

LIABILITY INSURANCE, PROFESSIONAL ACTIVITIES AND GROSS FAULT: THE QUÉBEC COURT OF APPEAL SETS THE RECORD STRAIGHT

By Bernard Larocque

On August 2, 2012, the Court of Appeal rendered a major decision on professional liability insurance¹. As a result of this ruling, insureds and insurers alike should review the wording of such policies, especially gross fault exclusions and the definition of "professional activities". The ruling is also noteworthy for its treatment of apportionment of liability between the professional and the client.

THE FACTS AND THE FIRST INSTANCE DECISION

Denis Guillemette and France Mercier entrusted their life savings earned mainly from their business, Alimentation Denis & Mario Guillemette ("the investors"), to a financial advisor and planner, Yves Tardif ("Tardif"), while he was working at Norshield Asset Management Ltd. When Tardif moved to iForum Financial Services Inc., their account followed.

After several investments, which did not comply with their instructions, the investors lost their savings. They then sued Tardif, his firm, iForum Financial Services Inc. ("the firm")² as well as their liability insurance carrier, Lloyd's Underwriters ("Lloyd's").

In 2011, the Superior Court held that Tardif and the firm were liable³, in particular because of their obligations under the *Act respecting the distribution of financial products and services* ("ADFPS")⁴. The judge held that Tardif had acted illegally by making sales of securities, governed by the *Securities Act*⁵, when he was not authorized to do so. The judge also held that Lloyd's was liable because the faults committed by its policyholders were covered under the insurance policy issued to Tardif and the firm. The judge therefore ordered the firm and Lloyd's to pay a sum of more than \$460,000 to the investors. The proceedings against Tardif were abandoned because he had declared bankruptcy.

ISSUES IN DISPUTE

Although a number of arguments were abandoned during the proceedings, the Court of Appeal had to determine the following issues:

1. Had the investors contributed to their losses by their own negligence ("contributory negligence"), which resulted in shared liability?
2. Were any of Tardif's actions excluded from his professional activities, as defined in the insurance policy, since they were outside the scope of activities that he was legally allowed to perform?
3. According to ADFPS provisions and related regulations, did the exclusion for "gross fault" apply in this case?
4. Could the liability insurer argue that Tardif's gross faults made the exclusion clause enforceable with regards to the claim filed against the firm?

THE COURT OF APPEAL DECISION

In a unanimous decision written by Justice Marie-France Bich, the Court answered the four questions in the negative and the judgment in first instance rendered against Lloyd's was upheld.

First, based on the appreciation of the evidence against Tardif by the judge in first instance, the Court found that he had significantly breached his legal and professional obligations under the ADFPS. The Court applied the principles enunciated by the Supreme Court of Canada in *Laflamme v. Prudential-Bache Commodities Canada Ltd*⁶ and held that there was no contributory negligence by the investors. Justice Bich wrote:

"Considering the complexity and the risks associated with investments, courts must recognize that individuals who, with little or no knowledge of investment mechanisms, choose to entrust their business to financial consultants or intermediaries, cannot be expected to constantly check and double check [the soundness of their investments] after having hired professionals precisely in order to avoid having to worry about this. This is not to say that investors should be allowed to blatantly ignore obvious problems. However, in this case, considering the limited knowledge of the respondents and the assurances provided by Mr. Tardif whenever they became anxious about their portfolio, willful blindness is not at issue."⁷ (translation)

Second, the Court of Appeal rejected Lloyd's argument based on the definition of professional services in the insurance policy. According to the insurer, by providing financial products governed by the *Securities Act*, when he was not authorized to do so, Tardif was not acting in the scope of his professional activities covered under the policy. Justice Bich held that the fault causing the losses suffered by the investors resulted from Tardif's professional actions viewed as a whole. Tardif's unauthorized and illegal actions were the result of poor financial planning. Therefore, the fault was a consequence of a service governed by the ADFPS or its regulations and met the definition of "professional activities" covered by the insurer.

Lloyd's further argued that the common law theory of concurrent causes should apply. In situations of concurrent faults, where one is excluded and the second covered, coverage is excluded. However, the Court of Appeal reiterated the decision in *Sécurité Nationale v. Éthier*⁸ and stated that this theory does not apply in Quebec civil law.

Third, the Court examined ADFPS provisions and regulations. Comparing them with other laws and regulations that specifically exclude this type of fault, the Court held that the legislator had not excluded gross fault from the legislative provisions requiring that professionals governed by the ADFPS and its regulations must have liability insurance. Consequently the Court declared that the clause excluding gross fault in the insurance policy was inoperative. The Court also drew a distinction between an intentional fault, which is automatically excluded from any insurance policy pursuant to section 2464 of the *Civil Code of Québec* ("C.C.Q."), and gross fault, which may be covered.

Fourth, considering the facts of the case, Justice Bich held that the firm had committed a fault that could not be characterized as gross fault. The Court added that the finding against Lloyd's as the firm's liability insurer must stand: according to sections 2414 and 2464 C.C.Q., even if Tardif had committed gross fault, the exclusion would not have applied to the firm. Section 2464 reads as follows:

"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.

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."

(Court's emphasis)

In other words, because Tardif is "a person", who is distinct from his firm, the exclusion respecting Tardif's potential gross fault cannot be set up against the insured and therefore cannot be argued by Lloyd's in an action brought against the firm for the faults committed by the person for whose acts the firm is liable in law.

CONCLUSION

In light of this recent Court of Appeal decision, it would be advisable for any insurer or insured to closely review their professional liability insurance coverage with respect to gross fault exclusions. Depending on the legislative framework, certain provisions in that regard could be declared inoperative. It is crucial to consider the relevant legislation and regulations governing professional liability and the attendant obligation to have liability insurance.

This decision also shows that the definition of "professional activities" must be considered in light of specific circumstances and all the professional's actions. Examination of the circumstances of each case will determine if the professional activity covered falls within the definition set out in the insurance policy, even if some of the professional's actions do not at first glance appear to be covered. Such an analysis must be based on all the facts for each situation, i.e., the analysis must be contextual and take into consideration all the professional's actions. Isolating a particular action must be avoided, even if that act is illegal and causal. The proper approach is to consider all the facts to determine the context in which the fault resulting in the loss was committed to ascertain if it really falls within the definition of "professional activities" in the insurance policy under consideration. In that respect, it could be worthwhile for insurers to conduct the statutory examination authorized under article 2471 C.C.Q.

¹ *Souscripteurs du Lloyd's v. Alimentation Denis & Mario Guillemette*, 2012 QCCA 1376, Justices Benoît Morin, Julie Dutil and Marie-France Bich.

² As the firm was declared bankrupt during the proceedings in first instance, it was represented by the trustee of its assets.

³ *Alimentation Denis & Mario Guillemette v. Groupe Boudreau Richard inc.*, 2011 QCCS 2362, Justice François Huot.

⁴ R.S.Q., c. D-9.2.

⁵ R.S.Q., c. V-1.1.

⁶ [2000] 1 S.C.R. 638.

⁷ Para 36 of the judgment.

⁸ [2001] R.R.A. 614 (C.A.).

Subscription: You may subscribe, cancel your subscription or modify your profile by visiting Publications on our website at lavery.ca or by contacting Carole Genest at 514 877-3071.

The content of this text provides our clients with general comments on recent legal developments. The text is not a legal opinion. Readers should not act solely on the basis of the information contained herein.

For more information, visit lavery.ca

© Lavery, de Billy 2012 All rights reserved