regulation 175/98 divides Schedule 1 Employers into 9 different industry classes:

- Lumbering
- Mining and Related Industries
- Other Primary Industries (e.g. farming, fishing)
- Manufacturing
- Transportation and Storage (e.g. trucking, taxicabs, street cleaning)
- Retail and Wholesale Trades
- Construction
- Government and Related Services
- Other Services (e.g. advertising, cleaning and building operation, catering)

More industries are included if they are **analogous** to a listed industry.

The Schedule is highly amorphous and out of date. Many contemporary workplaces do not fit neatly within the enumerate categories.

The WSIB can often confirm whether an employer is a Schedule 1 or Schedule 2 employer.

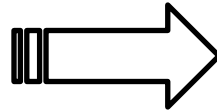
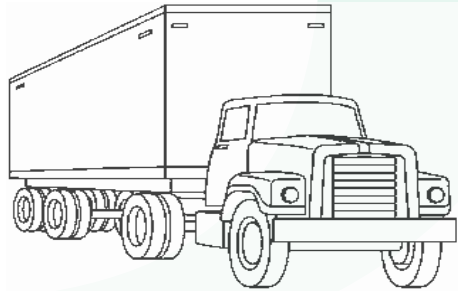
Workplace Safety and Insurance Board
200 Front Street West
Toronto ON
M5V 3J1

Recently, the WSIB has requested that all such inquiries be submitted via email to:

employeraccounts@wsib.on.ca

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- The Basic Bar
 - Interaction between WSIB and Tort
 - Interaction between WSIB and SABS

Scenario 1: Facts & Issues



- Heavy commercial vehicle
- Driver A is a worker in the course of his employment for a Schedule 1 employer

- Regular sized car
- Driver B (plaintiff) is a worker in the course of his employment for a Schedule 1 employer

ACCIDENT & LIABILITY

Vehicle A rear-ends vehicle B
Vehicle A is 100% liable

Focus is on exposure to Driver A's insurer

WSIB & Tort Interaction

There is no tort liability on driver A in Scenario 1 because:

- both drivers are workers in the course and scope of their employment;
 - their employers are Schedule 1 employers under the WSIB legislation.
- S.28 of the *Workplace Safety and Insurance Act* states that a worker employed by a Schedule 1 employer cannot commence an action against another worker employed by a Schedule 1 employer. The *WSIA* also prohibits actions from a Schedule 1 worker against any Schedule 1 employer (not just his or her own employer).

Based on the same analysis, there is no tort liability on driver A's employer in this Scenario.

WSIB & Tort Interaction

There is also **no vicarious liability** exposure on the **owner** of vehicle A in Scenario 1, even if the owner is not driver A's employer.

- According to s.29 of the *Workplace Safety and Insurance Act* and *Ling v. Transamerica* (1980), 31 OR (2d) 32 (Ont Div Ct), damages caused by a WSIB-protected person cannot be visited on another person or entity.

WSIB & SABS Interaction

Driver B (plaintiff) is not entitled to SABS in Scenario 1 as he is in the course of his employment and is therefore entitled to receive workers compensation benefits.

- Section 61(1) of the SABS states that an insurer is not required to pay accident benefits where the insured, as a result of an accident, is entitled to receive workers compensation benefits.

Pursuant to section 61(2), the bar in s. 61(1) does not apply to an insured person who “elects” to bring an action if the election is not made primarily for the purpose of claiming SABS (i.e. the election must be *bona fide*).

- In Scenario 1 there can be no *bona fide* election to commence an action as all potential defendants are WSIB-protected.


Scenario 1: Conclusions

If both workers are in the course and scope of their employment for Schedule 1 employers, then:

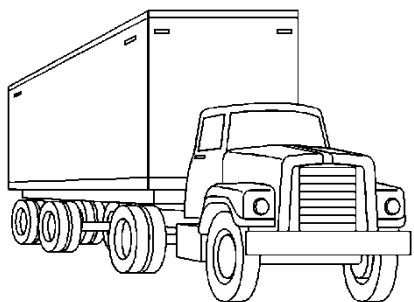
- no tort liability for driver A;
- no tort liability for his employer; and
- no vicarious liability on vehicle A's owner.

In addition, driver B is not entitled to SABs given that:

- he is entitled to workers compensation benefits; and
- he cannot make a *bona fide* election to bring an action in these circumstances as *all* potential defendants are WSIB-protected

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- Worker vs. Independent Contractor
 - “Course and Scope of Employment”
 - Election Issue
 - First Party Insurer and Assignment

Scenario 2: Summary of Facts & Issues



- Heavy commercial vehicle
- Driver A is a worker in the course of his employment for a Schedule 1 employer

- Regular sized car
- Driver B (plaintiff) is working *either* as an independent contractor or a worker in the course of his employment

- Regular sized car
- Stopped at stop sign
- Driver C *not* working

ACCIDENT & LIABILITY

Vehicle A pushes stopped vehicle B into vehicle C at stop sign

Vehicle A is 100% liable

Scenario 2: WSIB and Tort Interaction

Step 1: Worker or Independent Contractor?

Determine whether driver B (plaintiff) was an independent contractor or a worker at the time of the accident.

- Driver B (plaintiff) would likely argue (where facts permit) that he is an independent contractor and not a worker to:
 - enable him to **obtain SABS**, which are more generous than workers compensation benefits; and
 - **enable a potential tort claim** that would not be barred by WSIA.
- Again, section 61(1) of the SABS states that an insurer is not required to pay accident benefits where the insured, as a result of an accident, is entitled to receive workers compensation benefits.

Worker or Independent Contractor?

The WSIAT will consider several factors to determine if an individual is a **worker or an independent contractor**, including:

1. the degree of control the alleged employer has over the individual;
1. the opportunity the individual has to make a profit or suffer a loss;
3. any other features of the job that help define the work relationship (i.e. Independent Contractor Agreement);
4. a uniform and/or logo on the vehicle;
5. the responsibility for route selection;

Worker or Independent Contractor?

6. The ownership of equipment and tools;
7. market mobility (The individual's ability to work for other entities besides the alleged employer - in theory and reality i.e. how often in last the 6 months);
8. disciplinary protocol;
9. source deductions and dealings with CRA;
10. treatment by the alleged employer of other individuals in a similar position;
11. ability to refuse work or to send non-pre-authorized substitutes.

Worker or Independent Contractor?

The WSIB and WSIAT have *exclusive jurisdiction* regarding the determination of whether an individual is a worker or an independent contractor.

Defendant driver A would launch an application pursuant to s.31 of the WSIA seeking this determination and a consequent bar of the plaintiff's (driver B) action as against driver A

Opt-In Insurance for Independents

- Independent contractors, independent operators, sole proprietors, partners, and executive officers are not automatically covered under the *WSIA*.
- However, these individuals can apply to the WSIB for optional insurance.
- Individuals with optional insurance are entitled to all the benefits that would be due to an injured worker, including Loss of Income Benefits and Health Care Benefits.
- Individuals with optional insurance lose the same third-party rights of action as other workers.
- Opting-in can reduce exposure to claims in Tort and SABs.
- Independent operators who work in **construction** are required to have WSIB coverage. Mandatory coverage legislation became effective in 2013.

WSIB and Tort Interaction

Step 2: Course and Scope of Employment?

Determine if driver B was in the “course and scope” of his employment

- Even though driver B is determined to be a worker of a Schedule 1 employer he must be working at the time of the accident

Generally speaking, one is held to be in the course and scope of employment if:

- the accident occurs on the premises of the workplace, if the workplace is fixed;
- the worker was engaged in work-related activities while away from the workplace;
- the worker was engaged in the performance of a work-related duty or in an activity reasonably incidental to the employment;
- the accident occurs during work hours or a reasonable period before or after.

Course and Scope of Employment

Gray areas include:

- travel to and from the workplace (presume out)
- travel on employer's business (presume in)
- a "frolic of his own" or a "distinct departure on a personal errand"
 - "was the character of the activity employment related"
 - assault in the workplace
 - in custody of the Queen ?
- worker intoxication: "so drunk so as to have abandoned employment"
- the potential benefit-saving provision in s. 17: if the injury is attributable solely to serious and wilful misconduct and the injury results in death or serious impairment

Course and Scope of Employment

If it is determined that driver B (plaintiff) is a **worker** in the **course and scope** then his claim against driver A (also a worker in course and scope) would be barred.

WSIB and SABS Interaction

Step 3: The Election Issue

- If driver B is deemed a worker and in the course and scope of his employment, it would appear that the entire matter would be governed by the *WSIA* legislation, and as such, no SABS should be payable.
- However, driver B may argue that s. 61(2) of the SABS permits him to make a *bona fide* election to pursue a tort action against driver C and claim SABS. Recall that driver C is not WSIB-protected.

WSIB and SABS Interaction

Step 3: The Election Issue

In Scenario 2, driver C is not at all at fault for the accident.

- Accordingly, if driver B were to make an “election” to commence an action against driver C, it would not likely be seen as a *bona fide* election, given that there would be no meaningful recourse against driver C.
- As such, it would become apparent that any such “election” was done for the primary purpose of obtaining SABS, rather than the less generous WSIB benefits.
- The test of *bona fides*: Whether at the **time of the “election,”** the plaintiff could have reasonably anticipated he could recover more by way of tort action than WSIB (not Tort and SABS combined).

WSIB and SABS Interaction

- In our view, **FSCO (or the Court) has jurisdiction to determine whether the plaintiff's election was *bona fide***. It is doubtful whether the WSIB or WSIAT has any jurisdiction to determine that issue, and in any event, previous experience indicates that the Tribunal would decline any such requests for determination.
- It should be left to FSCO (or the Court) to determine whether the insured's election pursuant to s.61(2) of the SABS and s.30 of the WSIA was for the primary purpose of claiming SABS (and hence lacks *bona fides*), or whether the "election" was indeed for the purpose of pursuing a viable tort action.
- Accordingly, **an insurer met with a request for SABS from driver B may need to proceed both to the WSIAT** for a determination of the "worker/independent contractor" issue and/or the "in the course and scope" of employment issue, **and to appear at FSCO/Court to argue the "*bona fide* election" issue.**

Assignment: First Party Insurer Pays

What happens to SABS payments while:

- the WSIAT is determining the worker / independent contractor issue and/or the course and scope issue; and
- the FSCO/Court is determining the “election” *bona fide* issue?

The insurer must pay SABS pursuant to a WSIB approved assignment whether the issue is:

- **entitlement**, per section 61(1) of the SABS
 - Worker or independent operator
 - Course and scope; or
- *bona fide* election, pursuant to section 61(2) see: *Sumal v. American Home*, 2008 CarswellOnt 4107 (FSCO App).

WSIB Election

As indicated, an individual involved in an accident that gives rise to a legitimate right to sue or to claim WSIB benefits must elect one route or the other

It is not open to an individual to claim WSIB benefits and pursue a legal (tort) proceeding to claim compensation or pecuniary losses not covered by WSIB

- The routes are mutually exclusive
- No “top up” is permitted
- Section 30 of the WSIA states that the individual must elect whether to claim benefits or commence an action.
- A worker can re-elect to pursue a tort claim and make reimbursement to the WSIB.

see: *Sutor v. Ontario* (Workplace Safety and Insurance Board), 2003 63 OR (3d) 257 (CA)

- The WSIB election form plainly states that by electing to receive WSIB benefits, signee is forfeiting right to pursue legal action

WSIB *Deemed* Election

- **NOTE:** If the individual **refuses or neglects to elect**, they are **deemed to have elected NOT to receive** WSIB benefits
- This counter-intuitive result is presumed even when no tort action is actually commenced by virtue of the self serving language in the WSIA legislation

Scenario 2: Conclusions

- If B is “worker” in course and scope of employment, then:
 - No tort liability for driver A
 - No tort liability for A’s employer
 - No vicarious liability on vehicle A’s owner
 - C would obtain a s.29 declaration of several, not joint and several, liability from WSIAT
 - C not liable in tort in any event because of dynamics of accident
- In addition, driver B is not entitled to SABS, given:
 - He is entitled to worker’s compensation benefits, and
 - He cannot make a *bona fide* election to bring an Action because all potential defendants are either: not liable; or WSIB-protected.

Scenario 2: Conclusions

If B is “independent contractor” and/or found to be not in course and scope of employment at time of accident, then:

- B may maintain tort Action against A, A’s employer, and owner of vehicle A
- B can also receive SABS since he is not entitled to receive worker’s compensation benefits

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- Wrongful Death Claims
 - Insured Out of Ontario
 - Accident Outside of Ontario

WSIB and Wrongful Death Claims

- Wrongful death claims are not compensable at common law.
- The right to sue for damages claimed by a person for injuries sustained by another (including fatal injuries) is a creature of statute.
- **Family members of a deceased worker cannot claim in tort if deceased worker could not claim if alive** as they can stand in no better position than the deceased.
- If the deceased was a worker in the course and scope of employment whose claim would have been barred as against another worker or employer then any and all *FLA* claims are also barred. see: *Butler Trucking Co. v. Brydges*, 46 OR (2d) 686 (Ont HCJ (Div Ct))
- This is true with respect to family members who can and do receive WSIB benefits (spouse and dependents), but is also true of claimants who do not meet that criteria but are otherwise valid *FLA* claimants (e.g. grandchild).

WSIB and Wrongful Death - Example

- A worker is killed when hit by a train while travelling as a passenger in a car from one job site to another
- The worker`s spouse and some family members make claims with the WSIB.
- The WSIAT determines that the deceased was a “worker” (not an independent contractor) and WSIB benefits are paid to those family members
- Other family members (who are not entitled to WSIB payments) bring an action against the driver of the car hit by the train
- WSIAT determines that the deceased was a worker but also that the claimants/plaintiffs are not dependents (so no WSIB payments) and the action is not automatically barred by the Tribunal
- Summary judgment motion brought on basis that *FLA* claims are derivative and plaintiffs are not entitled to sue because the deceased would not be entitled to sue because he was worker in course and scope of employment with Schedule 1 employer (as was defendant car driver)
- Tough case because no compensation from either system or at common law

WSIB and Conflicts of Law: Insured out of Ontario

- Accident occurs in Ontario but defendant insured is resident outside Ontario
- Test at law: “Sufficient connection to Ontario”
- Board Policy on Non-Resident Workers, document no. 12-04-12: discusses number of days worked in Ontario in previous year and the like.
 - <5 days – no substantial connection
 - 6-10 days – possible substantive connection
 - >11 days usually has a substantive connection
- WSIAT: Employer must have a substantial commercial connection to Ontario and worker must be an important aspect or instrument of employer’s significant business interests in Ontario
- *British Airways Board v. Workers’ Compensation Board*, (1985) 17 DLR (4th) 36 (BCCA)

WSIB and Conflicts of Law: Accident out of Ontario

- Accident occurs outside Ontario in U.S. state but involves all Ontario residents (passenger sues co-driver and also employer)
- Employment contract made in Ontario.
- Terms of employment contract including the implicit trade off in workers' compensation should not change as workers travel.
 - Rolling workplace : see *Laufman vs. BLM*

Summary

- The interaction between WSIB and automobile repair schemes and WSIB and tort can be complicated and involves a variety of potential disputes and venues for resolving such disputes.
- Simple premise:
 - Worker cannot sue other workers or any Schedule 1 employer
 - However, issues may arise:
 - Worker vs. independent contractor
 - Course and scope of employment
 - The right to “elect” to sue and the *bona fides* of any such election
 - Pay pending and “assignment” protocols
 - Derivative nature of *FLA* wrongful death claims
 - Conflicts of law: accidents or individuals outside of Ontario
 - But, even those are resolvable when they are approached with the general overall principle in mind as to how these schemes interact, and the matter is brought forward in the appropriate forum.

Thank You

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