



BLENDED FAMILIES:

The Court of Appeal Resolves the Debate

Bernard Larocque and Jonathan Lacoste-Jobin | Lavery, L.L.P. | www.laverydebilly.com | 514-871-1522

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On August 17, 2009, the Court of Appeal¹ resolved several important liability insurance issues. It determined whether an insured, in the context of a blended family, could “live under the same roof” of more than one person, and what recourse is available to a liability insurer, where there is more than one insurer, to compel another insurer to assume its share of the liability.

The issues which the Court had to resolve were the following:

- a) What is the proper recourse of a liability insurer against another insurer where there is other or overlapping insurance?
- b) Does the exception for “members of the household of the insured” (article 2474 C.C.Q.) apply to the liability insurer of a person who is a member of the insured’s household and who is liable for the damage?
- c) What interpretation should be given to the expression “living under the same roof as the insured”?

Facts

In 2003, Philippe, age 12, ran over a lady while he was riding his bicycle. The lady suffered serious injuries and sued Philippe and Promutuel Portneuf-Champlain, the liability insurer of Philippe’s grandfather — in whose home Philippe and his mother were living at the time of the accident — for more than \$350,000 in damages. The action was later settled between the parties for \$150,000.

Portneuf-Champlain instituted an action in warranty against Promutuel Lévisienne-Orléans, the liability insurer of Philippe’s father. Portneuf-Champlain claimed that Lévisienne-Orléans was also a liability insurer of Philippe on the basis that he was an insured within the meaning of the father’s policy because he “lived under the same roof” as his father. According to Portneuf-Champlain,

there was overlapping insurance and the other liability insurer was responsible for 50% of the settlement, or \$75,000.

As for Philippe’s situation, the evidence showed that custody rights to Philippe had been determined when his parents separated, two years prior to the accident. Philippe visited his father every other weekend, while his mother had custody during the week and every other weekend. During summer and statutory holidays, the parents shared custody equally.

Judgment of the Court of Appeal

a) The procedural recourse

What is the proper recourse of a liability insurer against another insurer of the same risk for the reimbursement of a portion of the indemnification paid by it to a third party for the fault of its insured?

The Court of Appeal held that the action in warranty instituted by Portneuf-Champlain as the liability insurer for the grandfather against Lévisienne-Orléans, the father’s insurer, was valid. Indeed, the Court held that an imperfect form of joint and several liability, or obligation *in solidum*, existed between the two liability insurers, based in particular on the possibility of overlapping insurance, and therefore found that there was a binding legal relationship between them. Moreover, since Portneuf-Champlain had made a payment to the victim for the damage caused by Philippe, it was clearly subrogated in his rights.

Furthermore, based on the recent case of *Kingsway General Insurance Co. v. Duvernay Plomberie inc.*,² the Court of Appeal ruled that the other insurer could be impleaded in order to determine the issue of apportionment of liability between the two insurers.

The Court of Appeal confirmed that in the event of concurrent insurance, each liability insurer is required to contribute equally up to the lower of the coverages, with the insurer that granted the higher coverage being responsible for the excess. This was the solution adopted by the Supreme Court in a common law context in the case of *Family Insurance Corp. v. Lombard Canada Ltd.*³

In conclusion, even where an insured has only sued one of his liability insurers directly, and it is the

only insurer that is a party to the main proceeding, that insurer may bring proceedings in warranty against another liability insurer to compel it to assume its share of the damages.

b) Household of the insured

Lévisienne-Orléans submitted that because article 2474 C.C.Q. prohibited a subrogatory recourse against a person who is a member of the “household of the insured,” the recourse in warranty of Portneuf-Champlain was inadmissible, and that it was tantamount to suing one’s own insured.

The Court rejected this argument. In this case, it was the insured who had caused the damage to the third party and not the converse. Therefore, the liability insurance applied in favour of the insured for the benefit of the third party to whom the insured had caused damages. The purpose of the recourse was therefore to compel the insurer to fulfill its obligation as a co-insurer, and not the payment of the indemnity on behalf of a third party that was liable.

Therefore, when an insured is liable, his liability insurer may recover the share of the liability from a co-insurer for which that co-insurer is responsible.

c) Insured living under the same roof

Lévisienne-Orléans also argued that Philippe did not live under the same roof as his father, since he only lived there occasionally.

The Court considered some recent decisions from other Canadian provinces and also the decision rendered by the Quebec Court of Appeal in *Bélar, Compagnie d’assurances v. Moquin*⁴ (“Moquin”), which it construed liberally. On this basis, the Court found that Philippe did live under the same roof as his father. This was supported by the son’s recurring visits to the father and the stability and continuity of these visits over time. Even where a child only makes occasional visits to a parent, if they are repeated and regular, he or she will be considered to be “living under the same roof,” and will qualify as an insured under the liability policy. This liberal interpretation of the Moquin decision conflicts with that given by **Mr. Justice Dubois**, of the Superior Court, in the case of *Bérard v. Bérard*.⁵

¹ Promutuel Portneuf-Champlain, société mutuelle d’assurances générales v. Promutuel Lévisienne-Orléans, société mutuelle d’assurances générales, 2009 QCCA 1554 [2009] QCCA 926. ² [2002] 2 R.C.S. 195. ³ [1996] R.F.R.A. 941 (C.A.). ⁴ 2007 Q.C.C.S. 4430.

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