IN FACT AND IN LAW

Damage Insurance

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The Direct Recourse of a Subrogated Insurer

By Anne Bélanger

On April 4, 2005, the Court of Appeal issued its decision in CGU *v. The* Wawanesa Mutual Insurance Company *and* Axa Insurance[1]*, which sheds new light on the right of a subrogated insurer to institute legal proceedings directly against the insurer of the person allegedly responsible for the loss. The decision also contains a discussion of the concept of solidarity between insurer and insured for the purposes of the interruption of prescription.*

The Facts

CGU insured Donald Tremblay's residence was destroyed by a fire which was allegedly caused by a smoker's device. The identity of the person who started the fire is still to be determined; it may have been Donald Tremblay, himself, his son, Ken, or Guillaume Tremblay, a friend of the latter. The fire spread to a neighbouring house, owned by Léonidas Tremblay, an Axa insured.

Having indemnified its insured, Léonidas, Axa sued CGU in its capacity as Donald Tremblay's liability insurer. Later, realizing that friend, Guillaume, may have been responsible for the loss, was insured for civil liability by Wawanesa, CGU served Wawanesa with proceedings to force it to intervene in the lawsuit. In so doing, CGU was seeking to establish sole or contributory fault on the part of

Guillaume. Wawanesa filed a motion for dismissal, alleging that CGU was not an injured third person within the meaning of Article 2501 C.C.Q. and, further, that CGU's proceedings were prescribed (time barred).

The Judgment of the Superior Court

The Superior Court allowed the motion for dismissal based on its interpretation of Article 2501 C.C.Q., which reads as follows:

"An injured third person may bring an action directly against the insured or against the insurer, or against both. The option chosen in this respect by the third person injured does not deprive him of his other recourses."

According to the Superior Court, the injured third person can only be the victim and not the insurer of a co-perpetrator of the wrongful act. This opinion was based on the decision in *Procureur général du Québec* v. *Laplante*[2] and on the writings of Professor Jean-Guy Bergeron[3]. In the *Laplante* case, the concept of "injured third person" was reviewed in the context of impleading a third party in warranty and not in the context of forcing a third party to intervene.

Having concluded that the proceedings were invalid because Donald's insurer was not the "victim", the Superior Court refrained from ruling on the prescription issue.

The Judgment of the Court of Appeal

Without stating that the *Procureur général du Québec* v. *Laplante* case was wrongly decided, Mr. Justice Baudouin was of the view that it was

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[1] J.E. 2005-725.

[2] [1997] R.R.A. 997 (S.C.)

[3] *Précis du droit des assurances*, Éditions Revue de droit, Sherbrooke, 1995, p. 261.

not conclusive in the present case which involved a motion for forced intervention. It follows from the evolution of the case law and the wish of the legislature to avoid a multiplicity of cascading recourses that the *Code of Civil Procedure* should be interpreted broadly and generously. Therefore, a forced intervention which would simply join a new defendant to the proceedings as they stand in order to resolve the dispute and reach a complete solution thereof is to be distinguished from impleading in warranty, which is in the nature of a claim by the defendant against a third party. According to Mr. Justice Baudouin, the forced intervention only constitutes the extension to a third party, being Guillaume's insurer in the present case, of the legal relationship already created in the original lawsuit between the parties thereto, namely Axa and CGU, the insurer of Donald and Ken.

The Rights of the Co-defendant's Insurer

There is no doubt that Axa, Léonidas's insurer, had the right to sue Donald and his son Ken, who were the presumed perpetrators of the wrongful act, and their insurer, CGU. As the case involved delictual liability, the friend, Guillaume, who was insured by Wawanesa, was potentially solidarily (jointly and severally) liable with Donald and Ken. Since Léonidas could sue any of the parties responsible, there was no reason why CGU, which was sued by Léonidas, would be prevented from impleading Guillaume since Donald, CGU's insured, could have done so himself. Furthermore, Donald would have then had, under Article 2501 C.C.Q., the option of suing Guillaume, as the person who caused the loss, or his insurer, Wawanesa, to obtain a judgment that Guillaume was totally or partially responsible. It would be contrary to the proper administration of justice that the combined interpretation of the procedural rules governing forced intervention (Art. 216 C.C.P.) and the substantive law rule that grants a direct recourse against the insurer of the person who caused the loss (Art. 2501 C.C.Q.) be interpreted in such a manner as to deny the subrogated insurer, CGU, the opportunity to exercise the rights that its insured Donald may have had against Guillaume or its insurer, Wawanesa.

As a result, a subrogated insurer may itself exercise the option provided for under Article 2501 C.C.Q. and elect to proceed by forced intervention against a co-perpetrator of the loss, or directly against such person's insurer, or against both, as provided for by the *Code*.

The Interruption of Prescription

Once the Court decided that the subrogated insurer, CGU, was entitled to sue Wawanesa directly for the alleged fault of the latter's insured, the Court had to rule on the issue of interruption of prescription because CGU's recourse against Wawanesa had been commenced more than five years after the loss.

Until recently, the case law had held that there was no solidary (joint and several) obligation between the insurer and its insured[4], but Mr. Justice Baudouin acknowledged that the issue was controversial[5].

According to Mr. Justice Baudouin, the issue remains unresolved because Article 2501 C.C.Q.

does not provide for solidarity as such. However, he added that in the present case, solidarity existed between the insurer and its insured since they were both obligated for the same thing within the meaning of Article 1523 C.C.Q., that is to pay the whole amount of the liability in the event that Guillaume was actually liable.

[4] See *Factory Mutual Insurance Co.* v. *Gérin-Lajoie*, 500-17-014499-035, 21 septembre 2004, AZ-50270565.

[5] *Contra* : *Bouffard* c. *Genest*, [1995] R.R.A. 658 (C.S.).

In the opinion of Mr. Justice Baudouin, the three characteristics of a solidary obligation, namely unity of object, plurality of relationships and mutual representation of interests were present in this case because both the insurer and its insured were obligated to pay the amount of the liability, there were relationships between Guillaume, his insurer and the victim and, lastly, an insurer, by the very nature of its obligations, represents its insured in liability proceedings since it takes up his interest and pays his liability in his place.

Mr. Justice Baudouin acknowledged that the present case opposed two insurers rather than an insurer and its insured but concluded, however, that because Donald, his son and the friend Guillaume were all potentially the perpetrators of the wrongful act their liability was solidary and prescription had been interrupted.

Comments

We believe that this judgment puts an end to any controversy that may have existed concerning the right of a subrogated insurer to act directly against the insurer of a responsible third party, and especially as to the right of the latter insurer to directly implead the insurer of another potentially responsible third party, provided of course that such party is not a member of the insured's household. However, this judgment cannot, in our view, be considered as the final word with respect to the solidarity which may exist between an insurer and its insured for the purposes of the interruption prescription.

Indeed, we have reservations about the issue of unity of objects. The source of the obligation of the person who causes a loss is his responsibility for his acts and omissions whereas the source of his liability insurer's obligation is the insurance contract. At the very most, an obligation *in solidum* may exist but, in these circumstances, legal doctrine generally acknowledges that the secondary effects of perfect solidarity do not exist and that a lawsuit instituted against a debtor *in solidum* does not necessarily interrupt prescription against another debtor *in solidum*. In the present case, the liability of the wrongdoers was solidary because of the common wrongful act; the proceedings against Guillaume were possible but the proceedings against his insurer, Wawanesa, were not necessarily possible without circumventing the normally acknowledged distinctions between perfect solidarity and imperfect (or *in solidum*) solidarity. The decision may, however, be viewed as a "judicial policy" aimed at avoiding a multiplicity of lawsuits since Guillaume could have been sued as the co-perpetrator of a wrongful act and his insurer would, in all likelihood, have defended him. In this respect, the result sought was achieved.

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