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Unconscionability in Contract Law and in the New Sales Act - Confessions of a Doubting Thomas

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A. UNCONSCIONABILITY IN GENERAL

... is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injus-
Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other?

Thus, wrote Mr. Justice Frankfurter in his dissenting opinion in *U.S. v. Bethlehem Steel Corp.*, one of the most remarkable — and illuminating — cases on unconscionability.

I would like to examine the *Bethlehem Steel* case first because it seems to me to demonstrate clearly the next to impossible tasks that are delegated to the judiciary by the unconscionability doctrine. In *Bethlehem Steel*, the United States government sought a declaration that a 22% profit made by Bethlehem Steel on a contract which involved no risk for the contractors was unconscionable. Mr. Justice Black, writing for the majority, refused to find that the profits made were unconscionable. The majority showed its awareness of the social problem involved. “In this country,” wrote Mr. Justice Black, “every war we have engaged in has provided opportunities for profiteering and they have been too often scandalously seized”. Mr. Justice Black pointed out the alternatives that were open to the government; for example “if it chose to, the Fleet Corporation could have foregone all negotiation over price, compelling Bethlehem to undertake the work at a price set by the President, with the burden of going to court if it considered the compensation unreasonably low”. Alternatively, the government could have placed “a fixed limit on profits” or could “recapture high profits through taxation”.

In short, although my political sympathies are not with Bethlehem Steel, I am glad that the majority decided the case the way it did. In the first place, the court had no standard by which to judge whether Bethlehem’s 22% profit was unconscionable. After all, as Mr. Justice Black pointed out, the salmon canneries had been making a 52% profit and the steel companies had been making profits ranging from 30% to 320%. Secondly, if the court had attempted to fix a “conscionable” rate of profit in *Bethlehem*,

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1 315 U.S. 289, at p. 326.
2 Ibid., at p. 309.
3 Ibid., at p. 303.
4 Ibid., at p. 309.
5 Ibid., at p. 307.
6 Ibid., at p. 307.
it would have been assuming responsibility for a major social problem. The court would have received the plaudits and the brickbats which in a democratic system belong to the elected representatives who can be held accountable for their decisions.

Let me turn from the dramatic Bethlehem Steel case to two more mundane cases which also illustrate the difficulties I have with the unconscionability doctrine. In these cases, unlike the Bethlehem Steel case, the plaintiff was successful. Despite this fact, the cases appear to show the inadequacies of the unconscionability doctrine. In the first case, Pridmore v. Calvert, the plaintiff, after being involved in a motor-vehicle accident, signed a release of all her claims for $331.40. In the event, the judge held that the release was invalid and awarded her damages of $20,000. There would be problems enough if the judge had said that he was giving the plaintiff relief because $331.40 bore no "reasonable relation" to $20,000 and left it at that.

Instead, the judge listed the following factors as reasons for giving relief:

1. The plaintiff is a woman of limited intelligence.
2. The plaintiff had worked throughout her married life as a practical nurse and in 1971 her husband died. The plaintiff had no close personal friends to whom she turned for advice or counselling of a confidential nature.
3. At the material time she sought no legal advice nor any lay advice concerning the signing of the release.
4. There was no evidence to suggest that the plaintiff had any business acumen at all, much less any knowledge of "releases".
5. The defendants' adjuster courteously arranged for an interview with the plaintiff at her home where she was recuperating on the second day after the accident.
6. The plaintiff's poor physical condition was apparent to the defendants' adjuster, who observed that the plaintiff was taking pills, that she was suffering from headaches, that she was in pain, and when walking, she did so in a guarded fashion.
7. The defendants' adjuster knew that the plaintiff was unable to work and was under a doctor's care. 8

One might ask why the court did not simply give the plaintiff relief on the ground that the plaintiff had been the victim of an extremely unequal bargain. The answer must lie in the fact that, if the courts have a revulsion against enforcing unfair contracts as

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7 (1975), 54 D.L.R. (3d) 133 (B.C.S.C.).
8 Ibid., at p. 140.
Mr. Justice Frankfurter stated in *Bethlehem Steel,* they have at least as strong a commitment to freedom of contract. In the words of Mr. Justice Anderson of the British Columbia Supreme Court giving judgment in a recent unconscionability case: "I agree that as a general rule, apart from fraud, it would be a dangerous thing to hold that contracts freely entered into should not be fully enforced."10

In any event, decisions such as *Pridmore v. Calvert*11 however pleasing they may be to supporters of the unconscionability doctrine,12 make it *extremely* difficult to advise someone who has signed a release whether s/he is bound by it or not. In my view, the likelihood is that the courts will give relief only in truly egregious cases.13 The fact that relief will be given in only a few outrageous cases means that some insurance companies will continue to engage in behaviour which is illegal under the Ontario Insurance Act.14

One might say, with a great deal of truth, that the problem of releases has been "subsumed" instead of being "solved".15 In my view, it is both possible and desirable to have a statute that regulates releases of the kind involved in *Pridmore v. Calvert* in great detail.16 Thus, one could provide that a settlement which did not provide say, at least 75% of what a court would have awarded is not binding.17 A rule of this kind would prevent the

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9 Supra, footnote 1.
11 Supra, footnote 7.
12 See, in particular, the writings of Professor Waddams, "Unconscionability in Contracts", 39 Mod. L. Rev. 369 (1976), and Note, 17 Western. Ont. L. Rev. 295 (1979).
13 See, for example, *Beach v. Eames* (1976), 82 D.L.R. (3d) 736, 18 O.R. (2d) 486 (Co. Ct.), in which the court gave relief to someone who had settled for $500 a claim for $50,000. The court gave relief on the basis of the enormous disparity between these figures and on the basis that "both the plaintiff and his wife appeared to me to be dull intellectually", *ibid.,* at p. 739 D.L.R.
14 See Part XVIII of The Insurance Act, R.S.O. 1970, c. 224 which seeks to penalize "any unfair or deceptive act or practice in the business of insurance".
17 This is only one possible means of regulation. Alternatively, one could impose a duty on
court from having to make inquiries into the victim’s intelligence, his or her marital status, his or her degree of dependence on medication, his or her business accumen and all the other inquiries that at present seem necessary under our cherished system of case-by-case adjudication. Detailed regulation of this kind would afford greater protection to accident victims and would provide guidance for the victim’s legal advisers and for the judge whose task would be made less difficult.

My second unconscionability exhibit is the already celebrated decision of the Ontario Court of Appeal in Tilden Rent-A-Car Co. v. Clendenning. It will be remembered that Mr. Clendenning rented a car from the plaintiff company. Clendenning opted to pay an additional premium for “collision damage waiver”. On the face of the document it was provided that the renter was not entitled to protection if he drove the car in violation of any of the provisions of the agreement. On the back of the agreement it provided that the renter was not entitled to protection if he drank any intoxicating liquor “whatever be the quantity”. Clendenning consumed a considerable amount of alcohol and damaged the car. Tilden now sued to recover the damage to the car.

Before discussing the judgment of the Ontario Court of Appeal, it should be noted that there is a very strong argument for saying that, irrespective of any contractual conditions, it is against public policy to allow someone in Clendenning’s situation, who has damaged the plaintiff’s car and who has had to plead guilty to a charge of impaired driving, to escape responsibility for his actions. A majority of the Ontario Court of Appeal did not take this approach; the majority held that Tilden could

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18 Insurance company adjusters to have settlements in cases of serious injury approved by a master of the Supreme Court. Failure on the part of adjusters to get the approval of the master should be made an offence. Further, it should be expressly provided that in cases of failure to get any official approval of a settlement, the statute of limitations would not run in favour of the insurance company.

19 My own view is that people who are in the plaintiff’s position in cases such as Pridmore, supra, footnote 7, would lose nothing by being deprived of the opportunity of receiving paltry amounts.


20 The proportion of alcohol in Clendenning’s blood also exceeded the penal limit, supra, at p. 410 D.L.R.
not recover for the damage caused because the unusual and onerous clause relating to the consumption of intoxicating liquor had not been pointed out to Clendenning. I am not sure what significance to give to the obligation to point out unusual and onerous terms. First of all, there is some difficulty with what is meant by “pointing out”. Is it enough if the car rental company uses red ink? The court might easily say that “pointing out” means an oral warning since people who rent cars are in a hurry and cannot be expected to peruse contractual provisions. It will be necessary to spend another say, $30,000\textsuperscript{21} to find out the answer to that question. Let us assume that the majority requires some form of oral warning in a later case. That still does not dispose of the matter. It is possible after all, for a future court to state that a renter is not bound by an unconscionable provision in a contract, despite the fact that the clause was clearly explained to the renter. After all, anything is possible in the unconscionability game.\textsuperscript{22}

The Clendenning case also leaves unresolved the question of what are “unfair” terms in car rental contracts. Thus, courts will have to decide in individual cases how serious the renter’s violation of provincial or federal law is before the renter is deprived of protection. Or, to take another example, the courts will have to rule on the fairness of the clause which provides that the renter is responsible for all damage to the vehicle if at the time the vehicle was being driven off a federal, provincial or a municipal highway.\textsuperscript{23}

As I have argued elsewhere,\textsuperscript{24} it should not be too difficult to hammer out a standard agreement which protects the legitimate interests of the car rental companies and which removes unfair clauses without the need of the consumer to take his or her case to the Ontario Court of Appeal to get a Clendenning type decision. Car rental companies will still be able to compete on prices. Indeed, competition should work better after terms have

\textsuperscript{21} This is my estimate of the costs of a Clendenning type case. I do not believe my estimate to be excessive.

\textsuperscript{22} After all, even the fact that the aggrieved person has received independent advice does not necessarily save the transaction. As Lord Denning, M.R., pointed out in Lloyds Bank v. Bundy, [1975] Q.B. 326 at p. 339, [1974] 3 All E.R. 757 (C.A.), “Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal”.

\textsuperscript{23} Supra, footnote 19, at p. 403 D.L.R.

been standardized. At present, it is possible for a consumer to make a rational decision on the basis of prices only to find that his or her calculations have been rendered worthless because he or she has not taken into account the fact that the particular car rental company has particularly unfair contractual terms which the court may or may not uphold. Consumers renting cars have better things to do with their time than comparing the contractual terms offered by, say, twenty car rental firms. This is an exercise which even teachers of contract law would find unrealistic; it is even more unrealistic when we expect this exercise to be a meaningful one for non-lawyers.\textsuperscript{25}

Nor should those who love the common law tradition feel too unhappy about this proposed development. The common law will still be able to intervene to protect, for example, the alcoholic who sells his or her property at a gross undervalue.\textsuperscript{26}

B. UNCONSCIONABILITY IN THE SALES ACT

(1) Consumer Sales

After that long general introduction to the problems of unconscionability, I would like to examine how some problems would be dealt with under the new Sales Act. I had better reproduce the relevant sections of the proposed Act.

5.2(1) If with respect to a contract of sale, the court finds the contract or part thereof to have been unconscionable at the time it was made, the court may,

\begin{itemize}
\item[(a)] refuse to enforce the contract or rescind it on such terms as may be just;
\item[(b)] enforce the remainder of the contract without the unconscionable part; or
\item[(c)] so limit the application of any unconscionable part or revise or alter the contract so as to avoid any unconscionable result.
\end{itemize}

(2) In determining whether a contract of sale or a part thereof is unconscionable or whether the operation of an agreement is unconscionable under section 5.7(3), the court may consider, among other factors:

\begin{itemize}
\item As Professor Leff has pointed out: "It is hard to focus attention on what should not ordinarily happen, or at least to focus as carefully as upon what will happen for sure; i.e., the price and the nature of the goods." See his article, "Unconscionability and the Crowd — Consumers and the Common Law Tradition", 31 U. Pitt. L. Rev. 349 (1970), at p. 351.
\end{itemize}
(a) the degree to which one party has taken advantage of the inability of the other party reasonably to protect his interests because of his physical or mental infirmity, illiteracy, inability to understand the language of an agreement, lack of education, lack of business knowledge or experience, financial distress or similar factors;

(b) gross disparity between the price of the goods and the price at which similar goods could be readily sold or purchased by parties in similar circumstances;

(c) knowledge by one party when entering into the contract, that the other party will be substantially deprived of the benefit or benefits reasonably anticipated by that other party under the transaction;

(d) the degree to which the contract requires a party to waive rights to which he would otherwise be entitled;

(e) the degree to which the natural effect of the transaction, or any party's conduct prior to, or at the time, of the transaction, is to cause or aid in causing another party to misunderstand the true nature of the transaction and of his rights and duties thereunder;

(f) the bargaining strength of the seller and the buyer relative to each other, taking into account the availability of reasonable alternative sources of supply or demand;

(g) whether the party seeking relief knew or ought reasonably to have known of the existence and extent of the term or terms alleged to be unconscionable;

(h) in the case of a provision that purports to exclude or limit a liability that would otherwise attach to the party seeking to rely on it, which party is better able to safeguard himself against loss or damages; and

(i) the general commercial setting, purpose and effect of the contract.  

Let us examine how these guidelines might apply to particular situations.

(a) Door-to-door sales

Suppose that an encyclopaedia company sells encyclopaedias door-to-door in a certain area in Toronto. The company sells encyclopaedias for $1,400 although similar encyclopaedias can be bought from ordinary bookstores in the city for $700. Suppose further, that a customer was induced after five hours of sales talk to buy a set of encyclopaedias for $1,400. A week after entering into the contract to purchase the encyclopaedias, the customer wishes to get relief under s. 5.2(2) of the proposed new Sales Act. I suggest that it is virtually impossible to advise the customer with

26a Report, vol. 3.
even the slightest degree of confidence. In the first place, a court might decide that the plaintiff may not proceed under s. 5.2(2) of the Act at all since the plaintiff already has a two-day cooling off period provided him or her under The Consumer Protection Act. In short, a judge may end the whole business there and the plaintiff may be left remediless.

Suppose, however, that the judge reaches the conclusion that s. 5.2(2) is applicable. Unfortunately that conclusion does not get us out of the morass. The judge must now look at s. 5.2(2)(b) to determine whether there is a “gross disparity between the price of the goods and the price at which similar goods could be readily sold or purchased by parties in similar circumstances”. Suppose that the judge finds that there are no other encyclopaedia companies selling door-to-door in Toronto. Can the judge say that the existence of one door-to-door encyclopaedia company creates a “monopoly” situation and give relief under s. 5.2(2)(b) taking into account “the bargaining strength of the seller and buyer relative to each other, taking into account the availability of reasonable alternative sources of supply or demand?” Sadly, no one knows the answer to that question either. Again, would it be legitimate for the court to compare the $700 price charged by the regular bookstore with the $1,400 price charged by the door-to-door company and give relief on that basis? Your guess is as good as mine. Finally, what are we to make of the five-hour sales pitch? Is this factor to count against the validity of the transaction as indicating “unequal bargaining power” and provide a ground for relief? Alternatively, does the existence of a five-hour sales pitch indicate “hard bargaining” so that the transaction is upheld? Unfortunately, it is necessary to litigate these (and other) points in order to get any answers. Even experienced consumer lawyers will find it extremely difficult to advise their clients who have this kind of problem. Further, even if a consumer protection department is able to bring an action on behalf of the consumer, it seems to me that these problems remain intractable.

All these problems would disappear if we took the sensible step

27 R.S.O. 1970, c. 82, s. 33.
28 See s. 16(2) of the British Columbia Trade Practices Act, S.B.C. 1974, c. 96, as amended by S.B.C. 1975, c. 80, s. 9. There is no similar power vested in the Ontario director.
of simply outlawing door-to-door sales at least of items costing more than say, $50. In the first place, as two recent cases from British Columbia have reminded us, door-to-door sales generate a great deal of “pre-entry fraud”. Thus, in *Stubbe v. P.F. Collier* a seller of encyclopaedias gained entry by stating that he was conducting a survey and, in *Director of Trade Practices v. Gerald Mason Ltd.*, a seller of vacuum cleaners represented that he was offering to clean carpets, whereas he was, in fact, selling vacuum cleaners. Nor is this “pre-entry fraud” fortuitous; the court in *Stubbe v. P.F. Collier* accepted evidence from Dr. Kelly, an expert in marketing, “to the effect that people generally are much more likely to admit a person to their house if the stated purpose is to conduct some sort of survey, rather than a reasonably clear statement of intent to sell.”

More serious than the “pre-entry fraud” is the post-entry fraud that occurs on a vast scale. I believe this fraud occurs largely because the salesman is paid solely by commission. If the salesperson does not make sufficient sales s/he will starve. This system of remuneration, as Mr. Justice Aikins pointed out in *Stubbe v. P.F. Collier*, puts great pressure on salespersons “to apply their knowledge of selling and deviate from the prepared scripts with effective deceptive ploys of their own”.

Another very powerful inducement to fraud is the fact that the salesperson knows that s/he will be impossible to contact. Very few salespersons will leave their calling-card giving their telephone number. In ordinary sales, the fact that the consumer knows where to go when he or she has been cheated creates some disincentive to engage in fraud.

In short, I think consumers would suffer less fraud and gain more privacy if door-to-door sales were simply abolished. There would be a considerable payoff for the judges also if door-to-door sales were abolished. They would not have to make next to

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30 Supra.

31 Supra., at p. 615.


33 Ibid., at p. 615.
impossible decisions about how much fraud was acceptable and next to impossible decisions as to whether the salesperson had engaged in persuasion or coercion.

(b) Overpricing and unconscionability

A number of American cases have tried to deal with the problem of whether a sale at an excessive price can be an unconscionable practice.

In a number of cases, courts have held that a contract is unconscionable because the seller has received an "excessive price". Some of these decisions have troubled thoughtful commentators because they seem to ignore that interest charges to the poor must necessarily be higher than interest charges paid by affluent consumers. In other words, despite the fact that the "poor pay more", it does not follow that those selling to the poor make more.

As one commentator has pointed out:

If, for example, the retail market price of an item is $400, a seller who charges $500 might appear to be charging an unconscionable price. Yet if this seller is selling on time and assigning contracts at a 20% discount, he receives the same amount of cash as is received by a retailer charging $400. Salesmen's commissions and referral fees may be expected to increase the seller's price still further. Add to this amount the interest which the buyer must pay to the finance company, and the total amount will no doubt exceed what the buyer would have had to pay for the same item in a large department store on a strict cash basis.

There is no telling what Canadian courts will do with s. 5.2(2) of the proposed new Sales Act when presented with an unconscionable price problem. I fear that the results will be as erratic and as unsatisfactory as the American jurisprudence on the subject.

As Dean Speidel has suggested, a more sensible way of dealing with the unconscionable price problem is to compare the net profit made by an alleged delinquent seller with the net profits of similarly situated sellers selling similar goods or services. If there is a gross disparity, the price is unconscionable. Since costs, business risks and efficiency vary, a net profit comparison is the only meaningful way to test for gross disparity. However, it is important that comparisons be made with the profits of similarly situated sellers rather than "average" net profits.38

Attractive as Dean Speidel's solution is, I do not think that the courts could deal with the gross overpricing problem on a case by case basis.39 Let us suppose that in a given case a dealer admits that he makes net profits of 60% and the evidence shows that other similarly situated dealers make profits of between 15% and 70% and that the average profit is 25%. Does the court give relief in such a case on the ground that 60% is considerably in excess of the 15% profit that many dealers make and considerably in excess of the average profit? Your guess is as good as mine.

It seems to me that there are three choices that we have in dealing with the problem of unconscionable price. The first is to let the market operate. The second is to regulate directly the prices at which goods are sold to low income consumers. The effect of this price control would be to make credit less readily available for those with low incomes. The third approach would be to replace or supplement the private-sector credit industry, where "high-risk" borrowers are concerned by creating some kind of consumer loan program, either in the form of direct government loans or by public subsidization or guarantee of private loans.40

A general unconscionability provision of the kind envisaged by s. 5.2 of the proposed Sales Act would produce some messy (if not incoherent) jurisprudence and it would make it more difficult

39 Note also the forceful comment by Professors Speidel, Summers and White: "Absent an effective administrator with considerable power, the application of the unconscionability doctrine to the price term will be no more than a fart in a windstorm. This is so because debtors' lawyers are generally too lazy and unimaginative to marshall the facts necessary to prove a price unconscionability case." See Commercial and Consumer Law Materials, 2nd ed. (1974), p. 505.
for us from deciding which of the three alternatives we favoured.\textsuperscript{41}

C. EXPECTANCY DAMAGES IN CONSUMER CASES

In \textit{Custom Motors Ltd. v. Dwinell},\textsuperscript{42} a young man (the respondent) of 21 who was unemployed, agreed to buy a Chevrolet Impala for $1,395. The respondent chose a car and paid the appellant a deposit of $500, and signed a contract to buy the car. A few days after signing the contract, the respondent went to see his bank manager to get a loan to pay for the car. Not surprisingly, the loan was refused. The plaintiff now sought to get his money back. The Nova Scotia Supreme Court, Appeal Division held that the respondent was entitled to his money back because the parties had not entered into a binding contract but merely an agreement to make an agreement. If the Nova Scotia court had found that the parties had entered into a valid contract, would it have been unconscionable under s. 5.2 of the proposed new Sales Act for the appellant to have kept the $500, either as a deposit or as expectancy damages?

The simple fact of the matter is that no one knows. All one can say is that some judges probably would give the plaintiff relief because they would feel that someone who thought that he could borrow money from the bank while he was unemployed suffered from "a lack of business knowledge or experience" under s. 5.2(2)(a) of the proposed Sales Act. Alternatively, some other judges might refuse relief because there was no evidence of overreaching by the defendant. Further, shortly after claiming his $500 back, the respondent bought another car by private sale for $1,500.\textsuperscript{43}

Would it not be simpler to have a rule that allowed consumers their deposits back and disallowed claims for expectancy damages for lost volume claims? In England, the English Court of Appeal held in \textit{Lazenby Garages Ltd. v. Wright},\textsuperscript{44} that it would not award expectancy damages where a second-hand car was being sold. In my view, it would be desirable to place the principle in \textit{Lazenby Garages} on a statutory footing and to extend it to new cars (and

\textsuperscript{41} It is, of course, possible to use a combination (or combinations) of these three alternatives.
\textsuperscript{42} (1975), 61 D.L.R. (3d) 342 (N.S.S.C. App. Div.).
\textsuperscript{43} \textit{Ibid.}, at p. 345.
\textsuperscript{44} [1976] 1 W.L.R. 459.
other consumer durables) and to give protection to consumers who had made down-payments or deposits. After all, the reason why many consumers seek to back out of deals is for exactly the same reason that Dwinell did — the realization that they had entered into a contract that was beyond their means. One could require consumers to demonstrate on a case-by-case basis their impecuniosity but this seems a very expensive game to play. After all, several thousands of dollars were spent in the Dwinell case in a dispute over $500.

Nor would merchants be seriously inconvenienced by a rule which denied expectancy damages in consumer cases or one which obliged them to refund deposits in executory situations. The reasons which Fuller and Perdue advanced for awarding expectancy damages generally: (1) that awarding expectancy damages served to facilitate commercial transactions and (2) that businessmen regard present promises as having future value do not seem to have any great force in consumer transactions.\(^4\)

Moreover, Ross and Littlefield have shown that, when dealing with middle class clients, not only do reputable dealers not claim expectancy damages or keep deposits,\(^4\) they also are prepared in some cases to take back goods which have obviously been abused.\(^4\)

**D. DURABILITY AND DISCLAIMER CLAUSES**

According to the Report on Sale of Goods, the revised Act will provide that goods bought "will remain fit or perform satisfactorily, as the case may be, for a reasonable length of time having regard to all the circumstances".\(^4\) This sounds so reasonable that it seems churlish to raise any quarrel with it. The fact is, however, that the question of durability has had to be litigated in case after


\(^{47}\) Note the following statement made by a salesman to Ross and Littlefield, *ibid.*, at p. 208:

> Sometimes someone who is hard to sell will take a set home with him for a few days and then want to return it. We cheerfully refund his money so he's not mad at Western. It's better than trying to live with him. You hope that he'll come back some day and buy something that will work for him.

\(^{48}\) See s. 5.13(1)(b)(vi) of the draft Bill in Report, vol. 3.
case. Each case is like a bus ticket; it is seemingly valid for day of issue only. The case provides no guidance for other similar cases.

This uncertainty is best seen in the car cases which have been analyzed by Mr. Whincup.\textsuperscript{49} The protection given by the courts to buyers of cars has varied from nothing\textsuperscript{50} to very substantial protection.\textsuperscript{51} Even in cases where the buyer has been able to get protection s/he has frequently had to go to an appellate court to get protection.\textsuperscript{52} In these cases, one wonders whether the cost of litigation did not exceed the cost of the car.

A further complication is added by the fact that although disclaimer clauses are not permitted in consumer sales,\textsuperscript{53} this does not mean that they cannot be taken into account in determining the extent of protection the buyer gets. A judge may, unconsciously in some cases, take into account the existence of a disclaimer clause and reduce the protection the buyer gets. In my view, it should not be too difficult to compute a statutory tariff of durability for both old and new cars. This tariff could be based on the price and/or the age of the car. To be sure, the protection afforded by the tariff would not be extravagant,\textsuperscript{54} but the buyer would at least be given some protection without the need for litigation.

I have outlined some specific problems in the sales area and I have tried to suggest precise regulation of those practices which we find abhorrent. My suggestion is that we proscribe these practices by legislation rather than by judicial techniques. For one thing, it will be difficult, given the uncertainties of the unconscionability doctrine, to find consumers who are prepared to make legal history by establishing an unconscionability

\textsuperscript{49} M. Whincup, "Reasonable Fitness of Cars", 38 Mod. L. Rev. 660, (1975).
\textsuperscript{50} See e.g., Peters v. Parkway Mercury Sales Ltd. (1975), 58 D.L.R. (3d) 128, 10 N.B.R. (2d) 703 (S.C. App. Div.).
\textsuperscript{52} See e.g., Green v. Holiday Chevrolet-Oldsmobile Ltd. (1975), 55 D.L.R. (3d) 637, [1975] 4 W.W.R. 445 in which case the Manitoba Court of Appeal had to remind the trial court that the implied warranties of fitness applied to a second-hand car costing $2,895.
\textsuperscript{53} See s. 44(a) The Consumer Protection Act, R.S.O. 1970, c. 82, as amended by S.O. 1971, Vol. 2, c. 24, s. 2(1).
\textsuperscript{54} See the tariff prescribed by the South Australian Second-Hand Motor Vehicles Act 1971 described by Professor Trebilcock, "New Approach to the Protection of Used Car Buyers, 18 McGill L.J. 258 (1972).
precedent. Second, unlike the situation which apparently exists in Germany, according to Professor Dawson, common law courts generally base their unconscionability decisions on very narrow grounds. Thus, I have tried to advise a student who rented a truck and caused damage in the light of the decision of the Ontario Court of Appeal in *Tilden Rent-A-Car Co. v. Clendenning* but I felt unable to give my advice with any degree of confidence. Judges give rulings based on narrow grounds, I suggest, because they do not wish to take on the task of regulating various businesses. For one thing, the courts do not have the machinery to ascertain which clauses are unusual. The court in *Tilden* asserted that the clause challenged in that case was unusual but there was no evidence that this was, in fact, the case. A court is also not generally in a good position to examine the business justification for a particular clause. This kind of inquiry should lead the courts to ask questions about, for example, the availability of insurance and, even in large commercial cases, they have not shown any inclination to make these inquiries.

Further, if the courts begin to police contracts overtly, they will attract criticism from industry groups for interfering with freedom of contract and from consumer groups for not policing contracts vigorously enough. I think it is important to shield them from these kinds of criticisms. For one thing, if judges are to be agents of political change, they must be able to reply to their critics and few would want to see an ongoing debate between judges and various political groups. This addition to our political process does not appear to be a particularly attractive one.

55 See his article “Unconscionable Coercion: The German Version”, 89 Harv. L. Rev. 1041 (1976). Professor Dawson writes, in part: “one cannot easily imagine an American state court thudding forth so often [as a German court]: ‘This transaction offends the conscience and sense of decency of all fair and right-thinking persons in the state of (Maine)’”; *ibid.*, at p. 1124. For Maine, of course, one could insert England or Canada. It is significant that Professor Dawson ends his article with the following words: “We have much to learn from German law and should be willing to admire the German achievement. It does not follow that we have the means to emulate it”; *ibid.*, at p. 1126.


57 In some cases they have not merely failed to make inquiries into the availability of insurance. They have ignored it when they have been aware of its existence; see *e.g.*, Harbutt’s “Plasticine” Ltd. v. Wayne Tank and Pump Co. Ltd., [1970] 1 Q.B. 447, [1970] 1 All E.R. 225, (C.A.); Levison v. Patent Steam Carpet Cleaning Co. Ltd., [1977] 3 W.L.R. 90 (C.A.).

58 I find it remarkable that a whole range of commentators in various fields of law are asking for more powers to be given to the judiciary when there is no evidence that most
E. A NOTE ON UNCONSCIONABILITY IN COMMERCIAL TRANSACTIONS

Section 5.2(2) also allows the courts to strike down clauses in commercial contracts on grounds of unconscionability. This bothers me far less than giving the courts power to police consumer transactions. For one thing, businessmen seldom seem to sue one another anyway; a commercial case such as Harbutt's "Plasticine" v. Wayne Tank, is such a rarity that teachers of commercial law hug it to their bosoms for years. Second, in many areas of commercial activity, the respective groups have hammered out the equivalent of a collective agreement. Thus, in R. W. Green Ltd. v. Cade Bros. Farms, the condition in dispute

judges would welcome an increase in their power. Indeed, some outstanding judges have expressed disquiet at the prospect of being involved in political disputes. Consider, in this connection, for example, the remarks of Lord Wilberforce — probably the most thoughtful British judge on the Bench at the present time. In Gouriet v. Union of Post Office Workers, [1978] A.C. 435 (H.L.), his Lordship stated at p. 482:

The decisions to be made as to the public interest are not such as courts are fitted or equipped to make. The very fact, that, as the present case very well shows, decisions are of the type to attract political criticism and controversy, shows that they are outside the range of discretionary problems which the courts can resolve. Judges are equipped to find legal rights and administer, on well-known principles, discretionary remedies.

Consider also the remarks of Lord Scarman in a major decision of the House of Lords on the assessment of damages in a personal injuries case: Lim Poh Choo v. Camden and Islington Area Health Authority, [1979] 3 W.L.R. 44 (H.L.), affg [1979] Q.B. 196 (C.A.). His Lordship stated, inter alia, at p. 48 W.L.R.:

Lord Denning appeared, however, to think — or at least to hope — that there exists machinery in the Rules of the Supreme Court which may be adapted to enable an award of damages in a case such as this to be "regarded as interim award ([1979] Q.B. 196, at p. 220)". It is an attractive, ingenious suggestion — but, in my judgment unsound. For so radical a reform can be made neither by judges nor by modification of rules of court. It raises issues of social, economic and financial policy not amenable to judicial reform, which will almost certainly prove to be controversial and can be resolved by the legislature only after full consideration of factors which cannot be brought into clear focus, or be weighed and assessed, in the course of the forensic process. The judge — however wise, creative and imaginative he may be — is "cabin'd, cribb'd, confin'd, bound in" not as was Macbeth, to his "saucy doubts and fears" but by the evidence and arguments of the litigants. It is this limitation, inherent in the forensic process which sets bounds to the scope of judicial reform.


Supra, footnote 57. Even this case is not a commercial law dispute; it is, alas, only a contest between two insurance companies.

Compare the flood of cases in recent years on new and used cars.

was one of a standard form of conditions which had governed relations between the National Association of Seed Potatoes Merchants and the National Farmers’ Union for over 20 years. Members of these organizations are not likely to wish to go to court to ask it to declare invalid part of a collective agreement.

Third, a business enterprise which wishes to challenge a provision on the grounds of unconscionability will be able to finance its operation to a large extent at the expense of the state in that the cost of litigation is tax deductible as a business expense. The consumer who wishes to challenge the fairness of a particular clause bears the risk of paying the entire cost of litigation.

Having said that, I must confess that when the courts have had to deal with an unconscionability problem in the commercial field, the results have been singularly unimpressive. Sometimes, the courts strike down disclaimer clauses which are perfectly reasonable. At other times, these disclaimer clauses will be upheld — sometimes by the same court which earlier struck down an almost identical disclaimer clause!

Hopefully, s. 5.2(2)(h) of the draft Sales Act which directs the court to have regard, in the case of a disclaimer clause, to the question of “which party is better able to safeguard himself against loss or damages” will prevent the courts from striking down commercial disclaimer clauses whose sole function is often to specify which contracting party will insure.

Conclusion

When I was a graduate student in the United States between 1967 and 1970, everyone who was anyone in the field of contract law was writing about unconscionability. In the course of time


65 Compare, for example, the views expressed by Lord Denning, M.R., in Gillespie Bros. v. Roy Bowles, supra, with those expressed by the same judge in Harbutt’s “Plasticine” v. Wayne Tank, supra, footnote 57 and again in Photo Production Ltd. v. Securicor Transport Ltd., supra, footnote 63.

the flood of articles has become a mere trickle.\textsuperscript{67} The reason for the loss of interest in unconscionability is not difficult to discover. As a means of providing protection for consumers and as a means of curtailing unethical business behavior, it is very hard indeed to think of a more inadequate tool than the unconscionability doctrine. The essence of that doctrine is that it takes everything into account but gives decisive weight to no single factor.\textsuperscript{68}

Since about 1970 commentators and Legislatures have increasingly focussed their attention on legislation as a means of protecting the consumer. As Dean Speidel predicted in 1970: "The ineluctible presence is for more legislative regulation of the professional's trade behaviour. This legislation will increasingly be implemented through the administrative rather than the judicial process."\textsuperscript{69} Dean Speidel's prediction has, in my view, proved to be correct. There is no major U.S. unconscionability case that I know of in the past decade.\textsuperscript{70} However, the last decade has seen the enactment into law of, \textit{inter alia}, the Poison Prevention Packaging Act,\textsuperscript{71} the Lead-Based-Paint Poisoning Prevention Act,\textsuperscript{72} and the Consumer Product Safety Act.\textsuperscript{73}


\textsuperscript{68}In this respect the doctrine of unconscionability bears a striking resemblance to the law of negligence. See e.g., H. J. Glasbeek and R. A. Hasson, "Fault — The Great Hoax" in \textit{Studies in Canadian Tort Law}, L. Klat, ed. (Toronto, Butterworths, 1977), p. 395.


\textsuperscript{70}If there have been any major U.S. cases on unconscionability during the past decade I would be grateful if any kind reader would tell me of them.


Further, amendments have been made to the Highway Safety Acts\textsuperscript{74} and to the National Traffic and Motor Vehicle Safety Act.\textsuperscript{75} In addition, the Federal Trade Commission has promulgated its Preservation of Consumers' Claims and Defenses Rule.\textsuperscript{76} At the state level, measures such as Wisconsin's Consumer Protection Act have been passed.\textsuperscript{77} To be sure, there have been defeats for consumer advocates. Thus, Congress has rejected the Food and Drug Administration's proposed ban on saccharin\textsuperscript{78} and several state Legislatures have allowed the selling of laetrile.\textsuperscript{79} Again, Congress has overruled the Department of Transportation's decision to require helmets for motorcyclists.\textsuperscript{80}

There are two points to be made about this catalogue of victories and defeats. The victories could never have been achieved through the use of the unconscionability doctrine, no matter how often one intoned the word. As regards the defeats, no consumer advocate anywhere expects an unending series of victories.

It seems sad to me that we should have to learn about the inadequacies of the unconscionability doctrine for ourselves without learning from the American experience. Learning about the inadequacies of the unconscionability doctrine seems to me to be both a time-consuming and painful process. At the end of the day there will be little to show for our efforts no matter how many learned articles and comments we write on the subject.

\textsuperscript{76} See 16 C.F.R. 433 (1979). The Federal Trade Commission has also been increasingly bold in regulating certain products which it deems to be inadequate or unsafe.
\textsuperscript{77} Wis. Stat. 421-427 (1975). See, in particular, "Recent Developments in Consumer Law: A Symposium", [1973] Wis. L. Rev. 333. Other state Legislatures have regulated specific consumer abuses but the Wisconsin measure is probably the most ambitious measure passed by any state in the past decade.
\textsuperscript{79} Seventeen states have legalized the drug; see [1978] Food Drug Cos. L. Rep. (CCH) 942, 292.
\textsuperscript{80} Highway Safety Act of 1976, Pub. L. 94-280, Title II 208(a), 90 Stat. 451 (codified at 23 U.S.C.A. 402(c) (1976)).