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CITIES AND TOWNS: FAILURE TO GIVE NOTICE CAN NO LONGER BE RAISED AS A DEFENCE AGAINST CLAIMS FOR DAMAGES RESULTING FROM BODILY INJURIES.

Before the coming into force of the new *Civil Code of Quebec* it was not uncommon for the courts to dismiss an action against a municipality based on civil liability, on the ground that the plaintiff had failed to give notice to the city of the accident within 15 days of the date thereof. Sending such a notice as a condition precedent to exercise recourse is provided for in article 585 of *The Cities and Towns Act*, R.S.Q. c. C-19. In the case of municipalities governed by the *Municipal Code*, R.S.Q. c. C-27.1, article 724 of this Code requires that notice be given within 60 days of the accident. These provisions were designed to allow a city or a town, against which liability was claimed, to investigate the circumstances surrounding the accident or the dangerous state of site alleged by the claimant. Moreover, both *The Cities and Towns Act* and the *Municipal Code* provide for a short prescription of six months for civil liability actions against cities and towns. Finally, this type of action cannot be instituted until

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at least 15 days after the notice given to the city or town.

However, since January 1, 1994, article 2930 C.C.Q. provides that all actions based on bodily injury are subject to a prescription of three years, notwithstanding any stipulation to the contrary which requires prior notice as a condition precedent to the exercise of a recourse or which specifies a prescription of less than three years, as is generally the case with cities and towns:

> *"Art. 2930.Notwithstanding any stipulation to the contrary, where an action is founded on the obligation to make reparation for bodily injury caused to another, the requirement that notice be given prior to the bringing of the action or that proceedings be instituted, within a period not exceeding three years does not hinder a prescriptive period provided for by this Book."*

Various writers and practitioners have queried the extent to which this new provision could invalidate the requirement of prior notice to cities and towns. It is generally agreed that article 2930 C.C.Q. renders null the dispositions which provide for such notice, but only in claims for damages resulting from bodily injuries. This article is aimed at remedying injustices caused by the imposition of prescriptive delays much shorter than those provided by the Civil Code which, more often than not, result in the loss of any recourse by victims of bodily injuries.

In his comments on article 2930 C.C.Q. the Minister of Justice explained that the provision was aimed at ensuring better protection of the fundamental right to physical integrity and the right to redress for any impairment of this integrity. He pointed out, moreover, that even if the lack of notice might have an indirect effect on the ability of the parties to make proof, it could not affect the applicability of the three year prescription. The minister added that the new rule modified the scope of certain laws, particularly those providing for prior notice to municipalities in matters of bodily injury claims.

The case of *Doré* v. *Municipality of Verdun*, J.E. 94-1883 (S.C.) is the first decision rendered on this question since the coming into force of the new *Civil Code*; the court held that the victim's failure to give notice within 15 days of the accident could not be raised as a defence, thereby confirming what was to be expected.

Sued for damages by a citizen who was injured as the result of a fall on the sidewalk, the Municipality of Verdun presented an exception to dismiss the action on the sole ground that the plaintiff had failed to give notice to the city within 15 days of the accident. The fall occurred January 28, 1994, but the notice was only given on February 16, 1994.

The court held that the failure to give notice, required by any special Act such as *The Cities and Towns Act*, or any irregularity in such notice, could not be raised against a victim who had suffered bodily injury and who sought redress in the light of the new Code, and that article 2930 C.C.Q. was nothing more than a codification of the extended interpretation given by the courts to article 585 of *The Cities and Towns Act* to avoid injustices. The court also referred to article 300 C.C.Q. which provides that, although cities and towns are primarily governed by the Acts by which they are constituted, they are also governed by the Civil Code when they require to be complemented. Thus, article 2930 C.C.Q., being a provision of public order, applies without exception to cities and towns, notwithstanding the provisions of *The Cities and Towns Act* and the *Municipal Code*.

Finally, without specifically deciding on the validity of a prescription of six months for institution of an action against a city or town based upon bodily injury, the court let it be understood that such a prescriptive period again could not be raised against the victim of such prejudice, since, as in the case of prior notice, it is contrary to article 2930 C.C.Q.; the prescriptive delay of such recourse cannot be less than the delay of three years provided for in the Code.

It is significant to note that article 2930 C.C.Q. affects only the prescriptive delay for institution of an action based on the obligation to remedy <u>bodily injury damages</u>. As regards <u>material damages</u>, the requirements for prior notice and the shorter prescriptive periods provided for by *The Cities and Towns Act* and the *Municipal Code* are unaffected.

<u>LAST MINUTE NEWS:</u>

The Court of Appeal has affirmed the judgment of the Superior Court.

Jean Provencher

An insurer cannot require its insured to bear the costs of investigation.

In *Général Accident Indemnité, Compagnie d'Assurance* v. *Meca-Fab Inc.*, (C.Q. 410-02-000353-935), the court was called upon to decide the validity of an endorsement to an insurance policy providing that the insured must assume all investigation costs disbursed by the insurer prior to the institution of legal proceedings.

The clause in question reads as follows:

> *"N.B. the costs of investigation of any loss occurring in any outlying territory such as James Bay, New Quebec, Labrador, etc., are at the insured's expense. Consequently, the insured must reimburse the insurer upon presentation by the latter of statements of account as the investigation continues, whether or not the policy is in force.".* (Office translation).

The insured argued that, although it had agreed to this endorsement, it was contrary to public order as laid down by articles 2604 and 2605 C.C.L.C. (now articles 2503 and 2504 C.C.Q.). These provisions of the chapter entitled Liability Insurance oblige the insurer to take up the interest of any person entitled to the benefit of the insurance and assume his defence in any action brought against him and further to bear all costs and expenses over and above the proceeds of the insurance.

The insurer submitted that the endorsement was the result of negotiations between it and the insured and that this agreement was not contrary to public order. Moreover, it argued that without the clause in question it would have refused to issue the policy.

Finally, it pleaded that articles 2604 and 2605 C.C.L.C. had application only after the institution of judicial proceedings, and therefore it had the right to reach such an agreement with its insured and to claim investigation costs disbursed by it, as long as the insured was not involved in legal proceedings.

After a study of the jurisprudence, the court held that articles 2604 and 2605 C.C.L.C. obliged the insurer to assume all the necessary costs of the insured's defence, whether they were disbursed within the framework of judicial proceedings or not. In the court's view, the two provisions complemented each other; in placing upon the insurer the obligation both to take up the insured's defence, as well as to bear the costs and expenses of actions taken against it, the intention of the legislature was to make

insurers responsible for all costs, judicial or extrajudicial.

The court found that to claim the costs of investigation from an insured would be contrary to public order. In this regard it cited a decision of the Quebec Court of Appeal in *La Prévoyance Compagnie d'assurance* v. *Commission scolaire des Écoles Catholiques de Montréal*, [1990] R.R.A. 433 (C.A.) where it was held, that within the framework of an insurer-insured relationship, article 2605 C.C.L.C. imposed upon the insurer the obligation to bear all of the costs and expenses incurred, notwithstanding an endorsement of the policy providing that a part of such costs and expenses would be borne by the insured.

Pierre Gourdeau

THE INSURER'S RIGHT TO INSPECT THE DAMAGED PREMISES AND THE EFFECT OF USING A QUESTIONNAIRE AT THE TIME OF THE INSURED'S INITIAL DECLARATION.

These two questions were considered in a well reasoned judgment of the Superior Court in *Sirois* v. *Crum & Forster du Canada Limitée*, J.E. 95-47 (S.C.).

On October 11, 1988 plaintiff rented a house in Gatineau and on November 1, 1988 he took out a policy of insurance with the defendant companies intended to cover moveable property in the leased premises with a limit of $40,000 and, by means of endorsement, an agreed coverage of $100,000 on books and objects d'art. This endorsement was issued upon the express request of plaintiff. During his initial discussions with the brokers, prior to the issue of the policy, plaintiff declared that he had suffered only one loss in the previous five years.

Subsequently, plaintiff hired a specialized contractor who attended at the premises on December 3, 1988 to varnish the floors. Plaintiff, who had not yet taken occupancy of the premises, was present during the execution of the work, apparently for the purpose of installing curtain rods, and he remained on the premises after the workmen had left. The same night a fire broke out. When it had been brought under control, the municipality's investigators discovered that there were two separate points of origin of the fire. The first was situated near the kitchen counter, the second in the flooring of the second storey. Inflammable materials, such as newspapers, rags and partially burned books, were found in both places, despite the fact that the floors of the premises had been completely cleared to permit the varnishing work. Moreover, the investigators stated that there was no sign of fire in the basement nor any visible sign of spontaneous ignition, both the electrical and heating equipment apparently being intact.

On December 6, one Marcel Proulx, insurance adjuster, was retained to represent the defendants. Proulx hired a firm which specialized in repairing and restoring damaged books to get its recommendations as to what steps could be taken to salvage plaintiff's books. After an examination of the books the expert concluded that they were simply water sodden and could be restored by the appropriate drying process. Proulx also asked professionals in the field of fire losses to investigate and determine the cause of the fire.

The same day Proulx contacted the insured seeking information. The latter told him that the books had to be considered a total loss. According to Proulx the insured became hostile, even arrogant, and questioned the pertinence of the adjuster's questions.

On December 9, Proulx wrote to the insured, advising him to safeguard his goods, which the insured failed to do. On December 14, 1988 the insured

wrote to one of the defendants complaining that the premises were being visited without his authorization and, on December 16, 1988 the insured notified Proulx to neither visit nor authorize visits to the site in his absence.

On January 13, 1989 the insurers wrote to the insured cancelling the policy and returning the unearned premium. On January 28, 1989 the insured claimed payment from the insurers of the sum of $142,078, being the limit of the coverage of $100,000 for the loss of the books and $42,078 for the loss of moveable property and personal effects. The insurers refused payment and on June 12, 1989 the insured issued legal proceedings against them claiming payment of these amounts.

The defendant insurers pleaded that there had been intentional fault and a fraudulent claim and, finally, that the policy was null and void *ab initio* by reason of false declarations made by the plaintiff at the time of the application for the policy. The court upheld all three defences.

First of all, the three experts called by the defendants testified as to the existence of two distinct points of origin of the fire, as well as to the presence of combustible materials at both points. None of these experts found any natural cause of ignition and two of them concluded that the fire had been intentionally set. The plaintiff filed an expertise which concluded that the fire had been caused by the spontaneous ignition of polyure fumes in the heating system; the court rejected this thesis.

All of the defendants' proof to impute the origin of the fire to the plaintiff was based on indirect elements leading to serious, precise and concordant presumptions of the intentional fault of the insured.

Counsel for the plaintiff objected to the production of any proof of these elements which had been obtained by witnesses who had visited the premises without plaintiff's authorization on the ground that they constituted a violation of his right to respect of privacy. This objection was based upon article 2858 C.C.Q., which reads:

> *"Art. 2858.The court shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental rights and freedoms are breached and that its use would tend to bring the administration of justice into disrepute.".*

This is new law and a court must decide whether, in the circumstances, the rights and fundamental freedoms of the plaintiff have been breached and whether the administration of justice could be brought into disrepute by the admission of these elements of proof. The court held that the house did not belong to the plaintiff and that the owner had not objected to the entry upon the premises of the representatives of the insurers, the firemen and the police who investigated the fire. Moreover, and this is unprecedented, the court affirmed that article 2589 C.C.L.C. (article 2495 C.C.Q.) imposed upon plaintiff an obligation to collaborate with the insurers' representatives and to permit them to visit the premises and examine the site to determine the origin of the fire. The proof was therefore allowed.

In its appraisal of plaintiff's credibility, the court found that his testimony was not reliable, taking into account numerous unlikelihoods, plaintiff's evident financial interest, seven previous claims in the previous eight years concerning events which took place in premises leased by the plaintiff and finally the plaintiff's failure to divulge to the brokers, at the time of the application for the policy, six of such claims, as well as the cancellation of a previous policy in 1986. The whole of the proof led the judge to conclude that the fire had been intentionally set by the plaintiff, which would entail the forfeiture of the right

to indemnity in conformity with article 2563 C.C.L.C. (article 2464, para. 1 C.C.Q.).

Another interesting aspect of this judgment deals with the extent of the obligation of an applicant for insurance to declare, at the time of the application, all pertinent information in cases where a printed questionnaire is used. The court pointed out that there are two schools of thought on this point. According to one, the applicant is entitled to believe that he has satisfied this obligation, having completed the form and answered all the questions therein put by the insurer. The other school is of the opinion that not only must the applicant reply to the questionnaire, but he is subject to a residual obligation to declare, in good faith, all other facts known to him which are likely to materially influence an insurer in the setting of the premium, the appraisal of the risk or the decision to cover it. The court agreed with the second school of opinion, holding that it was more consistent with the essential nature of a contract of insurance, a contract founded upon good faith, as well as with the requirements of article 2485 C.C.L.C. The court stated:

> *"Perhaps the brokers Trepanier-Charlebois, should have made a more thorough investigation but, the Plaintiff, an attorney, who had at least seven losses or claims within the previous eight years, should have known that, in good faith he must declare all these facts. He had the obligation to divulge these important facts concerning the risk using the criterion of the reasonable man."* (Office translation).

False declarations or material omissions therefore entailed the nullity of the policy in this case.

This judgment is significant in two respects. First, notwithstanding the new article 2858 C.C.Q., proof obtained as a result of a visit to the site of the loss by an insurer's representative, despite the insured's refusal to allow entry, is admissible. Secondly, it affirms the existence of a residual obligation on an applicant for insurance to declare all pertinent facts, not simply those set out in a questionnaire.

JURISPRUDENCE

- ***An opinion of an employee of an insurer, expressed within the scope of his work, constitutes personal information within the sense of An Act respecting the protection of personal information in the private sector.***

In *Stebenne* v. *Assurance-Vie Desjardins*, A.I.E., 95AC-6 plaintiff had requested access to his disability insurance file; the file was given to him with the exception of certain internal administrative notes entered therein by employees of the enterprise and memos. The insurer refused to remit these items, arguing that they were not personal information within the meaning of the law, but rather opinions and comments belonging to the enterprise expressing its thinking. The insurer also argued that the notion of "information" implied the collection of information (from the insured or third parties), but not internal opinions. Finally, it raised the right to freedom of expression of its employees. The president of the commission decided to the contrary.

In the opinion of the commission, administrative notes and memos are personal information, as was some time ago decided in the public sector. According to the commission, the opinion of the writer, his observations and notations on the activities of a person cannot but be personal information.

The notion of information in no way implies the necessity of a communication. Finally, the handwritten character of the notes does not change their nature; they are entered in a person's file and provide an account of the method leading to the decision of the enterprise. In addition, the argument based on the freedom of expression of the employees was dismissed, since it was not one of the grounds of refusal available under *An Act respecting the protection of personal information in the private sector*. Therefore, the insurer had to remit all his notes to the insured. Permission to appeal this judgment has been granted.

- ***The insured's right of access to personal information concerning it which is held by an insurer.***

In *Duchesne* v. *Great West Life*, J.E. 95-263 (S.C.), an insured alleged, in legal proceedings between it and its insurer, that the latter had an investigation made by an investigation firm, and that certain information thus obtained had been communicated to third parties without the insured's authorization, thereby constituting an invasion of its privacy. Considering that it had suffered a prejudice, the insured requested the court to order the insurer to permit it to make a copy of the file, to allow the insured to amend its action if necessary.

First the court ruled that there was no proof that personal information concerning the insured had been transmitted to third parties.

Moreover, according to the terms of the application for insurance, the insured had authorized the insurer to gather personal information concerning it from third parties, and such authorization is valid according to article 6 of *An Act respecting the protection of personal information in the private sector*. The court was of the opinion that it was evident that, in the present case, the collection of facts from third parties was necessary in order to ensure the exactness of information in the insurer's possession. The insurer is therefore justified in gathering from third parties, as it had, personal information concerning its insured.

Finally, dealing with access to the file on the insured, the court cited article 39 of *An Act respecting the protection of personal information in the private sector* which provides that an enterprise may refuse access to a person to personal information concerning him when divulging such information is likely to affect judicial proceedings in which either party has an interest. The court noted plaintiff's admission that it wished to obtain information in the file in order to permit it to amend its action against the insurer. Divulging the information was therefore likely to have an effect on the proceedings between the parties and, consequently, the insurer was justified in refusing to produce that which the insured had requested.

- ***Is access to medical information subject to a specific set of rules?***

The Commission d'accès à l'information has rendered contradictory decisions dealing with access to medical information when the person concerned could become a party to litigation.

In *X* v. *Assurance-Vie Desjardins Inc.*, A.I.E. 94AC-54 Commissioner Cyr was called upon to decide the insured's right to access to the insurer's medical file on her when the insured had been advised that her incapacity benefits had been discontinued. The insured, having undergone various examinations by a doctor designated by the insurer, wished access to the medical report. This was refused her by the insurer on the ground that divulging such report risked having consequences on legal proceedings in which the parties could eventually become involved. The in-

surer argued that, in the event of proceedings, the medical report would form the basis of its defence. In support of its position the insurer invoked article 39 of *An Act respecting the protection of personal information in the private sector*. It further argued that article 39 C.C.Q. also permitted anyone keeping a file on a person to refuse to such person access to information contained in the file if it has a serious and legitimate reason for doing so or if the information is of a nature that may seriously prejudice a third person.

Plaintiff, on the one hand, testified that she had no intention of suing the insurer and therefore the insurer could not rely upon article 39 of Bill 68. On the other hand, she argued that the insurer did not have a "serious and legitimate reason" which would justify a refusal to access to the information within the meaning of article 39 C.C.Q.

The Commissioner ruled in favour of the plaintiff holding that, when dealing with information concerning a person's health, the only restriction on access to documents was the following: the enterprise which holds information on the state of a person's health and which refuses to communicate it to such person must, by virtue of article 37 of the *Act*, offer to such person the possibility of designating a health care professional of his choice to receive communication of the information and communicate such information to such physician who will determine the time of communication with such person. In default of proceeding in this manner, the commission decided, the insurer is obliged to communicate the information to the plaintiff.

In *Pichette* v. *S.S.A.-Vie*, A.I.E.95AC-7, the president of the Commission d'accès à l'information, M. Paul-André Comeau, came to a contrary conclusion and declared that the procedure provided for by article 37 of the Act did not prevent the insurer from also invoking article 39 of the Act, and he concluded that the possibility of legal proceedings could justify a refusal to provide access to a medical report. The decision has been appealed.

The Commission has rendered other decisions adopting one or the other thesis and we are advised that the question has recently been submitted to it again.

- ***The rights of a creditor which has financed the purchase of an automobile.***

In *Banque de Nouvelle-Écosse* v. *Bélair, Compagnie d'assurance*, J.E. 95-385 (S.C.), the bank claimed from the insurer the proceeds of a policy of insurance on a recreational vehicle which had been acquired from Campwagon Inc. by conditional sales contract entered into in 1988. The contract obliged the purchaser, Hallé, to insure the vehicle against the risks of fire and theft, and to arrange that the indemnity provided by the policy would be payable to the vendor or to its successors in title in the event of loss. On the same date as the sale, the vendor assigned the contract to the bank, which thus became the loss payee of the insurance policy subsequently obtained by the purchaser from Bélair.

In 1992 the vehicle was destroyed by fire and the bank claimed the policy indemnity from Bélair. The latter refused payment, arguing that the loss of the vehicle was caused by the intentional fault of the insured, Hallé, who had deliberately set fire to the house in which he resided, at a time when the vehicle was parked beside the garage. The bank took the position that while the destruction of the house was intentional, the loss of the vehicle was accidental. The court, after an examination of the proof, held that the destruction of the vehicle had been intended by Hallé, entailing the forfeiture of the insured's right to the indemnity under the policy. The bank alleged that Hallé's

intentional fault could not be raised against it on the ground that the conditional sales contract contained a mandate to obtain a policy of insurance protecting the separate interests of Hallé's creditor. The court, however, did not find in the contract any of the elements of a mandate by which the buyer had been charged by the vendor and on its behalf to insure the vehicle. The court, to the contrary, felt that the contract simply contained a stipulation in favour of a third party, that is to say, an undertaking by the buyer to insure the vehicle for his interests, but to provide that in the event of loss the indemnity would be payable to the vendor or its successors in title. In short, despite the fact that the indemnity was payable to the vendor or its successors in title, the insured was Hallé personally. Consequently, his intentional fault could be raised against the bank and its claim was dismissed.

It must therefore be kept in mind that in the absence of a specific clause separately protecting a creditor, such as the hypothecary endorsement, a creditor to whom the loss is payable under a policy has no greater rights than the insured.

- ***A victim's right to proceed against both the insurer and the insured at the same time is not retroactive.***

In *Androutsos* v. *Manolakos and La Corporation professionnelle des notaires du Québec*, [1994] R.J.Q. 2608 (S.C.), the court was called upon to rule on a motion to amend for the purpose of adding the insurer, La Corporation professionnelle des notaires du Québec (the Corporation) as a joint and several defendant in an action already instituted against a notary.

Briefly, in June 1991, plaintiff had taken an action in damages arising from professional liability against the defendant and the Corporation, but by reason of the law in force at that time, which required a victim to opt between an action against an insured and one against an insurer, plaintiff desisted from its action against the Corporation in October 1991. In May 1994, plaintiff amended its action to again proceed against the Corporation, invoking the new article 2501 C.C.Q. which now permits an action against the insured or the insurer, or both at the same time, at the option of the victim.

The Corporation contested, arguing that, according to the transitory provisions, the matter remained subject to the old Code; in response, plaintiff argued that its amendment was a simple question of procedure and that, in conformity with article 9 of *An Act respecting the implementation of the reform of the Civil Code*, the dispute must be resolved within the rules of the new law.

Having analyzed the jurisprudence and the authorities dealing with transitional provisions, the court concluded that the matter was governed by the former law. The acts with which the notary was reproached went back to 1989 and the action was served in June 1991, which had the effect of crystallizing the legal position before the coming into force of the new *Code*. The court held that the direct right of action against the insurer was a matter of substantive law, not a purely procedural matter; therefore, applying article 2603 C.C.L.C. the court decided that by desisting from his action against the Corporation plaintiff had opted to proceed only against the notary, in conformity with the former law, and could not at the present time proceed against the insurer.

- ***The provisions of an insurance contract being held to be incomprehensible, an insurer must indemnify the insured for losses not covered by the policy.***

In *Salerio* v. *Wellington Insurance Company*, L.P.J. 94-4680 (C.Q.) (leave to appeal refused), plaintiff, the owner of a

bakery, was insured by defendant under a policy covering damages caused to his building by wind storm. On May 26, 1986, the bakery chimney collapsed on the roof causing damages both to the building and the business. The cause of the collapse was not determined. Whatever may have been the cause, the plaintiff, convinced that he was protected against this type of loss, claimed from his insurer which refused to indemnify him on the ground that the policy did not cover this risk.

Plaintiff took action and the insurer adopted the position that, since the insured had not proved the cause of the accident, he had no right to be indemnified by the policy. Plaintiff argued that he could not understand the terms of the policy and that he sincerely believed that he was covered against the risk. He pleaded article 1432 C.C.Q., by the terms of which, in the case of doubt, the policy must be interpreted in his favour and against the insurer. He also pleaded article 1436 C.C.Q. dealing with clauses in consumer contracts or contracts of adhesion that are illegible or incomprehensible to a reasonable person, as well as article 1437 C.C.Q. which deals with abusive clauses in such kinds of contracts.

The court maintained plaintiff's arguments, holding:

> *"The plaintiffs, being insured, were confident that they were covered. It is difficult for a reasonable person to understand the terms of this policy."* (Office translation).

Curiously, the court did not specify which particular ambiguity gave rise to the application of the articles cited in favour of the insured.

- ***Fraudulent claims.***

In *Dim Dimetre Polymend* v. *L'Equitable, Compagnie d'assurance générale*, J.E. 94-1914 (C.A.), an insured claimed indemnity from his insurer alleging that his residence had been burglarized. The insurer refused to indemnify the insured on the ground that his claim was exaggerated and untrue. The Superior Court having dismissed the action, the insured went to appeal.

The Court of Appeal affirmed the judgment in first instance, holding that it was with good reason that the insured's testimony had been found not credible. The Court of Appeal underlined the improbability of the claim. As an example, the insured claimed he had lost a hundred or so items, of which some were of a considerable size. The thieves could not have carried off these items without the use of a vehicle. The police had found only a few footprints in the snow around the house. After the robbery, the insured presented three claims in the amounts of $19,324, $25,345 and $35,757. However, the day of the robbery, after a scrupulous examination of his premises, in the presence of the police, the insured had valued his loss at $500.

In two decisions, *Houde* v. *General Accident Insurance Company of Canada*, S.C. 415-05-000054-923 (12-09-94) and *Cormier* v. *General Accident Insurance Company of Canada*, S.C. 415-05-000175-926 (20-12-94), the plaintiffs claimed indemnity for the loss of a motor vehicle which, according to them, had been stolen.

In the first of these cases the vehicle was found burned in a ditch bordering a country road, the day after the alleged theft. Curiously, unlike the rest of the vehicle, the licence place was intact, the insured declaring that he had found it so on the burned- out vehicle. The insurer refused to pay the claim as it entertained serious doubts about the insured's version of the facts. At trial, the defendant's attorneys made a general attack upon the insured's credibility. He admitted that his sound system had not been completely paid for, that he was being pursued in several law-

suits, that he was the object of outstanding judgments and that his financial position was much more precarious than he had presented it in his declaration to the insurer. Moreover, he contradicted himself as to his employment at the time of the alleged theft, and the friend that he said was with him in a bar at the time of the theft contradicted him on this point. Finally, the court noted that the insured had not given any believable explanation as to the disappearance and destruction of his vehicle; it showed no sign of break in, it was equipped with an anti-theft alarm system, which no one had heard ringing, and it had been found in a deserted area. The court wondered why the vehicle had been burned, supposing that it had been stolen, but could not find, in the insured's testimony, any credible or plausible answer. The insured's action was therefore dismissed.

In the second case, the vehicle had also been found completely destroyed by fire. The insurer refused to pay the policy indemnity on the ground that the story seemed suspicious; moreover, it argued that the contract of insurance was null, having been issued on the basis of false representations by the insured. As to the circumstances surrounding the alleged theft, the court found that the insured's testimony was not credible. He tried, without success, to conceal his disastrous financial situation and had not told the whole truth about his judicial history, a part of which was of very recent date. All these elements, together with the attitude and comportment of the insured, his contradictions, reticences and falsehoods, created serious, precise and concordant presumptions of fact leading the court to conclude that the plaintiff had participated in the theft and arson of the vehicle and, in consequence, he had no right to any indemnity provided for in the policy. In addition, the insurer reproached the insured for failure to disclose a previous cancellation of a policy issued by another insurer. Plaintiff, in an attempt to explain this omission, said that he had not received notice of cancellation, which the court did not believe. Moreover, the proof revealed that the plaintiff had also failed to disclose several previous claims, and the court accepted the testimony of an employee of the insurer, who had been employed for eighteen years as an underwriter, to the effect that she would never have recommended the acceptance of the risk if she had been correctly informed. The court therefore held the contract of insurance to be null in virtue of article 2485 C.C.L.C.

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