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'Ancient right' of employers to sue survives despite no-fault regime

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Two recent decisions of Ontario courts have made it clear that, while under the province's no-fault auto insurance scheme a person injured in a car accident cannot sue for damages, employers can sue to recover wages paid to the injured employees while they are off work. At issue in each case was whether the no-fault provisions of the *Insurance Act* operate to bar an action *per quod servitium amisit* by the employers.

An action *per quod* refers to the right recognized by the common law of 'masters' to recover from the persons responsible the value of services lost from 'servants' who have been incapacitated. Nowadays, this translates into the right to sue to recover wages paid to injured employees. While the fact that this right lives on in Ontario was generally accepted, it was unclear what impact the no-fault compensation regime in the *Insurance Act* had on actions *per quod*.

In the first case, *Attorney General of Canada v. Kerr* (May 30, 1997), a member of the Canadian Forces was injured in a car accident and was paid almost $4,700 for the period he was unable to report for duty. His employer, the federal government, sought to recover this amount from the defendant, but the action was dismissed by a Small Claims Court on the basis that the claim was barred under the *Insurance Act*.

The employer's position was vindicated on appeal to the Divisional Court. The court accepted that there can be no *per quod* action where there has been no wrongful conduct. However, the court stated, the *Insurance Act* did not eliminate the wrongfulness of the conduct, it only immunized the wrongdoer from liability to the accident victim. The fact that the conduct remained wrongful preserved the employer's right to sue.

In *Schittone v. George Minkensky Ltd*. (Sept. 29, 1997), the defendant argued that s. 267(4) of the *Insurance Act*, which removes the right of subrogation from those who are obliged to indemnify motor accident victims, also operated to end the right of employers to bring *per quod* actions. The employee in the case had received wages directly from the employer while off work, not under an insured plan or contract of indemnity.

The court found for the plaintiff, ruling that any removal by statute of an existing right must be clearly expressed. Here, the employer was not claiming a right to sue by subrogation, and there was no clear intention to abolish "the ancient right" to bring *per quod* actions:

"The employer's right of recovery is his own. Subrogation is not pertinent to such a right. … In this

case, the employer suffered directly the loss of the worker's services and is entitled to the value of those services from the wrongdoer, if the injury was caused by the fault of the defendant."

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