

Industrial Accidents and Occupational Diseases The Case Law on Applications for the Transfer of Costs Following an Attack by a Beneficiary: A Change of Course?

By Érik Sabbatini



Section 326 of *An Act respecting Industrial Accidents and Occupational Diseases* (the "AIAOD") allows an employer to obtain the transfer of the cost of benefits paid by the CSST if the industrial accident in question is "imputable to a third person" and the allocation of the cost of such benefits would cause the employer to "unduly support" such cost.

For several years, the leading case law of the Commission d'appel en matière de lésions professionnelles (the "CALP") and, thereafter, of the Commission des lésions professionnelles (the "CLP"), were generally unfavorable to applications by Quebec health care institutions attempting to obtain the transfer of the costs resulting from an attack by a beneficiary on an employee.

Certain isolated decisions, namely *Institut Philippe Pinel de Montréal* and *Robert Deschambault*, [1995] C.A.L.P. 652, did allow applications for the transfer of the employer's costs. In this case, the CALP, basing itself on a test which considers the specific risk related to the employer's economic activity, decided that the economic activity in question was the provision of psychiatric care to patients and not the control of aggressive patients. Consequently, the CALP ruled that it would be unfair if the employer alone were to absorb the costs of such accidents and, accordingly, it granted the Institute's applications to transfer its costs.

Unfortunately, the subsequent case law did not follow the *Institut Pinel* decision, and other CLP commissioners refused similar applications by the same employer. These decisions constitute the majority trend, which considers the risks of attack as being part of the inherent risks of such an establishment, given that its mission is to provide care to patients with psychiatric problems.

Concurrently, and even more surprisingly, several decisions relied on the same grounds to refuse applications by establishments that were not psychiatric care providers, but rather hospital centres for short-term care or residential and long-term care centres.

Creating dissent among the commissioners, other decisions approved applications for the transfer of costs made by the same types of establishments. Our firm represented some of the establishments concerned by this jurisprudential trend.¹

At the present time, at least five recent decisions, one of which involved our firm, approved one after the other applications for the transfer of costs made by short and long term care establishments.² These decisions essentially concluded that an attack on an employee by a beneficiary does not result from the specific risks involved in the employer's economic activity.

¹ CSST and Centre hospitalier Anna-Laberge, 92282-62C-9711, 22-06-99 (Carl Lessard represented the establishment); Hôpital Sacré-Cœur de Montréal and CSST, 129246-64-9912, 10-07-00 and Hôpital Sacré-Cœur de Montréal and CSST, 146365-72-0009, 12-01-01 (Jean Beaugregard represented the establishment); C.H / C.A. Gouin-Rosemont and CSST, 103385-62-9807, 22-06-99 (Érik Sabbatini represented the establishment).

² CHSLD de mon quartier and CSST, 144721-63-0008 and 144722-63-0008, 22-03-01 (Érik Sabbatini represented the establishment); Centre hospitalier Royal Victoria (Pavillon Institut thoracique de Montréal) and CSST, 146248-71-0009, 21-03-01; Centre hospitalier Pierre-Boucher and CSST, 150948-629-0011, 10-04-01; CHSLD Résidence de l'Estrie and CSST, 141836-05-0006, 02-03-01; Centre hospitalier St-Eustache and CSST, 145943-64-0009, 15-02-01.



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In particular, one of these decisions states that subsequent to the reform of employer classification, employers are now classified by the *nature of their activities* rather than according to all the economic activities carried out in the establishment. Therefore, employers would benefit from equitable decisions extending the scope of the notion of “specific risk” which is the basis for the analysis of the element of “injustice” provided for at section 326 of the AIAOD. Given that an employer’s assessment rate now takes into account the specific risks related to the nature of an employee’s activities, the analysis of the element of injustice should be based upon this criterion from now on.

Skeptics might argue that this new manner of handling applications for the transfer of costs is of theoretical interest. However, regardless of the approach used to handle applications for the transfer of costs, the fact remains that the tide seems to have turned in favour of long-term and short-term care establishments in Quebec.

It remains to be seen whether this new jurisprudential trend will be confirmed in future cases ...

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