

The Effects of a Criminal Conviction on the Insurance Indemnity

By Mtre Jean-Pierre Casavant

The Court of Appeal recently rendered an important judgment on an issue which had not been clearly settled over the past twenty years: the effect of a judgment in a penal (or criminal) matter in a civil file dealing with the same facts. This problem arises regularly in insurance files (arson, fraud and attempted fraud) as well as in labour relations files (assault, fraud, theft, etc.).

The decision is in the matter of *Ali et 124558 Canada Inc. v. Cie d'Assurance Guardian et Cie d'Assurance Royale*,¹ rendered on May 28, 1999 by Justices LeBel, Baudouin and Thibault. The text of the decision was written by Madam Justice France Thibault.

Mr. Ali was operating a business corporation, 124558 Canada Inc., under the name of "Bon B.B.Q." Criminal charges were brought against Mr. Ali and his son. At the end of a 10-day trial held in the Court of the Sessions of the Peace, they were found guilty of having intentionally set the building on fire and of having defrauded their insurers, Guardian and Royal. The guilty verdicts were confirmed by the Court of Appeal,² and the Supreme Court denied leave to appeal this judgment.³



Despite these circumstances, Ali and his company brought an action against Guardian and Royal claiming the insurance indemnity for their property. Justice Jean-Guy Riopel of the Superior Court, indicating that he did not feel bound whatsoever by the judgment in the criminal case, decided that he believed the explanations given by the Alis, father and son, and allowed the action in part.⁴

The Court of Appeal quashed this judgment and dismissed the action.

Since the judgment of the Supreme Court rendered in 1943 in *La Foncière, Cie d'Assurance de France v. Perras*,⁵ there has been no doubt that a criminal judgment does not have the effect of *res judicata* in a civil proceeding; that is, the parties are not identical and the object is not identical. But the true issue submitted to the court was whether the criminal judgment has factual authority, and therefore, whether it is admissible as evidence, and if so, the weight that should be given to it.

Madam Justice Thibault recalled that in the *La Foncière* case, after the Supreme Court posited the principle that a judgment rendered in a criminal matter cannot have the effect of *res judicata* in a civil matter, nevertheless "explicitly stated that in some cases a criminal conviction of a party can be admitted as evidence." Citing the cases covered in articles 610 and 893 C.C.L.C. dealing respectively with the unworthiness of an heir to inherit where he or she has been "convicted of killing or attempting to kill the deceased" and "the revocation of a will where the legatee has been complicit in the death of the testator," Madam Justice Thibault, with the concurrence of her colleagues, decided that the criminal judgment was admissible in evidence in a civil matter:

¹ J.E. 99-1153

² J.E. 89-470

³ N° 21356, May 16, 1989

⁴ [1993] R.R.A. 187

⁵ [1943] S.C.R. 165

"In my opinion, the censure attached to such actions falls within the principle that "no person shall profit from his crime", which forms part of our judicial system. Moreover, this principle is taken up again in the more specific context of property insurance in article 2563 C.C.L.C., which provides that an insurer is never bound to answer for the prejudice caused by the intentional fault of the insured.

Accordingly, based on the analogy which can be drawn from the fundamental principles in articles 610, 893 and 2563 C.C.L.C., I am of the opinion, in the instant case, that the criminal conviction of Mr. Ali is admissible in evidence. In fact, in this file, this conviction constitutes a relevant fact in the civil dispute and an important evidentiary element."⁶ (the underlining is mine)

Justice Thibault stressed that it is difficult, in our legal system, to believe that, where an individual is convicted in a criminal proceeding for arson and fraud of his or her insurers, a judge in a civil proceeding, in the absence of new evidence, should be able to completely ignore this fact:

"Faced, as in the present case, with a reasoned criminal judgment establishing that the Alis intentionally set fire to their building to collect the insurance, it seems difficult to me, in the absence of new evidence, that the judge in the civil proceeding should completely ignore this fact and reassess the evidence, which is otherwise strictly identical, and reach a solution that is clearly contradictory. That is, I find it difficult to see how a judge in a civil proceeding, before whom a mere preponderance of evidence is required to prove fraud, can conclude that two persons found guilty of arson following a trial in which their guilt must be proven beyond a reasonable doubt, should be able to "retry" the case, so to speak, based on the identical evidence, with the result that two contradictory decisions are reached. The Alis are criminals who intentionally started the fire because they wanted to defraud their insurance company, but, in the end, they didn't start the fire intentionally for purposes of the payment of the insurance; that is the result we get!

...

The criminal judgment is a legal fact that none can ignore, that is relevant, and whose probative value must be considered. The judge in the civil proceeding is therefore free, depending on the circumstances, and without attributing the authority of *res judicata* in law or in fact to the criminal conviction, to draw the appropriate conclusions and presumptions of fact from this conviction.⁷

The judgment just rendered by the Court of Appeal certainly settles the problem of the admissibility in evidence of a criminal conviction. On the other hand, real difficulties will arise when a decision is to be made on the probative value to be given to the criminal judgment. The risk is, in some cases at least, that it will be necessary to engage in a comparative analysis of the evidence adduced in the criminal trial with that adduced in the civil trial in order to make the necessary distinctions, where appropriate.

Madam Justice Thibault noted incidentally that the guilty plea entered by an accused may have a mitigated effect in a civil proceeding, where the accused pleaded guilty to avoid the aggravation and costs of a trial (this is seen quite frequently in criminal matters for minor charges such as failure to obey a red light, speeding, and even in some more serious cases). In this regard, Justice Thibault stated:

⁶ p. 16

⁷ p. 17

⁸ p. 17



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"Of course, there are some circumstances in which the accused, albeit innocent, may plead guilty, notably to avoid the costs of a trial. In such a case, the civil judge can, of course, and without contradiction, place the guilty plea in its context and draw the necessary conclusions from it."⁸

The judgment of the Court of Appeal in the *Ali* case does not deal with the effect of a penal (or criminal) acquittal on the judgment in a civil matter. But, if the criminal judgment is admissible in evidence for the grounds expressed by the Court of Appeal, the temptation will be strong to also admit the judgment of acquittal on the pretext of avoiding a rule with a double standard. However, the probative value of such a judgment would certainly be questionable. Three factors influence the weight to be given to a judgment of acquittal rendered in accordance with the rules of criminal law. First, these rules have the effect of filtering and blocking much more evidence than in civil matters. Second, this judgment must be rendered "beyond all reasonable doubt". Third, there is no obligation on the accused to testify. In our opinion, the fact that an accused has been acquitted in a penal (or criminal) proceeding should not be admissible in evidence, and if ever it was, the weight to be given to such a judgment should be very small.

On the other hand, it is fully open to a judge in a civil matter to conclude, for purposes of the civil trial, that the individual acquitted in a criminal proceeding nevertheless committed a criminal act, since the judge must decide in such a case on the basis of the preponderance of the evidence, the standard applicable in civil matters.⁹ Moreover, in a civil proceeding, a person accused of committing a criminal act has an obligation to testify. Accordingly, it has long been recognized that an insurer may establish in a civil proceeding that its insured is the perpetrator of a fire, even if this person was exonerated of the crime of arson in a criminal case.¹⁰

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⁹ On the burden of proof in civil matters, see *American Home Insurance Co. v. Auberge des Pins inc.*, [1990] R.R.A. 1522? (C.A.); *General Accident compagnie d'assurance v. Camirand-Fortier*, [1992] R.R.A. 695 (C.A.).

¹⁰ *Deslondes v. Cie d'Assurance Mutuelle du commerce contre l'incendie*, [1932] 52 B.R. 235; *Larose v. Corporation d'Assurance Mutuelle de la Paroisse de Verchères*, [1930] 68 C.S. 33.

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