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Case Comment: Smyth v. Szep Unsettling Settlements: Of Unconscionability and Other Things

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Case Comment:
Smyth v. Szep
Unsettling Settlements:
Of Unconscionability and Other Things

by David Vaver

The recent decision of the British Columbia Court of Appeal in Smyth v. Szep once again canvasses the validity of releases signed by injured victims in favour of insurance companies and once again plunges into the murky waters of contractual unconscionability. Both issues have become more or less permanent squatters on judicial calendars throughout North America, and it seems worthwhile to consider why this is so and whether something can be done to reduce their tenure at least in Canada.

1. The facts
Ten days before Christmas day in 1986, Martina Smyth, a 19-year old university student working part-time at McDonalds to make ends meet, got hurt in a car accident and was prescribed physiotherapy for persistent shoulder and lower back pains. ICBC was notified of the accident and an adjuster - let's call him, generically, Settler - was allocated the file a few months later. Settler had begun his adjusting career when Smyth was still in diapers: 17 years altogether, 15 with ICBC, almost ever since ICBC got started.

Contacting Smyth in April 1987, Settler learned Smyth was still being treated and that she was soon off to Europe for a few months. When Smyth returned "broke", Settler asked her to come round to the claims centre, which she did on September 1, 1987. He quickly got to the point. He had a report from her family doctor dated April 1987, saying her condition at the end of February 1987, the last time the doctor had seen her, was all right: no permanent or partial disability expected. But Settler knew Smyth had been getting physiotherapy for her pains since February 1987 in Canada and learned she had had some in England too, for which she had receipts.

No-one will really know what went on in that September 1, 1987, meeting. The participants gave the usual conflicting versions. Smyth didn't seem clear exactly why she was there but Settler was obviously out to close his file. He told her she had two years to start a legal action and that she could retain a lawyer. He said ICBC would pay her $2,500 to settle her claim for non-pecuniary damages and $131 for her special damages ($81 lost wages at McDonalds and $50 for physiotherapy in England). The upshot was that Smyth signed a release for $2,631, the usual comprehensive document clearing both the negligence claim against the other driver (Szep) and also ICBC's no-fault liability for Smyth's future treatment and rehabilitation costs and loss of income flowing from the accident.

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When Smyth's father found out that day what had happened, he called Settler and gave him a piece of his mind. Two days later, on September 3, 1987, Smyth herself came round to Settler with a letter revoking her acceptance of the offer of release, saying she had acted involuntarily and that the extent of her injuries was yet unresolved. ICBC said the release was binding and later sent her a cheque for $2,631, which Smyth returned. When Smyth later sued to recover damages for her injuries, ICBC sought to have judgment entered for Smyth for only $2,631, the amount stated in the release.

2. In the courts

The trial judge dismissed ICBC's application, finding the release should be rescinded as an unconscionable bargain. On January 21, 1992, a majority of the Court of Appeal dismissed ICBC's appeal. Taylor J.A., with whom Wood J.A. concurred, agreed with the trial judge that the release was unconscionable and should not be enforced. Gibbs J.A. dissented. He would have entered judgment for Smyth for $2,631 because she knew what she was doing, Settler had not dominated her will, and there was no proof the sum agreed on was "substantially unfair." In the result, Smyth could now pursue her claim for compensation, untrammelled by the release she had signed.

I think the result reached by the majority is correct. Gibbs J.A. treated the case as if it were a simple free market transaction between a willing seller and buyer. It was nothing of the sort. Smyth could not shop around for people to pay her compensation for her injuries. There was only one supplier of compensation, the insurer ICBC, and by law it had to supply her with her due. This is the practical case whenever an insured claims from her insurer. ICBC happens to enjoy in British Columbia a legal monopoly in the provision of motor vehicle accident compensation; but virtually every insurer is, vis-à-vis its insured, a spot monopolist, because the insurer is practically the insured's only recourse for compensation. True, the insurer's power can be modified or weakened by the culture prevailing within the insurer's organization, by legal or extra-legal sanctions, or by any combination of these. Weak legal sanctions obviously encourage insurers to delay settlement or exact a price for early settlement.

I disagree with a legal policy that gives monopolies incentives to provide a lower standard of essential service — compensation for personal injury — than that prescribed by the law establishing the monopoly. Why should the law encourage Smyth in effect to pay a further large premium, namely the foregone difference between her due and what ICBC got her to agree to, as the price of getting the latter sum? A release of liability for personal injuries is not just a private matter that private parties should be entitled to order as they like. It is a contract in which the public is very much interested. A funded insurance scheme is supposed to be supported by the premiums allocated to it and should not, except by conscious public decision, be supported indirectly by taxation or premiums allocated to other community resources such as medical services or the social welfare system. Undercompensation causes unjustifiable distortions in the allocation and incidence of taxation and premiums.

Unconscionability was one course open to the majority to achieve the result it did and will likely continue to be so as long as legislatures don't intervene. Were the doctrine a mere staging-post to a flat rule invalidating all releases where the fallout of an accident is inaccurately predicted, it might be unobjectionable. But, alas, judges don't treat unconscionability that way. They claim to examine the minutiae of every case, thinking individualized justice is best. Maybe it is, if you are a lawyer or a judge, but not always if you are a litigant.

I am no fan of unconscionability. Whether created by judges (as in Canada) or by legislation, it does little more than give judges a platform from which they give their varying pronouncements on how far ordinary people should or should not be disciplined for behaving like ordinary people when dealing with private and public sector bureau-
cracies. This process yields few stable or durable principles and is an unpredictable and expensive response to the problem of releases.

I should much prefer that either courts hold or legislatures provide for these releases to be void on grounds of public policy. Any payment would then be interim. Until the action is time-barred, victims should be free to claim further against the insurer if they find they have injuries they didn't think they had when the release was signed. This won't happen often, only in pathological cases: adjusted claims will still remain the norm. However, in the small minority of cases where injuries prove more severe, insurers should get on with the job entrusted to them, paying compensation, not litigating prematurely signed releases.

Before elaborating some of these points, I shall first look at some features of unconscionability as applied by the judges in Smyth v. Szep.

3. Unconscionability: actionable unfairness in action

(a) Who rescinds: people or judges?

The contest in the appeal court, as at first instance, was over whether the release, as a contract, was unconscionable and so unenforceable. More precisely, since unconscionability is a defence that, like fraud or duress, allows the victim to proceed as if there was no contract — rescind the contract ab initio, as Latin-loving lawyers love to say — the court's job was to decide whether Smyth could revoke the deal three days later. Despite occasional loose language saying it is the court that rescinds for unconscionability, rescinding is what the victim does. The court merely declares the rescission valid or not and, if valid, gives it consequential effect unless the remedy is otherwise barred. No-one suggested any bar: Smyth's letter was timely and clear enough in complaining of duress and lack of volition for her to use it to ground an unconscionability defence.

(b) The test(s): two speed-bumps or one?

In 1978 in Harry v. Kreutziger, Lambert J.A. proffered a unitary test for unconscionability: "whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded". This test is not universally admired. In Smyth v. Szep, Gibbs J.A., for one, was unimpressed. It might work, he said, "if there is evidence of what the community is and what the generally acceptable standard of morality is in that community" but judges had to avoid introducing their "subjective view of the morality of the case." Gibbs J.A. preferred the older test stated by Davey J.A. in Morrison v. Coast Finance Ltd:

Proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger.

On proof of those circumstances, it [sic] creates a presumption of fraud which the stronger must repel by proving the bargain was fair, just and reasonable...

For this test to retain or gain adherents, its ponderous and foreboding language should surely be modernized. Davey J.A. himself could not have intended his words to be a carved-in-stone statutory definition and, even if he had, judges have warned one another often enough not to parse their words like statutes. So, for example, "fair, just and reasonable", a soothing and rhythmic phrase, no doubt carries the magic lawyers traditionally associate with groups of three; but the words are synonyms and nothing is gained by seeking to find some fine distinction between them. On the other hand, "ignorance, need or distress" are different but not exhaustive: Davey himself had earlier stated the principle more broadly ("an unconscientious use of power by a stronger party against
a weaker") and surely did not mean the abuse could be foiled by proof the weaker party was not “ignorant, needy or distressed” according to Webster’s.

(c) Cleansing the palate of fraud

It is also time judges stopped saying that unconscionable behaviour, while certainly undesirable, raises a “presumption of fraud”. “Fraud”, the mid-Victorian chancery court’s passe-partout to jurisdiction, was not being then used in the sense of “crookedness”: rather, it meant just that someone was behaving “unconscientiously” or “unfairly”.

But “fraud” more commonly meant and still means “dishonesty”, and courts with plenary law and equity powers like the Supreme Court of British Columbia need not use it to found jurisdiction.

Whatever Settler was in Smyth v. Szep, he was not a crook; and it is a pitiful plea in mitigation for a judge using an offensive word like “fraud” against someone to say, like some scornful Humpty Dumpty, that “when I use a word, it means just what I choose it to mean - neither more nor less.”

(d) Rampant amorality

Even if the language is modernized, it is impossible to rid unconscionability of moral content, as Gibbs J.A. apparently would have it. He liked the Davey test apparently because it prevents judges from applying their “subjective morality of the case”. But Gibbs J.A. is deluding himself if he believes that. Are phrases like “ignorance, need or distress of the weaker”, “power of the stronger”, “substantial unfairness”, and “fair, just and reasonable” measurable on a slide rule?

They may circumscribe or camouflage the application of a judge's moral views but they don’t invite those views to be suppressed nor give any standard by which a judge could do so.

Nor is the idea that a court should first be given evidence of a “community standard of morality” before it can apply any moral standards helpful. Equity may abhor a vacuum, but it surely neither is nor operates as one. Is unconscionability to become contract’s equivalent of obscenity? Is each side going to call an expert — whom? a humanist? moral philosopher? cleric? of which religion? — to qualify and testify on the appropriate moral standard to be applied? Assume the experts disagree (not unusual, even for philosophers or clerics): how will the court choose between them? By applying some morally-neutral test — like burden of proof (itself the reflection of a moral principle)?

Taylor J.A. for the majority in Smyth v. Szep did not seek to avoid the moral issue and was keen to update Morrison’s archaic language, although he obviously thought there was little in substance between the Davey and Lambert tests. The principle Taylor formulated to try and bridge both Davey’s equitable theory and Lambert’s “community morality” theory was that

a settlement such as the present may be set aside as unconscionable where it is shown that the parties were not on an equal footing — which will necessarily be so where a young person such as the present plaintiff, without relevant advice, knowledge or experience, settles a personal injury claim with an experienced Insurance Corporation adjuster — and where the settlement is made at the instigation of the adjuster for a sum which cannot be said to be ‘fair’ on the basis of what was then known to the adjuster, or within the adjuster’s means of knowledge, unless there are special circumstances justifying the transaction.

What is interesting about a principle like this is how most can agree on its statement but disagree on its application. So in Smyth v. Szep, with only transcripts and affidavits to go on, the majority and minority judges were able to say, with equal self-conviction, that Smyth had no “relevant advice, knowledge or experience” (Taylor J.A.), or she
had failed to prove that she was dominated, ignorant, poor, in pain or that she didn't know what she was doing when she signed the release (Gibbs J.A.). Similarly, from the same material, a fair settlement in September 1987, had Settler bothered to find out Smyth's condition, "would clearly have to be an amount several times the settlement offered" (Taylor J.A.). Or the settlement was not out of line on the facts known to Settler: it wasn't Settler's job to cross-examine Smyth on her state; it was up to Smyth herself, apparently fully in charge of her faculties, to have told Settler about it (Gibbs J.A.).

Unconscionability is like that. Where you get to depends upon where you start and what baggage you start off with. There's no dialogue among the starters once they're off: their paths quickly diverge and their voices become first dim, then inaudible to one another. And when one reads the final product of their mental voyage, one is hard pressed to believe that they all started off from the same point with common starting material.

(e) When: then or now?
All the judges in Smyth v. Szep said unconscionability should be judged only in the light of what was known at the time of contracting.

Assume Smyth had not had her pains but had some latent injury that revealed itself only after she had signed the release; assume further that what she lacked in commercial sophistication she made up by hiring a lawyer to represent her in settling. It seems plain she could not have rescinded, for unconscionability, any release signed by her on her lawyer's advice, however serious the injuries that appeared later might be.

This follows from a 1983 decision of the British Columbia Court of Appeal in Cougle v. Maricevic, which all in Smyth v. Szep accepted as good law. In Cougle, three days after his motor vehicle accident, the victim turned up, barely suo motu, friend in tow, at the ICBC claims centre wanting to settle his claim. The adjuster, who had the other driver's accident report in front of him, did not question liability. Instead, after checking with the hospital and deciding the victim would recover in 6 weeks, he offered the victim $1,500. The victim accepted, signed a release, and went back home to New Brunswick. His injuries took longer to clear up, so he claimed for extra pain and suffering and lost income. Both Paris J. and the Court of Appeal refused to set aside the release. The appeal court thought the plaintiff had shown he was no match for the insurer, but he had not shown the bargain was unfair: "all must be decided on the basis of the circumstances as they existed, and were known, at the time the transaction was entered into", said Lambert J.A.

Before a court like this, a victim would be no better off trying other defences such as mistake: judges who think a bargain is fair must also think that someone trying to avoid it is behaving unfairly. They are hardly likely to reach for other reasons to help him out. The doctor and lawyer who misjudged the plaintiff's medical and legal condition might perhaps be sued for incompetence, but those are not easy actions.

(f) Niceness is the best policy
There is another striking passage in Taylor J.A.'s judgment in Smyth v. Szep, where he said people ought to expect better things of ICBC than they might of a private insurer:

The community should in my view be taken to expect adherence to a high standard of commercial morality of a Crown corporation exercising a monopoly function of this sort in settling claims with members of the public which it serves.

Taylor J.A. at least looked at the conduct of the right party, the insurance corporation, rather than simply its employee, the adjuster. This has not always happened in the past. Indeed, in Cougle v. Maricevic and even Smyth v. Szep itself, the judges tended to talk more about the conduct of the adjuster than about that of his employer in
deciding whether the parties were unequal, commercially moral, or produced a fair bargain. But the plaintiff’s complaint is not against either the adjuster or the nominal defendant (the careless driver): it is against the corporation. It is the insurer’s conduct and relationship with the plaintiff that is relevant. A bargain, fair from the adjuster’s perspective, may not be so when viewed as the bargain of the insurer. The puppeteer has to be responsible for her marionettes.

Taylor J.A.’s sentiment goes beyond this but exactly where and how far is unclear. Is he saying:
(i) that ICBC owes a duty to claimants to be super-nice because it is a monopoly and an agent of the state and dealing with ordinary lay people?
(ii) that the standard of super-niceness applies to all entities that satisfy only one or more of the conditions in (i)?
(iii) that ICBC is hoist by its own boasted “philosophy and approach to adjusting”, allegedly distinct from the approach of private insurers that settle claims only “on the best possible basis for the benefit of the company”:
“We think we have two duties: a duty to the public at large to administer the funds which are entrusted to us in a responsible, careful manner and a duty to the individual who is making a claim to act in a fair and reasonable manner towards him, giving him every doubt we can, subject to the proper administration of the funds”?
(iv) some or all of the above?

Whatever the intention, as a statement of principle Taylor J.A.’s remarks lead nowhere. Are we really to infer that private insurers may instruct their adjusters to observe a lower standard of commercial morality than public sector insurers? On this theory, what, in practice, are judges going to let private insurers get away with?

Moreover, Taylor J.A.’s remarks do not square with Cougle v. Maricevic, which he claimed to be applying. In Cougle, the court explicitly rejected suggestions made earlier by Anderson and Toy J.J. as trial judges that an insurance adjuster must treat an unrepresented claimant as if he were a solicitor advising his own client. This is no outrageous suggestion: a similar holding by a British judge that an insurer was a fiduciary towards an injured victim and could not rely on a release when it undercompensated him has been approved by a leading text on insurance law. But the British Columbia court, like other Canadian courts, would have none of this. Instead, said Hinkson J.A. in Cougle, the general principles of unconscionability apply to “any member of society in dealing with another member of society,” and Lambert J.A., the proponent of the “commercial morality” test of unconscionability, expressly agreed.

The Cougle court knew it was dealing with an ICBC adjuster and that the earlier cases before Anderson and Toy J.J. involved adjusters working for private insurers; yet Cougle explicitly imposed the same standard of behaviour on public and private insurers and adjusters alike. On this point, Cougle is right in principle, if only because it seems both impossible and purposeless to formulate and apply different standards to these cases. Whether that standard should be that of a fiduciary or something lower is however a question of substantive legal policy, and in British Columbia “something lower” has plainly become the rule.

(g) How does it play in Peoria?

Unconscionability doesn’t have to be like this. It can operate differently, some think better. It does sometimes operate differently in the United States, not in some way-out state (typically California) that Canadians love to caricature (there but for the grace of B.C. courts go we), but in heartland U.S.A., Peoria no less.

In Newborn v. Hood, six months after her car accident in 1977, the victim released her negligence claim against the driver and his insurer for $1,200. The plaintiff was
legally represented and the lawyer offered to settle for $1,200, based on a report he sent to the adjuster from the hospital doctor who thought the plaintiff's injuries were minor and over. Exactly a year after the accident, the plaintiff had a delayed heart attack caused by her accident. Her medical bills were over $8,000 and she lost wages of over $7,000. In 1979 the Circuit Court of Peoria held the release invalid and allowed the plaintiff to pursue her negligence claim. The Illinois Appellate Court affirmed the following year.

When judged against the 20-odd pages *Smyth v. Szep* occupies in the law reports, the opinion is remarkable for its apparent unremarkability. It covers just three pages in the law reports and treats the case matter-of-factly, almost routinely. There were only two issues for decision:

(1) May a court consider facts, unknown at the time the parties execute a release of all claims, in determining whether or not the release is unconscionable and based upon a mutual mistake of fact; and (2) Was there a mutual mistake of fact under the circumstances of this cause as to the nature and extent of the injuries incurred by the plaintiff such that the release should be set aside as unconscionable?26

The court compared the injuries first suspected with those later discovered and the money received with the economic loss suffered, and quickly concluded in the plaintiff's favour.

The most noteworthy thing about this judgment, especially if one reads it immediately after having read *Smyth v. Szep*, is what the Illinois court chose not to say. It didn't get sententious or censorious about anyone. The plaintiff's lawyer was not called a fool; the doctor was not called an incompetent for his wrong diagnosis and prognosis; the plaintiff's mentality, life and finances were not judicially investigated to see whether or to what degree she was "ignorant, needy or distressed"; the insurance adjuster's experience, life history or good faith was not called into question, nor did the court say he had tried to take advantage of the plaintiff or her lawyer; a private insurance company was involved but the judges didn't ask it or themselves what standard of commercial morality it should be held to; and the fact that the release was fair on the facts known when it was signed was taken for granted.

I don't know whether Illinois courts would today take this tack, but I confess I find the Illinois decision not one whit the worse because it was low-keyed or because it did not investigate, indeed hardly mentioned, the matters that seemed to preoccupy the judges sitting in British Columbia. If unconscionability always operated like this, some of its Canadian critics might even be persuaded to treat it seriously. The trouble is, it doesn't.

4. Yesterday's unconscionability, today's conscionability, tomorrow's...?

Victims in decades past have tried to use all sorts of ways to avoid insurance releases signed before the full extent of their injury became evident: duress, mistake, fraud, innocent misrepresentation, infancy, interpretation (contra *proferentem* and its Latin ilk), *even non est factum* (a species of mistake more appropriate to invalidate transactions against strangers).27 After the dust of litigation and commentary settles, nobody can predict anywhere when a court will feel inclined to come to the aid of the victim.

Unconscionability, today's defence à la mode, may make some hope that the tendency for Canadian courts to mutter, like deranged versions of Gertrude Stein, that "a release is a release is a release", may be reversed, but the hope is unfounded. Unconscionability elsewhere is utterly unpredictable:28 why should it suddenly become so in release cases? Not every American court reasons like *Newborn v. Hood*.29 The prevailing mood among judges of one decade and place may favour victims, of another, insurers: judicial policy in Illinois in 1992 may differ from that prevailing in the 1980s.

Take, for example, Washington. There, in 1974, the state Supreme Court unanimously
allowed a plaintiff to claim for personal injuries appearing three months after a motor vehicle accident, even though the victim signed a general release and was compensated for his vehicle damage a month after the accident. The court said it was following the majority U.S. rule, which was to evaluate releases by the following criteria:

(1) The peculiar dignity and protection to [sic] which the law cloaks the human person, as contrasted with articles of commerce;
(2) The inequality of the bargaining positions and relative intelligence of the contracting parties;
(3) The amount of consideration received;
(4) The likelihood of inadequate knowledge concerning future consequences of present injury to the human body and brain;
(5) The haste, or lack thereof, with which release was obtained.

This preserved some flexibility, but the court's inclination was pretty plain: a general release signed by a victim soon after an accident when he or she might not know the extent or even presence of personal injuries would not hold up if serious injuries later appeared. By 1987, thirteen years later, the times had a-changed. The grand rhetoric of the 1970s about the "peculiar dignity of the human person" had given way to neo-conservative economics, to "crises" in the courts and amongst liability insurers, and to mounting public pressure to keep auto insurance premiums down. A differently composed Supreme Court kissed stare decisis goodbye: the 1974 case was "limited to its facts", i.e., "to situations where there is no known injury at the time the release is executed". A victim who signs a release knowing he or she has some personal injury, "knowingly takes a gamble" and the policy of promoting the finality of private settlements becomes trumps.

5. Common law (futility)

Nobody — except a lawyer or a judge — can really believe that judges, using their common law or equitable powers, can effectively regulate the validity of releases. Nor is it realistic to expect insurers voluntarily to do so. Whatever messages the courts have sent out for the last century through their judgments have left the insurance industry with enough manoeuvring room to keep firm to its policy of "release now, tough it out later". Does anyone really expect ICBC or any other insurer to act any differently after Smyth v. Szep, even had the court been unanimous? There is always another time, another court, another set of facts just a little different from the last. Marvin Baer can write that

in the absence of any dispute, there is no good reason why an insurer should enjoy the protection of a release given by an insured (or by an injured victim in the case of liability insurance) who has not yet appreciated the full extent of his loss

but pleas like this are never heard in insurance boardrooms and are given effect to all too rarely in courtrooms.

Unconscionability doctrine, perversely, has its uses here, but only because it reveals in stark relief how badly the legal process deals with a simple issue. Without being diverted by the fact that Smyth v. Szep reached the right result, albeit by a one-vote whisker, let's look at the process leading to this result and its implications.

Let's start with the fact that we have an accident victim who legally merits compensation and, for whatever reason, has signed a release to get some money now rather than feeling she's going to have to wait for Godot. Added to her physical trauma, the accident victim now has the added psychological trauma of having to hire a lawyer to go to court for her and prove, on a balance of probabilities, that his client was a fool. And having proved that before one court, the lawyer has to repeat the performance before three judges because our legal system indicates that just because one
judge finds you a fool, that isn’t enough. The victim might be only an ersatz fool, smart enough to gull a single judge into falling for her crypto-folly; so we must have three presumptively smarter judges there to make sure that, yep, she’s a bona fide, chromium-plated, patented fool all right — and the legal system won’t be messed up if we let her off the hook for signing the release.

The evidence of an expert in psychology is no doubt admissible on the point but fortunately this expense is generally foregone for lawyers seem to think they need no help in most cases figuring out how stupid a person is. This can be done even without seeing the people involved. All one need do is to read a transcript of what the person says and couple that with the precedents on unconscionability. These span many countries and decades. Indeed in Smyth v. Szep itself, it was thought important to refer to a case 109 years old from England for lawyers and judges to check out whether the stupidity there matched the stupidity here, and then to tut-tut about how silly some people really have been over the ages in dealing with others. Then the big question: pound for mental pound, was this plaintiff as silly as the plaintiff in 1873 or some other plaintiff who got his contract set aside, or were her synapses better ordered? Should a higher or lower standard of intelligence be expected now, as compared with then? Was the deal she got into quite as bad as the deal that or some other long-dead plaintiff struck, or did she do better? Was the adjuster and/or the insurer as nice as defendants past, or did either of them fall below that line that marks honest conduct from “presumptive fraud”?

Throughout all this, it is useful to remember that we have here an injured victim and an insurer who, by law, is responsible for compensating her in money for her injuries; that the insurer is trying to evade that responsibility because it has set in motion a chain of events, the likely result of which it knows full well; and that, as long as courts send out blurry messages like that in Smyth v. Szep, insurers will encourage their adjusters to behave as Settler did because it pays them to do so. The occasional persistent victim like Martina Smyth who realizes she’s been shortchanged will remain outnumbered by those who won’t challenge the release because they are made to feel like cheats for trying to renege on their signature, or simply because there is not enough money involved for a lawyer to take on their claim.

Think of the easy rule that should govern this case: where liability is not genuinely in issue, the release of a personal injuries claim should never bind the victim until the claim itself is barred by a limitation statute. Courts could establish a flat rule like this by saying that such releases are void as against public policy. The majority in Smyth v. Szep went that far, almost; but, in law, “almost” is a long step away from “always”.

6. An appealing note: or swimming to Victoria

It would be easy to applaud Smyth v. Szep as a wholesome case indicating keen judicial sensitivities on the part of the majority judges and reaffirming the continued vitality of unconscionability doctrine. To do so would, I think, be misguided. Twenty-five years ago, the late Arthur Leff saw what was wrong with over-relying on unconscionability:

... [Unconscionability] tends to permit to make the true bases of decisions more hidden to those trying to use them as the basis of future planning. But more important, it tends to permit a court to be nondisclosive about the basis of its decision even to itself. ... [W]hen you forbid a contractual practice, you ought to have the political nerve to do so with some understanding (and some disclosure) of what you are doing. ... Subsuming problems is not as good as solving them, and may in fact retard solutions instead.

The enforceability of insurance releases has remained unclear everywhere despite decades of litigation. If the judicial handling of the problem demonstrates anything, it
is that judicial handling hasn't worked. All one has is a plethora of doctrine, with unconscionability superadded to create further confusion and expense.

The legal profession often likes the intellectual challenge of complicated laws, complicated laws also mean more legal and judicial business, and at the end of the day everyone feels they have done something some good. But it behoves lawyers and judges of good conscience to seek to improve a system as inefficient and costly as that which has grown around the problem of insurance releases. Lawyers could draw the attention of legislators to the problem. They could try to convince courts to move away from unconscionability towards outright bans on public policy grounds. Judges could show themselves willing either to be persuaded or to support calls for remedial legislation. For those members of the general public who are accident victims do not benefit from the present situation; only insurers do. So long as the law remains as unstable as it is, insurers will continue to have greater leverage in settling and resisting the reopening of settlements. This will mean the systematic undercompensation of accident victims. Is this what the citizens of British Columbia want?

FOOTNOTES

2. There was some discussion — inconclusive because the parties were content to have the case decided as it appeared before the court — about whether the Rule 18A procedure adopted was appropriate and whether a decision under it was appealable. In principle, the answer to both questions should be, yes; but no judge in Smyth v. Slep seemed willing to express himself monosyllabically. Cf. Darrell W. Roberts, “Rule 18A Summary Trials — Under Attack Again”, (1992) 50 Advocate 49.
4. See, e.g., Baltic Shipping Co. v. Dillon, “Mikhail Lermontov”(1991) 22 N.S.W.L.R. 1 (C.A.), where an Australian court held that a release, signed by a surviving passenger of a cruise ship disaster and providing for grossly inadequate compensation, was “unjust” and unenforceable. The court relied on a local statute, the Contracts Review Act 1980 (N.S.W.), but reasoned much like Canadian courts do when dealing with unconscionability. And just as in Canada, the three judgments provide no clear principle, go on at great length (over 50 pages in the law reports), include a dissent — and the case is presently on further appeal.
5. Judges can do this easily enough: see David Vaver, “Developments in Contract Law: the 1984-85 Term” (1986) 8 Supreme Court L. Rev. 109, 150 ff., commenting on the pre-accident personal injury waiver case of Dyck v. Manitoba Snowmobile Assn. Inc. (1985) 1 S.C.R. 589, 18 D.L.R. (4th) 634, where the waiver was held enforceable. But the Supreme Court later has said that it pays to get drunk and then claim “I didn’t know what I was signing was a release”: see Crocker v. Sundance Northwest Resorts Ltd. (1988) 51 D.L.R. (4th) 321 (S.C.C.), holding a pre-accident waiver signed in these circumstances to be unenforceable.
8. Note 1 above, at p. 72.
11. See his comments at text accompanying note 8 above.
12. Cf. Hunter Engineering v. Syncrude Ltd (1989) 57 D.L.R. (4th) 321, 375 (S.C.C.), by Wilson J. (L’Heureux-Dubé J. concurring): “the courts, in my view, are quite unsuited to assess the fairness or reasonableness of contractual provisions as the parties negotiated them. Too many elements are involved in such an assessment, some of them quite subjective,” (my emphasis). Interestingly enough, Gibbs J. was the trial judge in Hunter and in the Supreme Court of Canada, his judgment on contractual liability (27 B.L.R. 59) was generally preferred over that of the B.C. Court of Appeal’s (68 B.C.L.R. 367), which the Supreme Court reversed.
15. CA810260 (Vancouver), oral reasons for judgment delivered February 16, 1983; Hinkson, Lambert and Macdonald J.J.A.
16. Ibid., p. 7 of oral reasons for judgment. Some authority suggests that circumstances known and arising after the date of contract may be considered where the fairness or reasonableness of enforcing a
contractual provision is in issue (see, e.g., Hunter Engineering v. Syncrude Ltd, note 12 above, D.L.R. at 380-81, by Wilson J. (fundamental breach)), but to translate these sentiments into unconscionability doctrine seems a task for which B.C. courts presently have no stomach.

17. Note 1 above, p. 63.


19. Note 15 above.


23. Note 15 above, p. 5.


27. E.g., Martin v. Schneider (1984) 6 Can.Cas.L. Ins. 93, 100-102 (B.C. Co. Ct.), where the victim succeeding in invalidating the release on both non est factum and unconscionability grounds.

28. See further, Vaver, note 3 above.

29. Note 25 above.


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