

Newsletter



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The “care, custody or control” exclusion clause, as reviewed and discussed by the Supreme Court of Canada

The eagerly expected decision in 3091 5177 Québec inc. (Éconolodge Aéroport) v. Lombard General Insurance Co. of Canada is finally out. First, a brief reminder of the facts.

In 2005 and 2006, Éconolodge was offering travellers a fixed price package that included parking, a night’s stay, breakfast, and shuttle transportation to the neighbouring airport. The package was especially popular during winter, when the lure of southern sun and warmth is irresistible to many. In January 2005, however, such a customer’s vacation ended abruptly when he found out that his car was missing when he returned to the hotel. After paying compensation for the loss, his insurer filed a subrogated claim against the hotel, holding it liable for the loss of the vehicle. The hotel called in warranty Lombard, its own liability insurer, who denied coverage under the “care, custody or control” exclusion.

The trial judge held that the hotel had been at fault, but refused to apply the exclusion clause. The Court of Appeal reversed the decision, allowing Lom-

bard’s appeal and dismissing the claim against it. The Supreme Court of Canada granted permission to appeal and, on October 19, released its decision reversing the Court of Appeal’s judgment. By leaving his car keys with the hotel staff, the customer’s purpose was not necessarily transferring custody of the vehicle: the Court of Appeal’s statement that the handover of keys could serve other purposes was not based on the facts in evidence, let alone on an improper assessment of that evidence. The Supreme Court therefore concluded that the Court of Appeal had made a palpable and overriding error.

To make things clearer, the Supreme Court held that the purpose of the “care, custody or control” exclusion was to prevent a liability insurance policy from being construed as insurance for third parties’ property. A liability policy issued by an insurer must not expose it



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to risk unrelated to the purpose of the insurance, since the insurer has no means to appraise the goods placed under the insured's care, custody or control and, consequently, cannot set an appropriate premium. The trial judge's decision was reinstated by the Supreme Court. The Court also cast

doubt on the insurer's argument that the clause had no effect in the summer, when customers were not required to leave their car keys with the hotel staff. As the Court held, it would have been odd that the application of the exclusion could have depended on the temperature or the amount of precipitation...

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