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# Tilden Rides again: A Comment on Reaume v. Caisse Populaire Ltée

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TILDEN RIDES AGAIN: A COMMENT ON REAUME v. CAISSE  
POPULAIRE LTÉE.<sup>1</sup>

In *Tilden-Rent-A-Car Co. v. Clendinning*,<sup>2</sup> a majority of the Ontario Court of Appeal held that there was a duty on the owner of a car rental company to point out “onerous and unusual terms” to the hirer of a car. That decision was hailed as a breakthrough by some academics.<sup>3</sup> However, for nine years the decision seemed to

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<sup>35</sup> In *Tappenden v. Artus*, *supra*, footnote 18, Diplock L.J. made the point that the sub-bailee could only rely upon its lien as against the owner if the bailee had the authority to deliver possession to the sub-bailee.

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<sup>1</sup> *Reaume v. Caisse Populaire Windsor Ltée* (1987), 25 C.C.L.I. 20, [1987] I.L.R. ¶1-2182 (Ont. H.C.J.).

<sup>2</sup> (1978), 83 D.L.R. (3d) 400, 18 O.R. (2d) 601 (C.A.).

<sup>3</sup> See, e.g., S.M. Waddams, “Legislation and Contract Law” (1979), 19 U.W.O. L.Rev. 185, at p. 195, where the decision is described as “being a development of contract law in the best tradition of the common law”. See also the same author’s textbook *The Law of Contracts*, 2nd ed. (Toronto, Canada Law Book Inc., 1984), especially at pp. 255-7.

be ignored even by the court which decided it. After all, it was not even cited in cases such as *Charania v. Travelers Indemnity Co. of Canada*<sup>4</sup> or by the Supreme Court of Canada in *Dyck v. Manitoba Snowmobile Ass'n Inc.*<sup>5</sup> In all these cases, the stronger party was not required to draw the weaker party's attention to "onerous and unusual" terms.

As a critic of *Tilden* I shed no tears for the decision's apparent demise. I thought the decision to be both enigmatic and irrelevant;<sup>6</sup> the critics of *Tilden* argued that procedural gimmicks were not the way to deal with allegedly unfair clauses.<sup>7</sup> They agreed with Arthur Leff who pointed out:<sup>8</sup>

Many people don't read contracts; even a clear one will not help them. And some people would sign a contract even if "THIS IS A SWINDLE" were embossed across its top in electric pink.

*Tilden* seems, however, to have found a new lease on life in *Reaume v. Caisse Populaire*.<sup>9</sup> The application of *Tilden* in this case is vivid proof that nothing good can be derived from a poor decision.

Marvin Reaume was raised in a francophone home; both his mother and father spoke French. Reaume's only formal education in that language was in Grade 2 or 3. He still speaks French but not as well as he would like to.<sup>10</sup> There is no indication in the report as to whether Reaume reads English more easily than he does French.

<sup>4</sup> (1984), 12 D.L.R. (4th) 478, 47 O.R. (2d) 705 (C.A.); for a critique of the decision see R.A. Hasson, "The Rape of the Lock: A Comment on *Charania v. Travelers Indemnity Co. of Canada*" (1985), 10 C. B. L. J. 373.

<sup>5</sup> (1985), 18 D.L.R. (4th) 635, [1985] 1 S.C.R. 589, trenchantly criticized by D. Vaver in "Developments in the Law of Contract 1984-85 Term" (1986), 8 Supreme Court L.Rev. 109 at pp. 124 *et seq.*

<sup>6</sup> See R.A. Hasson, "The Unconscionability Business — A Comment on *Tilden-Rent-A-Car v. Clendinning*" (1978-79), 3 C. B. L. J. 193, and in "Unconscionability in Contract Law and in the New Sales Act" (1979-80), 4 C. B. L. J. 383 at pp. 387-9.

<sup>7</sup> No one can determine the fairness of the clause until one knows whether, in charging the consumer the rental, the car rental companies take into account the cost of paying for cars smashed up by drunkenness, or by reckless driving. Until one knows this vital fact, any determination of unfairness will only be based on a gut feeling. We have to do better than this if we are to make intelligent social policy.

<sup>8</sup> See his article, "Contract as Thing" (1970), 19 Am. U. L.Rev. 131, at p. 157. It is a sad commentary on Canadian contracts scholarship that none of the textbooks or published casebooks in use in Canada discuss the views of the most brilliant contracts scholar in the English-speaking world in the last 40 years. Our students know all of Lord Denning M.R.'s judgments but they should also know about Leff.

<sup>9</sup> *Supra*, footnote 1.

<sup>10</sup> *Ibid.*, at p. 22 C.C.L.I., p. 8453 I.L.R.

In 1972, the Caisse Populaire Windsor Ltée. made a loan to Reaume, *inter alia*, for the repairs and renovations to his house. All the forms were in French and were signed by Reaume.

In 1977, Reaume negotiated an increase in the loan of \$42,925. The loan application was in French. In 1980, when Reaume renewed his mortgage, he signed a document which provided him with loan insurance. The policy was taken out by the Caisse, acting as agent for Reaume, with Assurance-Vie Desjardins. The policy was written in French and contained the following exclusion:<sup>11</sup>

The insurer pays no benefits for more than 2 years if the total disability occurs as a result of a mental, nervous or psychoneurotic illness, except if the insured borrower is confined to a clinic, hospital or any other institution for people suffering from mental illnesses or if the borrower suffers from psychotic problems.

In 1981, Reaume, who had worked for Chrysler, was disabled as a result of uncontrolled diabetes (*diabetes mellitus*) and severe emotional disorders. The insurer made payments for two years and then stopped making payments in 1983. The insurer argued that Reaume was totally disabled by mental disorders, but not of the psychotic variety.

Mr. Justice Anderson found for the insured but only after tortuous reasons for judgment.<sup>12</sup> He laid stress on the fact that: "All of the documents relating to the insurance were in French, of which Reaume had only an imperfect command".<sup>13</sup> This raises all sorts of questions. Reaume had signed the earlier mortgage agreements which were in French. Were they suspect also? Presumably, they were valid. Could Reaume have had a legal basis for complaint if the policy was in English because the loan agreements were in French?

Next, the learned judge pointed out that the agent "could not have failed to observe that he did not read the documents".<sup>14</sup> This is so, but there is no authority requiring policyholders to be informed of the contents of their policy, by either the agent or the insurer.<sup>15</sup>

<sup>11</sup> *Ibid.*, at p. 23 C.C.L.I., p. 8454 I.L.R.

<sup>12</sup> Although this comment is critical of Anderson J.'s judgment, it is not easy for a puisne judge to disregard a decision of the Ontario Court of Appeal, however confused that decision might be. Further, if the Superintendents of Insurance and the legislatures had been discharging their responsibilities, this case could not have arisen. The judge had to deal with a bad case of regulatory failure and judges are institutionally not equipped to deal with such cases.

<sup>13</sup> *Reaume, supra*, footnote 1, at p. 40 C.C.L.I., p. 8461 I.L.R.

<sup>14</sup> *Ibid.*

<sup>15</sup> No insurance case has suggested that there either is, or should be, a fiduciary relationship

Again, Mr. Justice Anderson stated that "the plaintiff was never given a copy of, or even shown, the policy of insurance".<sup>16</sup> But this is legally irrelevant. Since at least 1901 it has been established that an applicant for insurance accepts the terms of the policy the company usually issues.<sup>17</sup> It is legally irrelevant that the insured has not received the policy or, having received it, has not read it.<sup>18</sup>

Perhaps realizing that he had no authorities to support his remarkable statements of law, Anderson J. sought support from *Tilden-Rent-A-Car v. Clendinning*.<sup>19</sup> He deduced five propositions from that case,<sup>20</sup> which applied to this case to render the exclusion not binding on Reaume. The salient features of *Tilden* according to Anderson were:

- (1) The defendant did not read the contract and the clerk employed by the plaintiff who negotiated the contract knew that.

This is factually correct but is legally insignificant. Numerous Canadians sign contracts they have not read but are still bound by them, absent fraud, misrepresentation, and the like.

- (2) The conditions sought to be relied upon were completely inconsistent with the express terms providing coverage.

It is true that Mr. Justice Dubin, giving the majority decision in *Tilden*, asserted this,<sup>21</sup> but the statement is clearly wrong. First, Clendinning was not told that he was covered if he smashed the car

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between an insurance company and its policyholders. To see how far the courts are from any such notion, consider the recent decision in *Kropelyn v. Federated Life Insurance Co.* (1984), 8 D.L.R. (4th) 311, 53 B.C.L.R. 13 (S.C.). In that case, the insured had made an overpayment of a premium by mistake under a life insurance policy. Subsequently, the insured did not make a payment within the grace period and the policy lapsed. The beneficiary argued that the insurer was obliged to apply the overpayment so as to prevent the lapse of the policy. Finch J. of the British Columbia Supreme Court held that the insurer was not obliged to do this. If the courts seem unwilling to impose a very modest duty to co-operate on the insurer it seems most unlikely that they will impose a more far reaching "fiduciary relationship".

<sup>16</sup> *Reaume*, *supra*, footnote 1, at p. 41 C.C.L.I., p. 8461 I.L.R.

<sup>17</sup> See *General Accident Insurance Co. v. Cronk* (1901), 17 T.L.R. 233. In addition, it is extremely difficult to get rectification of an insurance policy; see the decision of the Supreme Court of Canada in *Leepo Machine Products Ltd. v. Western Assurance Co.* (1972), 31 D.L.R. (3d) 224, [1973] S.C.R. 171. See generally Woodcock, "Rectification in Insurance Law: A Lost Remedy or a Legal Chameleon?" (1976), 3 Queen's L. J. 151.

<sup>18</sup> It is significant that Mr. Justice Anderson recognized the limited utility of Reaume having a policy. In his words (*supra*, footnote 1, at p. 41 C.C.L.I., p. 8461 I.L.R.): "Considering the difficulty encountered by trained professionals in trying to make any sense of it [the policy], it would have done him no good had he had and read a copy."

<sup>19</sup> *Supra*, footnote 2.

<sup>20</sup> *Reaume*, *supra*, footnote 1, at pp. 40 *et seq.* C.C.L.I., p. 8460 I.L.R.

<sup>21</sup> *Supra*, footnote 2, at p. 403 D.L.R., p. 603 O.R.

while intoxicated. Second, the majority did not find the offending term to be substantively unconscionable.<sup>22</sup> They held that there was a duty on the part of *Tilden* to point out “onerous and unusual terms”. The inference is that had *Tilden* done so, Clendinning would have been bound.<sup>23</sup>

- (3) If the defendant had known of the full terms of the contract he would not have entered into it.

Every person seeking to be relieved of a contractual term will say this at trial, but this does not make it believable evidence about his state of mind when initially contracting. Such evidence is, rightly, given no legal weight. In the present case, it is most unlikely that Reaume thought that he would be disabled by psychosis — as opposed to psychosis — for a period exceeding two years.

- (4) The contract was not the result of formal negotiation and consideration but was entered into in haste.

All this is factually true, but again, legally insignificant. As Llewellyn,<sup>24</sup> Kessler<sup>25</sup> and Leff,<sup>26</sup> among others, have pointed out, to require negotiation in standard form contracts only increases transaction costs and will produce very little protection for the consumer. This is so, because the consumer will not foresee the breakdown of the transaction. Even if s/he does, s/he will not be able to persuade the seller to change the terms.

- (5) The plaintiff took no steps to alert the defendant to the onerous provisions of the contract.

Apart from the clauses relating to co-insurance which have to be prominently displayed in the insurance contract,<sup>27</sup> there has never been any legal obligation on insurance companies to point out onerous terms in the policy.

<sup>22</sup> *Contra*, Waddams, *The Law of Contracts*, *supra*, footnote 3, at pp. 255-7, I am fortified in my conclusion that *Tilden* is a case of procedural unconscionability by the fact that Anderson J. reads it (*Tilden*) the same way.

<sup>23</sup> The notion of the clerk being required to tell Clendinning something like “You realize that if you smash the car after having had only one drink, you must pay for the damage”, is so fanciful that one is reduced to mirth.

<sup>24</sup> Book review of Prausnitz, *The Standardization of Commercial Contracts in English and Continental Law* (1937) in (1939), 52 *Harv. L. Rev.* 700.

<sup>25</sup> “Contracts of Adhesion — Some Thoughts About Freedom of Contract” (1943), 43 *Colum. L. Rev.* 629.

<sup>26</sup> See *supra*, footnote 9. See also “Unconscionability and The Code: The Emperor’s New Clause” (1967), 115 *U. Pa. L. Rev.* 485; “Unconscionability and The Crowd — Consumers and The Common Law Tradition” (1970), 31 *U. Pitt. L. Rev.* 349.

<sup>27</sup> See, e.g., s. 126 of the Ontario Insurance Act, R.S.O. 1980, c. 218, which requires any kind of co-insurance clause to be noted in red ink on the face of the policy.

After this long and unrewarding travel through the *Tilden* swamp, Anderson J. disposed of the case before him correctly by simply applying the doctrine of *contra proferentem*. The learned judge wrote:<sup>28</sup>

Reaume's disability resulted from a combination of causes, including both mental and physical illness.

In construing the exclusionary clause, the *contra proferentem* rule applies. In this connection I have in mind what was said by Dr. Cassidy in his report, "[All] illnesses are a combination of psychological, physical and social factors." It seems to me that it hardly requires medical training to arrive at and hold that conclusion. Such being the case, I think it not unreasonable to attribute such knowledge to the draftsmen of a policy of disability insurance. Had it been intended that the exclusion should extend to disability occurring as a combined result of mental, nervous or psychoneurotic illness, and of other illnesses as well, no great ingenuity in drafting would have been necessary to accomplish such a result.

This is a liberal application of the principle of *contra proferentem*, but it is a permissible one.<sup>29</sup>

## Evaluation

There are two points to be made about the case. The first is that its resolution was made considerably more difficult by the invocation of *Tilden* and the "principles" of unconscionability.<sup>30</sup> This was nothing more than a simple case of *contra proferentem*. The case took five days to hear when it would have been disposed of in a fraction of the time had *Tilden* not been argued. It is particularly important in these days, when the courts are complaining of excessive workloads, to dispose of cases in the most expeditious manner possible. This was not done in *Reaume* and one can only hope that, if the case goes on appeal, the Court of Appeal will decide the case on the basis of *contra proferentem*.

The second point is whether or not this kind of exclusion should be allowed. The exclusion clause, it will be remembered, enabled payments to be made after two years if the insured was found to be

<sup>28</sup> *Supra*, footnote 1, at p. 43 C.C.L.I., p. 8462 I.L.R.

<sup>29</sup> The learned judge speaks of the *contra proferentem* rule. I have argued elsewhere that *contra proferentem* is not a rule but a principle. It may be trumped by other counter-principles. See R.A. Hasson, "The Special Nature of the Insurance Contract" (1984), 47 M.L.R. 505, at pp. 517-19.

<sup>30</sup> My colleague David Vaver has warned forcefully against applying notions of unconscionability when other more familiar techniques are at hand to police unfair contracts; see his article "Unconscionability: Panacea. Analgesic or Loose Can(n)on?" (1988), 14 C.B.L.J. 40.

psychotic or to be committed to a mental institution. The insurer's fear is the old one of moral hazard.<sup>31</sup>

In the first place, it is difficult to get agreement among psychiatrists as to what constitutes neurosis or psychosis.<sup>32</sup> There is for example an enormous body of literature on "borderline" states.<sup>33</sup> That concept has been attacked by Gelder, Garth and Mayou in their text, *The Oxford Textbook of Psychiatry*.<sup>34</sup> They point out that the people who write of "borderline states" are referring to three different kinds of condition.

In the first place some writers use "borderline" states to refer to those people who experience irrational anger, difficulty in forming relationships and lack of self-identity. There is a second group of writers who use borderline states to refer to mild schizophrenia. Finally, a third group of writers use borderline states to refer to people suffering from identity disturbance, unstable moods and chronic boredom. The authors conclude that "The lack of precise descriptive criteria makes these diagnostic criteria of doubtful value".<sup>35</sup>

Even if one agrees with Gelder, Garth and Mayou that the concept of "borderline" states is of little value, there will certainly be borderline cases where one psychiatrist certifies a patient as neurotic and another one certifies him/her as psychotic. This must be the case because the neurosis/psychosis line is a continuum with no exact demarcation. The vagueness of the term psychosis is indicated by the following definition from an American textbook on psychiatry:<sup>36</sup>

The concept of psychosis . . . implies an emotional (mental) illness whose seriousness is measured by behavior so unacceptable as to necessitate the withdrawal of social privileges.

<sup>31</sup> The notion of moral hazard is premised on a simplistic, non-deterministic theory of human behaviour which posits that the promise or expectation of a benefit conditioned upon the happening of an event generates incentives for the potential beneficiary to cause that event to occur or claim that it has occurred.

<sup>32</sup> I am indebted to my friend Dr. Tony Galea, B.Sc., M.D., for referring to some of the psychiatric literature. I am also grateful to him for several helpful discussions on this subject.

<sup>33</sup> See, e.g., R.R. Grinker, B. Werble and R. Drye, *The Borderline Syndrome: A Behavioral Study of Ego Functions* (New York, Basic Books, 1968); Ian Gregory and Donald J. Smeltzer, *Psychiatry: Essentials of Clinical Practice* (Boston, Little, Brown & Co., 1983), pp. 334 *et seq.*; J.C. Perry and G.L. Klenman, "Clinical Features of the Borderline Personality Disorder" (1980), 137 *American J. Psychiatry* 165.

<sup>34</sup> (New York, Oxford University Press, 1983).

<sup>35</sup> Gelder, Garth and Mayou, *ibid.*, at pp. 244-5.

<sup>36</sup> George A. Ulett, *A Synopsis of Contemporary Psychiatry*, 5th ed. (St. Louis, C.V. Mosby, 1972), p. 86.

Needless to say, psychiatrists will differ in their assessment as to how "unacceptable" behaviour has to be before "social privileges" will be withdrawn.

The uncertainty of the neurosis/psychosis line is also vividly demonstrated by the different diagnoses given to alcoholic conditions. At one extreme, one authority is prepared to classify delirium tremens, *Korsakov's* psychosis<sup>37</sup> and alcoholic hallucinosis all as being psychotic conditions.<sup>38</sup> At the other extreme, Gelder, Garth and Mayou do not regard delirium tremens or *Korsakov's* psychosis as being psychotic states.<sup>39</sup> They seem to treat only a small group of patients who have alcoholic hallucinosis with symptoms of schizophrenia as being truly psychotic.<sup>40</sup> It is vital in insurance law to be able to determine speedily whether someone is covered or not.<sup>41</sup> The neurosis/psychosis line makes it impossible in many cases to make such a determination.

Second, moral hazard exists with any disability, whether it be a mental state or a broken limb. There is no good reason for singling out mental illness for special treatment. It will be difficult enough for an insured to show that s/he has been disabled by a mental disorder<sup>42</sup> even without the additional burden of showing that s/he is psychotic.

Our Superintendents of Insurance and our legislatures would perform a great service if they were to recommend to their legislatures that disability policies be written without this exclusion.

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<sup>37</sup> This is a condition characterized by a striking loss of memory, disordered time appreciation and confabulation; see Gelder, Garth and Mayou, *supra*, footnote 34, at p. 300. The authors conclude that the term best be avoided. They recommend that the condition should be regarded as a form of amnesia.

<sup>38</sup> See Ulett, *supra*, footnote 36, at pp. 103-5.

<sup>39</sup> *Supra*, footnote 34, at pp. 426-9.

<sup>40</sup> *Ibid.*, at p. 429.

<sup>41</sup> The accidental death benefit (double indemnity) is open to substantial criticism because it fails to draw a "bright" line. See *Smith v. British Pacific Life Insurance Co.* (1965), 51 D.L.R. (2d) 1, [1965] S.C.R. 434; *Milashenko v. Co-op Fire & Casualty Co.* (1970), 11 D.L.R. (3d) 128n, [1970] S.C.R. vi, 1 D.L.R. (3d) 89, 66 W.W.R. 577 (Sask. C.A.).

<sup>42</sup> See, e.g., *Paul Revere Life Insurance Co. v. Sucharov* (1983), 5 D.L.R. (4th) 199, [1983] 2 S.C.R. 541, where the insured had to go to the Supreme Court of Canada to show that he was disabled by mental illness. He had to do this despite the fact that the trial judge and the Manitoba Court of Appeal had found him to be totally disabled.

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