

RECENT DEVELOPMENTS IN THE LAW OF CONTRACTS

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Recent writers in the field of contract have suggested that we have moved out of the classical period of the 19th and early 20th centuries when all was neat, tidy and logical and have moved into the romantic period of the late 20th century when everything is confused, sprawling and chaotic but nevertheless extremely interesting.

While I would not entirely subscribe to that view, I do agree that we are in a particularly interesting period of contract development. Contract law has adopted a much more activist role than it did a generation ago and we are observing contracts and torts which originated from a common source beginning to draw together once again. The areas of contract development on which I want to concentrate are first *Unconscionability*, secondly *Exemption Clauses* and the *Fundamental Breach* doctrine, thirdly *Mistake* and lastly the *Measure of Damages for Breach*.

Unconscionability

Unconscionability does, to some extent, overlap the older doctrines of duress and undue influence and is at present enjoying a new lease on life in Canada. Something which began in England in the 19th century to protect young aristocrats in financial straits from entering into improvident bargains is now being used to protect the elderly, the infirm and the inexperienced in business. What is required to invoke this jurisdiction is a combination of inequality and improvidence and the onus is then on the party seeking to uphold the contract to show that his conduct throughout was scrupulously considerate of the other's interests. This reversal of the burden of proof, which is occurring in many instances these days, is noteworthy.

One of the leading cases in Manitoba is *Natuk v. Kawula*² which arose out of a son's action against his mother to enforce an agreement for the sale of her farm to him. The son lived and worked on the farm for many years while his mother lived elsewhere. When the mother was 57 years old, she visited her son for the purpose of selling the land to him. The son offered \$10,000 for the farm; although unknown to his mother he had been offered \$12,000 and the land was, in fact, worth \$16,000. During the negotiations, the mother became extremely upset to the point of physical incapacity, but finally agreed to sell for \$8,000. Later, she refused to complete. The son brought an action for specific performance. The mother alleged undue influence and the Manitoba Court of Queen's Bench allowed the son's action, holding that there was no undue influence. The mother appealed on the ground that the agreement was an unconscionable transaction and the Court of Appeal allowed her appeal, holding that the transaction was unconscion-

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1. (1979), 1 Man. R. (2d) 25 (C.A.).

able because the parties were in unequal bargaining positions and the price was not fair.

It was pointed out by Mr. Justice Huband that a finding against undue influence does not conclude the question whether the appellant is entitled to relief against an unconscionable transaction. He went on to quote from Mr. Justice Davey's judgment in *Morrison v. Coast Finances Ltd.*, where he said:

A plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties . . . and proof of substantial unfairness of the bargain obtained by the stronger.²

Recently there have been two further Manitoba cases on this topic. In *Walker v. Cusack*,³ the defendant was the owner of land in Wellwood, Manitoba. He was aged about 70 years, a widower and a person who suffered from depression and other psychiatric difficulties. In 1979, he was committed to Brandon Mental Hospital really because he was not able to care for his own physical needs due to his mental or emotional condition. There was no substantial evidence that he was considered to be mentally incompetent. There was an agreement reached between the defendant and the plaintiff for the sale of the land for \$11,000, which the Judge found to be fair and reasonable. The Judge also found that the defendant understood what he was doing and there was nothing unconscionable on the part of the plaintiff. It was therefore held that the plaintiff was entitled to specific performance of the agreement.

In the second case of *Hall and Hall v. Grassie*,⁴ the plaintiffs were suing for specific performance of an agreement to sell a property and its contents for a sum of \$10,000. The defendant was a widow, aged 85 years and living in a house for the aged at Neepawa, Manitoba. She was unfamiliar with real estate transactions and values, received no independent advice and it was found that the value of the property and its contents was approximately \$17,000. The learned Judge found that the onus on the plaintiffs to show that the bargain was fair, just and reasonable had not been met, and therefore, refused to grant specific performance.

While the above cases all concerned the elderly and the infirm, it should not be thought that the doctrine of unconscionability is limited in its application to this category of persons. In *A. & K. Lick-a-Chick Franchises Ltd. v. Cordiv Enterprises Ltd.*,⁵ the defendants abandoned an existing franchise agreement with the plaintiffs in order to enter into a new one. When the defendants suggested that they get a lawyer to review the agreement (which comprised some 26 pages), they were told that time was of the essence and that if they refused to sign, the plaintiffs would immediately construct a

2. (1966), 54 W.W.R. (N.S.) 257 at 259 (B.C.C.A.).

3. (1982), 16 Man. R. (2d) 114 (Q.B.).

4. (1982), 16 Man. R. (2d) 399 (Q.B.).

5. (1981), 119 D.L.R. (3d) 440 (N.S.S.C.).

new outlet across the street since they had ample resources to do so. The agreement was rather a grandiose document with a fair share of 'puffery'. It also provided that on termination of the agreement, the plaintiffs could purchase the defendants' land at its original cost. The Judge said, "a transaction can be said to be unconscionable if it is sufficiently divergent from community standards or manifests a substantial inequality of bargaining power between the parties."⁶ In this case, he had no difficulty in finding that the contract between the plaintiffs and the defendants constituted an unconscionable bargain and was therefore unenforceable against the defendants.

A more recent case is that of *Hayward v. Bank of Nova Scotia*,⁷ where the Supreme Court of Ontario emphasized the fiduciary duty of banks in this regard. The plaintiff, who was an elderly widow, sued the bank and its local manager after she lost \$53,000 in loans (plus accrued interest) from the bank when the cattle broker, with whom she invested, went bankrupt. The broker was in debt to the Bank of Nova Scotia, which was the town's only chartered bank, for loans to his exotic cow business. Since he was needing new investors and new capital, he got the plaintiff interested in buying an exotic cow. With her family farm as her only fixed asset, she approached the local bank manager for a loan. The latter knew that the exotic cow business was a risk; he knew, too, that the cattle broker was behind in his payments, but nevertheless was enthusiastic about the plaintiff's venture. Mr. Justice Potts said:

the important aspect the Court must emphasize is that there was an inequality of bargaining position in existence. Dunnell [the local bank manager] possessed a substantial amount of knowledge about this business and was in a position, if he desired, to give the less-informed plaintiff a full and accurate picture. He chose not to do so. Instead, his selected remarks served to encourage the plaintiff.⁸

He accordingly gave judgment for the plaintiff in the amount of almost \$89,000. It should be noted, however, that this case is at present under appeal.

Professor Stephen Waddams, in his *Law of Contracts*,⁹ has shown that the notion of unconscionability is closely connected with the doctrine of fundamental breach and that this connection is the basic justification for its existence. He is of the view that, apart from those cases where one party has been guilty of unconscionable conduct, there is no justification for judicial interference with the parties' allocation of risk. This is the area which I shall examine next and I believe that recent developments in both England and Canada do tend to confirm Professor Waddams' view.

Exemption Clauses and the Fundamental Breach Doctrine

The decision of Lord Denning in the English Court of Appeal case of *Karsales (Harrow), Ltd. v. Wallis*,¹⁰ is generally regarded as the beginning of the view that, simply as a matter of substantive law, a disclaimer or exemption clause cannot exclude liability when the seller has committed a

6. *Ibid.*, at 449.

7. Ont. S.C. unreported, Feb. 13, 1984.

8. *Ibid.*

9. (1977) at 290.

10. [1956] 2 All E.R. 866.

fundamental breach. The problem which arose in the ensuing years after the *Karsales* case was how to define what was a fundamental breach or a fundamental term. In the car cases, for example, how many defects did a car have to have before it became a car which did not meet the seller's obligation?

About 10 years later in *Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*,¹¹ the House of Lords was unanimous in holding that there was no rule of substantive law that a party to a contract, having committed a fundamental breach of that contract, was not entitled to rely on a disclaimer clause. They did not overrule the *Karsales* case or any of the other cases following it, but rather disapproved of the reasoning and terminology which they had used. Clearly, what concerned their Lordships was the idea of an inflexible rule of law which might protect the reasonable expectations in the usual consumer type of sale, but at the same time defeat expectations in the case of a truly commercial sale where the parties were bargaining on terms of equality. The role of the courts was to protect persons from being victimized — not to protect someone who had freely agreed to what later turned out to be a bad bargain. Here, we observe the connection with the idea of unconscionable conduct. However, there were ambiguities in the speech of Lord Upjohn and, to some extent, in that of Lord Reid in the *Suisse Atlantique* case which enabled Lord Denning to resurrect the substantive doctrine relating to disclaimer clauses in several English Court of Appeal cases. The judgment of the House of Lords in *Photo Production Ltd. v. Securicor Transport Ltd.*¹² has now removed these ambiguities, and established once again that the doctrine of fundamental breach is a rule of construction and not a rule of substantive law. This decision was formally adopted by the Supreme Court of Canada in *Beaufort Realities (1964) Inc. and Belcourt Construction (Ottawa) Ltd. v. Chomedey Aluminum Ltd.*¹³

The Canadian courts in construing exemption clauses with regard to fundamental breach do appear to be following two principles; one old and the other new. The old one is that of *contra proferentem*, namely that an exemption clause must be construed strictly and any ambiguities resolved against the person seeking to take advantage of it. The new one is what we might term the 'fair and reasonable' principle; namely, is it fair and reasonable to allow the exemption clause to stand bearing in mind the circumstances of the parties and the allocation of risk to which they agreed? This has been embodied in legislation in England under the *Unfair Contracts Terms Act 1977*.¹⁴

An example of the first and old principle is seen in *Cathcart Inspection Services Ltd. v. Purolator Courier Ltd.*,¹⁵ where the defendant carrier failed to deliver a tender for a construction contract with the consequence that

11. [1967] 1 A.C. 361.

12. [1980] A.C. 827.

13. (1981), 116 D.L.R. (3d) 193.

14. C. 50 (U.K.).

15. (1982), 139 D.L.R. (3d) 371.

the plaintiff lost the contract and a profit of \$37,000. The bill of lading contained a clause for the exclusion of liability for "any special, consequential or other damages for any reason whatever including delay in delivery". The Ontario Court of Appeal held that the effect of the contractual limitation depended on the true construction and that it was to be construed against the interest of the courier and in a way that would give business efficacy to the contract; that the clause should be construed to apply to delay only and not to non-delivery; and that it would contradict the main purpose of the contract to construe the clause to enable the defendant to be free of any obligation to deliver.

Both principles can be seen operating in another recent Ontario Court of Appeal decision in *Canadian-Dominion Leasing Corp. Ltd. v. George A. Welch & Co.; O'Connor Office Machines Ltd.*¹⁶ There, the respondent leased a photocopying machine, supplied by a third party, from the appellant. The lease contained an exemption clause under which the appellant made no warranties as to the effectiveness of the equipment and in which the parties agreed that if the equipment proved to be defective, the respondent's remedies would be against the third party only. Also, the respondent would continue to be liable to the appellant for all rent due under the lease. The appellant brought an action for damages for breach of contract. Here, the Court of Appeal held that although a party to a contract may be in fundamental breach of it, he may nevertheless be able to enforce the contract if it contains an exemption clause which gives him that right. They reaffirmed the principles of *Photo Production Ltd. v. Securicor Transport Ltd.*¹⁷ that it is a question of construction and thus depends on whether it is fair and reasonable in the circumstances that an exemption clause should survive a fundamental breach. In this case, the Court felt that the terms of the lease were so clear that "no warranties" were given that the facts came squarely within the relevant contractual language.

In another photocopier case, *Nabel Leasing Division of Citicorp Leasing Canada Ltd. v. Walwyn Stodgell Cochran Murray Ltd.*,¹⁸ the New Brunswick Court of Queen's Bench affirmed that it is a question of construction whether an exemption clause can cover a fundamental breach. In this case, they found that there had been no fundamental breach.

In the recent Manitoba case of *Nikkel v. Standard Group Ltd.*,¹⁹ it was also stressed that reasonable notice must be given of exemption clauses even when contained in signed agreements. In that instance, a farmer contracted to purchase materials to erect a quonset building. He specified that time of delivery was of the essence, but agreed to extend the date once. When the materials were still not delivered, the farmer repudiated the contract. Mr. Justice Morse held that the supplier committed a fundamental breach and refused to allow him to rely on an exempting condition since he had taken no reasonable steps to draw the condition to the farmer's attention.

16. (1981), 125 D.L.R. (3d) 723.

17. *Supra*, n. 12.

18. (1982), 41 N.B.R. (2d) 291.

19. (1982), 16 Man. R. (2d) 71 (Q.B.).

It should be noted that in this case, the exempting condition was in a written contract which the farmer had actually signed. It was thought, under what had come to be known as the rule in *L'Estrange v. F. Graucob, Ltd.*,²⁰ that when a document containing contractual terms was signed then, in the absence of fraud or misrepresentation, the party signing it was bound whether he had read the document or not. However, in the Ontario Court of Appeal case of *Tilden Rent-a-Car Co. v. Clendenning*,²¹ it was held that a party should not be bound by the mere fact of his signature if the terms were onerous and no reasonable measures had been taken to bring them to his notice. Mr. Justice Morse's decision is therefore in line with this Ontario decision and does emphasize the principle of seeking what is fair and reasonable in each case.

More recently, there have been two cases which have followed this principle; one in Ontario and the other in British Columbia. In the Ontario case of *Crocker v. Sundance Northwest Resorts Ltd.*,²² the plaintiff, before taking part in a race on the defendant's ski complex, signed an application form and paid \$15 to enter the race. He did not read the form or know that it was anything other than an entry form. In fact, it contained a clause purporting to release the defendant from all liability for any damages sustained in the course of the races. The plaintiff took part in the race, was seriously injured and became a quadriplegic. It was held by Mr. Justice Fitzpatrick that the plaintiff was not bound by the exemption clause since no attempt had been made to draw it to his attention, and he did not read it or know of its existence.

In the British Columbia case of *Tilden Rent-a-Car Co. v. Chandra*,²³ the defendant signed a document, reasonably believing that he was buying full collision insurance. Actually, it contained onerous exemptions, to which the plaintiffs never drew his attention, although they should have known of his belief that he was getting full collision insurance. The learned County Court Judge held that the plaintiffs were precluded from relying on the exemptions.

Undoubtedly, this newer principle can be criticized as creating uncertainty in the law by increasing the area of judicial discretion. Whether we like it or not, however, I believe that this is something we shall see operating more and more in all areas of contract law in the future.

One of the most recent leading decisions in this whole area in England is that of the House of Lords in *Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd.*²⁴ The plaintiffs sued the defendant security service for a breach of contract which led to the sinking of their boat. There was a condition in the contract which provided that the defendants were not to be liable for loss or damage of any kind arising out of a failure in the

20. [1934] 2 K.B. 394.

21. (1978), 83 D.L.R. (3d) 400.

22. (1984), 150 D.L.R. (3d) 478 (Ont. H.C.).

23. (1984), 150 D.L.R. (3d) 685.

24. [1983] 1 All E.R. 101.

provision of the services contracted for beyond an amount of £1,000. The plaintiffs' boat had sunk because the defendants had completely failed to send a security guard on the night in question. It was held that since the clause was expressed to cover a total failure to provide the service, it could not be construed otherwise. Both Lords Wilberforce and Fraser drew attention to the fact that this was actually a limitation clause and not an exemption clause. They felt that the courts do not regard such clauses with the same degree of hostility as exemption clauses. Therefore, in their interpretation they did not strain at the plain meaning of words nor apply the *contra proferentem* approach. Lord Fraser pointed out that limitation clauses are not so suspect as exemption clauses, particularly when the amount being charged for the service is small compared to the potential risk which the defendant is asked to bear.

Lord Denning, in his final decision as Master of the Rolls in *George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd.*,²⁵ in a comprehensive judgment dealing with the history of exemption clauses, agreed with the above decision. He did, however, point out that he believed the reason for the House of Lords distinguishing between limitation clauses and exemption clauses was that the former were more likely to be reasonable than the latter. Logically, there is little or no distinction between a clause which bars the payment of damages altogether and one which merely reduces the amount. I believe Lord Denning is right, therefore, in adverting to the fact that the real distinction must depend on the question of reasonableness.

The above is borne out in the recent Ontario case of *Rose v. Borisko Brothers Ltd.*²⁶ The plaintiffs stored their goods with the defendant who assured them that the facilities were climate controlled, equipped with a modern sprinkler system and that the goods would not be moved. Since the plaintiffs owned a substantial number of valuable antiques, they were concerned about the defendant's facilities and their concerns were noted on the defendant's service order. The defendant subsequently sent the plaintiffs a warehouse receipt which purported to limit its liability to \$50 for any single article. Although the goods were stored in suitable facilities for a short period, the defendant removed them to another of its warehouses shortly afterwards. The latter warehouse was an old building, unheated and had no sprinkler system. The goods were destroyed by fire caused by unknown third parties. Mr. Justice O'Brien held that it was unfair and unreasonable for the clause limiting liability to operate in this case.

Mistake

One major development recently in the law of mistake has been with regard to the doctrine of *non est factum*. This is often pleaded by someone who is trying to escape liability under a written document which may have been signed without any real thought or under pressure or by sheer mistake. It therefore occurs frequently in connection with other defences such as

25. [1983] 1 All E.R. 108 (C.A.).

26. (1982), 125 D.L.R. (3d) 671 (Ont. H.C.).

unconscionability or undue influence. However, whereas the latter only operate to make a contract voidable, *non est factum* will make a contract void, so that it can be pleaded even against third parties who have taken rights under the contract in question. It is for this reason, of course, that the courts, therefore, have endeavoured to limit its operation.

The Supreme Court of Canada in *Prudential Trust Co. v. Cugnet*,²⁷ held that a document executed because of a misrepresentation as to its nature and character, as opposed to its contents, was void *ab initio* for mistake under the doctrine of *non est factum*. This was so, even though the defendant had been careless in his signing of the document.

This decision was based on an old English Court of Appeal case decided in 1911. However, in England the House of Lords had overruled this Court of Appeal decision in *Saunders v. Anglia Building Society*.²⁸ In that case, their Lordships had stated that a person, who had not exercised due care in signing a document, should not be able to raise the plea of *non est factum* against a party who had taken the document in good faith and for value. They pointed out also that negligence in this context connoted carelessness rather than tortious negligence involving duties of care. Their Lordships also abandoned the old position whereby it had been possible only to succeed with the plea of *non est factum* if the mistake was as to the nature of the document and not as to its contents. They stated that the real test was whether the document signed was radically different from what the signer intended to sign.

There had been several Canadian cases since 1971 which had clearly favoured the later House of Lords decision but could not wholly adopt it because of the Supreme Court of Canada decision in *Prudential Trust Co. v. Cugnet*.²⁹ Now, at last, in *Marvco Color Research Ltd. v. Harris*,³⁰ the Supreme Court of Canada has itself come out in favour of the decision in *Saunders v. Anglia Building Society* so that the plea of *non est factum* will not be available if the signer has been careless. This will help to create commercial certainty where third parties are concerned. Also, the newly adopted test as to whether the document is radically different from that which the signer intended to sign is a much better one than the old arbitrary distinction between whether the mistake was as to the nature or contents of a document.

Damages

It has always been regarded as fundamental that the aim of damages for breach of contract is compensatory. Since, however, our law of contract has a commercial base, non-pecuniary losses such as mental distress were not considered in the question of assessment of damages for compensation.

This was seen most clearly in the landmark case of the House of Lords, *Addis v. Gramophone Co., Ltd.*,³¹ where the plaintiff, who had been dis-

27. [1956] S.C.R. 914.

28. [1971] A.C. 1004.

29. *Supra*, n. 27.

30. (1983), 141 D.L.R. (3d) 577.

31. [1909] A.C. 488.

missed, was awarded damages for loss of commissions which he was prevented from earning but nothing for the "abrupt and oppressive way" in which his services were discontinued nor for "the loss he sustained from the discredit thus thrown upon him".

During the last decade, however, the courts have begun to break away from the restrictive view of a purely commercial compensation. It was Lord Denning who began the quiet revolution in *Jarvis v. Swan Tours Ltd.*,³² where he held that a holidaymaker could be compensated for "the disappointment, the distress, the upset and frustration" caused by the breach of contract on the part of a travel agency which resulted in his having an unpleasant and disappointing vacation.

For many years, this case was followed in many similar "disappointing vacation" cases in both England and Canada. In Manitoba, there was the case of *Keks v. Esquire Pleasure Tours Ltd.*³³ However, it soon became clear that damages for mental distress in contract were not limited to "vacation cases". For example, in *Tippett v. International Typographical Union Local 266*,³⁴ the plaintiffs, who were wrongfully expelled from their trade union and were accordingly treated as pariahs by their neighbours, were awarded damages for loss of reputation and mental distress.

In 1980, we see the extension of this head of damages into the area of wrongful dismissal, which is, of course, particularly interesting in the present economic climate. In *Pilon v. Peugeot Canada Ltd.*,³⁵ Mr. Pilon was an auto mechanic who worked for the Peugeot Company for seventeen years prior to his dismissal. He was forty-two years old at the time of his dismissal and a regional service manager with the company. He brought an action for damages for wrongful dismissal and the substance of his damage claim was based on the mental distress he had suffered as a result of the breach of his contract of employment. The Ontario High Court allowed him an award of \$7,500 under this head of damages.

The case was also interesting in that it went on to deal with a claim for exemplary damages due to the manner of the termination. The learned Judge, however, refused this, saying that the manner of the firing had increased the plaintiff's mental distress and he had awarded the necessary damages for such distress.

The question of damages for wrongful dismissal arose again in the case of *Brown v. Waterloo Regional Board of Commissioners of Police*.³⁶ The plaintiff was dismissed from his position as chief of police, but the Court subsequently quashed the dismissal. He was then paid his back salary, but only at the rate in force at the time of his dismissal. The plaintiff, therefore, sued for the amount of annual increases to the date of trial, and the value of fringe benefits, together with damages for mental suffering and aggra-

32. [1973] 1 All E.R. 71 (C.A.).

33. [1974] 3 W.W.R. 406 (Man. Co. Ct.).

34. (1976), 71 D.L.R. (3d) 146 (B.C.S.C.).

35. (1980), 29 O.R. (2d) 711.

36. (1983), 150 D.L.R. (3d) 729.

vated and exemplary damages. The Trial Court awarded him reasonable annual increases and fringe benefits together with \$10,000 for mental distress. The Ontario Court of Appeal, however, while confirming the amount for the annual increases and fringe benefits as damages for failure to negotiate such increases, rejected the amount for mental distress. This was not because they refused to recognize mental distress as a head of damages, but because any damages to be reasonable must flow from an actionable wrong. In this case, the plaintiff was the holder of a public office. The abortive attempt to dismiss him did not constitute a breach of contract and was not actionable since it was made in good faith and within the defendant's statutory authority. The Court was careful to state that the damages for mental distress could be recoverable if they fell within the reasonable contemplation of the parties in accordance with the old rule in *Hadley v. Baxendale*.³⁷ Unfortunately, they did not have to decide the interesting point raised by Mr. Justice Linden in the trial division as to whether damages in contract would, in an appropriate case, extend to exemplary or punitive damages as in actions in tort. This was, of course, because they had decided that there had been no breach of contract.

It is interesting to observe that in the recent case of *Cleary v. Cabletronics Inc.*, Mr. Justice Montgomery said: "In my view, the law in *Addis v. Gramophone [Co. Ltd.]*³⁸ . . . has no application to employment contracts"³⁹

It does appear, therefore, that the difference between the approach to damages in contract and tort is gradually disappearing and the concept of 'reasonable foreseeability' is now being applied in both fields with equal liberality. This is borne out by the remarks of Judge Borins in the case of *Newell v. Canadian Pacific Airlines, Ltd.* where he said:

In my respectful opinion when Lord Denning, M.R. stated in the *Jarvis* case that 'in a proper case damages for mental distress can be recovered in contract' he was equating 'proper case' with the *Hadley v. Baxendale* test — it was in the reasonable contemplation of the parties that if the defendant failed to provide what it had promised the plaintiff might sustain disappointment, distress, upset and frustration.⁴⁰

In the *Newell* case, Judge Borins awarded damages to an elderly couple for mental distress caused by the death and illness of their two pet dogs due to the negligent carriage of the defendant airline in a trip from Toronto to Mexico.

This is evidenced more recently in the case of *Widdrington v. Dickinson*,⁴¹ where the defendants failed to close a house purchase transaction with the plaintiffs, knowing that the plaintiffs were purchasing another house and required the proceeds of sale in order to complete that transaction. Mr. Justice Galligan of the Ontario High Court held that all parties must have contemplated that if either side failed to close the transaction,

37. (1854), 156 E.R. 145.

38. *Supra*, n. 31.

39. (1983), 140 D.L.R. (3d) 110 at 112 (Ont. H.C.).

40. (1977), 74 D.L.R. (3d) 574 at 591 (Ont. Co. Ct.).

41. (1982), 133 D.L.R. (3d) 472.

then the other side would suffer considerable vexation, frustration, distress and anxiety. He, therefore, awarded general damages of \$5,000 in this regard.

In summing up, therefore, with regard to damages, there does now appear to be a tendency, both in England and Canada, to expand the scope of liability and to limit, if not abolish, any distinction between remoteness of damage in tort and in contract. It was probably put well by Lord Denning in the case of *H. Parsons (livestock) Ltd. v. Uttley Ingham & Co. Ltd.* in which he said:

Remoteness of damage is beyond doubt a question of law. In *The Heron II, Koufos v. C. Czarnikow, Ltd.*,⁴² the House of Lords said that, in remoteness of damage, there is a difference between contract and tort. In the case of a *breach of contract*, the court has to consider whether the consequences were of such a kind that a reasonable man, at the time of making the contract, would *contemplate* them as being of a very substantial degree of probability . . .

In the case of a *tort*, the court has to consider whether the consequences were of such a kind that a reasonable man, at the time of the tort committed [*sic*], would *foresee* them as being of a much lower degree of probability . . .

I find it difficult to apply those principles universally to all cases of contract or to all cases of tort, and to draw a distinction between what a man 'contemplates' and what he 'foresees'. I soon begin to get out of my depth. I cannot swim in this sea of semantic exercises — to say nothing of the different degrees of probability — especially when the cause of action can be laid either in contract or in tort.⁴³

Similarly, in Canada, Mr. Justice Estey, in the Supreme Court of Canada, in *Asamera Oil Corp. Ltd. v. Sea Oil & General Corp.*, said:

We therefore approach the matter of the proper appraisal of the damages assessable in the peculiar circumstances of this case on the following basis: that the same principles of remoteness will apply to the claims made whether they sound in tort or contract subject only to special knowledge, understanding or relationship of the contracting parties or to any terms express or implied of the contractual arrangement relating to damages recoverable on breach;⁴⁴

In the most recent case of *John Maryon International Ltd. v. New Brunswick Telephone Co., Ltd.*,⁴⁵ there is a well reasoned judgment by Mr. Justice La Forest of the New Brunswick Court of Appeal dealing at some considerable length with the whole relationship between contract and tort. With regard to this question of damages, the learned Judge said: "In truth, in many cases, it will not, from the standpoint of damages, matter whether a case is pursued in tort or in contract."⁴⁶

Conclusion

In all these developments in the law of contract, what I believe we observe is one common feature; namely, the increased exercise of the judicial discretion. We are seeing a departure from the idea of a contract being treated simply as a fixed commercial document. As was remarked by Mr.

42. [1967] 3 All E.R. 686.

43. [1978] 1 All E.R. 525 at 531-2 (C.A.).

44. (1978), 89 D.L.R. (3d) 1 at 30.

45. (1983), 141 D.L.R. (3d) 193.

46. *Ibid.*, at 226.

Justice La Forest in the *John Maryon* case: "The climate regarding sanctity of contract has changed radically in recent years."⁴⁷ In the area of unconscionability and exemption clauses, we see the court considering whether it is 'fair and reasonable' to enforce the contract terms. Then, again, in the area of damages, the court is looking at what might be 'reasonably contemplated' as the parties' loss, whether it be mental or emotional, and certainly far beyond the old idea of the simple commercial loss. As Lord Radcliffe once said in the famous case of *Davis Contractors Ltd. v. Fareham U.D.C.*, "the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself."⁴⁸ All this, of course, makes the task of the professional person advising the client that much more difficult than it was, say, twenty years ago. But, it is encouraging to see the law responding that much more quickly to the rapidly changing social and commercial conditions of the last quarter of the 20th century.

47. *Ibid.*, at 225.

48. [1956] A.C. 696 at 728 (H.L.).