IN FACT AND IN LAW

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Damage Insurance

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Statutory Examinations:
Their Use Before the Courts is Not Automatic

By Bernard Larocque

Under article 2471 C.C.Q., an insured must inform the insurer of "all the circumstances surrounding the loss", including its probable cause, the nature and extent of the damage as well as the location of the insured property, in addition to providing the insurer with vouchers at the time of filing the proof of loss. This declaration must be sworn under oath (solemnly affirmed).

In most cases, claims adjusters merely obtain a written statement signed by the insured. However, if the claim appears more complex, the insurer will hire a lawyer to carry out what is commonly known as a "statutory examination". The lawyer for the insurer will examine the insured regarding the circumstances of the loss; this examination will take place in the presence of an official stenographer. This procedure, described in the text of article 2471 C.C.Q., is nothing more than a legal requirement, as indicated by its characterization as a "statutory" examination. Certain insurance policies specifically stipulate that an insured who files a claim will have to furnish a sworn declaration as to the facts and circumstances surrounding the loss.

At trial, can such a statutory examination, made under oath, be filed in the court record? The Court of Appeal recently ruled on this issue in *Promutuel Drummond, Société Mutuelle d'Assurance Générale* v. *Les Gestions Centre du Québec Inc.*[1]

Following a fire, an insurer was sued by two occupants of a building who sought indemnification for their damages. The liability of the insured of *Promutuel*, the insurer of the entire building, was not in question. However, the characterization of the legal transaction between the tenant and the owner of the building was at the heart of the dispute. The court had to determine whether an agreement entered into between the tenant and the former owner was a sale with a right

of withdrawal or, as the insured had argued, a contract of lease with an option to purchase. To answer this question, the court had to determine whether it was possible to file the statutory examination under article 2871 C.C.Q. Two of the three judges (Chamberland and Robert) concluded that the trial judge had the discretion to allow or refuse the filing of the statutory examination in the court record and that, under the particular circumstances of the case at bar, he had correctly used his discretion to refuse. Mr. Justice Beauregard disagreed.

The Majority Opinion

The Court of Appeal's reasons are set forth in the majority decision of Mr. Justice Jacques Chamberland, to which Mr. Justice Michel Robert subscribed.

He based his reasoning on the wording of article 2871 C.C.Q. which reads as follows:

> **"Art. 2871 Previous statements by a person who appears as a witness, concerning facts to which he may legally testify, are admissible as testimony if their reliability is sufficiently guaranteed."**

At the outset, he stated that this article allows the filing of a declaration such as a statutory examination made before the trial. He emphasized that since the introduction of the new Civil Code, the filing of such a declaration is no longer limited to a document intended to impugn the credibility of a witness by confronting the witness with a declaration contradicting a statement made at trial. The only condition of admissibility of such a declaration is that its reliability be sufficiently guaranteed. Furthermore, the courts have acknowledged[2] that an examination made in the presence of an official stenographer by a sworn witness is sufficiently guaranteed.

Mr. Justice Chamberland raised an important nuance when ruling on the discretionary power of a court to admit or refuse a prior declaration (for example, a statutory

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[1] Court of Appeal, District of Montreal, June 17, 2002, Justices Beauregard, Chamberland and Robert, C.A.M. 500-09-008980-997

[2] See, among others, *Desmarais* v. *Sécurité (La), compagnie d'assurance*, J.E. 95-1268 (C.S.)

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examination). According to him, a judge may admit or refuse a prior declaration; the process is not automatic. He added that in certain situations a court may decide that it would be beneficial to admit such a declaration. As an example, he referred to the reliability of such a document after some time has passed and certain events might be described in greater detail by a witness in the document than at trial; as a further example, he also stated that such a document would be useful in proving an admission. Nonetheless, there might be situations in which a judge believes that it would be preferable not to admit such testimony because the court record is sufficiently voluminous.

In the case at bar, based merely on the fact that the witnesses had been examined at the hearing and the facts on which they had testified were recent, the majority of the Court of Appeal concluded that the trial judge had used his discretion correctly by disallowing the filing of the statutory examinations.

It is important to note, however, that the court indicated that if there are inconsistencies between a statutory examination and an examination at trial, a lawyer will be entitled to use the statutory examination during cross-examination to confront the witness with his contradictory statements.

The Minority Opinion

Mr. Justice Beauregard was of the opinion that a prior declaration, such as a statutory declaration, is admissible as evidence. He did not see any principle of law on which a judge could rely to refuse the filing of such examinations. He stated that a judge might give more or less probative force to a statutory declaration in his judgment, but he was not entitled to refuse the filing thereof based on his discretionary power.

Conclusion

This decision should not dissuade insurers from carrying out statutory examinations. On the contrary, the law allows it and, furthermore, there can be no doubt as to the importance and usefulness of such examinations in guiding insurers with respect to their decision to pay a claim and their proper evaluation thereof.

Given that a statutory examination must be sufficiently guaranteed if it is to be filed subsequently in the court record, it is important that an official stenographer be used and that the insured make a solemn affirmation (sworn statement). If all of these steps have been followed, it will be difficult to raise doubts as to the reliability of the statutory examination if its admission is contested.

In summary, when carrying out an investigation, a claims adjuster has every reason to suggest to the insurer that it carry out a statutory examination. Among other benefits, there may be situations in which the investigation reveals certain incongruous facts leading the insurer to conclude that the claim is fraudulent.

Issues regarding the filing of the examination could then be dealt with at the trial. At that point, the lawyers would have to prove to the judge that the filing of the statutory declaration is not only permitted, but useful or even necessary.

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