LAVERY, DE BILLY
LIMITED LIABILITY PARTNERSHIP
BARRISTERS AND SOLICITORS

"CROSS CANADA CLAIMS CHECK UP!"

RELEVANT LEGAL PRINCIPLE IN MATTERS OF INTENTIONAL FAULT AND ITS IMPLICATIONS IN QUÉBEC

THE RELEVANT LEGAL PRINCIPLE

Section 2464 of the Civil Code is the source. There are also various exclusions in the insurance policies, which represent different ways of formulating the rule edicted by Section 2464 which reads:

> **Art. 2464**. The insurer is liable to compensate for injury resulting from superior force or the fault of the insured, unless an exclusion is expressly and restrictively stipulated in the policy. However, the insurer is never liable to compensate for injury resulting from the insured's intentional fault. Where there is more than one insured, the obligation of coverage remains in respect of those insured who have not committed an intentional fault.
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> Where the insurer is liable for injury caused by a person for whose acts the insured is liable, the obligation of coverage subsists regardless of the nature or gravity of the fault committed by that person.

In line with the judgments of the Supreme Court of Canada in the *Scalera* (1) and *Sansalone* (2) cases, the Québec Court of Appeal has defined intentional fault in insurance matters to mean a deliberate act in association with a deliberate result. Not only must the act be intended, but also the result.

To be deliberate, the act must be performed consciously and voluntarily. Any reckless or accidental act would not be deliberate. There has to be an intent to do the thing but also to bring about the result. As for the consequences, it only matters that they be intended or reasonably foreseeable, but not necessarily to their full extent.

In 2001, all these distinctions were made by the Court of Appeal in the case of *Allstate du Canada, compagnie d'assurance v. American Home Insurance Company* (3) amongst others. This judgment is of particular interest in that the culprit had set fire to a convenience store while being mentally distressed. His intention had been to set fire as a call for help. Although he was mentally distressed, he was fully aware at all times of

his acts and their consequences. Such were the findings of facts in both Courts so much so that he was held liable for the damages.

In first instance, the trial judge had not concluded to an intentional fault in setting fire to the convenience store, but to a call for help due to the mental distress. The Court of Appeal concluded otherwise. In overturning the judgment, the Court of Appeal concluded to intentional fault. His motive had no bearing on the decision rendered by the Court of Appeal. All that mattered to the Court of Appeal was that the act and the result had been deliberate. The Court of Appeal also pointed out that the culprit had pleaded guilty in the criminal proceedings.

Consequently, the proceedings in warranty against Allstate, the liability insurer of the culprit and his parents, were dismissed. That judgment was not taken to the Supreme Court of Canada.

SAME LEGAL PRINCIPLE, BUT A DIFFERENT APPLICATION

In an earlier decision of *La Royale du Canada, compagnie d'assurance v. Curateur Public and Bélair, compagnie d'assurance* (4), the same legal principle relating to intentional fault in insurance matters had been considered by the Court of Appeal. There again, the Court of Appeal overturned the judgment of first instance, but this time to conclude that there had been no intentional fault on the part of the insured and consequently condemn Bélair, the liability insurer.

As opposed to the trial judge, the Court of Appeal relied on the declaration from the insured. As to the facts relating to the explosion, only his declaration had been entered into evidence. His intention had been to commit suicide by asphyxiation in his apartment. He had turned off the pilot and turned on all the rings and left open the oven door of the gas stove to let the gas escape freely while sealing any escape route. After laying on his bed for a while awaiting to die, he got up to go to the living room and lit a cigarette. An explosion occurred.

It was the decision of the Appeal Court that the act of lighting up a cigarette may have been deliberate, but that the ensuing explosion had not been intended by the insured. All the signs were there pointing to the occurrence of an explosion. However, the Court of Appeal chose to consider that subjectively, the third party had not intended to set fire or to cause an explosion.

As for the courting the risk doctrine, the Court of Appeal expressed the view that it was not to be applied or considered if found to be any different from the Québec laws.

That judgment also was not taken to the Supreme Court of Canada.

INTENTIONAL FAULT NO DIFFERENT IN LIFE INSURANCE MATTERS

In 2000 again, the Court of appeal in the case of *Compagnie d'assurance-vie TransAmerica Canada v. Goulet* (5) stated that the intentional fault principle is not limited to cases of damage insurance, but also applies in life insurance matters.

In that case, the plaintiff's spouse attempted to place a bomb under a car, but an explosion occurred killing him. The Court of Appeal came to the conclusion that the explosion had been an accident. There again, the act of placing the bomb was intended, but not the loss of life as a result.

As for the courting the risk doctrine, it was considered by the Court of Appeal, but its application was denied after analysis. In the words of Mr. Justice Rothman, the Court would have had to conclude that the loss of life was not only a foreseeable consequence, but in addition that the loss was reasonably certain to result from placing the bomb. As pointed out by the Court of Appeal, he had no intention to cause his own death.

The act of placing the bomb may have been criminal, but innocent third persons or beneficiaries should not be precluded from claiming the indemnity. The victim himself could not have profited from his crime. There was no exclusion in the insurance policy dealing with criminal acts and the rule of public order should not punish an innocent beneficiary.

That judgment was affirmed by the Supreme Court of Canada (6). As to the principle and its reasons, Mr. Justice LeBel expressed his views in the following way:

> "It is important that the concept of intentional act be clearly understood. The insured must seek not only to bring about the event that is the object of the risk, but also to bring about the damage itself.
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> The principle is fundamental to the notion of risk in insurance law and its "raison d'être" is obvious. The insured is not permitted, by his own intentional act, to bring about the realisation of the risk for which the insurance policy was issued."

It is to note that all the judgments at all the levels were in agreement that there had been no intentional fault.

INTERPRETATION OF AN EXCLUSION

In the recent case of *Hallé v. La Bélair, compagnie d'assurances générales* (7), the Appeal Court has found a new way to deny the application of the exclusion dealing with intentional fault or criminal act.

The decision deals with the interpretation of the exclusion clause in the insurance policy, the legal principle in intentional fault matters is not questioned. The Court of Appeal based its decision on the opinion that the exclusion clause was confusing and consequently, there was no reason to focus on intentional fault. As a matter of fact, the fire had been caused by an unnamed insured under circumstances suggesting mental disorder.

This decision was rendered in light of old section 2563 and not under the new section 2464 of the Civil Code in effect since January 1st, 1994. Under the old section 2563, the claim was denied to all co-insureds if the intentional fault of one of them was involved. Such was the decision rendered by the Supreme Court of Canada in the case of *Scott v. Wawanesa* (8).

The wording of the exclusion in the *Hallé* case could be translated as follows:

> "Losses caused by voluntary or criminal acts or omissions of which you are the perpetrator or instigator."

That exclusion was compared by the Court of Appeal to the one in issue in *Scott v. Wawanesa*. In the opinion of the Court of Appeal, the understanding was that the exclusion clause in *Scott v. Wawanesa* did not refer only to the named insured.

In *Scott v. Wawanesa*, the exclusion reads as follows:

> "wilful act or omission of the insured or of any person whose property is insured hereunder."

In the *Hallé* decision, the Court of Appeal found the exclusion clause confusing as to the real meaning of the word "you". Was the word "you" used to refer to all insureds or only to the named insureds? On its own, the exclusion clause seemed to the Court of Appeal to concern only the named insureds. It is only through an additional exercise and looking at the definitions elsewhere in the insurance policy that the meaning could be different. The Court expressed the view that there was confusion in that a reasonable reader, not especially well versed in such matters, would feel the need to make use of some interpretation rule to discover the full meaning. Relying only on the impression left by the wording of the exclusion clause, the named insured could wrongly feel to have covered all aspects in coming to the conclusion that the exclusion clause would not apply in all cases of intentional fault on the part of an unnamed insured. Such was the decision.

In its interpretation of the exclusion clause, the Court of Appeal also alluded to the reasonable expectation of an insured.

SCOPE OF THE INTENTIONAL FAULT

Is the neighbour's property within the scope of the intentional fault committed next door?

What position is open to the insurer when faced with a liability claim from the neighbour on a loss by fire exposure?

Is it the same legal principle that applies? Is the foreseeability of the damage still a factor?

If the damage to the neighbour's property was contemplated or could be foreseeable, that is one thing. What if it never entered the mind of the insured that there could be damage to the neighbour's property?

Could the argument be made that the neighbour should be considered as an innocent beneficiary and as such entitled to the proceeds of the liability policy. By virtue of section 2500, the proceeds of the insurance are applied exclusively to the payment of third persons injured.

In his judgment rendered in May 2004 in the case of *Axa Assurances Inc. v. Assurances générales des Caisses Desjardins Inc. et al* (9), Mr. Justice De Wever of the Superior Court did not see any reason to vary from *Allstate v. American Home*. The third party had set fire to his house to commit suicide. There was damage by fire exposure to the neighbour's house located some 18 feet away.

In the opinion of Mr. Justice De Wever, no distinction could be made between the damages. If there were damages to the neighbour's house, it could have been that the consequences of the intentional fault were more serious than anticipated. All that mattered to Mr. Justice De Wever was that the damage to the neighbour's house was an immediate and direct consequence of the intentional fault.

That judgment is presently in appeal.

(1) Non-Marine Underwriters, Lloyd's of London v. Scalera, (2000) 1 S.C.R. 551

(2) Sansalone v. Wawanesa Mutual Insurance Co., (2000) 1 S.C.R. 627

(3) Allstate du Canada, compagnie d'assurance v. American Home Insurance Company. 2001 R.J.Q. 2457

(4) La Royale du Canada, compagnie d'assurance v. Curateur public and Bélair compagnie d'assurance, 2000 R.R.A. 594

(5) Compagnie d'assurance-vie Transamerica Canada v. Goulet, 2000 R.J.Q. 1066

(6) Goulet v. Transamerica Life Insurance Co. of Canada, (2002) 1 SCR 719

(7) Hallé v. La Bélair compagnie d'assurances gnérales, C.P. 200-09-004407-034, October 19, 2004

(8) Scott v. Wawanesa, (1989) 1 S.C.R. 1945

(9) Axa Assurances Inc. v. Assurances générales des caisses Desjardins Inc. et al, C.S. 500-05-065260-018, May 4, 2004

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