

DIGEST OF INSURANCE LAW

QUEBEC

Courtesy of
Lavery, de Billy
Montreal, Quebec

CIVIL JUSTICE SYSTEM

Superior Court is principal court of first instance in Province. With certain exceptions it hears all matters involving sums of \$70,000 or more. (Court of Quebec hears most claims below that amount). Appeal lies to Court of Appeal where object of dispute exceeds \$50,000. Decisions of this Court are final unless special leave to appeal is obtained from the Supreme Court of Canada sitting in Ottawa, which is highest court in Canada.

LAW

Abbreviations

- A.C. – Appeal Cases (Law Reports of Judicial Committee of Privy Council (England)).
- A.I.A. – Automobile Insurance Act, R.S.Q. c. A-25.
- A.M.F. – Autorité des marchés financiers.
- A.N.E.S.F. – Agence nationale d'encadrement du secteur financier.
- A.N.E.S.F.A. – Act respecting the Agence nationale d'encadrement du secteur financier R.S.Q. c. A-7.03. (Rename A-33.2).
- Art[s] – Article[s].
- B.R. – Official Reports, Court of Queen's Bench (Quebec). Since 1970, see C.A.
- C.A. – Official Reports, Court of Appeal (Quebec). Since 1986, see R.J.Q.
- C.C.L.I. – Canadian Cases on the Law of Insurance.
- C.C.P. – Code of Civil Procedure (of Québec).
- C.C.Q. – Civil Code of Québec.
- C.H.A.D. – Chambre de l'assurance de dommages.
- C.Q. Civ. Div. – Court of Quebec, Civil Division.
- C.S. – Official Reports, Superior Court (Quebec). Since 1986, see R.J.Q.
- C.S.F. – Chambre de la sécurité financière.
- D.F.P.S.A – Act respecting the distribution of financial products and services, R.S.Q.; c. D-9.2.
- D.L.R. – Dominion Law Reports (Canada).
- G.O. – Gazette officielle du Québec.
- H.S.C. – Highway Safety Code, R.S.Q. c. C-24.2.
- I.A. – Act respecting Insurance, R.S.Q. c. A-32.

- I.B.A. – Insurance Brokers Act, R.S.Q. c. C-74. (Repealed 1989).
- I.L.R. – Insurance Law Reporter.
- J.E. – Jurisprudence Express.
- M.I.A. – Act respecting market intermediaries, R.S.Q. c. I-15.1. (Replaced 1999, D.F.P.S.A.)
- O.C. – Order-in-Council.
- P.C. – Provincial Court (Quebec). Since 1988, replaced by Court of Quebec, Civil Division.
- RAIA – Regulation respecting the application of the Act respecting Insurance, R.R.Q. c. A-32, r.1.
- R.J.Q. – Recueil de jurisprudence du Québec.
- R.L. – Revue légale (Quebec).
- R.R.A. – Recueil en responsabilité et assurance.
- R.S.Q. – Revised Statutes of Québec.
- S.A.A.Q. – Société de l'assurance automobile du Québec.
- S.C.R. – Canada Supreme Court Reports.
- S.Q. – Statutes of Québec.
- S[s]. – Section[s].

A new Civil Code of Québec (L.Q. 1991, c. 64) was enacted on December 18, 1991. Enactment of new Civil Code required important changes in other laws, such as Code of Civil Procedure. Accordingly, Act respecting the implementation of the reform of the Civil Code (L.Q. 1992, c. 57) was adopted, setting out transitional law, as well as making hundreds of changes to Code of Civil Procedure and other affected legislation. New Civil Code came into force on January 1, 1994.

Insurance law was given major overhaul in 1974, which came into force in 1976, with the consequence that chapter on insurance in the new Civil Code required fewer revisions than in many other fields of law. However, Legislator made innovations in certain areas and took a stand on some controversial questions. Certain degree of uncertainty nonetheless remains on other questions.

With respect to insurance, Chapter XV of Title Two of Book Five of Civil Code (Arts. 2389 to 2628 C.C.Q.) imposes considerable limitations on principle of contrac-



tual liberty. Art. 2414 C.C.Q. provides that any clause in a non-marine insurance contract which grants the client, the insured, the participant, the beneficiary or the policyholder fewer rights than are granted by the provisions of the chapter on insurance in the Civil Code is null and that any stipulation which derogates from the rules on insurable interest or, in liability insurance, from those protecting the rights of injured third persons is also null. In other words, the provisions of the Civil Code set out the basic minimum content of an insurance contract.

Insurance Act (R.S.Q. c. A-32) was proclaimed in force on October 20, 1976. Note that Ss. 1 to 38 inclusive of (Quebec) Charter of human rights and freedoms, enacted in 1979 (R.S.Q. c. C-12), are supreme over all other legislation, by virtue of S. 52 of the Charter. Insurance Act (R.S.Q. c. A-32) Automobile Insurance Act (R.S.Q. c. A-25) and Highway Safety Code (R.S.Q. c. C-24.2) have been amended accordingly.

Arts. 2389 to 2628 of C.C.Q. embody general principles of Quebec insurance law and remain largely of Common Law inspiration, although they contain elements of substantial reform particularly with respect to formation and interpretation of insurance contracts, representations, warranties and conditions, plurality of insurance, liability insurance and limitation of contractual liberty.

Civil Code's chapter on insurance is structured so that one moves from the general rules applicable to each class or category of insurance to those specific to particular contracts.

Procedural questions are governed by Code of Civil Procedure. Since January 1, 2003, all proceedings are introduced by motion, (Art. 110 C.C.P.) and compelled to respect a 180-day delay to be inscribed for proof and hearing unless permission is granted to extend that delay. (Art. 110.1 C.C.P.).

ACCIDENT AND SICKNESS INSURANCE

General. Accident and sickness insurance is governed by general rules pertaining to non-marine insurance (Arts. 2389 to 2414 C.C.Q.) and by general rules pertaining to insurance of persons (Arts. 2415 to 2462 C.C.Q.).

Cancellation. Policy cannot be cancelled for non-payment of premium unless insurer gives insured 15 days prior notice in writing (Art. 2430 C.C.Q.).

Contract (nature and form). Contract is formed by insurer's acceptance of policyholder's application and policy itself is document evidencing the agreement, but

does not constitute the contract of insurance. (Arts. 2398, 2399 par. 1 C.C.Q.). Policy and copy of application made in writing must be provided to insured. In case of inconsistency between policy and application, latter prevails unless insurer has, in separate document, indicated to policyholder particulars in respect of which there is discrepancy (Art. 2400 C.C.Q.). Courts have held that English-language policy transmitted to unilingual Francophone has not been delivered to insured; application, which contains no conditions or exclusions, then governs relationship between parties. *Parent v. British Aviation Ins. Group*, [1999] R.J.Q. 843 (C.S.) (appeal dismissed on other grounds, AZ-01019612; REJB 2001-24346). However, if French speaking insured has accepted that policy and endorsements be issued in English, he cannot argue that it should be deemed that he did not receive the policy, *Spécialistes du Bardeau de Cèdre v. Smith*, 2007 Q.C.C.S 51 (appeal dismissed 2008 QCCA 2508, motion for leave to appeal to Supreme Court, February 20, 2009 (33033)). Information which policy must contain is set forth in Arts. 2399 par. 2 and 2415 C.C.Q. Except in case of fraud, no exclusion or reduction of coverage by reason of disease mentioned in policy is valid unless made in clause specifically mentioning that disease (Art. 2417 par. 1 C.C.Q.); general clause excluding or reducing coverage for reason of disease not mentioned in application is without effect, unless disease manifests itself within first two (2) years of insurance. (Art. 2417 par. 2 C.C.Q.).

Creditors. Benefits are alimentary in nature. They are unseizable, except for execution of debts of alimentary nature (Art. 553 (4) and Art. 553 (11.1) C.C.P.) in which case 50% is seizable.

Disability. Term "total disability" is given liberal interpretation. Insured will be entitled to long-term benefits as long as his disability renders him unable to work at job which accords with his qualifications. In evaluating the capacity and the qualifications of the insured, the court must take into consideration education, formation and experience of the insured to decide if another job is suitable. *La Personnelle-Vie v. Pouteau*, J.E. 2003-537 (C.A.). Thus, vice-president need not take position as night watchman. *La Métropolitaine v. Rivard*, [1984] C.A. 191, but truck driver is not totally disabled if he can work as stock boy. *La Confédération v. Dominicucci*, J.E. 84-474 (C.A). However, older truck driver who would have to relocate to find work is in fact disabled. *Collin v. Les Coopérants*, [1989] R.R.A. 166 (C.A.). Job should not only be in accordance with qualifications but also offer remuneration comparable to previous job. Even though it is implicit in policy that the insured must follow treatment as would have a reasonable person, refusal of proposed surgical operation will not necessarily be considered as an abuse of rights. *Mutuelle du Cana-*



da, *Cie d'ass. sur la vie v. Ouellet*, [1991] R.R.A. 88 (C.A.). Disability must be proven by insured, *Giroux v. Caisse Pop. Maniwaki*, [1993] 1 S.C.R. 282, *Compagnie d'ass. vie de la Pensylvanie v. English*, [1998] R.R.A. 947 (C.A.), but burden is on insurer to justify termination of payments. *Confédération Assurance-vie v. Laurencelle*, [2001] R.R.A. 304 (C.A.). Following disability which prevented insured from returning to previous occupation, insurer not liable for insured's inability to find employment for which he was qualified. *Mutuelle d'Omaha v. Paradis*, [1988] R.R.A. 133 (C.A.). Video recording of an employee's activities is admissible as evidence when insurer has serious grounds to doubt honesty of insured who is trying to fraudulently obtain incapacity benefits. *Servant v. Excellence (L'), compagnie d'assurance-vie*, [2008] R.R.A. 922 (C.A.).

Group Insurance. See "GROUP INSURANCE."

Insurable Interest. See "LIFE INSURANCE."

Misrepresentation and Concealment. See "LIFE INSURANCE" and "REPRESENTATIONS AND WARRANTIES" for general rules. Misrepresentation as to age of insured does not entail nullity (Art. 2420 par. 1 C.C.Q.). In accident and sickness insurance, insurer may elect to adjust premium to make it correspond to premium applicable to true age of insured or adjust sum insured in such proportion as premium collected bears to premium that should have been collected (Art. 2420 par. 2 C.C.Q.). If commencement or termination of insurance depends on age of insured, true age will be determining factor (Art. 2422 par. 1 C.C.Q.). In absence of fraud, no misrepresentation or concealment may justify annulment or reduction of insurance which has been in force for two years. However, in case of disability benefits, this rule does not apply if disability begins during first two years of insurance (Art. 2424 C.C.Q.). Insured who fails to disclose anomalous cells, which may become cancerous if untreated, loses benefit of insurance because insurer would have investigated risk further if had known. *Cie d'ass.-vie Transamerica v. Nourcy*, [1999] R.R.A. 244 (C.A.) (motion for leave to appeal to Supreme Court dismissed, March 23, 2000 (27335)).

Notification of Loss. May be made by policyholder, insured or beneficiary; written notice must be given within thirty days of acquiring knowledge of loss and be followed by supporting information such as is reasonably required by insurer, within ninety days; the term "loss" can be assimilated to the term "accident", as long as it is made within one year of loss, late notification will not deprive person entitled to payment of his right to benefits if he establishes just cause for delay (Art. 2435 C.C.Q.). There will be forfeiture of right if notice is given after one year, *Bourcier v. La Citadelle, Compagnie d'assurances générales*, 2007 Q.C.C.A. 1145. If na-

ture of disability admits it, insurer may require insured to submit to medical examination (Art. 2438 C.C.Q.).

Occupational Risk. Aggravation of occupational risk lasting six months or longer entitles insurer to reduce benefits payable in proportion to new risk and according to premium specified in contract (Art. 2439 par. 1 C.C.Q.). Reduction in occupational risk requires insurer, as long as it is notified of it, either to reduce premium or extend coverage accordingly at option of policyholder (Art. 2439 par. 2 C.C.Q.).

ACCIDENT - MEANING

Claxton v. Travellers, [1917] 52 C.S. 239; 36 D.L.R. 481 held that word "accident" has no technical or restrictive meaning and must be taken in ordinary or popular sense. Unless facts are irreconcilable with any other conclusion, insurer cannot rely on presumptions to establish non-accidental nature of event, but must prove that what is apparently accident is not in fact so. *Arkison v. Mutual of Omaha*, [1976] C.S. 1. "Accident" may include some element of fault, short of gross negligence. *Travelers v. Les Entreprises Cotenor*, [1978] C.A. 17 and *Canadian Indem. Co. v. Walkem Machinery & Equipment Ltd.*, [1976] 1 S.C.R. 309. Loss of use is not an occurrence if there is no covered physical injury to tangible property. *Geodex, Inc. v. Zurich Compagnie d'assurance*, 2006 QCCA 558; *CGU Compagnie d'assurance du Canada v. Soprema, Inc.*, 2007 QCCA 113 (motion for leave to appeal to Supreme Court dismissed, September 6, 2007 (31948)). There can be no coverage for insured's intentional fault (Art. 2464 par. 1 C.C.Q.).

There has been some controversy as to what type of behavior constitutes intentional fault for purposes of life insurance when alcohol level in driver's blood exceeds legal limit at time of accident or when the insured did not intend the result which in fact happened. Courts looked at whether insured's behavior was reckless or if he deliberately sought consequences of his acts. The fact that the insured was mentally impaired may be considered as an absence of intent, for example *Guilbault v. Groupe Commerce (Le), Compagnie d'assurance*, [1996] R.R.A. 1021 (C.S.), appeal dismissed (C.A. 1999-10-05), 500-09-003122-969; the fact that the insured had an ulterior motive to explain his acts does not change the fact that setting a fire was intentional. *Mutual of Omaha v. Stats*, [1978] 2 S.C.R. 1153; *Côté v. Les Prévoyants du Canada*, J.E. 85-57 (C.A.); *La Royale du Canada v. Curateur Public*, [2000] R.R.A. 594 (C.A.); *Goulet v. Assurance-Vie Transamerica*, [2002] 1 S.C.R. 719; *Allstate v. D.*, [2001] R.J.Q. 2457 (C.A.). However, the Court of Appeal has stated that 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 because there were no specific exclusions in the policy. *General Accident v. Groupe Commerce, cie d'ass.*, [2000] R.J.Q. 617 (C.A.). Exclusion for death related to the commission of a criminal act, even if the death was unexpected, would be valid. *Goulet v. Assurance-Vie Transamerica*, [2002] 1 S.C.R. 719.

Note that insurer will nevertheless be liable to hypothecary creditor which has the benefit of a mortgage guarantee clause, thus creating distinct contract, even in case of intentional fault. *Vallée du Richelieu v. Caisse Populaire des Deux Rives*, [1990] 2 S.C.R. 995. Mortgage guarantee clause does not automatically create second insurance contract between insurer and hypothecary creditor; debtor must have mandate to subscribe such insurance for benefit of creditor. *Banque Toronto Dominion v. General Accident*, [1999] R.J.Q. 349 (C.A.)

ADJUSTERS

Act respecting distribution of financial products and services (D.F.P.S.A.) (R.S.Q., c. D. 9-2) received assent on June 20, 1998. Some provisions entered into force on August 26, 1998; others entered into force in February, July and October, 1999. The last ones came into force in January 2003. More than 25 regulations have been adopted to delineate activities of representatives and brokers. D.F.P.S.A. replaces the Market Intermediaries Act (M.I.A.) (R.S.Q. c. I-15.1) and its regulations.

On December 12, 2002, *Act respecting the Agence nationale d'encadrement du secteur financier*, R.S.Q. c. A-7.03, was enacted. The purpose of the Agence acting now under the name of l'Autorité des marchés financiers (A.M.F.), R.S.Q. c. A-33.2 is the regulatory enforcing of laws applicable to the financial industry in Quebec. It controls insurance representatives' activities and may delegate some powers to authorized organizations as the Chambre de l'assurance de dommages (C.H.A.D) and the Chambre de la sécurité financière (C.S.F.) Some provisions of D.F.P.S.A. concerning insurance matters continue to have effect but licensing and regulatory powers are now exercised by A.M.F.

Under D.F.P.S.A., claims adjuster is natural person (*i.e.* physical person) who, in the field of damage insurance, investigates insured losses, appraises damages and negotiates settlement of claims (S. 10). Claims adjuster must hold appropriate certificate issued by A.M.F., whose function is to ensure public protection in fields of activity covered by Act. No claims adjuster may be authorized to act in a sector other than claims adjustment (S. 45). A.M.F. determines, by regulation, circumstances under which damage insurance agents and damage insurance brokers are qualified to act as claims adjusters in

respect of policies purchased through firm for which they act (S. 213).

Claims adjusters who offer direct services to claimant must propose two contracts, one providing for hourly remuneration and the other providing for percentage remuneration. The client may choose most suitable contract (S. 48). Contract is binding on claimant only from time he receives copy of contract (S. 49). Claimant may cancel contract within 10 days of receiving it by sending notice by registered or certified mail. (S. 50).

AGENTS AND BROKERS

D.F.P.S.A. brings about important changes in vocabulary as well as structure of insurance industry. It replaces concept of "market intermediary" with that of "representative." Representatives may act in number of fields, such as insurance of persons, group insurance or securities. A number of by-laws adopted under D.F.P.S.A. contain provisions which affect representatives, notably with respect to continuing education, code of ethics in different fields of activity, formalities for issuance of new policies and admissibility of customers' claims against Financial Services Compensation Fund.

A.M.F. carries out some supervisory and administrative functions that were previously performed by Inspector General of Financial Institutions. C.S.F. and C.H.A.D. ensure protection of public by maintaining discipline, training and ethics of members (Ss. 312 ff. D.F.P.S.A.).

With respect to insurance of persons, D.F.P.S.A. makes no distinction between agent and life insurance broker, who are both considered to be representatives in insurance of persons. Such representatives act as advisors in field of individual insurance of persons and are authorized to secure the adhesion of persons in respect of group insurance or group annuity contracts (S. 3). A similar rule applies to group insurance representatives (S. 4).

Distinction between agents and brokers has been retained in damage insurance: agent is natural person (*i.e.* physical person) who, either on behalf of firm that is insurer or that is bound by exclusive contract with single damage insurer, offers damage insurance products directly to public (S. 5), while broker is natural person (*i.e.* physical person) who offers range of damage insurance products from several insurers to public or who offers damage insurance products from one or more insurers to firm, independent representative or independent partnership (S. 6). Both agent and broker may act as advisors in field of damage insurance.

Note particularities with respect to structure of firms. There are single-sector firms as well as multi-



sector firms, which offer products and services in more than one sector (S. 70). D.F.P.S.A. also provides that representatives in fields of insurance of persons, group insurance and damage insurance and who do not act for firm and are not partners or employees of independent partnership, may act as independent representatives in their sector, provided that they register with A.M.F. (S. 128). Partnerships may also register as independent partnerships. (S. 130).

A.M.F. issues certificates to agents, brokers and representatives (Ss. 200 ff. D.F.P.S.A.). It may make regulations to establish term of representative's certificate (S. 203 (1)); fees payable for renewal of certificate (S. 203 (2)); rules and procedure governing issuance and renewal of certificates (S. 203 (3)); and particulars which certificate may contain (S. 203 (4)). A.M.F. is also responsible for ensuring that certificate holders comply with relevant provisions of D.F.P.S.A. (S. 184). A.M.F. also receives complaints made against certificate holders, firms, independent representatives and independent partnerships (S. 186).

Generally, Insurance representatives can simply be agents or can be brokers. Brokers are generally agents of insured. They are subject to general rules of civil law on mandate (Arts. 2130 to 2185 C.C.Q.). In *Lebrasseur v. Canada Health & Accident Ins. Corp.*, [1976] C.A. 131, broker was mandatory of insured to obtain coverage for given risk and broker's knowledge of material facts is not presumed to extend to insurer. See also *Car & General Corp. Ltd. v. Therrien*, [1969] B.R. 144.

When representations included in application have been suggested or written therein by the "representative of insurer or by any insurance broker," proof may be made by testimony that they do not correspond to what was actually represented (Art. 2413 C.C.Q.).

Where broker is in such exceptional relationship with insurer that latter's acceptance of risk is based solely on broker's evaluation thereof and where no formal application is made or required before policy is issued, broker's knowledge of material facts will be attributed to insurer. In such cases, broker will be seen as insurer's agent and any misrepresentation on his part to insurer cannot be invoked against applicant. *Royal Ins. Co. v. Gauthier*, [1964] B.R. 861; *Alliance Ins. Co. of Philadelphia Limited v. Laurentian Colony and Hotels Limited*, [1953] B.R. 241; *Raymond v. United States Fire Ins. Co.*, [1973] S.C.R. 522. Notice given to broker may be considered as sufficient notice to insurer. *Entreprises d'électricité Triangle Inc. v. Groupe Commerce*, [1987] R.R.A. 205 (C.A.) (motion for leave to appeal to Supreme Court dismissed, May 14, 1987 (20253)); *Cie d'ass. générales Kansa (Liquidation de)*, [2003] R.R.A.

1087; J.E. 2003-40 (C.A.) (motion for leave to appeal to the Supreme Court dismissed, June 26, 2003 (29573)).

Where agent is authorized under certain circumstances to contract in name of insurer and insured is unaware of limitations of that agent's mandate, then if insurer acts in such manner as to lead reasonable applicant to believe that agent has authority to renew insurance, insurer is bound by such renewals although they may be outside agent's specific mandate. Art. 2163 C.C.Q.; *Ledlev v. New York Underwriters Ins.*, [1973] S.C.R. 751.

D.F.P.S.A. imposes on insurance representatives certain disclosure requirements towards persons with whom they are doing business. Facts such as firm's business relationship with an insurer (S. 26), names of insurers whose products they are authorized to offer (S. 31), and fact that they are acting for firm that is bound by exclusive contract with single insurer (S. 32) must be disclosed. Damage insurance agents and brokers have similar obligations. (Ss. 28 and 40; S. 40 not yet in force).

Liability of Agent or Broker. When acting for insured, agent or broker must execute mandate with reasonable skill and care of prudent administrator. Duties include placing requested insurance coverage within reasonable delay or notifying client of inability to do so, *Dionne v. Castonguay*, [1979] C.A. 301; *Sol Air v. Marsh and McLennan*, [1988] R.R.A. 206 (C.A.); making accurate statements to insurers, on insured's behalf, so as to avoid any prejudice to insured, see *Therrien v. Dionne*, [1978] 1 S.C.R. 884; *Zurich Cie d'Assurance v. Rossignol*, [1984] C.A. 264; fulfilling duty to inform insured even at precontractual stage of characteristics of products, nature of coverage as well as all exclusions (S. 28 D.F.P.S.A.), *Baril v. L'Industrielle, Compagnie d'assurance sur la vie*, [1991] R.R.A. 196 (C.A.); or that the two-year suicide exclusion runs again when there is a change of insurer, *Vézina v. Théberge*, [2003] R.R.A. 823 (C.S.) (appeal abandoned, February 26, 2004); and knowing basic principles of contract law that affect formation and termination of insurance contracts and advising clients pursuant to those principles. *Cadres Professionnels v. Lemay*, [1971] I.L.R. 1-412 (C.S.). Insurance representatives must also gather information that is necessary to assess client's needs, in order to propose insurance product that best meets those needs (S. 27 D.F.P.S.A.). See also S. 39 D.F.P.S.A. Representative does not have to evaluate the value of the insured goods, *Mathieu v. Promutuel Bagot, société mutuelle d'assurances générales*, 2007 Q.C.C.S. 2098 (C.S.). But the insured has a duty to give all the necessary information to enable the representative to evaluate his needs. *Renaud v. Promutuel Dorchester*, 2006 Q.C.C.S. 2167



(appeal dismissed, March 28, 2008, 2008 Q.C.C.A 525). Duty to inform and advise does not end at expiration of insurance policy. Agent or broker must not only inform insured that insurance has not been renewed but also make sure that insured knowingly chooses not to renew insurance. *Veilleux v. Compagnie Trust Royal*, [1995] R.R.A. 351 (C.S.) (appeal allowed on other grounds [2000] R.R.A. 53 (C.A.)). Burden of proof on insured to establish negligence of agent or broker.

Mandate. Its effects on liability of agent. Insurance policy can be voided because of false representation of facts material to risk made by broker to insurer. Broker was found to be agent of insured and was held liable to insured for damages resulting from policy being voided (indemnity not paid), since he did not prove impossibility of obtaining insurance without false representation, but only difficulty of doing so. *Therrien v. Dionne*, [1978] 1 S.C.R. 884. Broker acting as agent of insured is required to ask necessary questions to his client so as to properly execute his mandate, *Photo Joliette v. Alfred*, [1987] R.R.A. 143 (C.S.).

Mandate regarding payments and premiums. Any insurance premium paid to firm, representative of firm on independent partnership for account of insurer is deemed to have been paid directly to insurer. Insurer who pays sums of money to firm for account of insured or beneficiary of insured has discharged its obligations only when insured or beneficiary receives money (Ss. 102 and 146 D.F.P.S.A.).

ASSIGNMENT

Damage Insurance. Insurance contract may be transferred only with consent of insurer, and in favor of person who has insurable interest in object of insurance (Art. 2475 C.C.Q.). In case of death of insured, bankruptcy or transfer between co-insureds of their interest in the insurance, insurance coverage continues in favor of heir, trustee in bankruptcy or remaining insured subject to his performing obligations that were incumbent upon insured. (Art. 2476 C.C.Q.). Proceeds of policy may be assigned in accordance with usual rules for assignment of future debts (Arts. 1637 and following C.C.Q.).

Insurance of Persons. Assignment can only be set up against insurer from time it is notified of it (Art. 2461 par. 1 C.C.Q.). In presence of several assignments, date of receipt of such notice will establish priority among them (Art. 2461 par. 2 C.C.Q.).

Assignment may be implicit, as in case of sale of business assets where vendor had been holder of policy on his partner's life. *Caron v. Boivin*, [1987] R.L. 347 (C.A.).

Assignment vests all rights and obligations of assignor with respect to insurance in assignee and entails revocation of beneficiaries not irrevocably designated and of any designation of subrogated policyholder; pledge of insurance (now called hypothecation of a right arising out of a contract of insurance) has effect only up to balance of debt, interest and accessories which it secures and entails revocation of revocable designation of beneficiary or subrogated policyholder only in respect of those amounts (Art. 2462 C.C.Q.).

AUTOMOBILES

Also see "NO-FAULT INSURANCE."

Age. Licenses are granted to persons sixteen years of age and over (fourteen years of age and over for mopeds) who have passed Automobile Insurance Bureau examinations, unless exempted by regulation (S. 67 H.S.C.). Permits not issued to unemancipated minors without parental consent (S. 68 H.S.C.).

Conditions in Policy. Insurer has burden of establishing insured's violation of conditions in policy, where it seeks to invoke such violations as cause of nullity. *London & Lancashire Guarantee & Accident of Canada v. Canadian Marconi Co.*, [1963] S.C.R. 106.

Criminal conviction does not have weight of *res judicata* in civil suit between insurer and insured. *La Foncière Compagnie d'Assurances v. Dame Perras*, [1943] S.C.R. 165. However, it can be admitted as evidence on facts in a civil matter. *Ali v. Cie d'ass. Guardian du Canada*, [1999] R.R.A. 427 (C.A.) (motion for leave to appeal to Supreme Court dismissed, June 8, 2000 (27458)). Further, insured's admission to having violated condition is of no consequence since it is judgment in law which he is not qualified to make. *La Prévoyance du Canada v. Poulin*, [1973] C.A. 501.

Insured is covered for damage caused by accident if he was legally authorized to drive (*i.e.* had valid permit) at time of accident, even if he was driving while intoxicated. *Frappier v. Bélair Ins. Co.*, [1995] R.J.Q. 1930 (C.Q.), and *Groupe Commerce cie d'ass. v. Général Accident*, [2000] R.J.Q. 617 (C.A.); *contra Duplessis v. Assurances générales des Caisses Desjardins*, [1995] R.R.A. 1081 (C.S.), and *Fortin v. Assurances générales des Caisses Desjardins*, [1998] R.R.A. 263 (C.Q.).

Driver. Driver of automobile is presumed jointly and severally liable with owner for damages caused by vehicle unless he establishes that accident was caused by fault of victim or third party, or by fortuitous event which did not result from his state of health or from act of passenger. (S. 109 A.I.A.).



Insurer of automobile driver is not obligated to contribute towards payment to victim of any loss for which owner is liable except to extent that such loss exceeds obligation of insurer of such automobile towards owner (S. 111 A.I.A.). *Traders Ins. Co. v. Canadian Indem. Co.*, [1978] C.A. 328.

Owner. Under S. 108 A.I.A. owner is liable for all damage caused by his automobile, or by its use, subject to certain legal limits. In *Procureur Général du Québec v. Gérard Crête et Fils Inc.*, [1998] R.R.A. 543 (C.S.), owner of vehicle was held liable for damage caused to bridge by oversized load. Pursuant to section 108, owner and driver are liable for damages caused by automobile, but insurer's sole obligation is to pay victim amount of indemnity to which he may be entitled. *L'Unique, cie d'ass v. Axa Assurances*, [2000] R.R.A. 712 (C.S.) (appeal dismissed January 22, 2003, [2003] R.R.A. 37 (C.A.)). Presumption of S. 108 A.I.A. is applicable to the owner of a snowmobile for bodily injuries that are not covered by no-fault. *Bédard v. Royer*, [2003] R.R.A. 1107 (C.A.).

Term "owner" is defined at S. 1 A.I.A. It includes any person who has acquired automobile and possesses it by virtue of absolute title, of conditional title which gives right to eventually become owner or of title which gives right to use it as owner for certain period of time, as well as person who leases automobile for period of not less than one year. While registration of motor vehicle can only be obtained by owner or co-owner (S. 26 H.S.C.), fact of registration does not constitute proof of ownership.

Regular operator and registered driver of taxicab was held to fall within broad meaning of term "owner" in insurance policy and hence to have sufficient insurable interest in taxi in spite of fact it was legally owned by another. *Wawanesa Mutual v. Caron*, [1953] B.R. 606.

Seizure. Plaintiff may seize before judgment motor vehicle which has caused him damage (Art. 734 (3) C.C.P.).

CONTRIBUTION

See "ACCIDENT AND SICKNESS INSURANCE."

Damage Insurance. Damage insurance requires insurer to indemnify insured for actual prejudice suffered at time of loss but only up to amount of insurance (Art. 2463 C.C.Q.).

Where there are several valid policies contracted without fraud and covering same object and risk and total amount of indemnity that would result from separate

performance of such policies exceeds loss incurred, insured may be indemnified by insurer[s] of his choice, each being liable only for amount contracted between the parties. Art. 2496 par. 1 C.C.Q. This rule is not applicable to subscription policies, *Sabau Construction, Inc. v. Symons General Ins. Co.*, [1986] R.J.Q. 2823 (C.A.), nor to excess insurance. *Orion Ins. Co. v. Lumbermen's Mut. Cas. Co.*, [1988] R.J.Q. 1497 (C.A.) (motion for leave to appeal to Supreme Court dismissed, February 9, 1989 (21111,21112, 21113)); *Tamper Corp. v. Kansa Gen. Ins.*, [1998] R.J.Q. 405 (C.A.); or specific insurance, Art. 2496 par. 3 C.C.Q. and *American Home Ins. v. Duret*, [1989] R.J.Q. 2142 (C.A.). An insurer can ask for contribution before he has paid any costs or indemnity under its own policy. *Compagnie d'assurance Temple v. ING*, 2007 QCCA 82 reversing [2005] R.J.Q. 1056 (C.S.); *Lemieux v. Bleau*, 2007 Q.C.C.S. 4591 (C.S.). (appeal pending 200-09-006114-075).

Unless otherwise agreed, indemnity is apportioned among insurers in proportion to share of each in total coverage. (Art. 2496 C.C.Q.); *Général Accident v. Chubb*, [2000] R.R.A. 691 (C.S.).

When there is conflict between excess clause and escape clause, courts will consider intention of parties in their interpretation of the insurance contracts. *West of England Ship Owners Mut. Ins. Ass'n v. Laurentian General Ins. Co.*, [1993] R.J.Q. 122 (C.S.) (settled out of court, February 4, 1994 (500-09-000065-938)).

Marine Insurance. Where there are several valid policies covering same object and risk and sums insured exceed indemnity recoverable, insured is said to be overinsured by double insurance. In such case, he may claim payment from insurers in such order as he thinks fit, but is not entitled to receive any sum in excess of indemnity recoverable (Arts. 2621-2622 C.C.Q.). If overinsurance has been made under an unvalued contract or results from several contracts effected without knowledge of insured, proportionate part of premium is refundable. But if contracts have become effective at different times, and if any of the contracts has, at any time, borne the entire risk or if a claim has been paid by insurer in respect of the full sum insured thereby, no premium is refundable in respect of that contract (Art. 2542 par. 2 C.C.Q.).

DEATH

Declaratory Judgment of Death may be pronounced on application of any interested person seven years after disappearance. May also be pronounced before that time where death of person domiciled in Quebec or presumed to have died there may be held to be certain although it is impossible to draw up attestation of death (Art. 92 C.C.Q.). Judgment is obtained in manner prescribed at



Arts. 865.3 to 865.6 C.C.P. and establishes date of death (Arts. 93-94 C.C.Q.). If deceased reappears, payment made by insurer pursuant to declaratory judgment is valid and discharges his liability under policy (Art. 100 C.C.Q.).

FIRE INSURANCE

General. Fire insurance is governed by general rules pertaining to non-marine insurance (Arts. 2389 to 2414 C.C.Q.), by general rules applicable to damage insurance (Arts. 2463 to 2479.1 C.C.Q.) and by specific provisions relating to property insurance (Arts. 2480 to 2497 C.C.Q.). In each case, the more specific provision prevails over one of general nature.

Aggravation of Risk. Insured has obligation to advise insurer of any aggravation of risk which comes to his knowledge and would be likely to materially influence reasonable insurer in setting premium, appraising risk or deciding to continue coverage. See Art. 2466 par. 1 C.C.Q. *Angelillo v. Prévoyance*, [1983] C.A. 305; Materiality is established according to same criteria which are applied to misrepresentations or omissions in application for insurance. Where insured fails to notify insurer of material aggravation, policy will not be voided unless insurer establishes that aggravation is such that it would not have continued to cover risk had it been informed of its existence. In all other cases, insurer remains liable for risk in same proportion as premium collected bears to that which should have been collected (Art. 2466 par. 2 C.C.Q.).

Insurer notified of such aggravation may cancel insurance (see “FIRE INSURANCE, Cancellation”) or propose in writing new rate of premium. Insured must accept that proposal and pay new premium within thirty days, failing which policy ceases to be in force. If insurer, duly notified of aggravation, continues to accept premium payments or pays indemnity for loss, it is deemed to have accepted (Art. 2467 C.C.Q.). If there is more than one insured and the aggravation is caused without any knowledge of one of them, the insurer can not raise that violation of the contract against the innocent party. *DaimlerChrysler Financial Services (Debis) Canada, Inc. v. AXA Assurances*, 2006 QCCA 420.

Arbitration. No specific rule in insurance law. If arbitration agreement is made, it must respect general rules on that subject. Arbitration agreement shall be evidenced in writing (Art. 2640 C.C.Q.). Arbitration agreement contained in contract is considered to be agreement separate from other clauses and ascertainment by arbitrators that contract is null does not entail nullity of arbitration agreement (Art. 2642 C.C.Q.). Subject to imperative provisions of law, arbitration process is governed by

contract or, failing that, by Arts. 940 and following C.C.P.

Cancellation. May be effected by insurer by giving written notice to every insured named in policy. Such notice takes effect fifteen days after receipt, at last known address of insured. Cancellation by insureds is available by mere notice to insurer by each of insureds named in policy. Named insureds can give one among themselves mandate of receiving or sending notice of cancellation (Art. 2477 C.C.Q.).

In cases where indemnity has been assigned to one of insured’s creditors and insurer has received notice thereof, it cannot cancel insurance without fifteen days prior notice to that creditor (Art. 2478 C.C.Q.).

When insurance is cancelled, insurer is entitled only to earned portion of premium, calculated from day to day in cases where cancellation proceeds from insurer, or at short term rate where it proceeds from insured (Art. 2479 C.C.Q.).

Conditions. See “FIRE INSURANCE, Standard Conditions.” Art. 2403 C.C.Q. dealing with content of contract precludes insurer from invoking conditions or representations not written in contract once it is validly formed. It is not however applicable to misrepresentation of insured which entails nullity of contract according to Art. 2410 C.C.Q. *Bilodeau v. La Souveraine, Compagnie d’assurances Générales*, [1995] R.J.Q. 1065 (C.S.). Conditions, being part of contract itself, are, in case of ambiguity, interpreted against insurer. Art. 1432 C.C.Q.; *Carrière v. Sécurité, Compagnie d’Assurance Générale du Canada*, [1974] C.S. 477; *Exportations Consolidated Bathurst v. Mutual Boiler*, [1980] 1 R.C.S. 888. If provisions of Code have not been violated, “uberrima fides” nature of insurance contract precludes insurer from invoking strictly technical violation of conditions where that violation is attributable to mere clerical error. *Leepo Machine Products Ltd. v. Western Assurance Co.*, [1973] S.C.R. 171. If insured is covered for different risks, false statements made with respect to proof of loss for one type of risk does not terminate coverage for other types of risk. *Marenger v. La Royale, cie d’ass. du Canada*, [1998] R.J.Q. 2306 (C.A.). Mortgage clause being considered as a distinct contract, hypothecary creditor can benefit from it even though insurance contract was breached or rendered null ab initio (e.g. for misrepresentation prior to issuance of policy). *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029. As well, breach of contract subsequent to issuance of policy cannot be invoked against hypothecary creditor. *Vallée du Richelieu, Cie mutuelle d’assurance de dommages v. Caisse Populaire des Deux Rives*, [1990] 2 S.C.R. 995. Hypothecary creditor is entitled to benefit from insurance policy if deed of loan explicitly gave



debtor mandate to insure property although he may not have done so. *Banque Toronto Dominion v. Général Accident, cie d'ass. du Canada*, [1999] R.J.Q. 349 (C.A.).

Contract. In addition to particulars required at Art. 2399 par. 2 C.C.Q., Art. 2480 C.C.Q. imposes certain further requirements on contents of damage insurance policies in general.

Inconsistencies. Policy and copy of application made in writing must be provided to client. In case of inconsistency between policy and application, latter prevails unless inconsistency has been indicated to client in writing, in a separate document. (Art. 2400 C.C.Q.). Difficulty remains with definition of inconsistency. *Robitaille v. Madill*, [1990] 1 S.C.R. 985 and *J.A. Martin & Fils v. Hercules Auto Parts*, [1996] R.R.A. 332 (C.A.); *Lumbermens Mutual Casualty v. Serres Magog*, AZ-02019589 (C.A.); R.E.J.B. 2002-31733; *Promutuel Valmont Société Mutuelle d'assurance v. Henderson*, 2006 QCCA 838. Also, *Faubert v. L'Industrielle, Cie d'Assurance Vie*, [1987] R.J.Q. 973 (C.A.), in which insurer restricted ordinary meaning of "accident" within life insurance policy it issued without indicating same to insured.

Insurable Interest. Provision of insurance contract which derogates from rules on insurable interest is null (Art. 2414 C.C.Q.). Insurance of object in which insured has no insurable interest is also null (Art. 2484 C.C.Q.). Person has insurable interest in property whenever he may sustain direct and immediate damage by its loss or deterioration. Future property and incorporeal property may be subject of insurance contract. Arts. 2481 par. 1 and 2482 C.C.Q.; *Saulnier v. Reliance Ins. Co. of Philadelphia*, [1976] C.A. 294; *Kosmopoulos v. Constitution Ins.*, [1987] 1 S.C.R. 2 (applied by the Quebec Court of Appeal in obiter in *Société d'entraide économique K.R.T. v. Prévoyants du Canada*, [1988] R.R.A. 635 (C.A.)) describes test for insurable interest as one of factual expectancy.

Insurable interest must exist at time of loss but it may change during policy period (Art. 2481 par. 2 C.C.Q.); *Paquette v. Prévoyance (La.)*, *Compagnie d'assurances*, J.E. 2001-1596 (C.A.); R.E.J.B. 2001-26430.

Notice and Proof of Loss. Insured, or any interested person, shall notify insurer of any loss which may give rise to indemnity, as soon as he becomes aware of it. Insurer which has not been so notified may, where it sustains prejudice therefrom, set up against insured any clause providing for forfeiture of right to indemnity in such a case (Art. 2470 C.C.Q.). Therefore, insurer must not only have been prejudiced in order to invoke late notice but must also have included in its policy a clause stating that it will avail itself of its right to deny cover-

age in such case. In absence of such clause, insurer cannot invoke late notice even if it has suffered prejudice therefrom. Insured can present evidence that the insurer had not suffered of any prejudice. *Union Canadienne v. Bélanger*, [1998] R.R.A. 685 (C.A.); *Bédard v. Royer*, [2003] R.R.A. 1107 (C.A.). Any prejudice to insurer must not come from its own negligence in the conduct of its investigation, which should be serious and complete. *Chayer v. Studio Chantal-Frank Inc.*, [1994] R.R.A. 309 (C.S.) (settled out of court, December 13, 1996 (500-09-000465-948)).

Insured is bound, at insurer's request, to notify it of all circumstances surrounding loss including its probable cause, nature and extent of damage, site of property, rights of third persons affecting it, and any concurrent insurance. Insured has obligation to cooperate with insurer's representatives and to allow them to visit site of fire and assess damage. Art. 2495 C.C.Q.; *Sirois v. Crum & Forster*, [1995] R.J.Q. 132 (C.S.). Further, insured must on request furnish vouchers in support of such information and attest under oath or by solemn affirmation to its truthfulness. Notwithstanding any specific time limit placed on notification and proof of loss in contract, insured is entitled to extension if it is not reasonably possible for him to perform his obligations under contract within time limit specified (Art. 2471 par. 1 and 2 C.C.Q.).

Regardless of requirements of contract, where insurer by its acts leads insured acting in good faith to believe that he has satisfied requirements as to proof of loss, insurer will not be permitted to invoke violation of condition in order to avoid paying loss. *Milinkovich v. Compagnie d'assurance Canadienne Mercantile*, [1959] B.R. 186; *Malo v. Compagnie d'Assurance contre les Accidents et Incendie*, [1973] C.S. 319; *Labrecque v. L'Équitable*, [1976] C.S. 619 (settled out of court, February 17, 1977 (200-09-000253-76)); *Perron v. La Réunion européenne*, [1996] R.R.A. 774 (C.S.) (appeal allowed in part on other grounds, [2000] R.R.A. 626 (C.A.)). The insurer cannot simply deny coverage because the claim is improperly presented; and if insurer is not satisfied with the proof of loss, he has the duty to advise the insured and give him a delay to correct the situation. *Max-I-Mum Services Financiers Ltée v. Promutuel Lac du Nord*, [2005] R.R.A. 984 (C.Q.). Any deceitful representation deprives person making it from right to any indemnity related to risk so misrepresented. *Sharma v. La Victoria cie d'ass.*, [1997] R.R.A. 46 (C.A.). If occurrence of event insured against entails loss of both movable and immovable property or of both property for occupational use and personal property, forfeiture is incurred only with respect to class of property to which representation relates (Art. 2472 C.C.Q.). This article establishes severability of insurance contract ac-

ording to nature of risk (fire, theft, vandalism, etc.), nature of coverage (buildings, personal property, legal liability, etc.) and, in certain cases, limitation of coverage (property used for professional or business purposes as opposed to property used for purely personal purposes). Quebec Court of Appeal has also applied principle of severability of insurance contract to article 2412 C.C.Q, which applies to breach of warranty. Non-fulfillment of warranty by insured suspends coverage only with respect to risk affected by warranty. *Auberge Rollande St.-Pierre Inc. v. Cie d'ass. Canadienne Générale*, [1994] R.J.Q. 1213 (C.A.) (motion for leave to appeal to Supreme Court abandoned, October 12, 1994 (24225)); *Marenger v. La Royale, cie d'ass. du Canada*, [1998] R.J.Q. 2306 (C.A.); *Florent & Gilbert Tremblay, Inc., v. M.J. Oppenheim*, [2004] R.R.A. 161 (C.S.). Deceitful representations by coinsured regarding circumstances of the loss (intentional fault of the other coinsured) deprive him from any right to indemnity. *Dubuc v. Promutuel Lotbinière*, 2006 Q.C.C.S. 4670, appeal dismissed (C.A.2008-10-21), 200-09-005712-069.

Standard Conditions. There are no longer any statutory conditions common to all fire insurance contracts. However, Civil Code of Québec has codified several of these former conditions. Any clause in contract which grants insured fewer rights than those granted by Civil Code is null (Art. 2414 C.C.Q.).

Underinsurance. Insurer may not refuse to cover risk for sole reason that amount of insurance is less than value of insured property. Insurer will be released by paying amount of insurance in case of total loss or proportional indemnity in case of partial loss (Art. 2493 C.C.Q.). *Althot v. Wawanesa Compagnie Mutuelle d'assurances*, [2003] R.R.A. 595 (C.S.).

GROUP INSURANCE

General. Group insurance is object both of specific legislation in Civil Code of Québec, and of considerable regulation with respect to rights of policyholder, benefits payable, conversion rights of participant who withdraws before term, rights of participant in cases where master policy expires and specific restrictions on form and contents of group accident and sickness insurance. *See* Ss. 254 to 299 R.A.I.A.

Group insurance is defined at Art. 2392 par. 3 C.C.Q. It must relate to specified group of persons, and may extend to their families and dependents.

Contract. Participation is confirmed by “certificate of participation.” That certificate may establish rights and obligations of members by reference to articles of policyholding association. However, only constituting instrument and by-laws specifically indicated in certifi-

cate may be set up against members (Art. 2407 par. 1 C.C.Q.). Insurer issues group insurance policy to policyholder and remits insurance certificates which the latter shall distribute to participants. Beneficiaries and participants may examine and make copies of policy at place of business of policyholder. In case of discrepancies between policy and insurance certificate, participants or beneficiaries may invoke either one according to their interest (Art. 2401 C.C.Q.). *Godin v. Compagnie d'assurance Canada sur la vie*, 2006 QCCA 851. The default to exercise the right of transformation of the policy into individual coverage within 31 days cannot be raised if the insured died within that period. Group coverage will be in place until the expiration of that delay. *Gauthier v. La Citadelle, Compagnie d'assurances Générales*, [2005] R.R.A. 904 (C.S.).

Laws of Quebec will apply to group insurance if participant is resident of Québec when he becomes participant (Art. 3119 par. 2 C.C.Q.).

INSURERS

Insurers. Defined at S. 1 (a) I.A. as one who advertises or acts as insurer, issues an insurance contract, receives premiums, assessments or other amounts under such contract.

Certificate. Certificate is required to act as insurer (S. 201 I.A.).

General. Provisions of I.A. regulate private insurance with respect to: insurers’ license; deposits required of insurers; investments, assets and reserves; ethics and conflicts of interest; books, accounts and reports; and annual statements and inspections (Ss. 201 to 325 I.A.).

Compliance with applicable Federal legislation is also required.

LIABILITY INSURANCE

General. In addition to general rules pertaining to non-marine insurance (Arts. 2389 to 2414 C.C.Q.) and to general rules applicable to damage insurance (Arts. 2463 to 2479.1 C.C.Q.), specific provisions (Arts. 2498 to 2504 C.C.Q.) govern liability insurance.

Action by Injured Third Party. Provision of insurance contract which derogates from rules protecting rights of injured third persons is null (Art. 2414 C.C.Q.). Such persons may invoke their independent right of action against insured or directly against insurer, or against both. Option chosen does not deprive third party of other recourses (Art. 2501 C.C.Q.). In reply to direct action by victim, insurer cannot invoke those defenses which arise out of acts or omissions committed by the insured after loss (e.g. late notice), but can set up against injured third



person any grounds it could have invoked against insured at time of loss (e.g. misrepresentations). Insurer has right of action against insured if it has paid indemnity notwithstanding a violation of contract that occurred after loss (Art. 2502 C.C.Q.) and may take an action in warranty against its insured in such a case. *St-Amour v. Société Mut. D'Ass. Gén. Coaticook-Sherbrooke*, [1995] R.J.Q. 2729 (C.S.).

In *Champagne v. CEGEP de Jonquière*, [1996] R.J.Q. 2229, Court of Appeal recognized that third party may ask for copy of insurance policy covering defendant. Insurer has right to delete parts of contract which are not relevant to case (such as amount of premium).

Contract. In addition to general requirements of article 2399 par. 2 C.C.Q., policy must state relationship between persons and property, and/or persons and acts which entail liability, amounts and exclusions of coverage, compulsory or optional nature of insurance and its direct or indirect beneficiaries (Art. 2499 C.C.Q.).

Defense of Insured. Subject to other legislative provisions, insurer is required to assume defense of any person entitled to benefit of insurance in any action brought against him. However, the Supreme Court of Canada has decided that the duty to defend imposed by the defense clause has limits: it is restricted to claims for damages which fall within scope of policy. Duty to defend does not apply to allegations which are clearly beyond scope of policy. *Nichols v. American Home Assur.*, [1990] 1 S.C.R. 801; *Non-Marine Underwriters Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551; *Johnston v. Fonds d'assurance responsabilité du Barreau du Québec*, 2006 QCCA 818; *Geodex v. Zurich Compagnie d'assurances*, 2006 QCCA 558; *CGU, Compagnie d'assurances du Canada v. Suprema Inc.*, [2007] R.R.A. 40 (C.A.) (motion for leave to appeal to Supreme Court dismissed, February 2, 2007 (31948)). The court could go beyond pleadings and consider extrinsic evidence to determine the substance and true nature of the claim. *Monenco Ltd. v. Commonwealth Ins. Co.*, [2001] 2 S.C.R. 699; *AXA Assurances Inc. v. Habitations Claude Bouchard*, J.E. 2001-1892 (C.A.). Court of Appeal decided that principles of *Nichols* case apply in Quebec law. *Boréal Assurances v. Réno Dépot*, [1996] R.J.Q. 46 (C.A.) (motion for leave to appeal to Supreme Court dismissed, October 10, 1996 (25158)). But insurer's reservations as to its duty to defend must not amount to denial of coverage. *Lawrence v. Kansa General Insurance*, [2000] R.R.A. 391 (C.S.) (motion to dismiss appeal allowed, June 5, 2000 (500-09-009352-006); appeal abandoned, August 25, 2000 (500-09-009419-003)); *C.G.U. Compagnie d'assurances du Canada v. Équipements Pierre Champigny, Inc.*, 2005 QCCA 313. Insurer's obligation to defend insured is determined by allegations in

proceedings even if final judgment does not retain facts that were pleaded to defend, *Lombard v. Roc-Teck Coatings Inc.*, 2007 Q.C.C.A. 986.

In cases where insurer actively intervenes and takes up defense of insured in spite of its knowledge of circumstances which might liberate insurer under its contract (e.g. violation of conditions or misrepresentation that could have rendered policy null ab initio), it is deemed to have waived its right to set up that exception against insured. *Western Canada Acc. & Guar. Co. v. Parrot*, [1921] 61 S.C.R. 595; *London & Midland General Ins. Co. v. Bêliveau*, [1970] C.S. 389, *Lombard du Canada v. Ezefflow Inc.*, 2008 QCCA 1759, and *Royal Ins. v. Chevalier*, [1975] C.S. 13. This last case also holds that waiver of rights by principal insurer cannot be set up against occasional driver specifically insured on rider to policy, who is considered an "insured" in his own right. See also *Joy Displays Inc. v. Canadian General Ins. Co. and Leading Constr. Inc.*, [1976] C.A. 1 (motion for leave to appeal to Supreme Court dismissed, February 25, 1976) and *Affiliated F.M. Ins. Co. v. Appel Jewelry Mfg. Ltd.*, [1990] R.J.Q. 2421 (C.A.).

Where there exists possibility that certain allegations may prove to be non-compensable under insurance contract, insured is not obligated to accept that insurer take up his defense without prejudice to its right not to indemnify. Because of fear of conflict of interest, insured may retain own counsel. *Boréal Assurances v. Réno Dépot*, [1996] R.J.Q. 46 (C.A.) (motion for leave to appeal to Supreme Court dismissed, October 10, 1996 (25158)). However, since insurer's duty to defend is distinct from its duty to indemnify, such fear must be based on reasonable appreciation of lawyer's role in presenting defense, *Zurich du Canada v. Renaud & Jacob*, [1996] R.J.Q. 2160 (C.A.). Insured may retain lawyer to "supervise" defense presented on his behalf by insurer but there will only be one attorney *ad litem* only in case of conflict of interest will the insurer be obligated to hire a distinct attorney for its insured, *9147-8495 Québec Inc. v. Audet & Associés*, 2008 Q.C.C.S. 2025 (C.S.). Insured's lawyer acts as counsel and advises insurer's lawyer not to direct defense towards application of exclusions. Trial judge will determine, at outset of hearing, a code of conduct that protects interests of parties while avoiding redundancy in lawyers' work. *Ville de Fermont v. Pelletier*, [1998] R.J.Q. 736 (C.A.).

In principle, insurer has duty to defend insured where allegations may possibly be covered under policy; insured may file motion at outset of case (Arts. 2 and 20 C.C.P.) to force insurer to perform its duty to defend. *Cie d'ass. Wellington v. M.E.C. Technologie*, [1999] R.J.Q. 443 (C.A.). However, if insured is not satisfied with the way his defense is lead by insurer's attorneys

and chooses to have his own attorneys, insurer is no longer required to defend or indemnify insured. *Association des Hôpitaux du Québec v. Fondation pour Le Cancer de la Prostate et C.H.U.L.*, [2000] R.R.A. 78 (C.A.). When insurance covers more than one insured, each insured may ask for separate counsel if there is a risk of conflicting defense. *Birdair v. Commerce & Industry Ins. Co.* [2003] R.R.A. 393 (C.A.).

Insurer is not bound to represent insured at Coroner's Inquest because it does not determine liability of insured but identity of victim as well as probable causes of death. *Ville de l'Ancienne-Lorette v. Cie d'ass. Scottish & York*, [2000] R.R.A. 294 (C.A.).

Fees, costs and expenses of suits against insured, including those of defense, as well as interest on amount of insurance, are borne by insurer over and above limits of insurance. Art. 2503 par. 2 C.C.Q.; *Parizeau v. Fonds d'ass. responsabilité du Barreau*, [1997] R.J.Q. 2184 (C.S.). However, this duty ends when limits are exhausted by payment of indemnities. *Mines d'amiante Bell Ltée v. Federal Ins. Co.*, [1985] C.S. 1096 (appeal abandoned, August 3, 1987 (500-09-001328-855)).

Fault of Insured. As in all damage insurance, insurer is liable for prejudice caused by insured's fault or negligence unless an exclusion is expressly and restrictively set out in contract. Art. 2464 par. 1 C.C.Q. In cases of concurrent causes of loss (negligence and superior force) in which one is expressly covered, the protection must prevail even if the other cause is excluded. *Sécurité Nationale v. Éthier*, J.E. 2001-1411 (C.A.). Exclusion in contractor's liability policy regarding professional liability applies only to acts of professionals contemplated by Professional Code. *Les Industries Guay v. Lessard*, [1981] C.S. 685 (settled out of court, June 20, 1986 (200-09-000678-810)); *Lavigne v. Poupert*, J.E. 2001-1441 (C.S.); *Sternthal v. Boreal Ins. Inc.*, J.E. 2004-904 (C.A.) (motion for leave to appeal to Supreme Court dismissed, November 18, 2004).

However, in no case is insurer liable for damages caused by insured's "intentional fault." Art. 2464 par. 1 C.C.Q.; *Oppenheim v. Dionne*, [1996] R.R.A. 474 (C.S.); *Allstate du Canada, compagnie d'assurances v. D.* [2001] R.J.Q. 2457 (C.A.). Burden is upon insurer to prove intentional fault according to balance of probabilities criteria applicable to civil law matters, even in case of criminal act (e.g. arson). *American Home Assur. Co. v. Auberge des Pins Inc.*, [1990] R.R.A. 152 (C.A.) (motion for leave to appeal to Supreme Court dismissed, March 22, 1990 (21771)). Exclusion will only apply if loss attributable to insured's voluntary or deliberate act, and if insured had full knowledge of risks incurred and intention that a loss results. *La Royale du Canada v. Curateur Public*, [2000] R.R.A. 594 (C.A.). An insured

who set fire to his own house while attempting suicide, may not have had full knowledge that fire would spread to another house located 18 feet apart. Thus liability insurer had to pay. *AXA Assurances, Inc. v. Assurances générales des Caisses Desjardins, Inc.*, 2006 QCCA 674 (motion for leave to appeal to Supreme Court dismissed, November 11, 2006 (31569)).

In *Bergeron v. Masson*, [1976] C.S. 818 (appeal dismissed, June 1, 1978 J.E. 78-464), it was held that assault during "friendly" softball game was intentional fault and though consequences of act were not intended, act itself, coupled with negligent disregard for consequences, were sufficient to discharge insurer. See also *Cooperative Fire & Cas. Co. v. Saindon*, [1976] 1 S.C.R. 735. Insurance contract with specific clause for hypothecary creditors creates two groups of insureds; intentional fault of hypothecary debtor cannot be invoked against hypothecary creditor. *Vallée du Richelieu, Cie Mutuelle d'assurance de dommages v. Caisse Populaire des Deux Rives*, [1990] 2 S.C.R. 995; *Banque Toronto Dominion v. Général Accident, cie d'ass. du Canada*, [1999] R.J.Q. 349 (C.A.).

Courts shall identify substance of allegations contained in pleadings. If both negligence and intentional tort claims arise from same actions and cause same harm, negligence claim is derivative and will be subsumed into the intentional tort, for purposes of exclusion clause analysis. *Non-Marine Underwriters Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551. The court should examine the proceedings to ascertain the "substance" and "true nature" of the claim. *Monenco Ltd. v. Commonwealth Ins. Co.*, [2001] 2 S.C.R. 699; *Geodex v. Zurich Compagnie d'assurances*, 2006 QCCA 558.

Insured's intentional fault does not deprive innocent insureds from receiving insurance benefits. Arts. 2414 and 2464 C.C.Q.; *Poulin v. Sun Alliance Canada cie d'ass.*, [1996] R.R.A. 628 (C.S.) (appeal abandoned, January 26, 2000 (200-09-000942-968), but see *contra*, *Godin v. Group Commerce cie d'ass.*, [1996] R.R.A. 119 (C.S.). Intentional fault of the lessee does not deprive the lessor who is also insured by automobile insurance policy from receiving insurance benefits. However, if insured is a company, intentional fault of shareholder who can be considered as an "alter ego" of company will deprive innocent shareholder of any insurance benefits. *Général Accident v. Miscou Motel*, [1999] R.J.Q. 330 (C.A.).

Contractual Liability. It is distinct from delictual liability and arises out of violation of contractual obligations. Rules governing contractual liability cannot be avoided by opting for more favorable rules (Art. 1458 C.C.Q.).



Delictual Liability (Tort). See Art. 1457 C.C.Q. Between joint tortfeasors, liability towards claimant is solidary (*i.e.* joint and several) (Art. 1526 C.C.Q.). Claimant may thus apply for payment of entire award from either tortfeasor (Art. 1528 C.C.Q.). Judgment establishes respective liability of wrongdoers according to principles of contributory fault (Art. 469 C.C.P.).

Legal Liability. Courts maintain distinction between liability arising out of contract and legal liability which may be imposed on party. Thus, product liability policy in which contractual liability was not covered was found nonetheless to include coverage for legal liability arising out of vendor's warranty unless such coverage was specifically excluded. New Civil Code introduces concept of manufacturer's liability in tort for injury caused by reason of safety defect in product. Liability is extended to distributors and suppliers. Anyone other than purchaser who suffers damages as a result of safety defect in product has right of action against manufacturer, distributor and supplier, whether or not he is an importer (Art. 1468 C.C.Q.). Manufacturer, distributor or supplier is not liable if he proves that victim knew or could have known of defect or could have foreseen injury. Nor is manufacturer, distributor or supplier liable if he proves that, according to state of knowledge at time that he manufactured, distributed or supplied property, existence of defect could not have been known, or that he was not neglectful of his duty to provide information when he became aware of defect (Art. 1473 C.C.Q.). Purchaser of product will only have contractual remedy (as a result of rule prohibiting option between contractual and delictual remedies, in Art. 1458 C.C.Q.), but will still only benefit from what was known as seller's "warranty against latent defects," now called "warranty of quality" (Arts. 1726 to 1731 C.C.Q.).

When seller in good faith, it is only bound to reimburse for reduction of selling price and no other damages. If good sold is a house, calculation is usually based on damages to house and not on cost of repair of defect that caused damages (*ex.* Repair of chimney). *Basque v. Alpha compagnie d'assurance*, 2009 QCCA 739; *Caron v. Alpha Compagnie d'assurance*, 2009 QCCA 740 et *Pellerin v. Alpha compagnie d'assurances*, 2009 QCCA 744. Court of Appeal ruled that a multiple-risk insurance policy does not cover claims resulting from insured's defective products when such defects were excluded by specific clause in policy. *Lombard du Canada Ltée v. Ezeflow Inc*, 2008 QCCA 1759.

Liability Assumed by Contract. Refers to specific assumption of liability in contract over and above legal liability imposed on parties. *U.S. Fire Ins. v. Bouchard*, [1990] R.R.A. 667 (C.A.) (motion for leave to appeal to Supreme Court dismissed, January 17, 1991 (22054)),

but see *contra Dominion Bridge Co. Ltd. v. Toronto General Ins. Co.*, [1963] S.C.R. 362. Faulty design exclusion was applied in *Canadian Pacific Ltd. v. American Home Ins. Co.*, [2001] R.R.A. 39 (C.A.).

Notification of Loss. See "FIRE INSURANCE, Notice and Proof of Loss." Under Art. 2470 C.C.Q. insurer must prove it suffered prejudice because of late notice by insured. Insurer is considered to have suffered prejudice if it was not given opportunity to exercise duty to defend. *Cie d'ass. Guardian du Canada v. Cie d'ass. St-Maurice*, [1990] R.R.A. 700 (C.A.); *Banque Toronto-Dominion v. Soroka*, [1995] R.J.Q. 2896 (C.S.) (appeal dismissed, October 27, 1997, AZ-50072227), or if elements of proof have disappeared or have been destroyed. *Papin v. Éthier*, [1995] R.J.Q. 1795 (C.S.). Under claim's made policy, the duty to report circumstances that may give rise to a claim does not prevent the insurer to limit the scope of coverage to claim activity made as opposed to merely being discovered and to deny coverage for the latter. *Jesuit Fathers of Upper Canada v. Guardian Insurance of Canada*, [2006] 1 R.C.S. 744.

Product Liability. See "LIABILITY INSURANCE, Legal Liability."

Settlement. No transaction may be set up against insurer without its prior consent (Art. 2504 C.C.Q.). Insured who nonetheless settles with third party without consent of insurer does not lose right to claim from the latter, but will have to prove existence of coverage, his liability for loss and whether amount disbursed as settlement represented real amount of damages suffered by third party. *American Home, Compagnie d'assurances v. Inter-Tex Transport, Inc.*, [1994] R.R.A. 21 (C.A.). Insurer which takes up defense of insured must consult him before concluding settlement with third party. *La Royale du Canada, Compagnie d'assurance v. Gérard Hamel Limitée*, [1994] R.R.A. 190 (C.Q. Civ. Div.).

LIFE INSURANCE

General. Life insurance is subject to general rules pertaining to non-marine insurance (Arts. 2389 to 2414 C.C.Q.) and to rules governing insurance of persons. Arts. 2415 to 2444 C.C.Q.

Age. Misrepresentation as to age of insured does not entail nullity of insurance. Where age is misrepresented, insurer is entitled to adjust sum insured to that which premium actually paid would have purchased, given true age (Art. 2420 par. 1 C.C.Q.). Where insurance ends at given age before death of insured, only true age is relevant. (Art. 2422 par. 2 C.C.Q.).

In cases where insured's actual age at time of issue is such that he could not have obtained insurance from insurer, the latter may request annulment of contract, but

must bring the action within three years of the making of the contract, during insured's lifetime and within sixty days of becoming aware of error (Art. 2421 C.C.Q.).

Application. Insurer must provide policyholder with policy and copy of any application made in writing. In case of discrepancy between these documents, application prevails unless insurer has, in separate document, indicated particulars in respect of which there is discrepancy (Art. 2400 par. 2 C.C.Q.).

Testimonial evidence may be set up against contents of written application where answers were suggested or application was filled out by representative of insurer (agent or medical examiner) or by any insurance broker (Art. 2413 C.C.Q.).

Assignment. See "ASSIGNMENT, Insurance of Persons."

Attempt on life of insured. If by policy owner, entails nullity of insurance and payment of surrender value. If by any other person, entails forfeiture of rights to insurance only in respect of such person (Art. 2443 C.C.Q.).

Beneficiaries. Designation and revocation: (a) Means of making designations and revocations. Beneficiary may be validly designated in policy itself or in separate writing which may or may not be a will (Art. 2446 C.C.Q.). In *Favreau v. Lapointe*, [1977] C.A. 15, it was held that beneficiary of insurance policy is determined by contract in force at time of death and not by previous contract which had been cancelled, even though two contracts were similar. (b) Nature of designations: Designation of spouse as beneficiary in writing other than a will is irrevocable unless otherwise indicated. Designation of any other person as beneficiary is revocable unless otherwise indicated in policy or in separate writing other than a will (Art. 2449 par. 1 C.C.Q.). Separation from bed and board does not affect the rights of a spouse as beneficiary or subrogated policyholder, but the court may declare them revocable or lapsed when granting a separation. (Art. 2459 par. 1 C.C.Q.). Divorce or dissolution of a civil union causes designation of spouse as beneficiary or subrogated policyholder to lapse (Art. 2459 par. 2 C.C.Q.). In order for designation to be irrevocable, it must be expressly made so, either in policy or in separate writing other than a will (Art. 2449 par. 1 C.C.Q.). Regardless of its terms, every designation remains revocable until received by insurer (Art. 2451 C.C.Q.). Interested third parties may prove, by any means, that beneficiary of irrevocable designation has renounced to that designation. *Blanchard v. Lapointe*, [2001] R.R.A. 1 (C.A.). (c) Special case of designations or revocations made in a will: Designation that is made in a will is always revocable (Art. 2449 par. 1 C.C.Q.)

and does not avail against another designation or revocation subsequent to signing of the will; nor does it avail against designation prior to signing of a will, unless the will identifies the insurance policy in question or unless intention of testator is manifest (Art. 2450 par. 2 C.C.Q.). The fact that the policyholder changes the beneficiary of pension fund but did not mention life insurance in her will indicates a manifest intention to maintain the named beneficiary. *Succession de L.M.G.*, [2003] R.R.A. 987 (C.S.). (d) Who may be beneficiary: Beneficiary or subrogated policyholder need not exist at time that designation is made, nor even be expressly determined. He must however, at the time his right may be exercised, exist or be conceived and subsequently be born alive and viable and his quality as beneficiary must be recognized. Designation of beneficiary is presumed to be made conditional on aforementioned existence and determination (Art. 2447 C.C.Q.). If condition is not realized, fruits of insurance will revert to estate of policyholder. (e) Renunciation: Majority of Court of Appeal held that where insured and beneficiary are associated by way of corporation, the latter's sale of his shareholding shows desire to end any association, and by implication any right to benefit under insurance contract. Dissent held that sale of shares does not constitute implicit renunciation of beneficiary status. *Boivin c. Caron*, [1987] R.R.A. 437 (C.A.)

Coming into Effect of Insurance Policies. Three conditions must be met for contract of life insurance to come into effect. (i) Insurer must have accepted application without modification. (ii) There must have been no change in insurability between time of application and that of acceptance. (iii) First premium must have been paid. Art. 2425 C.C.Q. These conditions must exist concurrently in order for insurance to come into effect. *Trust Général du Canada v. Artisans Coopvie, Société Coopérative d'assurance-vie*, [1990] 2 S.C.R. 1185. If insurance policy is backdated, coverage will apply retroactively to policy date, even if policy is issued at a later date. This is particularly relevant for operation of suicide exclusion clause. *Goldstein v. London Life Ins.*, [1996] 1 S.C.R. 162. Moreover, parties to life insurance contract may agree that two-year suicide exclusion period begins prior to entry into force of insurance. *Blais v. Union Commerciale*, [2001] R.R.A. 22 (C.A.) (motion for leave to appeal to Supreme Court dismissed, December 6, 2001 (28449)). However any modification to the policy to increase the coverage is, in respect to additional coverage, subject to an exclusion period of two years beginning on the effective date of the increase. (Art. 2441 C.C.Q.).

Criminal Acts. When insured committed criminal act, this does not deprive innocent beneficiaries from claiming insurance proceeds. *Goulet v. Compagnie d'as-*



surance-vie Transamerica du Canada, [2002] 1 S.C.R. 719. But a proper exclusion to that effect may be valid.

Inconsistencies. If certificate confirming existence of insurance coverage is issued and refers to exclusion clause, certificate must accurately summarize or reproduce text of clause. Failure to notify the new exclusion in the summary and to remit the policy to the insured renders the exclusion inapplicable. *Général Accident, Compagnie d'assurance du Canada v. Genest*, [2001] R.R.A. 15 (C.A.). Failure to disclose 24 month exclusion period for insured's suicide constitutes major inconsistency, and more favorable text of certificate must then be applied. Art. 2401 par. 2 C.C.Q.; *Lapointe v. L'Industrielle-Alliance*, [1998] R.R.A. 14 (C.A.).

Insurable Interest. Stipulation of insurance contract which derogates from rules on insurable interest is null (Art. 2414 C.C.Q.). Person has insurable interest in his own life and health, as well as that of certain other persons, including spouse, descendants and spouse's descendants, or persons who contribute to his support and education (Art. 2419 par. 1 C.C.Q.).

Contract is without effect if at time it was concluded policyholder had no insurable interest in life or health of insured, unless insured consents in writing (Art. 2418 par. 1 C.C.Q.). Clause covering misrepresentations where insurance has been in effect for certain period of time will not cover want of insurable interest. *Ancil v. Manufacturers Life*, [1899] A.C. 604.

Payment of Premiums. Civil Code allows thirty-day period for the payment of premiums as they come due. That period runs concurrently with any term established in contract but cannot be reduced. Failure to pay within the period terminates insurance (Art. 2427 C.C.Q.).

However, if insurer demands payment of subsequent premium, it may be deemed to have waived effect of tardiness of previous payments, but only if such demand has been made after the expiration of the period that was granted. *Mutuelle d'Omaha Compagnie d'Assurances v. Tremblay*, [1986] R.J.Q. 1639 (C.A.).

Policyholder. Sums insured which are payable to designated beneficiary do not form part of estate of insured (Art. 2455 C.C.Q.). However, unless policy indicates otherwise, owner of policy retains right to participation or to other profits arising out of it, even though beneficiary is irrevocably designated. Policyholder is bound by his own irrevocable designation, even if beneficiary has no knowledge of it (Art. 2458 C.C.Q.). Also, even if beneficiary has been designated irrevocably, policyholder may dispose of his rights under insurance contract, subject to those of beneficiary. Art. 2460 C.C.Q.; *Trust Général du Canada v. Artisans Coopvie*,

[1987] R.R.A. 454 (C.A.), (confirmed on other grounds, [1990] 2 S.C.R. 1185).

Representations and Warranties. In absence of fraud, no misrepresentation or concealment may justify annulment or reduction of insurance which has been in force for two years. Art. 2424 par. 1 C.C.Q.

Suicide of insured is not cause of nullity. Any stipulation to contrary is without effect if suicide occurs after two years of uninterrupted insurance (Art. 2441 par. 1 C.C.Q.). The period of two years runs again for any change-giving additional coverage beginning on the effective date of the increase. (Art. 2441 par. 2 C.C.Q.). This modification was adopted to reduce the impact of the Supreme Court decision in *Goldstein v. London Life Ins.*, [1996] 1 S.C.R. 162, in which the court held that for purposes of suicide exclusion clause, two-year period runs from policy date rather than issue date, given insurer's practice of backdating policies and notwithstanding the fact that coverage was largely increased a few months before the suicide. However, if insured fails to pay premium and policy lapses, then even if coverage is reinstated, two-year period will be calculated from date policy is restored. Art. 2434 C.C.Q.; *1858-0894 Québec Inc. v. Cie d'ass. Standard Life*, [1999] R.J.Q. 729 (C.A.) (motion for leave to appeal to Supreme Court dismissed, January 27, 2000 (27302)). It is well established that where death of individual is proven to have been caused by external physical factors, it will be presumed accidental and burden of proving suicide will rest on insurer. Rule formulated by Supreme Court in *London Life v. Chase*, [1963] S.C.R. 208 requires only that presumption of accident be rebutted on a balance of probabilities, as is general rule in civil cases. See *Rioux-Therrien v. L'Alliance*, [1974] C.A. 271 (motion for leave to appeal to Supreme Court dismissed, May 26, 1976 (13672)); *Thompson v. La Prévoyance*, [1976] C.A. 453; *Trudel v. La Prudentielle*, [1976] C.A. 451 and *Crown Life v. Curateur Public du Québec*, J.E. 82-1109 (C.A.) (motion for leave to appeal to Supreme Court dismissed, January 26, 1983 (17459)); *Shallow v. Colonia Life Ins. Co.*, [1995] R.R.A. 884 (C.S.). However, in most of these cases, proof that was adduced would have met "beyond reasonable doubt" standard. The Supreme Court decided that in order to ascertain whether a given means is "accidental," it is necessary to determine whether the consequences of the actions and events that produced the death were unexpected from the standpoint of the insured. *Martin v. American Int'l Assurance Life Co.*, [2003] 1 S.C.R. 158. In that case, an overdose of Demerol was an accident since the insured, a doctor, did not give any hints he would attempt to end his life and injected himself to relieve pain that was well known. The court specifies that its decision was not a



rebuttal of “courting the risk” theory for cases involving extremely dangerous activities.

LIMITATION OF TIME FOR COMMENCEMENT OF SUIT

General. Actions for enforcement of personal rights arising from contract or delict are prescribed by three years, unless prescriptive period is otherwise established (Art. 2925 C.C.Q.); except libel and slander which are subject to a one-year period (Art. 2929 C.C.Q.). In case of damages which appear progressively, prescription only begins from date damage appears for first time. Art. 2926 C.C.Q. Besides, when the application of a party is dismissed without a decision having been made on the merits of the action and where, on the date of the judgment, the prescriptive period has expired, the plaintiff has an additional period of three months from service of the judgment in which to claim his right. (Art. 2895 C.C.Q.). In damage insurance, prescription period starts sixty days after insured transmits notice of loss to insurer or sixty days after insurer cease to request additional relevant information. Art. 2473 C.C.Q. *Aménagement Vert-Plus de l’île Inc. v. Scottish & York Insurance*, 2006 Q.C.C.S. 5792.

Prescription. Court may not, of its own motion, raise plea of prescription. However, it shall, of its own motion, declare remedy forfeited where so provided by law. Art. 2878 C.C.Q.

NO-FAULT

See also “AUTOMOBILES.”

On December 22, 1977, National Assembly of Quebec passed “Automobile Insurance Act.” A.I.A. This Act replaces Highway Victims Indemnity Act (R.S.Q. 1964, c. 232).

General. A.I.A. (R.S.Q. c. A-25) provides compensation by “Société de l’assurance automobile du Québec” (S.A.A.Q.) for victims who suffer bodily injury as a result of automobile accidents regardless of whom is at fault (S. 5), to exclusion of civil remedies (S. 83.57); *Périard v. Ville de Sept Îles*, J.E. 85-357 (C.A.). No fault compensation will apply even if an automobile is remotely involved in the accident as in a case of slip and fall while getting out of a car. *Laurin v. Centres Commerciaux Régionaux du Canada*, J.E. 2005-1317 (C.S.). All owners of motor vehicles driven in Quebec, unless specifically exempted, must hold liability insurance policy guaranteeing compensation for property damage caused by motor vehicles. Compulsory minimum amount of such insurance is \$50,000 (S. 87). For buses and large commercial vehicles, minimum coverage is set at \$1,000,000 (S. 87.1). Owner will not be able to regis-

ter his vehicle or obtain license plate unless he can certify that he holds such insurance policy. Owners have option of taking out insurance for damage to their own cars. Commercial insurers provide insurance for property damage.

Under A.I.A., all Quebecers sustaining bodily injuries resulting from automobile accidents and their dependents are entitled to compensation whether accident occurred in Quebec or outside Quebec (S. 7). Non-residents who are victims of accidents occurring in Quebec are entitled to compensation under A.I.A. only to extent that they are not responsible for accident, unless otherwise agreed between Société and competent authorities of place of residence of such victim (S. 9). When accident occurs in Quebec, non-resident is entitled to compensation to same extent as Quebecer, if he is owner, driver or passenger of car registered in Quebec (S. 8). Quebec resident who sustains bodily injury in automobile accident outside Quebec is entitled to compensation but retains his right of action for excess, if such is case, under law of place where accident occurred (S. 83.59). Supreme Court of Canada created a new general rule with respect to inter-provincial traffic accidents. It is the law of place of accident that applies, regardless of residence of parties or where action was instituted. *Tolofsen v. Jensen*, [1994] 3 S.C.R. 1022. Art. 3126 C.C.Q. allows for an exception to general rule where tortfeasor and victims have their domicile or residence in same country or province; the law of that country or province then applies. Quebec courts will not entertain action taken by one Quebec resident against another arising from accident which occurred outside province despite availability of such remedy according to law of jurisdiction in which accident occurred. *Szeto v. La Fédération*, [1986] R.J.Q. 218 (C.A.) (motion for leave to appeal to Supreme Court dismissed, April 21, 1996 (19806)). For accidents occurring in Quebec, courts of other provinces will give effect to immunity from suit established by A.I.A. *Lucas v. Gagnon*, [1994] 3 S.C.R. 1022. Compulsory insurance of \$50,000 against property damage to others automatically covers bodily injury and property damage caused to others outside Quebec (s.85). A.I.A. provides that this insurance increases to whatever minimum amount of liability insurance is mandatory in state, province or territory of Canada or United States where accident occurs, when latter amount is greater than that subscribed for in Quebec by insured (s.88).

Administration. S.A.A.Q. has exclusive jurisdiction to decide victim’s right to indemnity and its amount (S. 83.41 A.I.A.), subject to review by S.A.A.Q. or appeal to the Administrative Tribunal of Québec (S. 83.49).

Compensation Fund. Victims of property damage and victims suffering bodily injuries as result of accident



occurring in place other than public roadway and caused by off-highway vehicle may apply to S.A.A.Q., which will act as compensation fund, in order to satisfy final judgment obtained in Quebec. Claim may also be made in case where identity of person responsible for accident is unknown, provided notice is given to Société within ninety days of accident. Maximum amount in both cases is \$50,000. No such claim can be made by those exempted from obligation to carry liability insurance (Ss. 142-149). See *Montréal v. Fonds d'Indemnisation Automobile du Québec*, J.E. 83-588 (C.P.).

Driver. See "AUTOMOBILES."

Indemnities. A.I.A. provides for income replacement indemnity for victim and lump-sum indemnity to surviving spouse or dependents where death of victim results from accident. Pension is subject to adjustment when there are changes in situation or condition of victim. Act provides for lump-sum payments to compensate for disfigurement, dismemberment, suffering or loss of enjoyment of life (Ss. 73-76 A.I.A.). It also provides for reimbursement of reasonable expenses incurred due to accident (Ss. 79-83.6 A.I.A.). Act provides for certain exceptions whereby victims of automobile accidents are not entitled to compensation when such accidents occur as result of automobile races or of use of certain vehicles off a public highway (S. 10 A.I.A.).

Worker, who by reason of automobile accident is entitled to compensation under an Act respecting industrial accidents and occupational diseases (R.S.Q. c. A-3.001) must claim this compensation first (S. 83.63 A.I.A.). However, beneficiary may also receive any excess amount which automobile insurance plan would normally pay. Persons suffering bodily injuries caused by automobile while criminal act is being committed have option of claiming either benefits provided under an Act to promote good citizenship (R.S.Q. c. C-20), or Crime Victims Compensation Act (R.S.Q. c. I-6) or under A.I.A. (S. 83.64).

Income replacement indemnity is designed to compensate victim of bodily injury for loss of revenue when because of his injury he is unable to continue his regular full-time or part-time employment. See *Société de l'assurance automobile du Québec v. Hamel*, [2001] R.J.Q. 961 (C.A.); *Hamel v. Commission des affaires sociales*, [1998] R.J.Q. 3082 (C.S.) (appeal dismissed [2001] R.J.Q. 961). Indemnity is based on victim's salary up to maximum amount; minimum indemnity is also established (Ss. 51-59 A.I.A.). A.I.A. defines victims who are entitled to income replacement indemnity; these include full-time students at universities, minor children, persons unemployed at time of accident but able to work, victims who at time of accident are 65 years of age and over, etc. (Ss. 13-44 A.I.A.).

Except for students, income replacement indemnity is paid every two weeks for entire disability period except first seven days (S. 83.20). If victim receiving income replacement indemnity obtains or returns to employment, indemnity ceases to be paid (S. 49 A.I.A.). However, if victim, because of injury sustained, earns from such employment a lower income than that actually earned or estimated by S.A.A.Q. at time of accident, he is entitled to a reduced indemnity (Ss. 55-56 A.I.A.).

Death of victim as result of automobile accident gives rise to indemnities for his spouse, dependents, mother and father if victim has no spouse or dependents or if they qualify as dependents (Ss. 60-71 A.I.A.). Estate is entitled to lump-sum indemnity of \$3,000 for funeral expenses (S. 70 A.I.A.).

Right to compensation under Act is prescribed by three years from date of accident or manifestation of injury, and in case of death benefit, from time of death (S. 11 A.I.A.).

Property Damage. Owner of automobile is presumed responsible for property damage caused by such automobile. He may rebut this presumption in specific cases such as fault of victim or of third party, fortuitous event or loss of possession of automobile (S. 108 A.I.A.). A.I.A. also provides for compensation of insured owners by their own insurer for damage to their automobiles in cases where accident involves collision between at least two automobiles whose owners have been identified (S. 116 A.I.A. and S. 3 of Direct Compensation Agreement, [2007] G.O. II 1933). It has been held that a go-kart is an "automobile" as defined by A.I.A. *Roy v. Matteau*, [1981] C.S. 978 (confirmed on other grounds, February 21, 1984, 500-09-000639-815). Owner may take legal action against his insurer in accordance with ordinary rules of law if he is not satisfied with settlement offered by insurer in accordance with Direct Compensation Agreement but is precluded from exercising remedy against owner or driver of other automobile (S. 116 A.I.A.). When Agreement is not applicable, for instance when accident does not involve collision between two automobiles, insured owner may exercise his recourse against owner or driver of other automobile or latter's liability insurer in accordance with ordinary rules of law (S. 115 A.I.A.). *Bédard v. Trudel*, [1987] R.J.Q. 824 (C.A.). Direct Compensation Agreement regulates administration of such direct compensation, including apportionment of liability between owners involved in accident. The uninsured victim of property damage caused by automobile is compensated according to ordinary rules of law. (S. 115 A.I.A.); *Daoust v. Master Restaurant Equipment*, [1982] C.A. 1. Act has special provisions dealing with liability insurance for



garage owners and automobiles used for public transportation (Ss. 112 and 114 A.I.A.).

Subrogation. When accident occurs outside Quebec, S.A.A.Q. is subrogated for compensation it is required to pay to victim, in rights of that victim against non-resident who is responsible for accident under law of jurisdiction where accident occurs (S. 83.60 A.I.A.). When Société compensates victim of accident occurring in Quebec, it is subrogated in rights of that victim, for compensation it is required to pay, against non-resident who is responsible for that accident, to the extent of that person's responsibility (S. 83.61 A.I.A.).

PROPERTY INSURANCE

General. Property Insurance is governed by general rules pertaining to non-marine insurance (Arts. 2389 to 2414 C.C.Q.), by general rules applicable to damage insurance (Arts. 2463 to 2479.1 C.C.Q.) and by specific provisions relating to property insurance (Arts. 2480 to 2497 C.C.Q.). In each case, the more specific provision prevails over one of general nature.

Amount of Loss. If there are no valuation formulas in policy, proof of true value of property insured must be established (Art. 2490 C.C.Q.). Amount of insurance does not make proof of value of insured property in unvalued policies. In valued contract, agreed value makes complete proof of true value of property, as between insurer and insured (Art. 2491 C.C.Q.). Contract made without fraud for amount greater than true value is valid up to such value and insurer is not entitled to premiums for the excess, but premiums paid or due remain vested in insurer (Art. 2492 C.C.Q.).

Cancellation. See "FIRE INSURANCE, Cancellation."

Conditions. Conditions, being part of contract itself, are, in case of ambiguity, interpreted against insurer. Art. 1432 C.C.Q.; See *Carrière v. Sécurité Compagnie d'Assurance*, [1974] C.S. 477. Where there has been no violation of Code, uberrima fides nature of contract precludes insurer from being allowed to invoke strictly technical violation of conditions where such violation is attributable to mere clerical error. *Leepo Machine Products Ltd. v. Western Assur. Co.*, [1973] S.C.R. 1971. Since mortgage clause is considered as distinct contract, hypothecary creditor can benefit from it even though insurance contract has been breached or rendered null ab initio (e.g. for misrepresentations prior to issuance of policy, see *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029). As well, breach of contract subsequent to issuance of policy cannot be invoked against hypothecary creditor. *Vallée du Richelieu, Cie Mutuelle d'assurance de dommages v. Caisse Popu-*

laire des Deux Rives, [1990] 2 S.C.R. 995. See also *Banque Toronto Dominion v. Général Accident, cie d'ass. du Canada*, [1999] R.J.Q. 349 (C.A.). However, according to the terms of the mortgage clause, the hypothecary creditor has the duty to inform of any vacancy exceeding 30 days when he knows about such situation. *American Home Ins. v. AXA Assurances Inc.*, J.E. 2002-515 (C.A.).

Contract. See "FIRE INSURANCE, Contract."

Inconsistencies. See "FIRE INSURANCE, Inconsistencies." Court of Appeal held that if an "all risk" insurance policy is issued, insurer must provide insured or his broker with separate document listing the exclusions. In the absence of such document, exclusions will have no effect. *J.A. Martin & Fils v. Hercules Auto Parts*, [1996] R.R.A. 332 (C.A.). The fact that policy was not delivered to the insured prevents insurer from invoking exclusion that does not appear on the summary of coverages. *Ferme Marie-Andrée, Inc. v. Promutuel de Bagot*, [2003] R.R.A. 217 (C.S.).

Indemnity. Where several valid insurance contracts have been made covering same property and risk and total amount of indemnity that would result from separate performance of such policies exceeds the loss incurred, insured may be indemnified by insurer[s] of his choice, each being liable only for amount which has been contracted. Unless otherwise agreed, indemnity is divided among insurers proportionally to share of each in total coverage (Art. 2496 par. 1 and 3 C.C.Q.). Excess or specific insurance clauses or policies may nevertheless be given effect. *American Home Ins. v. Duret*, [1989] R.J.Q. 2142 (C.A.). In absence of mortgage guarantee clause naming creditor as insured, indemnities available are apportioned among secured creditors having liens on property damaged, according to their rank and upon notice and proof by them (Art. 2497 par. 1 C.C.Q.). Subject to creditors' rights, insurer may reserve right to repair insured property (Art. 2494 C.C.Q.).

Insured must facilitate salvage of property insured and inspection by insurer. He must permit insurer to visit premises and examine property insured. Art. 2495 par 2 C.C.Q.; *Sirois v. Crum & Forster*, [1995] R.J.Q. 132 (C.S.).

Insurable Interest. See "FIRE INSURANCE, Insurable Interest."

Notice and Proof of Loss. See "FIRE INSURANCE, Notice and Proof of Loss."

Underinsurance. See "FIRE INSURANCE, Underinsurance."



RELEASE

In cases involving bodily or moral injury no release, transaction nor any statement may be set up against victim if he suffers harm thereby, unless it is obtained more than thirty days after act which caused injury (Art. 1609 C.C.Q.).

No transaction made for purpose of terminating or preventing litigation may be annulled for error of law (Art. 2634 C.C.Q.). It may however be voided for error, fear or lesion (Art. 1399 C.C.Q.). Intent of parties is of paramount importance. Thus where victim has signed release based on incorrect medical evaluation of his disability, release may be voided for error, unless it is clear that parties intended release to avail against all claims, known or unknown, present or future. *Stapleton v. Havemeyer*, (1947) 14 I.L.R. 62 (C.S.).

In no case will settlement entered into by person of age of majority be voided merely because he suffers harm thereby. Where, however, such release has been effected by tutor to minor without approval of tutorship council, contrary rule prevails (Art. 212 C.C.Q.).

REPRESENTATIONS AND WARRANTIES

General. Articles 2408 to 2413 C.C.Q. dealing with both nature and effect of representations and warranties are applicable to all contracts of insurance.

Effect of Misrepresentation. Subject to the provisions on statement of age and risk, any misrepresentation or concealment of relevant facts by policyholder or insured nullifies contract, at request of insurer, regardless of whether loss actually sustained is or is not connected to facts misrepresented or concealed (Art. 2410 C.C.Q.). Art. 2403 C.C.Q. dealing with content of contract and which precludes insurer from invoking conditions or representations not written in contract once it has been validly formed, does not apply to misrepresentations of insured. *Bilodeau v. La Souveraine, Compagnie d'assurances générales*, [1995] R.J.Q. 1065 (C.S.). In damage insurance, unless bad faith of applicant is established, if material fact has been misrepresented insurer will nevertheless remain liable in proportion that premium collected bears to that which should have been collected unless the insurer proves further that it would not have covered risk had it known facts. Art. 2411 C.C.Q.; *Peron v. La Réunion européenne*, [1996] R.R.A. 774 (C.S.) (appeal allowed in part on other grounds, [2000] R.R.A. 626 (C.A.)); *Westmount Security Ltd. V. Cie d'ass. Jevco*, [2003] R.R.A. 88; J.E. 2003-491 (C.A.). Standard against which materiality of misrepresentation or omission is evaluated is that of "reasonable insurer's" Art. 2408 C.C.Q. Insurer may make proof of its own practices and policies as to acceptance of risks but evidence

must be made that another insurer would have reacted in the same way and thirdly that the practice of these insurers is reasonable. *Wawanesa v. G.M.A.C. Location*, 2005 QCCA 197; and *Bergeron v. Lloyd's Non-Marine Underwriters*, 2005 QCCA 194. Expert evidence as to the reasonability of the practices of insurers is not mandatory since it is mostly a question of facts rather than of science. *C.G.U. Compagnie d'assurances du Canada v. Paul*, 2005 QCCA 315.

Representations. Policyholder, and insured if insurer so requires, has obligation to represent all facts known to him which are likely to materially influence reasonable insurer in setting of premium and appraisal of risk or decision to cover it (Art. 2408 C.C.Q.); *Cie d'ass.-vie Transamerica v. Nourcy*, [1999] R.R.A. 244 (C.A.) (motion for leave to appeal to Supreme Court dismissed, March 23, 2000, (27335)). However the duty of the insured may be lessened by specific questions; those questions may lead the insured to believe that the insurer is not interested by other facts and, in light of the insured knowledge of insurance and related matters, a tribunal can conclude that he met the test of a "normally provident insured." Art. 2409 C.C.Q.; *Wawanesa v. G.M.A.C. Location*, 2005 QCCA 197; and *Bergeron v. Lloyd's Non-Marine Underwriters*, 2005 QCCA 194.

Obligation is deemed met if representations are such as a normally "provident insured" would make, if facts are substantially as represented and if there is no material concealment (Art. 2409 C.C.Q.). There is no obligation to represent facts which are known to insurer or which by reason of their notoriety it is presumed to know, except in answer to inquiries (Art. 2408 C.C.Q.). Insurer has a duty to inform itself about the risks of a particular industry which it insures, see *Canadian Johns-Manville v. Canadian Indem.*, [1990] 2 S.C.R. 549, and even those of a particular insured for whom insurance is required by statute or regulation for benefit of third parties. See *Coronation Ins. v. Taku Air Transport Ltd.*, [1991] 3 S.C.R. 622.

Insured is presumed to have represented that he complied with the law. *Madill v. Lirette*, [1987] R.J.Q. 993 (C.A.).

Warranties. No conditions or representations may be invoked by insurer unless they are written in contract (Art. 2403 C.C.Q.). Changes to contract concluded by parties are evidenced by riders attached to policy; where such rider purports to reduce insurer's liability or to increase insured's obligations, other than an increased premium, it is without effect unless policyholder consents in writing (Art. 2405 par. 1 and 2 C.C.Q.). If change is made upon renewal, insurer shall indicate it clearly to insured in document separate from rider. Change is presumed to have been accepted by insured

thirty days after receipt (Art. 2405 par. 3 C.C.Q.). However, rider reintegrating warranty into policy to correct previous omission will be valid when insured's knowledge of insurer's requirements is proven. *Madill v. Importations Leroy Inc.*, [1990] R.J.Q. 2378 (C.A.). Warranty in rider must be expressly and restrictively stated, otherwise it is interpreted against insurer. (Art. 1432 C.C.Q.). *L'Équitable, Compagnie d'assurances Générales v. Entreprises Éramelle Inc.*, [1995] R.R.A. 358 (C.S.) (settled out of court 500-09-000429-951, July 9, 1997 and 500-09-000423-954, August 19, 1997).

Breach of warranty will suspend coverage, but only if it is such as to aggravate risk and only until insurer's acceptance or until breach has been remedied (Art. 2412 C.C.Q.). Court of Appeal has decided that non-fulfillment of warranty by insured suspends coverage only with respect to risk affected by warranty, *Auberge Rollande St.-Pierre, Inc. v. Canadian Gen. Assur. Co.*, [1994] R.J.Q. 1213 (C.A.) (abandonment of motion for leave to appeal to Supreme Court, October 12, 1994 (24225)); *Lloyd's v. Paramsothy*, 2007 QCCA 239, and that non-fulfillment of warranty must be the cause of the loss. *Gagnon v. Oppenheim*, [2001] R.R.A. 705 (C.S.). In *Florent & Gilbert Tremblay, Inc. v. Oppenheim, C.A.*, [2004] R.R.A. 161 (C.S.), it was decided that the insurer has no obligation to establish that the fulfillment of the warranty would have prevented the loss. However, warranty must have been included in application or, if not, clearly indicated in separate document to insured at time of issuance of policy. Otherwise, it may be considered as inconsistency between application and policy and therefore not forming part of contract. (Art. 2400 C.C.Q.); *Robitaille v. Madill*, [1990] 1 S.C.R. 985 and *Madill v. Importations Leroy Inc.*, [1990] R.J.Q. 2378 (C.A.); *Groupe Commerce, compagnie d'assurances v. Service d'entretien Ribo*, [1992] R.R.A. 959 (C.A.) (motion for leave to appeal to Supreme Court dismissed, March 4, 1993 (23242)); *J.A. Martin & Fils v. Hercules Auto Parts*, [1996] R.R.A. 332 (C.A.); *Lumbermens Mutual Casualty v. Serres Magog Ltée*, (AZ-02019589); R.E.J.B. 2002-31733.

SERVICE OF PROCESS

Upon Foreign Insurers. Such insurers may not do business in Québec without having obtained license from A.M.F. (Ss. 201 and 206 I.A.). In order to obtain such license, company must comply with the requirements of A.M.F. (S. 205 I.A.). It must, inter alia, maintain head office in province (S. 205 (d) I.A.), in which case service is made at that office (Art. 130 C.C.P.), or confer power of attorney on "chief representative" in province, which representative shall be served with all proceedings addressed to corporation (S. 207 I.A.).

Any agreement to contrary notwithstanding, action based on contract of insurance and taken against insurer may be instituted before court of domicile of insured or, in property insurance case, before court of place where loss occurred. (Art. 69 C.C.P.).

SUBROGATION

Damage Insurance. In every case where insurer pays indemnity under contract of damage insurance, it is legally subrogated, in tort as well as in contract, *Société Nationale d'Assurances v. Adiro Construction Ltée*, [1989] R.J.Q. 1803 (C.A.) to extent of that payment in all rights of insured against third parties who are responsible for loss, except where those persons form part of household of insured. This latter exception has been broadly interpreted. Temporary babysitter, *Cie d'ass. Général Accident v. Legault*, [1986] R.J.Q. 311 (C.S.), and neighbor who voluntarily repaired insured's piping, *Gagné v. Groupe La Laurentienne*, [1990] R.R.A. 746 (C.A.) (motion for leave to appeal to Supreme Court dismissed, January 17, 1991 (22105)), have been considered part of the insured's household. Application of exception will depend on particular circumstances of each case. *Cie d'ass. gén. Dominion du Canada v. Chabot*, [1999] R.R.A. 250 (C.A.); *Zurich Canada, Compagnie d'indemnité v. Société Mutuelle d'assurances générales du Saguenay*, [2001] R.R.A. 924 (C.S.). In *Compagnie d'assurances Missisquoi v. Duquette*, [1996] R.J.Q. 1479 (C.A.) (motion for leave to appeal to Supreme Court dismissed, December 5, 1996 (25454)), Court of Appeal stated that a person is part of insured's household only if he is member of immediate family or is employee performing recurrent household task, according to specific schedule and for indefinite term. See also *Groupe Commerce Compagnie d'assurances v. Tardif*, [1994] R.R.A. 314 (C.S.). However, Court of Appeal has found exception to include, as general rule, grandparents, descendants, spouses and collateral relations of first degree; these persons do not necessarily live in insured premises and law does not limit exception to dwelling of insured. (e.g. may extend to garage). *Martel v. Martel*, [1999] R.R.A. 258 (C.A.); *Wawanesa v. Royal SunAlliance*, J.E. 2003-383 (C.A.). However, a corporation belonging to the insured and which is located in insured's house is not part of the household of the insured. *La Capitale v. Groupe Commerce*, [2003] R.R.A. 1132 (C.A.) (Motion for leave to appeal to Supreme Court dismissed, February 19, 2004 (30058)); *Groupe Commerce v. Compagnie d'assurances Missisquoi* [2004] R.R.A. 1075 (C.A.). Furthermore, article 2501 C.C.Q. does not allow insurer to exercise subrogation rights against liability insurer of persons who form part of insured's household. *Allstate, cie d'ass. v. Cie d'ass. Général Accident*, [2004] R.J.Q. 10 (C.A.); *Zurich Canada, Compagnie*



d'indemnité v. Société Mutuelle d'assurances générales du Saguenay, [2001] R.R.A. 924 (C.S.). But other than in that situation insurer may exercise its subrogation rights directly against the liability insurer of the author of the fault. *C.G.U. Compagnie d'assurances v. Wawanesa*, 2005 QCCA 320. In builders risk insurance policies, subcontractors are included as unnamed coinsured. *Axa Assurances inc v. Valko Electrique inc*, [2008] R.R.A. 41 (C.A.). Subrogation cannot operate against subcontractors because the objective of builders risk insurance is to avoid that parties of a same building site sue each other in order to allow a fast rebuilding. *Optimum, société d'assurances Inc. v. Plomberie Raymond Lemelin Inc.*, 2009 QCCA 416.

Insurer may be released from its obligation towards insured in whole or in part where by reason of latter's act it cannot be so subrogated (Art. 2474 C.C.Q.); *Rassemblement des employés techniciens ambulanciers du Québec métropolitain (RETAQM) (Confédération des syndicats nationaux) v. Royal & SunAlliance, compagnie d'assurance*, 2008 QCCA 885.

In *Trepanier v. Plamondon*, [1985] C.A. 242, Court of Appeal held that subrogation is legal and automatic. Therefore, no action can be taken in insured's name once

indemnity has been paid. Third party remains responsible for all damages caused by his fault (Art. 1608 C.C.Q.). He is therefore answerable to victim's insurer, which must take or continue action in its own name, for indemnity paid to insured and to victim for part of damages not indemnified by victim's insurer. Rights of victim for whatever remains due may be enforced in preference to insurer (Arts. 1657-1658 par. 1 C.C.Q.). In an action by insured against insurer, if latter refuses to pay indemnity, it can implead the third party who is potentially responsible for the damages. Art. 216 C.C.P. *Kingsway General insurance Co. v Duvernay Plomberie et Chauffage Inc.*, 2009 QCCA 926.

See also "NO-FAULT, Subrogation."

VOIDABLE INSURANCE CONTRACTS

Funeral expense insurance contracts and "tontine" contracts, whereby group of persons contract to pool capital and agree that amount will be carried forward, at each member's death, to survivors of group, are prohibited by law. Nullity of such contracts may only be invoked by persons having paid premiums or installments in respect of them, or by Autorité des Marchés Financiers acting on their behalf (Art. 2442 C.C.Q.).

