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## The Rape of the Lock: A Comment on Charania v. Travelers Indemnity Co. of Canada

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THE RAPE OF THE LOCK:  
A COMMENT ON CHARANIA v. TRAVELERS  
INDEMNITY CO. OF CANADA

One of the difficulties in trying to teach insurance law is that one has to fight against the notion that most of the cases involve mere questions of “construction”. Viewed thus, insurance law becomes a myriad of single instances. No single case is of any great significance. Unfortunately, this view obscures the fact that the construction of a policy may be something that is of vital consequence to tens of thousands of individuals.

In *Charania v. Travelers Indemnity Co. of Canada*<sup>1</sup> the Ontario Court of Appeal gave a brisk judgment dismissing the insured’s claim, without any appreciation of the social consequences of its decision.

The case involved a burglary policy which the insured had taken out. The trial judge found that the store had been entered by someone picking the lock in the front door. There was evidence to support this finding. A police expert said that on the cylinder of the lock of the front door he discovered gouge marks which were evidence that the lock had been picked. The cylinder was inside the door.

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<sup>55</sup> *Supra*, footnote 4.

\* Chairman, Law Reform Commission of British Columbia.

<sup>1</sup> (1984), 12 D.L.R. (4th) 478, 47 O.R. (2d) 705 (C.A.).

The difficulty in this case arises because the insurer defined "burglary" in part, thus:<sup>2</sup>

" 'Burglary' means the felonious abstraction of insured property (1) from within the Premises by a person making a felonious entry therein by actual force and violence, of which force and violence there are *visible marks* made by tools, explosives, electricity or chemicals *upon*, or physical damage to the exterior of the Premises at the place of such entry . . . ."

The trial judge held that a mark inside the lock could constitute a mark "visible . . . to the exterior of the premises"<sup>3</sup> and found for the insured.

Brooke J.A., writing for a unanimous Court of Appeal, reversed the decision. The critical part of the court's opinion reads:<sup>4</sup>

We think that the words of this policy must be given their ordinary meaning and, that being so, the marks being invisible because they were inside could not be marks that were visible upon the exterior of the premises.

The only thing that prevents the reader from laughing out loud at this point is the realization that thousands of businesses and thousands of car owners have identical or very similar policies.<sup>5</sup>

Now, I am not a big believer in the doctrine of unconscionability,<sup>6</sup> but it appears to me to be unconscionable for an insurer to refuse to pay for a loss which it does not deny is genuine, merely because the burglar did not do a little violence to the exterior of the lock. The insured in this case appears to be as deserving of relief as, say, an expectant heir who sells his/her inheritance at a gross undervalue,<sup>7</sup> or drunks who damage rented cars,<sup>8</sup> or amnesiacs who sign mortgages or guarantees in a bank.<sup>9</sup>

<sup>2</sup> *Ibid.*, at p. 479 D.L.R., p. 705 O.R. Emphasis added by Brooke J.A.

<sup>3</sup> *Ibid.*, at p. 480 D.L.R., p. 706 O.R. Arnup and Blair JJ. A. concurred in the judgment.

<sup>4</sup> *Ibid.*, at p. 480 D.L.R., p. 707 O.R.

<sup>5</sup> This definition of burglary comes from U.S. policies. English insurers merely require that the insured prove that the burglar used "force and violence" to procure entry; see *Re Calf and The Sun Insurance Office*, [1920] 2 K.B. 366 (C.A.). Even the English requirement can cause great hardship. It would offer no protection in a case such as *Lichtentag v. Millers Mutual Fire Insurance Co.*, 250 So. 2d 105 (La. Ct. App., 1971) where burglars forced at gunpoint the insured to open the outer door of his safe and then forcibly opened the inner door.

<sup>6</sup> My position on unconscionability is: "I am . . . not opposed to using unconscionability as a means of striking out unfair provisions in standard form contracts, provided this device is recognized as being the poor second best that it is": see Hasson, "The Unconscionability Business — A Comment on *Tilden Rent-A-Car Co. v. Clendenning*", 3 C. B. L.J. 193 (1978), at p. 196.

<sup>7</sup> See e.g., *Bawtree v. Watson* (1834), 3 My. & K. 339, and see generally S. M. Waddams, *The Law of Contracts*, 2nd ed. (Toronto, Canada Law Book Inc., 1984), at p. 381.

Indeed, if counsel for the insured had looked a little further afield, he would have discovered U.S. authorities which have held this provision to be unconscionable.

First, in *Ferguson v. Phoenix Assurance Co. of New York*,<sup>10</sup> the Supreme Court of Kansas held invalid a "visible exterior marks provision" as being contrary to public policy.

In the court's words:<sup>11</sup>

We hold that where a rule of evidence is imposed by a provision in an insurance policy, as here, the assertion of such rule by the insurance carrier, beyond the reasonable requirements necessary to prevent fraudulent claims against it in proof of the substantive conditions imposed by the policy, contravenes the public policy of this state.

A subsequent noteworthy authority is the leading case of *C. & J. Fertilizer v. Allied Mutual Insurance*,<sup>12</sup> a decision of the Supreme Court of Iowa. In that case, although the exterior of the premises was neither damaged nor visibly marked, the thief had broken an interior door in order to steal chemicals worth \$9,582. Truck tire marks were visible in the driveway leading to an entrance in the warehouse that could be opened forcibly without leaving visible marks. When the insurer pleaded that no visible marks had been left, the Iowa Supreme Court held by a majority of 5 to 4 that the provision was invalid.

Five judges held that the provision was invalid because (1) it violated the reasonable expectations of the insured, and (2) because it was unconscionable. Further, three judges held that the provision violated the implied warranty of fitness which, they held, applied to insurance contracts.

<sup>8</sup> See *Tilden Rent-A-Car Co. v. Clendenning* (1978), 83 D.L.R. (3d) 400, 18 O.R. (2d) 601 (C.A.).

<sup>9</sup> See e.g., *McKenzie v. Bank of Montreal* (1975), 55 D.L.R. (3d) 641, 7 O.R. (2d) 521 (H.C.J.) affd 70 D.L.R. (3d) 113, 12 O.R. (2d) 719 (C.A.). (In this case the defendant claimed that she did not know that she was signing a mortgage despite the fact that she signed nine copies of the document.) See also *Royal Bank of Canada v. Hinds* (1978), 88 D.L.R. (3d) 428, 20 O.R. (2d) 613 (H.C.J.), in which the defendant was able to gain relief because she alleged that she could not remember signing a document agreeing to pay off her deceased husband's debts to the bank.

<sup>10</sup> 370 P. 2d 379 (1962).

<sup>11</sup> *Ibid.*, at p. 387.

<sup>12</sup> 227 N.W. 2d 169 (Iowa, 1975); see the excellent note on this case in 64 Geo. L.J. 987 (1976). Attempts to strike down an identical provision in an auto theft policy have so far not met with success; see e.g., *Limberis v. Aetna Cas. & Sur Co.*, 263 A. 2d 83 (Me., 1970); *Cochran v. MFA Mutual Insurance Co.*, 271 N.W. 2d 331 (Neb., 1976).

The minority in *C. & J. Fertilizer* thought the impugned clause was reasonable because it gave the insurer protection against fraudulent claims (or "inside jobs"). Without being an expert in burglary, it would seem to me that the burglar will use as little violence against locks and other parts of the building as possible. First, it is quicker to jiggle a lock open than it is to use a saw or explosives. Secondly, it is quieter.

### *Conclusion*

Insurance companies are already the darlings of contract law. Thus, they alone are owed duties of disclosure by applicants for insurance.<sup>13</sup> They can adduce evidence of a material misrepresentation in a way that would not be accepted in any other contractual context<sup>14</sup> and they can frequently disown the fraud and negligence of their own agents.<sup>15</sup> To immunize them also from the doctrine of unconscionability, such as it is, is carrying a good joke too far.<sup>16</sup>

But apart from adding to the privileges of insurance companies, the decision in *Charania* is of great importance to thousands of Canadian shop owners and car owners. Failure by the courts and the Provincial Superintendents of Insurance to have this

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<sup>13</sup> See Hasson, "The Doctrine of 'Uberrima Fides' in Insurance Law — A Critical Evaluation", 32 M.L.R. 615 (1969). According to G. H. Treitel, family arrangements are said to be the only class of contracts (together with insurance) which can be described as *uberrimae fidei*. See his *Law of Contract*, 6th ed. (London, Stevens & Sons, 1983), pp. 304-6. P. S. Atiyah takes the view that the insurance contract is the only one which is truly *uberrimae fidei* apart from the contract of partnership: see his *An Introduction to the Law of Contract*, 3rd ed. (Oxford, Clarendon Press, 1981). Waddams, *op. cit.*, footnote 7, at p. 323, states that "Some contracts, notably insurance contracts, are characterized as contracts of utmost good faith (contracts *uberrimae fidei*)" but the learned author does not tell us what these other contracts are.

<sup>14</sup> See, notably, *Henwood v. Prudential Insurance Co. of America* (1967), 64 D.L.R. (2d) 715, [1967] S.C.R. 720. In this case the Supreme Court of Canada accepted an insurer's view of what was a material misrepresentation on the assertion of the insurer's company doctor who was allowed to give expert evidence in psychiatry, a field in which he had no expertise.

<sup>15</sup> See *e.g.*, *Blanchette v. C.I.S. Ltd.* (1973), 36 D.L.R. (3d) 561, [1973] S.C.R. 833.

<sup>16</sup> In *Pridmore v. Calvert* (1975), 54 D.L.R. (3d) 133 (B.C.S.C.), Toy J. held that a payment by an adjuster of \$331.40 did not fairly compensate a plaintiff for injuries for which \$20,000 would be a satisfactory settlement. Further, in *Beach v. Eames* (1976), 82 D.L.R. (3d) 736, 18 O.R. (2d) 486 (Co. Ct.), the court held that a settlement of \$500 could not stand when the victim had suffered damages which the court fixed at \$48,066.92. But these cases indicate that the protection will be given only in scandalous cases. In no Canadian case has a court, to my knowledge, held a provision in an insurance contract to be invalid because it was unconscionable or unfair.

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provision removed constitutes a gross dereliction of duty to policy holders who do not have the economic power to rid themselves of this cruel trap.

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