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LIABILITY INSURANCE AND RECONSTITUTED FAMILIES: WHERE DOES THE COURT OF APPEAL STAND?

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IN AUGUST 2009, THE COURT OF APPEAL ISSUED A JUDGMENT[1] IN WHICH IT RULED ON THE FOLLOWING INTERESTING PRACTICAL ISSUES RELATING TO LIABILITY INSURANCE:

1) WHAT IS THE APPROPRIATE PROCEDURAL VEHICLE FOR A LIABILITY INSURER TO EXERCISE RECOURSE AGAINST ANOTHER INSURER IN SITUATIONS WHERE THERE IS OVERLAPPING INSURANCE?

2) DOES THE EXCEPTION RESPECTING MEMBERS OF THE HOUSEHOLD OF THE INSURED (ARTICLE 2474 C.C.Q.) APPLY IN RESPECT OF THE LIABILITY INSURER OF THE PERSON WHO IS LIABLE FOR THE DAMAGE AND IS A "MEMBER OF THE HOUSEHOLD OF THE INSURED"?

3) WHAT INTERPRETATION SHOULD BE GIVEN TO THE EXPRESSION "LIVING UNDER THE SAME ROOF AS THE INSURED"?

[1] *Promutuel Portneuf-Champlain, société mutuelle d'assurances générales* v. *Promutuel Lévisienne-Orléans, société mutuelle d'assurances générales*, 2009 QCCA 1554 (Justices Thibault, Giroux and Côté).

1. THE FACTS

Plaintiff instituted an action for more than $350,000 against a 12 year-old child, Philippe Lemieux (hereinafter called "Philippe"), who allegedly hit her while riding a bicycle. She also sued the child's liability insurer, Promutuel Portneuf-Champlain, société mutuelle d'assurances générales (hereinafter called "Portneuf-Champlain"), which was the liability insurer of Philippe's grandfather, in whose house Philippe and his mother were living. This action was later settled between the parties for an amount of $150,000.

Portneuf-Champlain instituted an action in warranty against Promutuel Lévisienne-Orléans, société mutuelle d'assurances générales (hereinafter called "Lévisienne-Orléans"), the liability insurer of Philippe's father, at whose residence Philippe lived only in accordance with the custody provisions made when his parents separated.

Portneuf-Champlain claimed that Lévisienne-Orléans was also a liability insurer of Philippe because he "lived under the same roof" as his father. Accordingly, Portneuf-Champlain was of the view that there was overlapping insurance and the other liability insurer was required to pay 50% of the settlement, that is, $75,000.

The evidence revealed that at the time his parents separated, two years prior to the accident, the custody terms provided that Philippe would visit his father every second weekend while his mother had custody during the week and every other weekend. During summer and statutory holidays, the parents shared custody equally.

2. THE JUDGMENT OF THE TRIAL COURT

Concluding that no legal relationship or solidarity existed between the two insurers, the trial judge dismissed the action in warranty instituted by Portneuf-Champlain. He also stated that legal subrogation could not be used as a basis for the recourse in warranty instituted against Lévisienne-Orléans.

3. THE JUDGMENT OF THE COURT OF APPEAL

Portneuf-Champlain appealed the decision and the Court ruled on three issues:

i- THE PROCEDURAL VEHICLE

Lévisienne-Orléans maintained that it could not be sued in warranty since no legal relationship existed between it and Portneuf-Champlain, particularly in view of the absence of solidarity between them; Lévisienne-Orléans relied upon, among others, the decision of the Court of Appeal in the case of *Éclipse Bescom*[2].

The Court of Appeal concluded that an obligation *in solidum* existed between the two liability insurers, particularly because of the possibility of overlapping insurance. The Court noted that at the time the action in warranty was heard, Portneuf-Champlain had made a payment to the victim on account of the damage caused by Philippe. Therefore, it was clearly subrogated in Philippe's rights against his other insurer and a legal relationship existed with Lévisienne-Orléans. Furthermore, basing itself on the recent case of *Kingsway General Insurance Co. v. Duvernay Plomberie inc.*[3], successfully argued by our firm, the Court ruled that the action in warranty was possible in order to have the issues pertaining to the accident caused by Philippe and those dealing with the respective obligations of the two liability insurers decided together. The Court expressed itself as follows:

> [Translation]
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> "[47] In the present case, at the time the action in warranty was heard, the appellant had already made a payment to the victim of the damage caused by its insured. It was clearly subrogated in the rights of the latter against the respondent. At the time it instituted its recourse, it had already incurred costs to defend its insured. Thus, a potential legal relationship resulting from this subrogation existed. Whether the recourse is exercised early through impleading in the main action or subsequently through a recursory action, what matters is the link existing between the action in warranty and the main action.
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> [48] Adopting the approach of our Court in the previously mentioned *Kingsway* case, I am of the opinion that the action in warranty allowed the issues pertaining to this accident on May 15, 2003 to be decided together in order to establish the liability and the share of each insurer in the payment of the indemnity. All in all, by allowing the action in warranty against the respondent, we seek to have it pay its share of the compensation paid in the context of a dispute where the relationship between the issues to be resolved is obvious. Its participation can only be beneficial for the complete resolution of the matter and to avoid a repetition, if not a resumption, of the same debate before the courts. For these reasons, I am of the view that the judge should not have dismissed the action."

It is interesting to note that the Court implicitly approved the opinion of several authors according to whom article 2496 C.C.Q., pertaining to overlapping insurance, only applies to property insurance and not to liability insurance. However, the Court applied the same solution, that is, when there is overlapping insurance, each liability insurer is required to contribute equally up to the limit of the lower coverage and the insurer who provided the higher coverage is required to pay the excess. Of course, this presupposes that both insurers have not otherwise contractually limited their obligation to the insured in case of overlapping insurance covering the same risk. This is the same solution as that applied in a common law context, which the Supreme Court set out in the case of *Family Insurance Corp. v. Lombard Canada Ltd.*[4]

[2] *Éclipse Bescom Ltd. v. Soudures d'Auteuil inc.*, [2002] R.J.Q. 855 (C.A.).

[3] [2009] QCCA 926.

[4] [2002] 2 S.C.R. 695.

In conclusion, even if an insured has not directly instituted proceedings against one of his liability insurers or has not impleaded the second insurer, with the result that only one of them is a party to the main action, the insurer who is a party to the main action may institute proceedings in warranty against the other liability insurer to have it assume its share.

ii- THE SUBROGATORY RECOURSE OF ARTICLE 2474 C.C.Q. (THE HOUSEHOLD OF THE INSURED)

Lévisienne-Orléans also argued that article 2474 C.C.Q., which prohibits subrogatory recourse against a person who is a member of the "household of the insured", made Portneuf-Champlain's recourse in warranty ill-founded because instituting this recourse was tantamount to Portneuf-Champlain suing its own insured.

The Court was of the view that the exception prohibiting subrogation in favour of the insurer against members of the household of the insured did not apply for the following reasons:

> [Translation]
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> "[39] In my opinion, this argument is ill-founded. This article provides for the subrogation of the insurer against the person who caused the harm suffered by the insured. It is the mechanism that allows the insurer to sue the person who caused damages to its insured, namely, the third party responsible for the injurious act; the subrogation occurs against the persons who caused the damage for which the insurer has indemnified its insured. For instance, if the son of the insured is responsible for the fire caused to his parents' house, subrogation in favour of the insurer cannot occur. Here, the situation is different; it was the insured that caused the damage to a third party, not the contrary. The liability insurance applies to the liability of the insurer toward the third party to whom its insured caused damage. Therefore, this article does not apply in the present circumstances.
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> [40] Thus, the exception whereby the insurer is not subrogated against persons that the insured would be reluctant to sue is also inapplicable since the recourse does not seek to recover the amount of the compensation from the third party who is liable but rather to require the insurer to comply with its obligation as co-insurer."

Therefore, when an insured is held liable or settles a claim, his liability insurer may recover, from another liability insurer covering the same risk, the payment of the latter's share.

iii- THE INSURED LIVING UNDER THE SAME ROOF AS THE NAMED INSURED

Lévisienne-Orléans claimed that Philippe did not live under the same roof as his father because he lived there only occasionally.

Interpreting the recent decisions rendered in other Canadian provinces and liberally interpreting the decision of the Court of Appeal in the case of *Bélair, Compagnie d'assurances v. Moquin* [5], the Court concluded that Philippe was living under the same roof as his father. In fact, the recurrence of the visits as well as their stability and continuity over time had to be taken into consideration. Even if a child visits one of his parents only occasionally, if there is repetition and regularity, the child may be considered as "living under the same roof" as that parent and becomes an insured within the meaning of his parent's liability insurance policy.

> [Translation]
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> « [58] The evidence shows that these visits are not temporary but recurrent, which reveals a certain stability and continuity over time. The child cannot be considered to be a visitor or simply passing through. Parents are liable for their children and children are covered under the liability insurance of the parent, whether they spend three days at the residence of one parent or four days at the residence of the other."

This interpretation by the Court of Appeal takes precedence over that put forward by the Québec Superior Court in the case of *Bérard* v. *Bérard* [6].

[5] [1996] R.R.A. 941 (C.A.).

[6] 2007 Q.C.C.S. 4430, September 27, 2007, number 765-17-000539-066, Honourable Jean-Guy Dubois.

CONCLUSIONS

Firstly, the Court of Appeal shows itself to be more flexible in the application of the rules of procedure so as to involve all the parties concerned and, secondly, it widens the concept of "person living under the same roof as the insured".

This judgment confirms the principles recently put forward that favour a liberal interpretation of the rules of procedure while taking into account the rule of proportionality of proceedings as it applies to the case before the court and promoting a flexible interpretation of these rules for better judicial management.

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