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PROFESSIONAL LIABILITY INSURANCE AND GROSS FAULT: THE COURT OF APPEAL SINGS A DIFFERENT TUNE

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Following the important judgment rendered by the Court of Appeal on August 2, 2012[1], the Court has ruled once again, on September 27, 2012[2], on the exclusions for gross fault with respect to professional liability insurance. In addition, the decision confirmed, as provided in the *Civil Code*, that an intentional fault is never covered.

THE FACTS

After their mother's death, Pierre Audet and Marie Audet ("**the Audet**") hired Jacques-André Thibault ("**Thibault**") to manage their assets. Thibault had previously provided advice to their mother regarding some of her life insurance policies. Always acting on Thibault's advice, the Audet namely purchased life insurance policies issued by Transamerica and performed many financial transactions. Following a string of mistakes by Thibault, the Disciplinary Committee of the *Chambre de la sécurité financière*, where Thibault was a member, imposed various sanctions against him.

The Audet lost more than $2 M in that saga, namely because of Thibault's mistakes. The trial judge ordered Thibault to repay those sums, but not Transamerica that issued the financial product (life insurance policy) nor the liability insurer (Lloyd's). It is worth mentioning that Lloyd's limit of liability is $500,000 per loss.

THE JUDGMENT OF THE COURT OF APPEAL

First, the Court reaffirmed that disciplinary committee decisions were receivable in evidence[3] in civil proceedings. Although those decisions did not represent evidence of the facts therein stated, the breach of a code of professional conduct, as shown by these decisions, could be an indication of a civil fault.

Second, the Court argued that the claims or "losses" were distinct even though each client, i.e. the Audet, were victims of the same faulty investment strategy.

Third, the Court emphasized some of the duties that companies, which offer financial products such as life insurance policies, are required to perform. For instance, if the company issuing the product came to realize that intermediaries like Thibault did not seem to understand the product well, it had the obligation to inform them once again and to do everything necessary to ensure that the public (the investors) was ultimately well informed. In this case however, the Court confirmed that the life insurance company could not be held liable since it was not the lack of information that made the Audet invest in that product but rather the 100% guaranteed principal protection, as the first judge observed. Judge Dalphond, who wrote the Court's decision, mentioned:

> "[63] Under these circumstances, the Audet were not able to prove whether the judge erred in law in concluding that Transamerica caused them actual damage. I am nevertheless of the view that had it not been for his error of law regarding the scope of the duty to inform and his consecutive misapprehension of evidence, the judge would not have condemned the Audet to pay cost orders to Transamerica. Considering the circumstances described hereinbefore, the judge would have rather rejected the cause of action against Transamerica at no cost. This seems plain to me with regards to expert fees, which are mentioned in the report, particularly the tax treatment of fund performance by Transamerica." [translation]

Fourth, the Court concluded that some mistakes committed by Thibault, as many as they were while proving his incompetence, could not be defined as "gross", contrary to the conclusion reached by the trial judge. However, the Court agreed with the trial judge that some other mistakes could be qualified as "gross". Moreover, the Court concluded that Thibault had not committed any intentional fault.

Fifth, the Court noted that the intentional fault was not covered by an insurer. To arrive at such a conclusion, the Court relied on section 2464 C.C.Q. and added that, if the opposite solution had been adopted, it would have misrepresented the randomness of the risk insured. Judge Dalphond reiterated in his ruling that the insurer bore the burden of proving the intentional fault, that the intentional fault could not be set up against a coinsurer and lastly that the insurer was liable to reparation for injury, which resulted from the intentional fault committed by a person for whom the insurer is responsible (ex.: an employee or a child). Judge Dalphond wrote:

> "[111] The intentional fault, save and except what I have just expressed, is therefore not covered by an insurer. This means that the recourse of a victim is normally limited to bringing proceedings against the wrongdoer. In order to adequately protect the clients of certain service providers from an intentional fault that could be committed by the latter, the legislature requires, in most cases, the establishment of a compensation fund. (...)" [translation]

Sixth, the three judges' conclusion was different from the one reached by another panel of Court of Appeal judges in an *obiter dictum*, in the case *Souscripteurs du Lloyd's v Alimentation Denis & Mario Guillemette*[4] . According to judge Dalphond, supported by judges Doyon and Léger, an exclusion for gross fault, although the legislature did not expressly authorized it in laws and regulations governing professionals, was not of no force or effect. His opinion was based, among other things, on a decision rendered recently in *St-Pierre v Le*[5]. Judge Dalphond added that the practice of excluding gross fault, which is implemented by certain insurers in regard to the professional liability of financial planners, had been accepted by the Bureau des services financiers. That conclusion is valid for insurers as well as third parties. Lloyd's was therefore ordered to pay a sum of $500,000 for each of the investors, the Audet.

CONCLUSION

We therefore observe that there is some disagreement with regards to the validity of exclusion clauses for gross fault in professional liability insurance policies. However, in the present case, the Court of Appeal reached a conclusion, which is not an *obiter*, to the effect that exclusion clauses for gross fault in professional liability insurance policies are valid.

It remains to be seen whether the Supreme Court will be asked to decide the issue one way or the other. Stay tuned…

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[1] *Souscripteurs du Lloyd's v Alimentation Denis & Mario Guillemette*, 2012 QCCA 1376, judges Morin, Dutil and Bich.
[2] *Audet et al v Transamerica Life Canada*, 500-00-021042-106; *Thibault v Audet et al*, 500-09-021044-102; *Thibault v Audet et al*, 500-09-021045-109, September 27, 2012, judges Dalphond, Doyon and Léger.
[3] *Ali v Compagnie d'assurance Guardian du Canada*, [1999] R.R.A. 427 (C.A.); *Hamel v J.C.*, 2008 QCCA 1889.
[4] 12 QCCA 1376.
[5] 12 QCCA 783.