

Legal Subrogation and the person who is a member of the household of the insured: once again

By François Duprat



In December 2000, the Court of Appeal ruled in two cases where a property insurer was seeking to sue directly the insurer of the liable third party while the latter was a “person who was a member of the household of the insured”. It ruled that one cannot do indirectly what one is not allowed to do directly: the person who is a member of the household of the insured cannot be sued, therefore that person’s liability insurer cannot be sued either.

In the case of *Allstate Insurance Company v. The General Accident Assurance Company of Canada*¹, the father’s insurer was seeking compensation from the son’s insurer, while in the case of *Guardian Insurance Company of Canada v. The Citadelle General Assurance Company*², the insurer was seeking compensation from the insured’s brother’s insurer. In both cases, the alleged persons responsible did not live under the same roof as the victim and both had civil liability insurance.

In 1990, in the case of *Gagné v. Le Groupe La Laurentienne*³, and on a number of occasions thereafter, the Court of Appeal had proposed a broad interpretation of the concept of a “person who is a member of the household of the insured”. The Court ruled that it included any person related by blood or by a domestic activity exhibiting a certain integration to family life or a certain continuity, and had given full effect to the second paragraph of Article 2474 C.C.Q. by dismissing the recourses against these persons:

“2474. The insurer is subrogated to the rights of the insured against the person responsible for the loss, up to the amount of indemnity paid. The insurer may be fully or partly released from his obligation towards the insured where, owing to any act of the insured, he cannot be so subrogated.

The insurer may not be subrogated against persons who are members of the household of the insured.”

Here, *Allstate* and *The Citadelle* argued that since Article 2501 C.C.Q. allows an action to be brought directly against the insurer of the person responsible for the prejudice, subrogatory action is therefore allowed against said insurer:

“2501. 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.”



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¹ J.E. 2001-4 (C.A.);

² 500-09-008961-997;

³ [1990] R.J.Q. 1819

Their contention was based, among others, on the following premisses:

- Article 2474 C.C.Q. does not specify that the insurer cannot be subrogated “against the insurer” of said persons;
- the debt still exists, only the recourse is curtailed;
- the recourse between two insurers shall not affect family ties, and moral considerations are not involved;
- French law, which includes a similar restriction, has allowed such a recourse since 1993;

As to the insurers in defence, they argued that:

- the effect of forbidding the action against the person who is a member of the household of the insured extinguishes a debt;
- the liability insurer is not itself a liable third party;
- it cannot be liable to pay a debt that the insured himself is not liable to pay;
- there is a risk of a contributory action against the person who is a member of the household of the insured and the latter could eventually be liable for compensation, which would therefore lead indirectly to what the legislator wanted to forbid directly.

Justice Forget, speaking on behalf of the Court, finds that the French decisions are not material, and if Article 121.12 of the French Insurance Code could lead to believe that recourse is forbidden, the text of Article 2474 C.C.Q. is clear and it is the right to subrogation itself that is denied:

“The right against relatives is not created and it is not only the recourse against them that is curtailed”.

Although the direct recourse created by Article 2501 C.C.Q. is a substantive right, it calls for a legal relation between the victim and the liable third person; in the absence of this underlying relation, there is no recourse.

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