



THE NOTION OF INTENTIONAL FAULT IN INSURANCE LAW AND THE INSURER'S OBLIGATION TO DEFEND

By: *Me Genevieve Forget*, lawyer

Liability insurance policies almost always systematically stipulate that the insurer will defend the insured party if they are subject to legal action. This means that your insurer will mandate a lawyer to defend you and will pay all costs related to defending your rights.

An important limitation to the obligation to defend is intentional fault. If the damage claim against the insured party is the result of his intentional fault the insurer would be justified in refusing to assume his defence. The question is, what constitutes intentional fault in insurance law?

This notion has been very strictly interpreted by the Court of Appeal on more than one occasion. An intentional fault must not only be committed deliberately but with full knowledge. The person committing the act must not only be aware of the possible consequences but must intend the consequences of his deliberate act.

Therefore the intent of the insured at the time the action was taken will be examined.

For example, the Court of Appeal ruled that a man who opened the gas line inside his apartment to commit suicide and then lit a cigarette that caused an explosion in the room did not commit an intentional act. It was proven that the man never intended to cause material damage to the building but only to end his life.

Recently in the matter of *Mathieu vs. Gagnon* (J.E. 2008-846), the Superior Court determined that the

insurer was wrong to refuse to defend their insured party in the case of a suit for damages for injuries caused to a third party in a hockey game. In fact it was not clear that the insured party deliberately injured the third party with his hockey stick.

The circumstances in which insurers can refuse to defend their insured clients are very limited. In closing, we want to remind you that in all situations that could affect your extracontractual liability, the first step is to contact your insurers. This allows them to start an inquiry immediately and thus provide you with the best possible defence.

ABSENTEEISM: CAN AN EMPLOYER DEMAND A MEDICAL CERTIFICATE AND LEARN THE DIAGNOSIS?

By: *Me Étienne Morin*, lawyer

Employers have an obligation to provide workers with a safe work environment. Therefore, in general an employer has the right to be informed about the health of their employees. However, this right does not include the right to be advised about the nature of the illness.

Short term absence

Illness is part of human nature. Therefore an employee who is absent from work for a few days due to his health condition is by right, presumed to be in good faith. It is only legal for an employer to ask an employee to justify his absence with a medical certificate if he has reasonable and sufficient motives; for example if an employee's absences occur regularly on Monday or Friday, or the day after legal holidays. As a general rule, jurisprudence seems to recognize reasonable grounds as employee behaviour that causes suspicion of bad faith, that is to say, the employee is not really absent for health reasons.

Long term absence

When the absence is long term, the regular work benefit the employer has the right to expect is affected. In this case the employee must provide a medical certificate that justifies his absence.

Does the medical certificate have to state the diagnosis?

If an employer wants to know the diagnosis of an employee's illness, the employer must have serious reasons to justify his request. The simple reason that the information would be practical or useful is not enough.

The answer must be essential for the business. For example, divulging a medical diagnosis might be necessary if an employer must accommodate an employee returning from a period of invalidity who will have future functional limitations.

In summary, as is often the case in labour law, the facts must be examined individually, on a case-by-case basis. Speak to your lawyer!

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NEWS FROM OUR FIRM

- Me Alexandre McCormack will now be working with our offices in Ville Mont-Royal.
- We are pleased to announce that Mme Annie-Claude Ménard, from Sainte-Agathe-des-Monts and M. Natale Scenci, of Montreal, are joining our firm this month as law students.
- Me Joanne Côté will teach a course on access to municipal documents at a training session for Quebec municipal directors on June 5th in Rimouski and June 12th in Gatineau. Me Joanne Côté is also an invited speaker at the Forum national sur les lacs in Sainte-Adèle on June 6th.
- Me Étienne Morin and Me Amélie Chouinard will speak at the Congrès annuel de l'Association des directeurs municipaux du Québec (ADMQ) on May 22nd. The topic will be recourse available for municipal administrators as per applicable laws and recent jurisprudence in labour laws. The congress will take place in Quebec City on May 21st, 22nd, and 23rd.
- Drawing of the Rotary Club April 21st, 2008
 - Automobile – M. Georges Labelle of Saint-Jérôme (sold by René Bédard)
 - 1 000 \$ - Mme Valérie Lagrange of Mirabel (sold by Me Marc D'Aoust)
 - 500 \$ - M. Claude Trudel of Saint-Jérôme (sold by Richard Trudel)
 - 500 \$ - Groupe Mily Pharmacie (sold during the evening's event)



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