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For Golfers: A Classic Bailment Case with an Exclusion Clause Issue

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Case Commented On: *Bloomer v Connaught Golf Club*, 2017 ABPC 105 (CanLII)

Bailment is an interesting legal concept because it is ubiquitous and because it is at the overlap of contract, property and tort law and yet is its own distinct area of law. However, because the issue in *Bloomer v Connaught Golf Club* involved an exclusion clause, the exclusive focus of Judge Derek G. Redman's decision was on contract law (rather than the far more fascinating property law). This case is also factually simple, but those facts might disturb some readers. The Connaught Golf Club — which Mr. Bloomer was a member of — had agreed to store Mr. Bloomer's golf clubs for him but was unable to find his golf clubs when he came in to play his daily golf game with his wife on June 24, 2016. In other words, the case is about a pro shop in Medicine Hat that lost a club member's golf bag and its contents.

Before I go much further, I should confess that I am not a golfer. When I was in practice, the Wetaskiwin law firms would get together annually for a friendly golf tournament and I always won the prize for taking the most number of shots, or strokes, or whatever you call it when you swing a club and hit or miss the ball. Judge Redman, however, begins his judgment sounding like a golfer:

> The game of golf presents a myriad of opportunities to practice one's perseverance, persistence, and perhaps most of all, patience. One is expected to contend with the wind and the rain, the roll of the greens and unusual lies, and slices, hooks, whiffs and yips; there are also the hazards – bunkers, berms, traps and trees. But one thing that can be counted upon is your clubs, the bag to carry them in and the accoutrements one collects over a lifetime of managing this sometimes miserable, but always memorable, game. (at para 1)

Mr. Bloomer asked for compensation for the loss of his golf clubs and then sued when efforts to settle matters failed. The Connaught Golf club defended by arguing that exclusionary clauses in its members' handbook prevented Mr. Bloomer from pursuing his claim against the club.

Bailment is a temporary transfer of personal property, with the goods of a "bailor" handed over to a "bailee": Bruce Ziff, *Principles of Property Law*, 6th ed (Toronto: Carswell, 2014) at 321. It requires that the bailee voluntarily assume control of goods that belong to another person, whether by contract or gratuitously (Ziff at 322). The bailee has certain duties implied by the common law, but can try to limit or exclude its liability through an exemption or exculpatory clause:

> We have all seen signs in cloak rooms and parking lots that declare something like: "Not responsible for lost goods," or "park at your own risk." (Ziff at 330)

There is no general rule against these limitations on or exclusions of liability, but courts have tried to restrict these clauses which aim to reduce or eliminate a bailee's duties to take care of the goods in its possession (Ziff at 330-31). For example, the bailor must accept these clauses, so the parking lot sign, for example, has to be a sign that the bailor had seen or should have seen (Ziff at 331).

The main and deciding issue in *Bloomer v Connaught Golf Club* was whether the exclusionary clause in the members' handbook was part of the contract for bailment between Mr. Bloomer and the Connaught Golf Club (at para 6).

When Mr. Bloomer first joined the Connaught Golf Club in 2005, he filled out an Application that included the following statement just above the line for the member's signature:

> I, the above member(s), agree to abide by the policy, rules and regulations of Connaught Golf Club.

Mr. Bloomer was a member of the Connaught Golf Club from 2005 to 2007 and, after playing elsewhere in 2008, again joined for 2009 to 2017. Every year he signed an Application with the same statement above the line for his signature. Mr. Bloomer admitted in cross-examination that he was aware of the statement in the Application that said he was he was bound by the "policy, rules and regulations" of the Connaught Golf Club.

Every year from at least 2009 on, Mr. Bloomer paid the Connaught Golf Club to store his clubs.

In 2008, the Connaught Golf Club prepared a new Membership Handbook and a version of that Membership Handbook was still in use in 2016. It contained two exclusionary clauses relevant to the storage of golf clubs and liability for that storage:

> **Club Storage:**
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> Connaught Golf Club provides club storage services to members for an annual fee. . . . *Connaught Golf Club shall not be responsible for any property loss or damage which may occur to member's clubs while on the golf club premises*. Members must have their own insurance coverage for public liability, property damage, fire and theft for any property left at the golf club including but not limited to golf clubs. (emphasis added)
>
> **Liability**
>
> Every member and/or guest shall use the premises at his/her own risk. *Connaught Golf Club shall not be responsible for any injury or for any property loss* or damage suffered by any member and/or guest while on the golf club premises. *Members and/or their guests should have their own insurance coverage* for public liability, property damage, fire and theft *for all of their property left at the golf*

> *club including but not limited to golf clubs and equipment,* carts and vehicles. . . . (emphasis added)

Mr. Bloomer denied ever seeing the Membership Handbook. He called as one of his witnesses the individual who was the golf club's office manager beginning in 2006. Unfortunately for Mr. Bloomer, she testified that she specifically recalled Mr. Bloomer coming in to enquire about becoming a member again in 2009. She recalled this enquiry because she was surprised by it; when Mr. Bloomer and his wife left in 2007, they were very upset with golf club's management. The office manager recalled providing Mr. Bloomer with an Application and a copy of the newly printed Membership Handbook. She had spent a great deal of her time preparing the new Membership Handbook and had printed 150 copies of it. On this factual disagreement, Judge Redman accepted the evidence of the office manager.

Mr. Bloomer argued that because the exclusionary clauses were not in the Applications he signed, were not specifically referred to in those Applications, and were not brought to his attention in any other way, he was not bound by them.

The Connaught Golf Club argued that the Application that Mr. Bloomer signed incorporated by reference its policy, rules and regulations and therefore the Membership Handbook, including the exclusionary clauses.

The question for Judge Redman was: "Does the Application incorporate by reference the Membership Handbook, particularly the exclusionary clauses?" It is at this point in this judgment that Judge Redman begins to refer to contract principles. He quickly lists a number of them (at paras 35-40) of which the most relevant were those about incorporating terms into contracts by reference to another document:

> Where parties expressly incorporate terms into a contract, the incorporated terms must be interpreted as if they had been written out in full in the contract, and, accordingly, must be interpreted in the context of the contract into which they have been incorporated. (at para 37, quoting K. Lewinson QC, *Interpretation of Contracts*, 6th ed (London: Sweet and Maxwell, 2015) at 119)
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> In addition to express verbal incorporation, terms may be incorporated by the conduct of the parties. Such conduct may consist of one party drawing to the attention of the other the terms in which he is willing to contract before the contract is concluded. *The more onerous or unusual the terms, the greater degree of notice required to incorporate them.* (at para 40, quoting *Interpretation of Contracts*, emphasis added)

Judge Redman noted that, although the Application did refer to the golf club's "policy, rules and regulations," it did not refer to any *particular* policy, rule or regulation (at para 41). The Membership Handbook included many pages and a lot of information on everything from the Seniors' League to rain checks to the redemption of shares. And although Judge Redman was satisfied that Mr. Bloomer received a copy of the new Membership Handbook in 2009, he noted that it was never brought to his attention again in subsequent years (at para 42).

Because the exclusionary clauses were what Judge Redman called "very onerous and unusual," he held that they should have been actually included in the Application, specifically referred to in the Application, or otherwise brought to Mr. Bloomer's attention every year he applied to become a member (at para 42). Justice Redman does not say what was so onerous and unusual about these exclusionary clauses. They do seem to be onerous on their face because they completely exclude any responsibility for all loss, rather than simply limit responsibility to a certain types or types of loss. But unusual? The clauses seem to be rather normal fare. Is it payment for storage that makes them unusual? The golf club setting? Despite these questions, once Judge Redman characterized the clauses as "very onerous and unusual," the principle that a greater degree of notice was required in order to incorporate them into the Application kicked in. That meant that the exclusionary clauses were not part of the contract of bailment between Mr. Bloomer and the Connaught Golf Club.

Those readers who are golfers will be pleased to learn that the golf club was held liable for the value of Mr. Bloomer's golf equipment. However, they might not be pleased by the sum he was awarded.

Mr. Bloomer claimed $5,500. Two witnesses that he called, however, pegged the value much lower. Mr. Oliphant, the golf club's head professional between 2011 and 2013, testified that the actual value of Mr. Bloomer's equipment as it existed when it was lost was $1,155. Mr. Ellerman, the current golf club general manager, testified that the value at the time of the loss was $1,145.

Judge Redman noticed that in one of the written valuations filed with the Court, equipment such as golf gloves, a putter head cover, tees, and ball markers had no value attached to them (at para 45). He determined that some value had to be given to all of these items. Because he awarded Mr. Bloomer the sum of $1,350, he must have attached about $200 to these miscellaneous items.

Mr. Bloomer testified that much of his golf equipment was gifts with sentimental value. He also testified that the clubs that were lost had a special value to him because he was comfortable with them and had acquired them over a number of years. Golfer or not, Judge Redman did not add anything to the sum awarded for the disheartening nature of Mr. Bloomer's loss.

Mr. Bloomer's costs were limited to the $200 filing fee he spent to start the court action (at para 46). His costs were limited because the Connaught Golf Club had offered to settle by giving Mr. Bloomer a credit at the pro shop or a free membership, worth $1,500 — and both parties asked Judge Redman to consider this evidence. Judge Redman held that Mr. Bloomer "acted unreasonably in insisting upon claiming damages in the sum of $5,500.00 – approximately four times [the clubs'] value" (at para 46).

Judge Redman did not acknowledge that the golf clubs and other equipment that the Connaught Golf Club lost probably did have a value of $5,500 to Mr. Bloomer, although his judgment hints at it. Unfortunately, the law treats sentimentally valued and comfortable golf equipment the same way it treats the vast majority of commodities — like widgets. Only the market value of the used equipment was recoverable. Even a non-golfer like me can understand that the loss of a set of golf clubs is not simply financial in nature. But as Astrid Yrigollen wrote in *His Black Wings*, "you can't put a price on a sentimental value."

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