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The Unconscionability Business-A Comment on Tilden Rent-a-Car Co. v. Clendenning

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COMMENTARY

THE UNCONSCIONABILITY BUSINESS — A COMMENT ON TILDEN RENT-A-CAR CO. v. CLENDENNING[1]

The doctrine of unconscionability is developing apace,[2] and while it may not yet be big business, it is making a decent living. It is the purpose of this brief comment to suggest, by examining one recent unconscionability decision, that the doctrine is a very crude and imperfect device for regulating unfair terms in standard form contracts.[3] Like "consideration" or "fundamental breach", unconscionability can be uttered very quickly[4] and it therefore gives one the illusion that it is a concept which can easily be used.

The sad fact is that, just as consideration performs an indifferent job in deciding which promises should be enforced,[5] so does unconscionability serve as a poor device for regulating unfair provisions in standard form contracts.[6]

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[1] (1978), 83 D.L.R. (3d) 400, 18 O.R. (2d) 601 (C.A.).

[2] See, in addition to the present case, *e.g.*, *Pridmore v. Calvert* (1975), 54 D.L.R. (3d) 133 (B.C.S.C.); *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.); *Black v. Wilcox* (1976), 70 D.L.R. (3d) 192, 12 O.R. (2d) 759 (C.A.); *Davidson v. Three Spruces Realty Co.* (1977), 79 D.L.R. (3d) 481, [1977] 4 W.W.R. 460 (B.C.S.C.). It is significant that the common law doctrine is wider than the statutory codification of unconscionability in the provincial Business Practices Acts. What price, statutory obsolescence?

[3] In this comment, I have drawn very heavily from the ideas of Professor Leff. See, in particular, "*Contract as Thing*", 19 Am. U.L. Rev. 131 (1970) and "*Unconscionability and the Crowd* — Consumers and the Common Law Tradition", 31 U. Pitts. L. Rev. 349 (1970). My excuse for restating Leff's ideas is that I am a great believer in the dictum (attributed to Mr. Justice Holmes) that we need education in the obvious more than we need elucidation of the obscure.

[4] Note, in this connection, Professor Paul Freund's comments about the "clear and present danger" test in determining what is permissible speech under the First Amendment of the U.S. Constitution. Freund writes, "No matter how rapidly we utter the phrase 'clear and present danger', or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms which the judge must disentangle": *The Supreme Court of the United States* (Meridian Books, 1961), p.44.

[5] See, in particular, the criticisms in recent years by Atiyah, *Consideration in Contracts: A Fundamental Restatement* (Canberra, 1971); Swan, "Consideration and the Reasons for Enforcing Contracts", 15 U.W.O.L. Rev. 83 (1976); Reiter, "Courts, Consideration and Common Sense", 27 U.T.L.J. 439 (1977).

[6] Even Professor Posner concedes, by a circuitous route, that there are unfair provisions in

It is the purpose of this brief comment to suggest that we should regulate standard form contracts which are commonly used by consumers by adopting mandatory statutory terms and conditions. These conditions would serve to protect the legitimate interests of the seller (or provider of services) as well as providing minimum protection for the buyer. I will try to show that the unconscionability doctrine (as exemplified by the decision in the present case) achieves neither of these goals.

What Does the Case Decide?

In common with most unconscionability decisions, it is possible to say who won in *Clendenning* but it is impossible to derive any guidance for cases which are even slightly different from the facts in the present case.

Mr. Clendenning, the defendant, rented a motor vehicle from the plaintiff, and elected to pay an additional premium for "collision damage waiver" which he understood to amount to full insurance against damage to the vehicle, having been told on previous occasions that the waiver provided "full non-deductible coverage". On the face of the document it was provided that the defendant was not entitled to protection, if he drove the car in violation of any of the provisions of the agreement, and on the back of the agreement there were a number of terrifying exclusions[7] including one which deprived the hirer of protection if he drank any intoxicating liquor "whatever be the quantity". The defendant consumed some alcohol and damaged the car. The plaintiff then sued to recover the damage to the car.

The trial judge held for the defendant on the basis that the

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standard form contracts. After pointing out that competition deals adequately with the problem of the unfair provision, Posner states: "An occasional feature of printed contracts that is objectionable is the use of fine print to slip an onerous provision past an unwary customer"; see his *Economic Analysis of Law*, 2nd ed. (Boston, Little, Brown & Co., 1977), p. 85. Posner would regulate these provisions by deeming them to be fraudulent. Since this technique involves the use of a fiction for no understandable reason, I shall continue talking about unfair provisions.

[7] As Mr. Justice Dubin pointed out in his majority opinion: "It is to be noted, for example, that if the driver of the vehicle exceeded the speed-limit even by one mile per hour, or parked the vehicle in a no-parking area, or even had one glass of wine or one bottle of beer, the contract purports to make the hirer completely responsible for all damage to the vehicle. Indeed, if the vehicle at the time of damage to it was being driven off a federal, provincial or municipal highway, such as a shopping plaza for instance, the hirer purportedly would be responsible for all damages to the vehicle": 83 D.L.R. (3d) 400 at p. 403, 18 O.R. (2d) 601 at p. 603.

plaintiff had misrepresented the terms of the contract to the defendant. The majority of the Ontario Court of Appeal (Dubin and Zuber, JJ.A.) were unable to find any misrepresentation by the plaintiff's clerk, but they found for the defendant on the ground that the plaintiff could not enforce the contract since the plaintiff had not pointed out certain unusual and onerous (*i.e.*, unconscionable) provisions to the defendant. Mr. Justice Lacourciere dissented because, although he thought that the terms of the contract were harsh, he did not think it was unconscionable to deny protection to someone who had been driving when "the proportion of alcohol in his [the defendant's] blood exceeded the penal limit"[8] and when "on the advice of counsel he pleaded guilty to a charge of impaired driving".[9]

It is at this point that the questions come rushing at one.

If the basis of the majority's decision really is the failure of the plaintiff to point out onerous terms, then one would expect a different result if the plaintiff's clerk had told the defendant to read the conditions on the back of the contract before signing the contract. One cannot be sure of this, but I would imagine that the present majority would still have reached the same result. The opinion might state that disclosure meant "real" disclosure and merely asking someone to study the terms of the contract did not amount to "real" disclosure since laymen could not be expected to absorb complex provisions of standard from contracts.

Assume, now, that instead of asking the defendant to study the printed terms and conditions, the plaintiff's clerk had told the defendant that he (the defendant) would not be entitled to protection if he consumed any intoxicating liquor. Again, it is impossible to predict the result, but one suspects that the majority would have held that the defendant would have understood this communication as meaning that if he (the defendant) drove while he was unable to control the car as a result of being intoxicated, the plaintiff would be able to recover for damage to the car.

In short, all the court's talk about the need to point out unreasonable and unfair terms is probably beside the point. However, even if the present majority uses disclosure as a smokescreen for their decision, there is no guarantee that other judges will see this.

One senses that the result in the present case would have been

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[8] *Ibid.*, at p. 410 D.L.R., p. 611 O.R.

[9] *Ibid.*

different if the trial judge had found that the defendant was unable to control the vehicle because of intoxication. The question that then arises is why the court did not state this. The answer, of course, is that the common law tradition works by indirection and by "case-to-case sniping".[10] The majority, rightly, felt it did not have the mandate to formulate a legislative rule. The question of what protection (if any) we want to give to people who damage cars as a result of drunken or reckless driving is a political one and it is one that should therefore be made by politicians. That point has been grasped in the area of tax discounting, an area in which there was at least one unconscionability precedent.[11] I am not suggesting statutory standard form contracts for every single contractual transaction; there is no need, for example, to have a statutory contract dealing with alcoholics selling their property at gross undervalue, although that has been the subject of at least one reported case.[12] I am also 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.

A Statutory Car Rental Contract

I shall resist the temptation of drafting a statutory car rental contract. I will do this because, like the judiciary, I know very little about the car rental business. Instead, I will set out the procedure that I think should be followed in drawing one up and an outline of what should be included in the contract. To deal with the procedure first: the Minister of Corporate and Consumer Affairs should consult with the car rental companies, insurance companies, Superintendent of Insurance and consumer organizations with a view to devising a statutory standard form contract. The contract should state *all* the disqualifying conditions with as much precision as possible; thus, if drunkenness is to be an ex-

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[10] See Leff, "Unconscionability and the Crowd — Consumers and The Common Law Tradition", 31 U. Pitts. L. Rev. 349 (1970), at p. 358.

[11] See *Hanson, Director of Trade Practices v. John's Tax Service Ltd.* (B.C.S.C.), March 5, 1975, unreported. A number of legislative responses have been adopted in order to deal with the tax discounting problem with outright prohibition (*e.g.*, Quebec) at one extreme to disclosure legislation at the other (Alberta). In between these two extremes, the Federal *Tax Rebate Discounting Act*, S.C. 1977-78, c. 25, limits the amount the discounter can keep to 85%.

[12] See *Black v. Wilcox* (1976), 70 D.L.R. (3d) 192, 12 O.R. (2d) 759 (C.A.). This kind of case is unusual and freakish enough for a "tailor-made" solution to be entirely appropriate.

cluded risk, drunkenness should be defined as precisely as possible. A disqualification which depended on the proportion of alcohol in a driver's blood[13] would be better than one that depended on the trial judge's finding of whether the hirer was sufficiently impaired or not. Similarly, if a disqualification is to be made for driving at "an illegal, reckless or otherwise abusive speed",[14] that speed should be quantified. If there is to be a deductible provision, the size of the deductible should be regulated.

Two arguments can be made against a statutory contract. In the first place, it might be argued that the resulting statutory contract will be an unhappy compromise between the interests of the car rental companies and consumers. This is likely to be true, but it is also true of every piece of legislation on the statute books. A statutory rental contract makes private legislation that previously was invisible and uncertain,[15] visible and less uncertain.

The second fear that might be expressed is that a statutory standard form contract would merely restate the present horrific contract already used by car rental companies. This is a possibility but an exceedingly remote one. For one thing, it is difficult to believe that the executives of car rental companies will fight desperately to retain some of the clauses that presently appear in car rental contracts. Second, it would be a foolhardy Minister of Consumer and Corporate Affairs who would merely rubber-stamp the present car rental contracts. Experience with administrative control over insurance contracts shows that while it is difficult to counter "the significant role of industry representatives in drafting standard policies",[16] some obnoxious clauses are removed.[17] Further, those who are afraid of codifying contract terms, fail to take into account that we already have unfair contract terms. It is true that some of these unfair clauses can be successfully challenged

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[13] Thus, I am attracted by Mr. Justice Lacourciere's definition of drunkenness rather than the majority's definition. See text at footnotes 8, 9, *supra*, at p. 195.

[14] See cl. 7(g) of the rental agreement cited in Mr. Justice Lacourciere's dissenting opinion: 83 D.L.R. (3d) 400 at p. 414, 16 O.R. (2d) 601 at p. 614.

[15] For a description of standard form contracts as being tantamount to an exercise of legislative power, see *e.g.*, Kessler, "Contracts of Adhesion — Some Thoughts About Freedom of Contract", 43 Colum. L. Rev. 629 (1943).

[16] See Kimball and Pfenningstorf, "Legislative and Judicial Control of the Terms of Insurance Contracts: A Comparative Study of American and European Practice", 39 Indiana L.J. 674 (1964), at pp. 704, 729.

[17] See Kimball and Pfenningstorf, "Administrative Control of the Terms of Insurance Contracts: A Comparative Study", 40 Indiana L.J. 143 (1965).

but the consumer does not know which clauses will be held to be unfair and few will have the resources and tenacity of a Mr. Clendenning to pursue a challenge to the fairness of a particular clause up to the highest court in the land.[18]

Conclusion

It is very seldom that the interests of sellers (and providers of services) and consumers coincide. It is my belief that both would benefit from having a statutory form contract. Sellers would be assured that their legitimate interests were protected and consumers would be assured of a minimum level of protection at very low cost. Judges would also benefit from a movement to statutory contracts. They would be relieved of the thankless task of having to make difficult policy judgments in situations where the relevant evidence necessary to make an informed judgment is unavailable.[19] Practising lawyers would lose very little by the adoption of statutory form contracts, since there are more lucrative fields of law than consumer litigation. Academic commentators might well be the principal losers if we moved from the present system of "catch-as-catch-can" to a more rational system of controlling private economic power. But this seems a small price to pay. Anyway, it is not much fun criticizing judges for failing to achieve impossible goals.

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