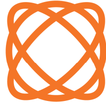

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Editor's Comments

I am pleased to present to you the third edition of our insurance law newsletter.

In this edition you will find an article that addresses the indemnity for lost wages following a decision of the Court of Appeal that was rendered earlier this year.

This edition also includes an analysis of the nature and scope of the litigation privilege with regards to the information gathered and collected by a claims adjuster.

Lastly, I am pleased to announce that Mtre Catherine Rayle-Doiron and Mtre Antoine Melançon, both members of our insurance team for the last 10 years, have been named partners. I invite you to consult their professional background on our web site at lrmm.com.

I wish you all a great summer!

Mtre Paul A. Melançon

Compensation for lost wages: gross income vs. net income

Mtre Pierre-Étienne Lucier

On January 17, 2012, the Court of Appeal rendered a unanimous decision in the case of *Rosenstein* v. *Kanavaros* (2012 QCCA 128) covering, particularly, compensation for lost wages.

The Court had to rule on an issue of interest to any practitioner in the field of compensation for lost wages, an issue often raised in cases of disability due to injury. More specifically, the Court of Appeal had to determine if the compensation for lost wages claimed by the victim, both past and future, should be calculated on the basis of gross income or net income. Should the amounts that would have been collected by tax authorities, had it not been for the accident, be deducted from the amount awarded?

The question was raised in very particular factual context. At the time of the facts in issue, the plaintiff, Ms. Kanavaros, was a teacher in a French immersion class at Roslyn elementary school in Westmount. Ms. Kanavaros taught the son of the defendants Hagop Artinian and Kathryn Rosenstein. In a separate action, the latter were suing Ms. Kanavaros as well as the head of Roslyn school and the school board in question, blaming the teacher, most notably, for having humiliated and intimidated their son in front of the entire class. On March 25, 2008, the morning of the scheduled trial of this separate action, the parties settled the dispute amicably through an agreement that was to remain confidential.

However, following the conclusion of this confidential agreement, Mr. Artinian and Ms. Rosenstein made statements to the media concerning the settlement reached

with Ms. Kanavaros. These statements were repeated by numerous medias, which led to a claim for damages for defamation instituted by the plaintiff, Ms. Kanavaros, against her student's parents.

Ms. Kanavaros alleged particularly that the defamatory statements of Ms. Rosenstein and Mr. Artinian drove her to a major depression, preventing her from performing her job, hence her claim for lost wages.

Rendering a judgement in this case on July 30, 2010, (*Kanavaros* v. *Artinian*, 2010 QCCS 3398), the Honourable Danielle Richer of the Superior Court sided with the plaintiff, Ms. Kanavaros, with regards to the content of the defamatory remarks made by the parents, and awarded the plaintiff compensation for lost wages. With regards to the amount to be awarded, the question arose whether only the plaintiff's net income should be included in the calculation of the compensation.

Based on a classic case of the Supreme Court of Canada on this question, *R.* v. *Jennings et al.*, [1966] S.C.R. 532, and on a decision from the Court of Appeal rendered in 1986 (*Québec-Téléphone* v. *Lebrun et al.*, AZ-86011271), judge Richer concluded:

> *"[227] This case law still being current, the court grants the plaintiff the replacement of her gross income without reduction for tax impact. The court is not to retain for the tax authorities when the law does not provide for it."*
>
> *[our translation]*

Note that in this case, the compensation claimed concerned, principally, wages lost prior to the trial, but also loss of future wages.

The parents brought the case on appeal and the Court of Appeal rendered a decision forthwith on January 17, 2012. The appeal was dismissed and the findings of the judge of first instance, notably on the question of compensation for lost wages, were maintained. On this issue, the Court's reasoning was limited to a short paragraph:

> *"[10] She was also right in granting compen–sation on the basis of income before tax as opposed to income after tax, whether for past or future income, the jurisprudence on this issue being constant (Cunninham v. Wheeler, [1994] 1 R.C.S. 359; Watkins v. Olafson, [1989] 2 R.C.S. 750; R. v. Jennings [1966] R.C.S. 532)."*

The Court of Appeal relied notably on a Common Law decision rendered in the case of *R.* v. *Jennings* by the Supreme Court in 1966[1]. In this case, the Supreme Court decided not to take into account the tax when calculating the compensation awarded for lost wages. The Supreme Court explained in these terms:

> *"To assess another uncertainty – the incidence of income tax over the balance of the working life of a plaintiff – and then deduct the figure reached from an award is, in my opinion, an undue preference for the case of the defendant or his insurance company. The plaintiff has been deprived of his capacity to earn income. It is the value of that capital asset which has to be assessed. In making that determination it is proper and necessary to estimate the future income earning capacity of the plaintiff, that is, his ability to produce dollar income, if he had not been injured. This estimate must be made in relation to his net income, account being taken of expenditures necessary to earn the income. But income tax is not an element of cost in earning income. It is a disposition of a portion of the earned income required by law. Consequently, the fact that the plaintiff would have been subject to tax on future income, had he been able to earn it, and that he is not required to pay tax upon the award of damages for his loss of capacity to earn income does not mean that he is over-compensated if the award is not reduced by an amount equivalent to the tax. It merely reflects the fact that the state has not elected to demand payment of tax upon that kind of a receipt of money. It is not open to the defendant to complain about this consequence of tax policy and the courts should not transfer this benefit to the defendant or his insurance company."*

This decision has been long followed by the Quebec courts.

Lastly, however, the Superior Court showed a certain openness to consider tax implications (*Ménard* v. *Archambault*, 2010 QCCS 264; *Clément* v. *Painter*, 2010 QCCS 4631; *Mailloux* v. *Angeli*, 2010 QCCS 1967) in agreement with the general principles of civil law according to which the victim must not enrich itself at the expense of the debtor.

This openness by the courts relied notably on the opinion expressed by the author Daniel Gardner. With regard to previous lost wages, between the time of termination of employment and the date of the trial, Mr. Gardner explained as follows:

> *814 - Opinion. Starting from the moment when the Supreme Court of Canada never addressed the issue of the tax implications relative to lost wages between the date of the accident and the trial, the Quebec courts are free to adopt a position that respects the advantages of the rules of the Civil Code. However, in this matter, we must inevitably return to article 1611 C.c.Q. that foresees that "the damages due to the creditor compensate for the amount of the loss he has sustained". The loss actually suffered by a victim of a personal injury is not made up from*

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his gross salary, but rather by an amount that would have been given to him if the accident had not occurred. It is thus on this basis, very easy to calculate because the tax implications are known at the time of the trial, that the victim must be compensated. The tendency of the recent jurisprudence that recognizes the reality, must therefore be approved."[2]

[our translation]

For example, in the case of *Mailloux* v. *Angeli*, rendered on May 17, 2010 by the Honourable Daniel W. Payette, the latter concludes:

"[91] In agreement with author Gardner, the Court is of the view that the loss suffered by the victim in that capacity is made up of the amount which he would have received had it not been for the fault. This amount is the net amount.

[92] In effect, Mailloux would not have had use of the sums payable as tax on the revenue. Moreover, the amount of the compensation under the present judgement is not taxable.

[93] It follows that granting him a sum taking into account a non-existing tax would have the effect of compensating him for a loss that he did not suffer nor will suffer."

[our translation]

With regards to future losses, Daniel Gardner states, in the above-cited book, that the omission to take into account tax implications can have the effect, in some situations, of over-compensating or under-compensating the victim. He concludes thus that tax implications must be taken into account when awarding compensation.

In the case of *Mailloux* v. *Angeli*, Justice Payette takes into account tax implications for past lost wages as well as loss of future wages (see the decision adopting the opposite position: *Hudon* c. *Cloutier*, 2010 QCCS 4612).

Thus, considering the floating jurisprudence observed and the openness expressed by various judges of the Superior Court to take into account tax implications, notably with regards to past wages, it would have been preferable if the Court of Appeal, for the purpose of a better comprehension of the applicable principles, had developed its analysis.

While the conclusion in *Rosenstein* v. *Kanavaros* seems to definitively close the debate, note that an application for leave to appeal to the Supreme Court of Canada was filed.

1. [1966] R.C.S. 532.
2. Daniel Gardner, Le Préjudice Corporel, 3rd ed., Cowansville, Éditions Yvon Blais, 2009, page 750.

Litigation Privilege and Claims Adjusters

Mtre Natasha Trodler-Lainé

As a general rule, the claims adjuster's report is confidential. However, there are exceptions to this rule in certain circumstances.

General Principles

The claims adjuster is obliged to respect the confidentiality of the information gathered[1] during the investigation (article 9 of the *Charter of human rights and freedoms*[2], articles 22 and 23 of the *Code of ethics of claims adjusters*[3] and article 8 of the *Regulation respecting standards of conduct of agent licence holders carrying on a private security activity*[4]).

Furthermore, the claims adjuster's report is generally recognised as being a document prepared for litigation and is thus protected from forced communication to an opposing side. This principle was established by the Court of Appeal in *La Prévoyance* c. *Construction du Fleuve Limitée*[5].

However, there are exceptions to the protection that is given to claims adjuster's reports, such as:

1. **The facts observed or photographs taken by the claims adjuster:** Whenever the claims adjuster is called as a witness he might have to testify on what he saw. He might even have to divulge the photographs taken[6].
2. **Waiver of privilege:** In some cases there can be an implicit waiver of the right to confidentiality of the report of the claims adjuster. For example, when a party produces the report in question[7], when the attorney of the insurer examines the claims adjuster on the contents of the report, when a party discloses favourable elements from the report or alleges the existence of the content of the report in motions and procedures.
3. **Author of the declaration:** When a person makes a declaration and requests disclosure of it, this request will be granted.

In light of the above mentioned principles, we invite you to consider the following two recent decisions:

L'Union canadienne compagnie d'assurances c. St-Pierre[8]

In this Appellate Court decision, the plaintiffs, Mr. St-Pierre and his company 9118-0471 Quebec inc., sued their insurer, L'Union Canadienne Compagnie d'assurance (hereafter "L'Union"), to be indemnified following a fire that occurred on the 29th of January, 2010. The plaintiffs also claimed punitive damages, as they alleged that L'Union took too long to inform them of their position with regards to coverage. During that time, L'Union continued to receive payment of the applicable premiums. In fact, invoking false statements and suspecting the commission of an intentional act, L'Union denied

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coverage by a letter addressed to the plaintiffs eight (8) months after the fire. Additionally, the insurer invoked the annulment *ab initio* of the insurance policy.

During the examinations of two representatives of L'Union, the plaintiffs demanded communication of a copy of the report from the Sebec Investigation Agency and a copy of the report from the claims adjuster (both having been mandated by L'Union). The attorney for L'Union objected to the disclosure of the documents arguing that they are confidential.

This debate was submitted to Justice André Prévost of the Superior Court. He decided in favour of the plaintiffs because, in his opinion, the reason behind the request for disclosure was to ascertain the point in time where the facts became known to L'Union and thus shed light on the circumstances surrounding the long delay before making a decision on coverage. Unsatisfied of the judgement, L'Union appealed.

The appellate Court analysed in detail the difference between "professional secrecy" and "litigation privilege". In sum:

- **"Professional secrecy":** The obligation to be silent and to respect confidentiality must originate from legislation. It must also result from a relationship of help between the parties. In the Court's opinion, only the professions governed by the Professional Code[9] meet the criteria and can benefit from "professional secrecy". A claims adjuster, although held to secrecy by some laws (as seen here above), is not held to "Professional secrecy" as he is not a member of a professional order and does not act in a relationship of help when he is gathering information.

- **"Litigation Privilege":** This privilege is aimed at giving the parties the chance to prepare their case without any risks of interference and without the fear that their documents will be requested. The privilege makes a document confidential if it was primarily created for the purpose of litigation. It is in this context that the report of the claims adjuster benefits from the right to confidentiality.

According to the Court of Appeal, the reports from claims adjusters of L'Union fulfilled all the criteria mentioned here above to benefit from the litigation privilege. And yet, the plaintiffs alleged that L'Union had implicitly waived the right to the privilege. This waiver would have taken place by the vague allegations in the motions and procedures. They also affirmed that there was renunciation during the examination of a witness and by the use of a certain exhibit, namely an email between employees of the claims and underwriting departments of L'Union related to the acceptance of the risk. Finally, they argued they had the right to receive the reports because of the "reprehensible" behaviour of L'Union.

The Court analysed each of their arguments and concluded that:

1. The fact that the allegations are vague is not enough to allow the Court to infer there was any waiver of a right.
2. The mere fact that the existence of a report was raised during a testimony or in an email, does not mean that there was a waiver of the confidentiality of its content.
3. There is no legal foundation for the argument that reprehensible behaviour can be punished by disclosure of otherwise confidential documents.

In sum, the Court reaffirmed the principle of confidentiality of the report of the claims adjuster because of litigation privilege. Further, the Court clarified that in order to conclude to a waiver of that privilege, the renunciation must be voluntary, clear and obvious. In other words, raising the existence of a report does not mean that one has given up on its confidentiality.

Giroux c. Chouinard[10]

In this case there was a fire in a home, which at the time, was occupied by tenants. Having received their insurance indemnity, the property owners sued the tenants for the non-insured portion of their damages. They claimed that the fire was caused by a cigarette butt belonging to the tenants. The defence of the latter relied on the existence of three possible causes for the fire, thus excluding their liability.

The dispute between the property owners and the tenants did not involve the property owner's insurer. However, the property owners wanted to get the reports from the claims adjuster of their insurance company to verify the declarations he took from the tenants. The tenants objected as they claimed the declarations were confidential, protected by litigation privilege. Furthermore, it was their own declarations, therefore they belonged to them.

The parties found themselves before justice Catherine La Rosa of the Superior Court to debate this objection. According to the judge, the reports were not prepared for litigation. The reports had been prepared for the insurance company in order to determine the indemnity to be paid to the property owners. The investigation was qualified by the judge as "research contemporaneous to an accident"[11].The judge highlighted the absence of any dispute between the property owners and their insurance company. Also, she insisted on the fact that the claim adjuster had made the property owners sign a "request for indemnity" where a cause for the fire was indicated. This information had to have come from somewhere, and it was probably from the tenant's declarations. The judge also brought up the right of the property owners to obtain the information as to the cause of the accident. Consequently, she ordered communication of the declarations gathered by the claims adjuster of the property owner's insurance company, authorised examinations of the claims adjusters and ordered communication of all photographs taken by the latter.

In light of the principles mentioned here above, this decision comes to a surprising result.

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Conclusion

Despite the decision in *Giroux* c. *Chouinard*[12], the claim adjuster's report continues to benefit from the protection afforded to it by the litigation privilege. However, one must be careful not to act in a manner that could eventually be interpreted as a waiver of the privilege and thus force disclosure of the report to a third party.

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1. *2752-9585 Québec Inc.* v. *Promutuel Haut St-Laurent*, A.E./P.C. 2005-3970, EYB 2005-89002 (C.S.).
2. R.S.Q., chapter C-12.
3. RRQ, c D-9.2, r 4.
4. RRQ, c S-3.5, r 3.
5. [1982] C.A. 532; *Ciment St-Laurent* v. *Barrette*, REJB 1997-01469 (C.A.).
6. *Société d'habitation du Québec* v. *Mercier*, EYB-2006-108294 (C.S.); *Oppenheim* v. *Équipement Fédéral Inc.*, REJB-2003-43893 (C.S.).
7. *Axa Assurances inc.* v. *Pageau*, 2009 QCCA 1494 (CanLII).
8. 2012 QCCA 433.
9. R.S.Q., chapter C-26.
10. 2011 QCCS 6801.
11. *Id.*, par. 31.
12. *Id.*

The content of this newsletter is intended to provide general comment only and should not be relied upon as legal advice.

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