Whatever Happened to… Tilden Rent A-Car

The Facts

Mr. John Clendenning of Woodstock, Ontario travelled a lot in his work and often rented a car from the Tilden Rent-A-Car Company when he was away from home. He would get extra insurance protection in the event he had an accident with the rental vehicle. On a trip to Vancouver he picked up his bags at the airport and strode to the Tilden counter to rent a car.

Clendenning said he wanted additional insurance coverage. Tilden employees usually did not review with their customers all the conditions in the rental contract. For $2 per day, Clendenning was told he would get "full non-deductible coverage." Otherwise, unless a customer specifically inquired, nothing was volunteered by the clerk to the customer about the exclusionary conditions in the contract. As was his habit, Clendenning never paused to read the contract before signing it, which the clerk observed. She placed his copy of it in an envelope and gave him the keys to the car.

Clendenning was involved in a collision while driving the rental car in Vancouver early one morning, after drinking a quantity of alcohol between 11.30 p.m. and 2 a.m. He said he drove the rental car into a pole to avoid a collision with another vehicle. A breathalyzer test was administered and Clendenning was charged. He pled guilty to that charge on, he said, his lawyer's advice.

Tilden refused to cover Clendenning's car accident. It pointed to a small-print exclusionary clause in the contract which he had signed: "The customer agrees that the vehicle will not be operated . . . by any person who has drunk or consumed any intoxicating liquor, whatever be the quantity."

83 D.L.R. (3d) Tilden stood by its contract. It said it did not mislead Clendenning in any way. Customers of rental cars want the transaction to be handled quickly, especially at airports. Surely, Tilden argued, businesses should not have to read and explain everything in the standard contracts to every customer. The onus, Tilden said, should be on the customer to read and understand the contract before they sign it, because businesses rely upon customers' signatures. It argued that the guilty plea to the criminal impaired driving charge justified refusing coverage. Moreover, the law was strongly on Tilden's side. Where a party signs a contract (and especially initials the coverage exceptions as Clendenning did here) then, short of fraud or misrepresentation, which were not present here, the signing customer is bound by the writing above his signature.

On the other hand, Clendenning had assumed he would not be responsible for any damage to the vehicle if he paid the extra $2 premium unless he was so drunk that he could not control the vehicle. Clendenning specifically bought insurance to cover him in such accidents. He argued that it was not fair that a company like Tilden can collect the premiums and know that he was relying upon insurance, yet not inform him of any unexpected, unusual or technical exceptions to that coverage. The Tilden clerk obviously knew that he did not read these adverse clauses or know about them;, therefore, Clendenning should not be bound by them. *Consensus ad idem*, meeting of the minds, assent to those terms, and all that. Clendenning said if he knew the full terms of the written contract, he would not have agreed to it and it seemed unfair that the rental company should be able to rely upon them now.

Legal Outcome

Faced with Tilden's denial of coverage, Clendenning sued. At the Ontario Court of Appeal, in *Tilden Rent-A-Car Co. v. Clendenning*,[1] two judges agreed with Clendenning. Tilden was required to fully cover his losses from the collision with the pole, pay its own legal fees through trial and appeal, and about one-third of Clendenning's total legal

costs.

This 1978 case continues to have modern application. Like Clendenning, we enter into common, familiar consumer contracts every day. We sign these contracts, but we do not read them. The transactions are quick and other side knows we do not read them. The law says that in such circumstances, the business must draw the customer's attention to any unusual or unexpected terms in these consumer contracts at the time they are being signed. If it does not, it will not be able later to rely on those unusual terms. Tilden and other businesses who deal with average consumers will not be able to sneak waivers, unusual and onerous terms which are adverse to the consumers' interest into contracts, even where the contract is signed but clearly not read or understood. Businesses must bring them to the attention of the other side at the time of contracting and receive consent to them. This case and legal principle is studied by all first-year law students.

Since this case was decided in 1978, the Internet and e-commerce have made it even easier for businesses to purport to insert "Terms and Conditions" into their contracts where there is no personal contact. Even face-to-face contracts today might have references in the written document to further terms on a webpage.

Research consistently shows that very few people go to, much less read through (understand and consent to) all the Terms and Conditions (or Terms of Use). To paraphrase a case referred to in *Tilden*, these Terms and Conditions "are not meant to be read, much less understood." The staff member – if there is one – serving the customer is rarely informed about these Terms and Conditions and even more rarely authorized to negotiate or waive them with anyone. These standard form contracts and their clauses are fixed. There is no bargaining of terms. The only choices are "take it all or leave it all." Moreover, this small print is hard to find and very hard to decipher. If you did read and understand them, you would discover that these Terms and Conditions are one-sided in favour of the business and often unfair.

Modern consumer protection legislation prohibits "unfair trade practices" and misleading advertising. You might invoke this legislation to obtain a civil remedy. Or you might sue for breach of contract where the deal turns out to be so different from what you expected. The courts, in particular, will be interested (along the lines of *Tilden* reasoning) in determining whether the business relying upon the adverse Terms and Conditions reasonably took measures to bring them to your attention at the time the contract was made, as the business will have the burden of proving you consented to them. That explains why it is common practice to have the customer initial or sign (or click "I agree") to these terms, or to specifically direct the customer to the terms ("See other side"), highlight the terms in bold, italics and / or a neon colour, or place prominent signage at the point of contracting. We know from the law of consideration that both parties to a contract must agree to the mutual rights and obligations at the time the contract is made. They cannot be foisted on anyone after the contract.

Where are the parties now?

Tilden Rent-A-Car was a Canadian vehicle rental company founded in 1953 by Sam Tilden, a shoe salesman from Montreal. Sam Tilden died in 1973 of a heart attack. His sons moved the head office from Montreal to Toronto and continued to run the business. In 1991 one of the sons died, also of a heart attack. The event which started Tilden on its greatest decline was not the 1978 Clendenning litigation. Rather, it was a mid-1991 accident in the Bronx, New York City. A Tilden rental vehicle was involved in a collision with a gasoline tanker truck which triggered a major explosion that destroyed a dozen stores and many nearby parked cars. Dozens of lawsuits against Tilden were started, some for wrongful death. The owner of the gas tanker was insufficiently insured and plaintiffs turned to Tilden for compensation. Seventeen of these lawsuits were consolidated into a single action against Tilden. This caused some anxiety on the part of Tilden's bankers, and they made it difficult to finance the business and carry on operations. In June 1996, five years after the Bronx accident, a U.S. judge ruled that Tilden could ultimately be held liable in that accident. Within one week, Tilden and all its inventory of many thousand vehicles, was sold at the fire sale price of $115 million to National Car Rental in the United States. So came the end to an independent Canadian car rental company. Eventually the Bronx lawsuit that brought it down was dismissed.[2]

[1] (1978) 18 O.R. (2d) 601 (C.A.), 83 D.L.R. (3d) 400, 1978 CLB 1431, [1978] 1 A.C.W.S. 604, 4 B.L.R. 50. Dubin and Zuber JJ.A. were the majority judges in the decision, and Lacourciere JA dissented.

[2] Sandra Martin, "He helped build Tilden Rent-a-Car into a thriving, all-Canadian concern ", obituary of Walter Tilden, *The Globe and Mail*, Toronto edition, 30 July 2008, p. s8.