

## The Household of the Insured: Subrogation can be Exercised Against the Insurer of the Person Responsible

by Jean-François Michaud



On November 19, 1999, Justice Pierre Jasmin of the Superior Court granted the subrogatory action of *La Citadelle Compagnie d'Assurance Générale* ("Citadelle") against the *Compagnie d'assurance Guardian du Canada* ("Guardian") (JE 99-2326), the insurer of the person responsible for a fire, even though this person was a member of the household of the insured. To our knowledge, this is the first decision to authorize such a recourse.

### The Facts

Mr. Jean Théorêt, Guardian's insured, had lent his car to his brother, Gilles Théorêt, Citadelle's insured. A fire started in the vehicle while it was parked at Gilles Théorêt's home. The fire caused about \$45,000 in damages to the home of Gilles Théorêt who was indemnified by Citadelle. Citadelle sued Jean Théorêt and Guardian, his liability insurer. The liability of Jean Théorêt and the quantum of damages were admitted.

### The Issue in Dispute

The sole issue submitted for determination to the court was whether Citadelle could obtain a judgment, not against Guardian's insured, but against Guardian itself when it is sued directly.

Citadelle acknowledged that it could not sue Jean Théorêt since he was "a member of the household of the insured" Gilles Théorêt within the meaning of article 2474 of the *Civil Code of Québec*:

**Art. 2474. The insurer is subrogated to the rights of the insured against the person responsible for the loss, up to**

child, the grandchildren, brothers and sisters and even a neighbour benefit from this exception, whether or not they live with the insured. However, many of these persons may have liability insurance protection, which is why Citadelle argued that it had a right of action against Guardian. Guardian submitted rather that article 2474 is a provision of public order and that Guardian could only be liable to the victim if a judgment could be rendered against their insured directly, which was not possible in this case. In short, Guardian pleaded that Citadelle could not indirectly do what article 2474 prohibited it from doing.

### The Judgment

Recall that underlying moral reasons form the basis of the exception in article 2474 C.C.Q. prohibiting the insurer from suing a person who is a member of the household of the insured. As the Court of Appeal stated in the case of *Compagnie d'assurances générales du Canada v. Chabot*, [1999] R.R.A. 250:

**the purpose of this exception is to avoid:**

- a) a suit by the insurer against a person that the insured would not have sued due to the existence of an intimate relationship; and**
- b) placing the insured in a dilemma in which he must choose between resorting to or renouncing his insurance.**

Justice Jasmin noted that the exception in article 2474 C.C.Q. does not mention the liability insurer of the person responsible.

**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.**

The courts have given a broad and liberal interpretation to this notion of "member of the household of the insured," holding that a



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He added that the legislator's intention was to protect the close relations or family members of the insured and not their liability insurers. Therefore, relying on the rules of interpretation and the fact that an insurer seeking recovery can sue the third party responsible and his or her liability insurer directly, Justice Jasmin concluded:

**If the legislature had wanted to deprive the victim's insurer of their direct recourse against the insurer of a "member of the household of the insured," it would have done so in express terms.**

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Justice Jasmin did mention a recent decision<sup>1</sup> to the contrary effect but noted that it makes no reference to the French law in which two decisions in 1993 of the Cour de Cassation resolved this controversy. Since these two decisions, it is now established law in France that the insurer of the person responsible can be sued even if their insured benefits from the exception. The wording of the relevant article of the French *Code des assurances* is not only similar to article 2474 C.C.Q., the French article is the source of article 2474. Consequently, Justice Jasmin concluded that he could base himself on the solutions of French law:

**Nothing therefore prohibits the court from following the two Cour de cassation cases cited above, since the relevant texts of Quebec and French law are similar and the grounds underlying the drafting of these texts are the same.**

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Accordingly, an insurer that indemnifies their insured can sue the liability insurer of the person who caused the damages directly even if this person is a "member of the household of the insured."

Justice Jasmin's decision is under appeal.

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<sup>1</sup> *Allstate Compagnie d'assurances v. General Accident, compagnie d'assurances du Canada*, [1997] R.R.A. 812, on appeal;

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