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Newsletter

Insurance Law

September 2017

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The impact of destruction of evidence on the outcome of a case

What is the viability of a subrogated claim which relies solely on evidence that was destroyed after the loss? Can the defendant oppose an exception to dismiss based on the impossibility to examine the evidence? The destruction of evidence, or spoliation, can cause headaches to insurers. What are the real implications?

The applicable rule: negative inference

It is imperative to specify that the destruction of evidence must not be confused with the lack of demand letter or notice of defect[1], which also constitute important issues, albeit not discussed herein.

Regarding the destruction of evidence, in his reasons for judgment, Justice Rothman, J.C.A., expressed the rules that apply when it is not possible to examine the object in the context of an action in damages. As such, the highest court of the province highlights that it is more a matter of evidence: in the absence of a rule depriving the party who spoiled the evidence from its rights, spoliation impacts the weight to give to the evidence adduced[2].

Despite an *obiter* by the Superior Court which suggests that dismissing an action could sanction spoliation, in the presence of abuse of procedure[3], a landmark 2011 ruling has stated that spoliation alone had not yet led to the dismissal of an action on its merits. It would rather lead to a negative inference against the party who destroyed the evidence[4]. In concrete terms, this negative inference is a simple presumption (a presumption that may be rebutted by proof to the contrary) that the destroyed evidence was unfavourable to the party that had it in its possession and failed to fulfil its obligation to preserve it[5].

Interesting developments can be expected, based upon reading article 20 C.c.p., which entered into force on January 1, 2016. This article explicitly provides for the parties' obligation to preserve evidence relevant to the case. Although the Minister of Justice wrote that she believes this article restates the anterior implicit rules[6], a recent decision by the Superior Court suggests that the reasoning which prevailed under the previous code does not necessarily constitute the sanction under article 20 C.c.p. However, Justice Hamilton, j.c.s., opines that negative inference against the party who destroyed the evidence should, in principle, remain the rule[7].

Case law example

Another recent judgement applied the rule according to which the dismissal of an action cannot, in principle, be the punitive sanction for spoliation alone.

In *Promutuel l'Outaouais, société mutuelle d'assurances générales* v. *Artic Cat Sales Inc.*[8], the plaintiff sued the dealer and the manufacturer of an ATV following an accident sustained by two insureds. The accident was allegedly attributable to the blockage of the drive belt which would have caused the wheels of the ATV to stop.

In its application for dismissal based upon article 51 C.P.C., the manufacturer alleged several grounds for the dismissal of the action, including spoliation of transmission parts of the ATV at issue. The legal representatives of Arctic Cat alleged to have seen, upon inspecting the ATV, that a transmission part had been removed and replaced by a damaged part after the accident. Justice Suzanne Tessier, j.c.s., after referring to the decisions previously cited, wrote that she believed spoliation alone was not a sufficient ground to justify the dismissal of the action[9], thus confirming the previous interpretation of the courts.

Conclusion

In light of the above, insurers must be aware of the possible sanction of spoliation: do not expect to have a case dismissed solely because the plaintiff party has thrown away the evidence; likewise, your subrogated claim is not automatically lost in similar circumstances. However, the insurer has to pay particular attention to its investigation in order to collect every element of proof that could help rebut

the negative inference applicable to a situation where the insured or a representative has disposed of a relevant piece of evidence.

1. Despite the fact that jurisprudence on the subject is *"usually inconsistent"* (Jean-Louis BAUDOUIN, Pierre-Gabriel JOBIN and Nathalie VÉZINA, *Les obligations*, 7th ed., Cowansville, Éditions Yvon Blais, 2013, pp. 807-808, our translation), note that the creditor of the obligation to repair poor workmanship (*Genest* v. *Rénoconstruction SBC inc.*, 2017 QCCS 894, par. 137; *Desrochers* v. *Harrison*, 2016 QCCQ 1639, par. 27-28) exposes himself to the risk of seeing his action rejected if he does not conform to these rules, in the absence of a case of exemption.

   The same applies in the matter of latent defects (*Quintas* v. *Gravel*, [1993] R.D.I. 175, par. 11 (C.A.); *Caron* v. *Centre Routier inc.*, [1990] R.J.Q. 75, p. 11 (C.A.)), where the requirement is doubled with a prior notice serving a different purpose, which is to allow the seller to evaluate damages (*Claude Joyal inc.* v. *CNH Canada Ltd.*, 2014 QCCA 588, par. 68-71, where the Court of Appeal specifies the necessity of an "actual injury"; *Immeubles de l'Estuaire phase III inc.* v. *Syndicat des copropriétaires de l'Estuaire Condo phase III*, 2006 QCCA 781, par. 157-164) (Future newsletters cover these rules).
2. *Société nationale d'assurances* v. *Adiro construction ltée*, [1989] R.J.Q. 1803, p. 5 (C.A.); See also *Nergiflex inc.* v. *Sécurité (La), assurances générales inc.*, 2010 QCCA 1868, par. 5; *Intact Assurances* v. *Alpine Shredders Ltd.*, 2015 QCCS 4455, par. 27; *Via Rail Canada inc.* v. *Canadian Rail Track Materials Inc.*, 2015 QCCS 5405, par. 27-30.
3. *Centre maraîcher Eugène Guinois Jr inc.* v. *Semence Stokes ltée*, 2007 QCCS 2451, par. 400-405 (See also paragraph 81 appealed, where the Court references a case where a party who destroys evidence after a demand of disclosure of proof by the other party, which could become a case of abuse: *Centre maraîcher Eugène Guinois Jr inc.* v. *Semences Stokes ltée*, 2009 QCCA 2313); this *obiter* has been cited with approval, but not applied, in *Mag Energy Solutions inc.* v. *Falconer Cloutier*, 2016 QCCS 2830, footnote 14).
4. *Jacques* v. *Ultramar ltée*, 2011 QCCS 6020, par. 26. It is interesting to note that, as highlighted by an author, the case law has however accepted this defence in the absence of a notice of defect: Émilie GERMAIN-VILLENEUVE, "La notion de 'destruction de la preuve' en droit québécois et les développements récents sur la nécessité de l'avis d'engagement de responsabilité" in *L'assurance de dommages*, Collection Blais, vol. 12, Cowansville, Éditions Yvon Blais, 2012.
5. *Stagias* v. *Mathieu*, 2016 QCCS 3797, par. 159; *Fédération des producteurs acéricoles du Québec* v. *Régie des marchés agricoles et alimentaires du Québec*, 2016 QCCS 5409, par. 123-126; *Zegil* v. *Compagnie d'assurances Missisquoi*, 2012 QCCS 3788, par. 134.
6. Comments of Minister of Justice, art. 20 C.p.c.
7. *Mag Energy Solutions inc.* v. *Falconer Cloutier*, *supra* note 3, par. 62-63.
8. 2016 QCCS 5269.
9. *Ibid*, par. 23.

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