Assurances

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THE BROKER AS PROFESSIONAL ADVISER TO THE ASSURED: THE NATURE OF THE ROLE OF INSURANCE BROKER

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Aller au sommaire du numéro

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Résumé de l'article

Cette étude ne se veut pas une thèse sur la responsabilité professionnelle des courtiers d'assurance. Son but est d'illustrer, à l'aide de cas déjà soumis aux tribunaux, l'étendue des obligations qu'il assume envers le client qui requiert ses services. Ces obligations résultent principalement de la confiance que le client place en son courtier et en son expertise. Le rôle du courtier sera critique dans l'analyse du risque et l'obtention de l'assurance adéquate pour les besoins de son client, y inclus la suggestion de garantie additionnelle, si nécessaire. Le courtier doit également informer son client des restrictions aux assurances disponibles, ainsi que de toute difficulté dans l'obtention de l'assurance requise. Il doit aussi vérifier l'assurance obtenue, faire corriger les erreurs ou signaler les divergences à son client. À l'expiration des contrats, le courtier pourra avoir une obligation de renouveler l'assurance, même en cas de silence de son client. Enfin, le courtier a un rôle à jouer dans la présentation d'une réclamation de son client à l'assureur.

Insurance broker's duties and responsibilities

Les deux articles qui suivent sont des extraits d'un séminaire organisé par la Faculté de droit de l'Université Laval. Ces deux textes, en langue anglaise, complètent bien, nous semble-t-il, les études antérieures que nous avons publiées en français dans cette Revue.

Me O'Donnell présente une vue générale du rôle du courtier et de l'expertise qu'il possède dans les différents champs reliés à sa compétence.

Me Nicholl étudie les responsabilités du courtier sous l'angle du mandat : celui qui lui est conféré par l'assureur et celui qui émane de l'assuré.

Ces deux études fort documentées au plan de la jurisprudence pourront aider à la fois ceux qui agissent à titre de courtier et ceux qui s'intéressent au rôle de cet intermédiaire.

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I – THE BROKER AS PROFESSIONAL ADVISER TO THE ASSURED : THE NATURE OF THE ROLE OF THE INSURANCE BROKER [1], by J. Vincent O'Donnell, Q.C. [2].

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[1] Allocution prononcée dans le cadre d'un séminaire organisé par la Faculté de droit de l'Université McGill, sous le thème *Le rôle du courtier : nouvelles tendances et responsabilités.*

[2] Me O'Donnell est avocat de l'étude Lavery, O'Brien. L'auteur remercie sa consoeur, Me Odette Jobin-Laberge, pour l'étroite collaboration qu'elle a apportée au plan de la recherche et de la rédaction.

également informer son client des restrictions aux assurances disponibles, ainsi que de toute difficulté dans l'obtention de l'assurance requise. Il doit aussi vérifier l'assurance obtenue, faire corriger les erreurs ou signaler les divergences à son client. À l'expiration des contrats, le courtier pourra avoir une obligation de renouveler l'assurance, même en cas de silence de son client. Enfin, le courtier a un rôle à jouer dans la présentation d'une réclamation de son client à l'assureur.

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Introduction

Fundamental to the determination of the role and of the responsibility of the broker is the identification of who his client is : his mandate may be from the insured, from the insurer or sometimes from both.

This is a subject which will be treated in depth by Mr. John Nicholl, when he speaks of the broker and the *Two-Hat Syndrome.*

The present text, which is intended to be a broad overview of the role of the insurance broker, concentrates on his duties and responsibilities when he is acting on behalf of the insured or the person who relies on his competence and expertise when seeking insurance.

The broker's duties and responsibilities are different when he represents solely the insurer as will appear from certain of the decisions which will be discussed in this paper. Where the broker is the agent of the insurer, his acts may bind the insurer and potentially give rise to a recourse against him by the insurer.

Unless there is indication to the contrary, it should be assumed that references to the client of the insurance broker in this text are references to the insured or the person seeking insurance.

This paper does not pretend to be a thesis on the responsibility of the insurance broker. The cases cited here have been collected as a sampling or illustration of the duties and responsibilities of the broker.

1. What the client expects from the broker – the reliance placed on the broker by the client

Although it may not be the last word on the subject, the decision of the Ontario Court of Appeal ten years ago in the matter of *Fine's Flowers Limited vs. the General Accident Ass. Co. of Canada, (1978) I.L.R. 1-937,* presents an important and influential statement of the obligation of the insurance broker in response to the expectations of his client ; the opinions in that case were written by Mr. Justice Estey and Madam Justice Wilson, then of the Ontario Court of Appeal and now both of the Supreme Court of Canada.

In the Fine's case, the insured, who owned and operated green houses in Ottawa, had given to his broker the broadest possible mandate : his instructions are described in the judgment variously as "to see that he was adequately covered by insurance" and again "he wanted everything covered" and left the rest up to the broker.

The broker furnished boiler and machinery insurance policy which did not include among the objects insured, the pumps which eventually failed causing the loss. Furthermore, the policy excluded liability for accidents occasioned by wear and tear. The evidence showed that the pump had failed due to ordinary wear.

The insurer had brought to the broker's attention this absence of coverage but the broker had not brought it to the attention of his client.

In addition to suing the insurer (against whom the action was dismissed), Fine had also sued his agent for having failed to advise him properly and for having failed to obtain the insurance which he required.

In defence, the broker attempted to show that the risk was not insurable and that no insurance could have been obtained against normal wear and tear. The Court rejected this argument on the grounds that the insured was unaware of this fact whereas the broker had known it for a number of years and had never brought it to the attention of his client.

Mr. Justice Estey stated that "it was the duty of the defendant agent to either procure coverage, or to draw to the attention of the plaintiff his failure or inability to do so and the consequent gap in co-

verage" (page 896). Having not lived up to that obligation, he had not fulfilled his duty to obtain adequate coverage (see also page 898).

As to Madam Justice Wilson, she observed that the insured "simply said he wanted everything covered" (page 898), which required the broker to inform himself about his client's business in order to assess the foreseeable risks and insure his client against them. Quoting from the earlier decision in *Lahey vs. Hartford Fire Insurance Company*, (1968) I.L.R. 219, she defines the duty of the broker as follows :

> "The solution lies in the intelligent insurance agent who inspects the risks when he insures them, knows what his insurer is providing, discovers the areas that may give rise to dispute and either arranges for the coverage or makes certain the purchaser is aware of the exclusion" (p. 900).

Madam Justice Wilson adds the comment that she does not think that this is too high a standard to impose upon an agent who knows that his client is relying upon him to see that he is protected against all foreseeable insurable risks.

In Quebec, the leading decision on the reliance placed by the insured on his broker is that of the Supreme Court of Canada in the matter of *Dionne vs. Therrien, (1978) 1 R.C.S. 884*, where the broker had said to Mr. Therrien « de ne pas s'inquiéter, qu'il était protégé », to which Mr. Therrien had replied : « J'ai confiance en vous » (page 886). This decision will be discussed in the third part of this text dealing with the obligation of the broker to inform the client.

In *Blackburn vs. Bossche, (1949) B.R. 697*, the broker had given an incorrect description of the risk to the insurer notwithstanding that the insured had given the broker the correct information and that the broker had even visited the premises. In submitting the risk to the insurer, the broker had not mentioned that the insured's merchandise was stored in a building separated from that in which the insured carried on his retail business. A fire occurred and the insurer refused to pay for the merchandise in the separate building.

The decision of the insurer not to cover was judged to be well founded. The Court of Appeal held that the absence of coverage resulted from the fault of the broker and that he must bear the loss entirely ; in the circumstances, the Court of Appeal refused to place

part of the blame on the insured for having failed to verify the policy which had been given to him.

Whether an insured has an obligation to verify the policy that is delivered to him has been the subject of contradictory judgments over the years although the differences in the judgments may be justified to some extent by differences in facts. The introduction of Article 2478 C.C. into the Insurance Chapter of the Civil Code requiring that difference between the application and the policy be brought to the attention of the insured, brings a new element to this long controverted question.

The decision in *Durocher vs. Gevry, (1961) B.R. 283*, concerns the case of a broker who, having been requested to obtain insurance for a racehorse, obtained the issue of a policy which excluded accidents happening on public racetracks unless the insured paid an additional premium for the additional coverage. Unfortunately, the broker had not read the policy and had not noticed the exclusion nor the possibility of offering this additional coverage. The negligence of the broker was all the more surprising in that his client had read the policy and had expressed to the broker his concern as to the apparent absence of racetrack coverage. Without reading the policy, the broker had simply relied on a verbal inquiry and assured his client that the risk was covered.

Noting that the Court should not be "too ready to condemn a professional man for a mere mistake in judgment", the Court of Appeal found that the broker's error went far beyond simple error in judgment. As to the argument that the insured had the same opportunity to read the policy as did the broker, the Court responded that while the insured was a businessman of somewhat limited education, the broker was a professional who could be expected to understand the interpretation of insurance policies (page 287). The Court of Appeal confirmed the judgment against the broker.

In the case of *Grunfeld vs. Konigsberg, (1961) B.R. 432*, the Quebec Court of Appeal again touched on the question of "error of judgment". The broker had obtained for his client, a trucking concern, insurance covering theft from a vehicle, which coverage was subject to the requirement that the vehicle be kept under lock and key. Asked by his client the meaning of that requirement, the broker

had replied that it would be sufficient that the rear portion of the truck containing the merchandise be kept locked at all times.

The vehicle was stolen while the rear part was locked but the key was in the ignition ; when the truck was found, it was empty and marks indicated that the doors to the rear of the truck had been broken open.

An insurance adjuster retained by the insurance company had told the insured that the loss was not covered ; relying on that affirmation, the client sued the broker without attempting to sue the insurer. The Court of Appeal dismissed the action against the broker, noting that the interpretation given by the broker was not unreasonable and indicating that the insured should have attempted to exercise his rights against the insurer.

In the case of *Wilkinson vs. Lagrandeur, (1971) C.A. 198*, the broker Wilkinson, who had handled the insurance business of his client who was engaged in the business of delivering gasoline, had gone to his client and told him of an accident in which a person delivering oil had caused a fire resulting in considerable damage. The broker suggested to the client that he should have a policy covering his liability in the case of a similar accident. The client agreed and the broker obtained the issue of the policy.

An accident occurred while an employee of the client was delivering gasoline.

Following the accident, the broker assured his client that he was covered by the policy ; however, when the policy was examined, it was seen that the first paragraph of the exclusions provided that the policy did not apply to accidents occurring on premises not belonging to the assured or rented or controlled by the assured.

The broker was held liable for having failed to obtain the specific protection which had been requested by his client.

In this case, the broker had raised the defence that he was not the agent of the insured but only the agent of the insurer ; on the facts, this issue was decided against the broker.

In the Ontario decision of *Carousel Travel Inc. vs. Livio Ricci Broker Ltd., (1987) I.L.R. 1-2156*, the insured, who was engaged in the travel business, had a falling out with its previous broker and

asked its new broker, Ricci, to "take over the account". These rather broad instructions led to a dispute as to the actual extent of the mandate given to the broker, in the following circumstances. The insured regularly organized travel packages to Jamaica and the liability policy obtained by the new broker did not cover the responsibility for accidents occurring outside of Canada and the United States and did not contain non-owned automobile coverage ; the insured regularly used leased automobiles when he was out of the country.

210 The Court held that the broker had not made a sufficient study of the needs of his client and had been negligent in his analysis of the risk. The Court found that where a client gives a general mandate to an insurance broker to provide insurance, he is entitled to rely on the broker to provide adequate insurance. In this case, the Court also held that the broker's client is entitled to rely on the broker's expertise so that the failure of the policyholder to read the policy is not a defence available to the broker.

While the decisions discussed above, in the present section of this text, have been offered within the context of the client's expectations from the broker, most of them could also be considered under one or other of the topics which follow, as the expectations of the client are more often than not breached by the negligence of the broker.

2. Investigating the needs of the client – Analysis of the risk

In the Alberta decision of *Bar-Don Holdings Ltd. vs. Reed Stenhouse Limited, (1983) I.L.R. 1-1637*, the Court held that a broker, in the absence of specific instructions from his client, has a duty to inform himself as to the nature of the insured's activities in order to be in a position to properly assess the risk.

The client had approached the broker to discuss his insurance requirements for a mobile home business. The insurance was obtained but when a loss occurred involving one of the mobile homes situated at a location different from that named in the policy, the insurer refused to pay and the insured sued both the insurer and the broker.

The Court dismissed the action against the insurer but condemned the broker for having failed in his duty to inform himself about the nature of his client's business in order to assess foreseeable

risks ; the possibility that a mobile home might be moved was considered to be foreseeable.

The case of *Gerber vs. Eagle Star Insurance Co.* and *Parsons, Brown & Company, (1981) I.L.R. 1-1442*, presents an unusual set of facts. The plaintiff Gerber leased his aircraft to Fox Aviation. The lease of the aircraft had been amended to permit Fox to sublet the aircraft.

Fox approached Hayes, an employee of the brokerage firm Parsons, Brown & Company to insure the aircraft which Fox had leased. The evidence as to what took place in that conversation appears unsatisfactory ; however, the Court, after noting that the agent was negligent in relying of a few "spotty or sketchy" notes instead of obtaining a complete application for insurance, concluded that the agent was at fault for not having examined the lease which was the basis of Fox's request for insurance.

The policy as issued excluded coverage if the aircraft was rented to others and the aircraft disappeared while it was so rented. When the insurer denied coverage, the owner, Gerber, sued not only the lessee Fox and the insurer but also the broker (with whom the owner had had no direct relationship).

The Court based its judgment on the negligence of the agent. Relying on the principles enunciated in Hedley Byrne Co. Ltd. vs. Heller Partners Ltd. and the line of cases which followed that decision, the Court decided that the agent owed a duty to the owner of the aircraft, a *loss payee* under the policy, even in the absence of direct contractual relationship between the agent and the owner.

The effect of Article 2488 C.C.

In Quebec, although the obligation to represent all material facts to the insurer is as strong as elsewhere in Canada, the introduction into the Civil Code articles on Insurance of Article 2488 has lightened the sanction in case of innocent misrepresentation ; if the misrepresentation is one which would have affected only the amount of the premium, then the insurer must pay the insured in proportion that the premium collected bears to the premium that should have been collected if the risk had been properly represented.

This rule in turn has its effect on the responsibility of brokers. If the error in representing the risk is that of the broker, so that the insured recovers only a portion of the loss, the broker may be held to make good to the insured for that proportion of the loss not paid by the insurer.

Thus, in the case of *Lapierre vs. Assurances Robert Dionne Inc.*, (1984) C.S. 18, the insured's claim had been proportionally reduced by the application of Article 2488 because of an innocent misrepresentation of the risk.

212 In the Lapierre matter, the insured had requested that his building be insured against fire. The property had been decribed as both commercial and residential whereas in fact it was entirely occupied by a grocery, a restaurant and a bar. When the building was damaged by fire, the insurer pleaded that the difference in the description was material to the fixing of the premium and the insured recovered only 60% of the damages from the insurer.

However, the Court found that the broker knew the actual use of the premises, having visited them and, as an expert, was held to know that the mention of a residential occupancy would have the effect of reducing the premium. The broker was condemned to pay to the insured that part of the loss which was not payable by the insurer.

Similarly, in *Dupuis vs. Phoenix du Canada, J.E. 83-851*, the insured rented rooms in the basement of his residence to students and had informed the broker of the fact. Nevertheless, the broker obtained a policy for a single family dwelling. When a fire occurred, the Court applied Article 2488 and condemned the insurer to pay only in proportion to the premium which should have been charged if the risk had been properly described. The Court held that the insurance broker had not carried out his mandate and condemned the broker to pay to the insured that proportion of the loss which was not recovered from the insurer.

The analysis of the risk by the broker may also raise a possible responsibility towards the insurer where the broker is found to be acting as agent for the insurer, a subject which has been treated by M^e^ Raymond Duquette (3). In the case of *Sécurité Compagnie Géné-*

rale du Canada vs. Piché, J.E. 83-688, the insurer, having been obliged to pay its insured, then sued the broker.

The insurer reproached the broker for having not properly evaluated the risk in presenting it to the insurer, the broker having presented it as a residential risk, on his assessment of the facts, whereas the underwriters for the insurer, on those facts, would have considered it as a commercial risk. There was evidence from other insurers that they would have considered the risk to be a residential risk ; the Court held that the broker had exercised reasonable judgment in analyzing the risk and therefore dismissed the action against the broker.

3. Duty to inform the client - Availability of coverage, restriction on coverage, difficulty on procuring coverage

The case of Therrien vs. Dionne is a classic example of the consequences of the breakdown in communications between broker and client. It went through the courts in two stages.

The broker Dionne had, for several years, insured the building of the plaintiff Therrien against fire, the risk being placed with six insurers. In 1959, one of the six insurers refused to renew their policy on the risk and the broker was unable to replace the coverage with another insurer, leaving a gap in coverage of $6,000, when the fire occurred. The first of the two series of actions by Therrien against Dionne was that in which the broker was alleged to have been at fault in failing to replace the coverage left vacant by the refusal of the sixth insurer to renew coverage.

The broker pleaded that, in spite of his best efforts, it had been simply impossible to place the risk. The Court noted that the duty of the broker is one of means and not of result ; the measure of his responsibility is whether in the execution of his mandate, he has acted with reasonable skill and prudence. The Court found that the broker had taken all reasonable means to replace the coverage and therefore had fulfilled his contractual obligations to the client.

The Judge noted that it was a fault on the part of the broker not to have advised his client that the sixth insurer had refused to renew

(3) L'essentiel de l'allocution de Me Duquette, dans le cadre du séminaire de l'Université McGill, sera trouvé dans une étude publiée dans la Revue «*Assurances*», en deux parties : la première, en juillet 1987, page 177 ; la seconde, en octobre 1987, page 371.

the policy. Nevertheless, accepting the evidence that the nature of the risk was such that neither the insured himself nor another broker would have been able to place the risk, the Court held that the failure to inform the insured was, in those circumstances, not causal to the loss and dismissed the action against the broker.

The troubles of the broker Dionne were, however, not ended.

In presenting the risk (which was difficult to place because of its location) to the five other insurers, the broker Dionne had failed to disclose that his client Therrien had suffered a previous fire in 1956,
214 a fact well known to Dionne. Following the fire in 1959, the five insurers refused to pay on the grounds that there had been a failure to disclose a material fact. Therrien's action against the insurers had been dismissed, the Court holding that Dionne was the agent of the insured Therrien so that his representations were to be imputed to the insured.

Therrien then sued Dionne for his fault in failing to disclose to the insurers the previous fire in 1956. Dionne again pleaded that there was no causal relationship arguing that had he disclosed the previous fire, it would have impossible to obtain insurance. This time, however, the argument did not succeed. The Supreme Court of Canada, reversing the Quebec Court of Appeal, held that Dionne had clearly committed a fault in the execution of his mandate and that if he wished to escape liability by pleading impossibility of performance, he had the burden of proving actual impossibility (whereas the Court of Appeal had imposed on the insured the burden of proving that coverage could have been obtained). The Court found that the broker's proof was not sufficient to discharge that burden and the broker Dionne was condemned.

In 1979, the Quebec Court of Appeal again had occasion to consider the situation where a broker failed to obtain the coverage requested and dit not inform his client that the coverage had not been obtained.

In the case of *A.E. Dionne Inc. vs. Castonguay, (1979) C.A. 301*, the client had asked the broker to insure a barking drum which he had purchased. The broker telephoned a number of insurance companies seeking to place the risk but when the machine was damaged by fire approximately four weeks later, he had neither succeeded in

obtaining coverage nor informed his client that there was no coverage in place. The Court of Appeal, after reviewing the decisions in the matter of Therrien and Dionne, ruled that the broker who is unable to place a risk within a reasonable delay must advise his client and not leave him under the impression that he is insured. If the broker wishes to establish that he could not by reasonable means secure an insurance coverage, the burden of proof upon the broker is severe. The broker was held to indemnify the client.

In the matter of *Lemieux vs. Dessureault, (1969) C.S. 383*, the client had requested his broker to insure his automobile against theft and the broker had given the client to understand that the automobile was insured from the time of the signing of the application. In fact, the broker experienced difficulty in obtaining coverage from the insurer indicated on the application, so that when the car was stolen one month later, the insurance had still not been placed. The Court held that the broker had the duty to inform the client of the necessity of the consent of the insurer and the moment when the coverage would attach so that if there was no coverage, the insured could take other means to insure the car elsewhere.

The broker pleaded that the client could have seen by carefully reading the application that the insurer might refuse the risk. The Court held that it was the duty of the broker to point this out to the client.

The case of *Les Importations Leroy Inc. vs. J.A. Madill, (1985) C.S. 538*, concerns the responsibility of a broker in relation to application by its client for insurance on a jewelry store. Following a theft, the insurer refused to pay the loss as the insured had failed to respect the clause in the policy requiring that the doors be kept locked at all times. It was not until after a first armed robbery that the broker became aware of the existence of this clause in the policy. He had therefore failed to advise his client of the requirement. The broker was held liable for the loss.

In rendering this judgment, the Court declined to endorse the theory that an insured is not required to read the insurance policy stating that the question must be decided on an assessment of the level of knowledge and experience of the insured and the resultant variation in the duty of the broker when advising a more or less sophisticated insured. In this case, the Court found that the broker had

lulled the insured into a false sense of security which led the insured not to read the contract with as much attention as he might have done.

4. Verification of the coverage obtained – Is it as required ? Duty to inform client of differences from coverage requested

A corollary of the obligation of the broker to obtain the coverage requested and to warn the client of any unusual restrictions in the coverage obtained is the duty of the broker to verify the coverage which he has obtained and to point out to his client any differences between the coverage obtained and the coverage requested. While the introduction of Article 2478 into the Covil Code articles on Insurance creates against the insurer a presumption that the policy issued conforms to the application for insurance, the duty of the broker in this regard remains important.

In the case of *La Souveraine vs. Robitaille, (1985) C.A. 319*, the action of the insured against the insurer was dismissed because the insured had failed to respect a clause in the policy whereby he warranted that automatic fire extinguishers would be kept in good condition and inspected at least twice a year. The insured's argument that the warranty clause had not been included in the application was not accepted by the Court of Appeal which held that not all clauses and conditions of the eventual policy need be incorporated into the application. The Court of Appeal said that the insured, a businessman, had an obligation to read the policy which he received and could not invoke his own negligence in failing to note the warranty as to automatic sprinklers and to comply with it.

Although the action had not been directed against the broker, the Court of Appeal noted in passing that the broker should have been aware of the warranty clause in the policy and remarked that it was the broker "whom Robitaille entrusted with the task of seeking coverage from the insurers".

The Ontario case of *G.K.N. Keller vs. Hartford Fire Ins. Co. and Reed Stenhouse, 1 C.C.L.I., 34* concerns a contractor, Keller, who was involved in soil compaction using a vibration method. Keller approached a broker who conducted a study into the client's needs and obtained the issue of a comprehensive general liability policy. In relation to a particular contract which the client Keller was to per-

form, he requested that the coverage be increased for the purposes of that specific contract. The contract contained a clause making the contractor fully responsible for damages which might result from the vibration compaction system which the contractor used.

When the contractor was subsequently sued for damages, the insurer declined to defend as the policy contained an exclusion for damages assumed by contract.

The Ontario Trial Court, confirmed by the Court of Appeal, held that the broker was liable in that it failed to provide an insurance policy which covered the needs of plaintiff or, alternatively, that it failed to communicate to its client that the contractual liability coverage which the client sought was not provided by the policy which was in fact issued by the insurer.

5. Expiry and renewal - timely advice and timely approach to the market

Most brokers see to it that they inform their clients of approaching renewal dates of policies, if for no other reason than the desire to maintain the client's business. Where the renewal may be difficult to place, the broker is well advised to start his approach to the market in a timely fashion. The consequences of the failure to place insurance and to inform the insured of the difficulty in placing insurance are illustrated by the case of Therrien which we have discussed earlier in this text.

The question however arises as to whether, in the face of the silence of the client, the broker has a tacit mandate to renew the policy.

The question has presented itself a number of times in the context of attempts of the broker to recover from the client premiums for a policy renewed in the absence of specific instructions from the client. Two judgments rendered in the 1940's found that such a tacit mandate did exist. In the case of *Lavigne vs. Desruisseaux, (1945) C.S. 280* and *Levin vs. Feldman, (1948) C.S. 374*, the broker had in each case renewed the insurance policy without specific instructions and then had been obliged to sue the client for the premiums. In both cases, the Court found that a tacit mandate existed and condemned the client to pay the premiums.

Ten and twenty years later, in *Dorion vs. Savard, (1959) R.L. 497* and in *Garneau Turpin Ltée vs. Gravelle, (1969) R.L. 498*, the opposite conclusion was reached. In both those cases, the Court held that the renewal of the policies in the face of the silence of the insured exceeded the mandate and held that the insureds were not obliged to reimburse the premium that had been advanced by the broker. It may be wondered whether, if the brokers in those two cases had not renewed the policies and a loss had occurred, the Courts would have come to the same conclusion.

218 More recently, the Quebec Court of Appeal in the matter of *Dulude, Forté, Lachance & Associés Ltée vs. Néron, J.E. 85-546*, again alluded to the question of whether, in the absence of instructions from the client, the broker has the obligation to renew the insurance ; however, the Court of Appeal declined to express an opinion on the question as it was not necessary for the decision of the issues before it.

Earlier, in 1971, the Quebec Superior Court had condemned an agent for failure to renew an automobile insurance policy. In the case of *Cadres Professionnels Inc. vs. Lemay, (1971) I.L.R. 1-412*, the Court found as a fact that over a period of years, the insurer, and subsequently the broker, had always informed the insured of the renewal date and solicited the renewal. In 1966, the broker and the insurer did not renew the policy, the insurer having discontinued that line of business. The broker failed to warn the client who discovered that he was uninsured when he was involved in an accident the day after the expiry of the policy. The Court held that both the general custom of insurance brokers as established by the evidence and the particular custom between the parties required the broker to advise if the policy was not to be renewed and held the broker liable.

6. Suggesting additional coverage

The principles discussed earlier in this text, in virtue of which the broker has the obligation to properly analyze the risk, lead to the corollary that the wise broker will recommend additional coverage, both with regard to the amount of the insurance and the scope of the insurance, where the needs of the client warrant it.

In the case of *Agincourt Motor Hotel Limited vs. Tomenson, Saunders, Whitehead Limited, (1982) I.L.R. 1-1590*, the client sued

the broker alleging that he had failed to recommend a "miscellaneous electrical apparatus clause" in the Boiler and Machinery insurance which the broker obtained for the client. The case was, however, decided on a factual issue, the Court accepting the evidence of the broker that he had in fact recommended such coverage and that the plaintiff had refused it because of the additional cost. The broker was therefore relieved of responsibility.

A similar result was reached in the case of *Lester vs. Philip Abbey Inc., (1976) I.L.R. 1-802.* In that case, a break in the insured's heating system caused water damage to the property of a tenant in the insured's building. The insurance policy did not cover the claim of the tenant against the insured because both were related or affiliated companies ; a cross-liability clause would have been necessary in order for the claim of the affiliated company to be covered. The client sued the broker for failure to recommend and obtain such additional coverage.

The case again turned on a question of fact and credibility, the Court accepting the testimony of the broker that such additional coverage had in fact been proposed to the client and had been refused because of the additional cost. The claim against the broker was dismissed.

7. The broker's role in presenting the claim to the insurer

It is when a loss occurs that the services of the broker are most appreciated by the client. The intervention of the broker to ensure that the claim is processed promptly, that the client receives from the insurer all that he is entitled to receive under the coverage, and that, to the extent reasonably possible, all doubts are resolved in favour of the client, do not only avoid potential claims against the broker but ensure the broker's continued success in business.

Cases which have studied the responsibility of the broker for his failure in services to his client after a loss, are not numerous. The case of *Tremblay vs. Bouchard, (1964) B.R. 681,* is however worth mentioning.

In that case, the broker Bouchard had placed for his client Tremblay insurance covering the latter's truck. When the truck was involved in an accident, Tremblay went to see Bouchard and related the facts of the accident to him. Bouchard discussed the facts of the

accident and concluded that his client Tremblay was not responsible ; he therefore recommended to his client not to report the accident to the insurance company immediately but to wait to see what would develop later. What developed later was an action by the injured party against Tremblay.

The insurer declined to cover on the grounds of the insured's failure to report the accident. The insured sued both the insurer and the broker. The action against the insurer was dismissed but the action against the broker was maintained, the Court of Appeal noting
220 that it was not a simple error in judgment but an instance of total incompetence on the part of the broker in the carrying out of his professional obligations.

These facts occurred thirty years ago and it is unlikely that a broker in today's more sophisticated environment would commit such a blatant error. Nevertheless, the principle is sound that the broker's duty to his client may extend to assisting the client after a loss has occurred.