IN FACT AND IN LAW

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Drunk Drivers: The Court of Appeal Examines the Insurance Coverage Issue

By Pierre Gourdeau

In a decision rendered on February 22, 2000[1], the Court of Appeal examined a controversial issue which had given rise to several contradictory decisions by the Court of Québec and the Superior Court. According to the Court of Appeal, an insured who has an automobile accident is covered by the insurance policy notwithstanding the fact that he was driving under the influence of alcohol.

The Court thereby confirmed the Superior Court decision[2] in which France Thibault J. had held that an insured who drives when his alcohol level is over 80 mg of alcohol per 100 ml of blood[3] is still "able to drive" within the meaning of the automobile insurance policy.

The decision includes an analysis of the standard automobile insurance policy (Q.P.F. No. 1), which contains the following exclusion:

> **"4. The insured shall not drive or operate the automobile nor permit, suffer, allow or connive at the use of the automobile by others:**
>
> **a) unless the driver is for the time being authorized by law or able to drive or operate the automobile, or while he is under the age of sixteen years or under such other age as is prescribed by law**
>
> **[...]"**

The Facts

The litigation is the result of an accident which occurred on May 29, 1996. The person insured by General Accident died when the car he was driving collided with a mechanical broom owned by the party insured by Groupe Commerce.

A coroner's report later revealed that the person insured by General Accident was driving with a blood alcohol level of 0.24, three times over the legal limit, and that he had also used cocaine before the accident.

Groupe Commerce, pleading legal subrogation, claimed the amount of $46,839.46 which it had to pay to its insured after the collision.

General Accident, which had already paid an amount of $30,000, contested the action and refused to pay more than the $50,000 it was required to pay under sections 87 and 119 of the *Automobile Insurance Act*.

Groupe Commerce had admitted the "physical incapacity" of the person insured by General Accident. The only remaining question of law was therefore whether that physical incapacity rendered the automobile insurance contract with General Accident unenforceable.

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1 *Général Accident* v. *Groupe Commerce*, C.A.Q. 200-09-001934-980, February 22, 2000, Gondreau, Nuss and Letarte JJ

2 *Groupe Commerce*. v. *Général Accident*, (1998) R.R.A. 554

3 The legal limit is .08 mg

Trial Decision

France Thibault J. divided the case into three questions, of which the following two are of particular interest to us:

Does the physical incapacity of an insured to drive his vehicle due to the consumption of alcohol and drugs render the insurance policy unenforceable?

Did the insured commit an intentional fault?

With regard to the first question, the judge rejected the argument that the withdrawal of a specific exclusion involving driving under the influence of drugs or alcohol indicates the legislator's intention to cover this type of behaviour and that the term "able to drive" refers to the ability to drive, irregardless of the physical or mental state of the driver at the time of the accident[4]. However, the judge added that the exclusion clause contained two separate prohibitions, that of driving without being authorized by law or without being able to do so and that of driving under the age of 16 years or under such other age as is prescribed by law. Both these prohibitions contain the same type of alternative; the first refers to the ability to drive (able to drive or authorized by law to drive), and the second refers to the driver's legal age (being 16 years of age or such other age as prescribed by law). As the insured in this case had a driver's licence, he satisfied one of the two alternatives of the prohibition and the accident was covered[5].

As for the second question, the judge was of the opinion that the accident could not be the result of an intentional fault in this case because the insured obviously had no intention to cause an accident or to kill himself. Even if driving under the influence of alcohol constitutes a civil and criminal fault, we cannot assume that it was intentional.

Court of Appeal Decision

The decision rendered by Nuss J. is divided into four points:

- **Interpretation of Clause 4 a) of Q.P.F. No. 1 Policy**

Noting the current controversy, Nuss J. referred to several decisions which hold that an insured who drives with a blood alcohol level greater than .08 commits a criminal act within the meaning of the Criminal Code and cannot be said to be "able to drive"[6], whereas, according to several other decisions, you have to distinguish between the requirement of being authorized by law to drive and being able to drive. Does compliance with only one of these requirements allow the insured to be indemnified? If so, the decisions of the second school of thought conclude that the expression "able to drive" refers to the general ability to drive rather than the ability of the insured to drive at the specific time of the accident. Accordingly, the fact that an insured had the necessary ability to drive a vehicle makes him comply with the requirements of the policy, even if he is drunk at the time of the accident. Nuss J. then examines the second point.

- **Cumulative or Alternative Aspect of the Conditions**

In his opinion, a person who has a driver's licence necessarily has the ability to drive a vehicle since he holds a document to such effect issued by the authorities concerned. However, it is also possible to be able to drive without holding a permit. These two conditions are therefore distinct from each other. In addition, the use of the term "or" to separate the two requirements confirms that the conditions are alternative and not cumulative. The wording of the exclusion therefore allows the insured to be covered if he satisfies only one of the conditions listed.[7]

- **Interpretation of the Term "Able to Drive" and the Effect of that Interpretation on Drunk Driving – Historical Background**

In a previous version, the policy contained a more specific exclusion which read as follows:

[4] On this point, the judge refers to a decision rendered by F. Michel Gagnon J. in *Frappier* v. *Bélair*, (1995) R.R.A. 1930 (C.Q.) but follows the trend developed in *Duplessis* v. *Assurances Générales Caisse Desjardins* (1995) R.? 108 (S.C.).

[5] In support of her reasoning, the judge refers to *Les Coopérants, Cie d'assurance générale* v. *Dumais*, [1986] R.R.A. 36 (*résé*) and J.E. 86-286 (S.C.).

[6] See the citations at notes 4 and 5 of the appeal decision, page 4, indicating the various decisions adopting each of the theories.

[7] It is interesting to note that, on the same day, the Court of Appeal rendered a similar decision in *Promutuel Lotbinière, Société Mutuelle d'Assurance Générale* v. *Ferme Jacmon Inc.*, C.A.Q. 200-09-002092-986, February 22, 2000, Gondreau, Nuss and Letarte JJ. In that case, the Court of Appeal upheld the decision of the Court of Québec ordering the insurer to indemnify the insured for damage caused to his automobile, notwithstanding the fact that the accident occurred while the latter's driver's licence was suspended.

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"4. Prohibited Uses

The insured shall not drive or operate the automobile nor permit, suffer, allow or connive at the use of the automobile by others:

a) Drunkenness (...)

Under the influence of alcohol or drugs which prevent him from driving or operating the automobile properly.

b) Conduct

Without being authorized by law or able to drive or operate the automobile, or while he is under the age of sixteen years or under such other age as is prescribed by law."

In 1978, condition a) of exclusion 4 was removed from the general conditions applicable to both Chapter A and Chapter B and the policy no longer contained an exclusion pursuant to which the insurer could invoke the intoxication of the insured to refuse to indemnify the latter for damage caused to his own vehicle:

"Damage caused:

[...]

g) by a collision or overturn occurring in circumstances leading to the conviction of the insured (or of any other person, unless the insured had nothing to do with it) for driving or operating an automobile under the influence of alcohol or drugs which prevented him from driving or operating the automobile properly."

Further to a second change in November 1979, any reference to the insured driving under the influence of alcohol or drugs was removed.

Nuss J. saw the latter change as the legislator's wish to cover all consequences of an accident caused by the driver's inebriated state. This statement seems to be justified by the coming into force in 1978 of the automobile insurance reform which introduced no-fault insurance.[8]

In addition to this conclusion, Nuss J. points out that the current wording of exclusion 4 a) of the automobile insurance policy is identical to that of standard policies in several other Canadian provinces and that the courts in those jurisdictions have determined, as he did, that the terms «authorized by law to drive» and «able to drive» are alternative conditions, not cumulative ones.

- **Intentional Fault of Insured**

Nuss J. agreed with the trial judge that the fault of the insured could not be considered to be intentional within the meaning of article 2464 C.C.Q. because the insured would have to be aware of the inevitability of his action and its consequences for his fault not to be considered as such. In this case, there was no proof that the insured wished to cause the damage, and he obviously did not intend to cause an accident or to kill himself.

Conclusion

The Court of Appeal decision puts an end to a controversy which had existed for several years and sets aside several decisions which held that a drunk insured could not be covered by the disputed policy. The exclusion of intentional fault may sometimes still be applied where the state of intoxication does not affect the ability to form an intention and where there may be evidence that such intention was malicious. Such proof would not be easy to make and has not received favourable treatment recently.[9]

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[8] Note that the trial judge had held that, in and of itself, this argument was not material (p. 557).

[9] *Succession Penard v. Compagnie d'assurances Bélair,* J.E. 99-1349 (C.Q.); *Cryres-Hébert v. La Compagnie d'assurance Missisquoi,* (1999) R.J.Q. 612 (C.A.).

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