

Contract - Exemption Clauses - Fundamental Breach: *Solway v. Davis Moving & Storage Inc.*

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*I. Introduction*

Simple cases also make bad law. *Solway v. Davis Moving and Storage Inc.*<sup>1</sup> was a case on point in which the Ontario Court of Appeal divided along clear ideological lines on the enforceability of an exemption clause in a contract of bailment. In all fairness to both majority and minority in the case, this outcome was a predictable result of the irresolution of the Supreme Court of Canada in *Hunter Engineering Co. v. Syncrude Canada Ltd.*,<sup>2</sup> the leading case, decided almost 15 years earlier, and the unwillingness of that court to hear an appeal in *Solway* simply further underscored the Supreme Court's abdication of its duties as a final court of appeal for private law matters generally. On the other hand, if the Supreme Court still cannot make up its mind about the treatment of exemption clauses in contract, it may be as well that it decided not to revisit the issue. Provincial appellate courts should simply get on with the task of stating definitively the law; the present uncertainty makes for too much litigation on simple matters with no net increase in the wealth of the nation. The clear division in *Solway* laid bare the two policy choices available for the courts on this issue.

The Ontario Court of Appeal itself, over the past decade has swung between these two poles of either enforcing exemption clauses on construction or striking them down as a rule of law. The majority finding in *Solway* that exemption clauses can be ignored in commercial transactions on grounds of unreasonableness, unfairness or unconscionability (choose one; choose more than one) contrasted with earlier unanimous decisions in *Kordas v. Stokes Seeds Ltd.*<sup>3</sup> and *Fraser*

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<sup>1</sup> (2002), 222 D.L.R. (4th) 251 (Ont. C.A.) var'g (2001), 57 O.R. (3d) 205 (S.C.J.); leave to appeal dismissed by S.C.C. 29 May 2003, [2003] S.C.C.A. No. 57.

<sup>2</sup> (1989), 57 D.L.R. (4th) 321 (S.C.C.). See also: Robert Flannigan, "Hunter Engineering: The Judicial Regulation of Exculpatory Clauses" (1990) 69 Can. Bar. Rev. 515 and M.H. Ogilvie, "Fundamental Breach Excluded But Not Extinguished: *Hunter Engineering v. Syncrude Canada*" (1990) 17 Can. Bus. L.J. 75.

<sup>3</sup> (1992), 96 D.L.R. (4th) 129 (Ont. C.A.).

*Jewellers (1982) Ltd. v. Dominion Electric Protection Co.*,<sup>4</sup> in which the same court found that exemption clauses should be enforced according to their terms. If *Solway* is a bellwether signalling a change in approach, then considerable uncertainty has been introduced into commercial law and the future enforceability of exemption clauses is doubtful. It seems perfectly obvious that Canadian postmodern courts will quite enjoy overturning them willy nilly under the guise of mere fairness, thereby defeating the contractual allocation of risks agreed to at the time of contract formation. That is, they will completely undermine the freedom of contract necessary for certainty in contractual relationships and turn contract law back 50 years to the time before the courts, especially the House of Lords,<sup>5</sup> had refined judicial approaches to these clauses.

This comment will briefly analyse *Solway* in the context of the Anglo-Canadian jurisprudence with particular emphasis on Canadian developments since *Hunter*. It will argue that the approach set out in *Photo Production Ltd. v. Securicor Transport Ltd.*<sup>6</sup> of strict construction is the fairest approach and that only in those rare cases where the plaintiff is truly "victimized" should the contract be overridden.

## II. The Case

The facts could not have been simpler. The bailors entered into a contract with the bailee moving company to have their household goods removed from their current house, stored for about two weeks, and delivered to their new house. Eleven days after the removal, the trailer with the bailor's goods was stolen from the public street outside the bailee's premises and never recovered. The bailors claimed replacement costs for their possessions and income loss from their two corporations which they operated from their house as a result of time lost dealing with the fallout from the theft. The bailee admitted liability but relied on a limitation of liability clause in the bill of lading to limit the claim to \$0.60 per pound for a total of \$7,089.60. The clause was a condition required to be part of every contract for the carriage of household goods pursuant to provincial regulations.<sup>7</sup>

<sup>4</sup> (1997), 148 D.L.R. (4th) 496 (Ont. C.A.). See also: *Carleton Condominium Corp. No. 32 v. Camdev Corp.* (1999), 124 O.A.C. 352.

<sup>5</sup> *Suisse Atlantique Société d'Armement Maritime S.A. v. Rotterdamsche Kolen Centrale*, [1967] A.C. 361 (H.L.); *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] 1 All E.R. 556 (H.L.); *Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd.*, [1983] 1 All E.R. 101 (H.L.); *George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd.*, [1983] 2 All E.R. 737 (H.L.).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Truck Transportation Act*, R.S.O. 1990, c. T.22; *Conditions of Carriage - Household Goods Carriers*, R.R.O. 1990, Reg. 1088, condition 9.

At trial,<sup>8</sup> Himel J. found the bailors chose the defendant because of a positive experience during an earlier move and because it was affiliated with the well-known Atlas Van Lines; the bailors were reasonably sophisticated business people; the bailee gave assurances that the goods would be secure and the bailors arranged to store their goods in a trailer rather than in fixed premises; the trailer was locked, its landing gear down and detached from a truck but there was no surveillance other than street lights on the public street on which it was placed the night the bailee's lot was to be ploughed to clear snow; the bailee knew that the goods stored included valuable antiques and artifacts and all the bailors' sentimental goods; and the bailee represented that the trailer would be stored on its lot and not on a street.

However, the trial judge also found that the bailee advised the bailors about the limitation clause and suggested that they obtain further insurance from their insurance company or from the bailee. They did obtain further insurance but it was insufficient to cover their losses. The trial judge further found that warehouse storage for the goods would have cost at least double the price quoted for trailer storage. The trial judge also found that the mover's yard had no fencing or surveillance or security equipment, and this was the only theft of a trailer in almost 30 years in business. The Ontario Court of Appeal further characterized the trial finding about the security of the storage as a "false assurance."<sup>9</sup>

The trial judge concluded that the bailors relied upon the promise of security to enter the contract and in light of the breach of contract, it was unreasonable to enforce the limitation clause.<sup>10</sup> In reaching this conclusion, Himel J. reviewed *Hunter, Fraser Jewellers*, and *Beaufort Realities (1964) Inc. v. Chomedey Aluminium Co. Ltd.*<sup>11</sup> and equated the tests of unconscionability and unreasonableness as set out by Dickson C.J.C. and Wilson J. in *Hunter*, respectively, to find that the limitation of liability clause was both and therefore unenforceable. Labrosse J.A. (Gillese J.A. concurring) accepted this result without further analysis.

In dissent, Carthy J.A. would have enforced the limitation clause. He characterized the approach of the majority as based on a fundamental breach of contract;<sup>12</sup> although there is no express support for that phrase in the decision of Labrosse J.A., his reasons for enforcing the clause reflected his view that there was no serious breach of contract. These reasons were the bailors' business sophistication, knowledge of the limitation clause,

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<sup>8</sup> *Supra* note 1 (S.C.J.).

<sup>9</sup> *Supra* note 1 (Ont. C.A.) per Labrosse J.A. at 255.

<sup>10</sup> *Supra* note 1 (S.C.J.) at 228.

<sup>11</sup> (1980), 116 D.L.R. (3d) 193 (S.C.C.).

<sup>12</sup> *Supra* note 1 (Ont. C.A.) at 257.

arrangement for additional insurance and the statutory source for the clause itself. He further observed that an assurance of security is implicit in every contract for the storage of goods and cannot weaken a limitation clause when a loss occurs.<sup>13</sup> But his greatest concern was with the interpretation of *Hunter* on which the trial judge and the majority in the Court of Appeal based their results.

Carthy J.A. read *Hunter* through the spectacles of the earlier decision of Finlayson J.A. in *Kordas*, which was interpreted as leaving little room for the operation of fundamental breach after *Hunter*.<sup>14</sup> After a brief review of the decisions of Dickson C.J.C. and Wilson J. in *Hunter*, in which he noted that Wilson J. did not abandon the doctrine of fundamental breach of contract, Carthy J.A. concluded that while it was not necessary for him to choose between the two approaches, he would favour that of Dickson C.J.C. on the ground that there is no need for courts to have an undefined discretion in the enforceability of exemption clauses. All affected persons are best served by certainty. However, he cautioned that while fundamental breach should play no role in the enforcement of exemption clauses, it may do so in relation to continuing performance under a contract.<sup>15</sup>

Carthy J.A. then opined that both Dickson C.J.C. and Wilson J. would have enforced the limitation clause in *Solway* but for different reasons. Dickson C.J.C. would have concluded there was no unconscionability because the clause was imported by statute into the contract and the parties were knowledgeable business people. Wilson J. would also have looked at the outcome but would have concluded that policy considerations pointed to the enforcement of the legislation. Carthy J.A. expanded upon the policy justification and noted that the statutory limitation clause was originally adopted to provide some balance to the absolute liability of carriers for loss or damage which has been part of the common law for over 200 years. "Commercial realities"<sup>16</sup> required the limitation because a carrier would have no means of knowing the value of the goods for insurance purposes and the cost of insurance for the most valuable goods in a cargo would impose prohibitive charges on the consigner of less valued goods. The best person to assess the value and pay insurance was the owner but by imposing liability tied to the weight of the goods, the carrier bore sufficient risk to have an incentive to act prudently.<sup>17</sup> The Ontario legislative requirements were also noted to be found internationally.<sup>18</sup>

Returning to *Solway*, Carthy J.A. thought its facts fitted precisely

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<sup>13</sup> *Ibid.* at 259 and 264.

<sup>14</sup> *Ibid.* at 259.

<sup>15</sup> *Ibid.* at 261.

<sup>16</sup> *Ibid.* at 262.

<sup>17</sup> *Ibid.* at 262-63.

<sup>18</sup> *Ibid.* at 263.

within the policy and wording of the regulation which imported the limitation clause into the contract. He characterized the loss of the trailer as a “misadventure...at most”<sup>19</sup> caused “in part” by negligence.<sup>20</sup> The case was about the manner of performance not the failure to perform. The bailors recognized the risk passed to them by the clause when they arranged their own insurance. No higher standard of care should be imposed because the goods were especially valuable; movers are required to treat all goods alike and the bailors ought to have purchased adequate insurance coverage. Carthy J.A. did not agree with the majority’s implicit importation of a higher duty of care into the contract beyond that expressed in the whole contract.<sup>21</sup>

Before turning to the topic of this comment, the proper judicial approach to exemption clauses, several other observations should be made about the decision. First, both majority and minority decisions are based on different facts as found by the trial judge. Particularly significant was the fact that the limitation clause was incorporated as a result of legislation. The majority completely ignored this while Carthy J.A.’s decision was undergirded by the legislation and his acceptance of the policy the legislation expressed. By ignoring the legislation, the majority effectively overturned it and displayed that judicial disdain for parliamentary supremacy is no longer limited to *Charter* jurisprudence, but is now entrenched in that most common law of all, the law of contract. As argued below, it is unclear that this move is inspired by any affection for the common law tradition or desire to enrich it.

A second, related, observation is that the selection of facts by the majority appears ideological rather than the result of a balanced review of all the facts. In *Hunter*, the Supreme Court of Canada emphasized the importance of the commercial sophistication and knowledge of the parties<sup>22</sup> in assessing the bargaining power of the parties, yet the majority in the Ontario Court of Appeal completely ignored the findings of the trial judge about the bailors in order to focus narrowly on the alleged failings of the bailee. The majority, therefore, did not apply *Hunter* fully as it said it did. The majority appears to have decided at the outset to defeat the limitation clause rather than to assess it in the whole context of the case. Thus, to disdain for parliamentary supremacy, must be added disdain for the contractual allocation of risks at the heart of freedom of contract, on the part of the Ontario Court of Appeal, even where the parties are of roughly equal commercial sophistication.

A third, related, point is that the majority could have reached the

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<sup>19</sup> *Ibid.* at 264.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Supra* note 2 per Dickson C.J.C. at 342 and per Wilson J. at 381-82.

outcome it desired honestly by reformulating the common law issues in the case. At least three possible routes to the same decision were available and all of these can be taken where both parties are commercially sophisticated. First, the representation that the goods would be completely secure could have been framed either as a fraudulent or negligent misrepresentation inducing the contract, so that the case could be resolved as one of misrepresentation rather than breach of contract. The Court of Appeal characterized the assurance as “false,” as noted above; and negligence is an easy standard to satisfy in law today.<sup>23</sup> Secondly, that same representation could have been construed as a collateral warranty and upheld on the basis of *Mendelsohn v. Normand Ltd.*,<sup>24</sup> or thirdly, it might also have been characterized as an overriding oral undertaking on the basis of *Evans (J.) & Son (Portsmouth) Ltd. v. Andrea Merzario Ltd.*<sup>25</sup> While decisions such as *Hawrish v. Bank of Montreal*<sup>26</sup> and *Bauer v. Bank of Montreal*<sup>27</sup> would constitute significant bars to the construction of the facts as a collateral contract or an overriding oral undertaking, respectively, enforcement of the undertaking that the goods would be secure would still be defensible on a *stare decisis* basis, notwithstanding the existence of conflicting principles in the law. The second and third options were argued at trial but the trial judge made no related findings of fact and preferred to apply *Hunter* instead, and the Court of Appeal followed suit. Once a decision is taken to treat the facts as a breach of contract action, the question becomes whether the result is an appropriate application of *Hunter*.

### III. An Historical Excursus

The story of the rise and fall of fundamental breach as a rule of law is such an oft-told tale that a brief synopsis is sufficient for present purposes.<sup>28</sup> Although the rule that a fundamental breach of contract could even defeat an exemption clause drafted to cover such a breach is identified with the decision of Denning L.J. in *Karsales (Harrow) Ltd. v. Wallis*,<sup>29</sup> it may be recalled that similar attempts to curb problems of inequity associated with exemption clauses had elicited the so-called “four corners rule” in

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<sup>23</sup> *Curtis v. Chemical Cleaning & Dyeing Co. Ltd.*, [1951] 1 K.B. 805 (C.A.).

<sup>24</sup> [1969] 2 All E.R. 1215 (C.A.).

<sup>25</sup> [1976] 2 All E.R. 930 (C.A.).

<sup>26</sup> (1969), 2 D.L.R. (3d) 600 (S.C.C.).

<sup>27</sup> (1980), 110 D.L.R. (3d) 424 (S.C.C.).

<sup>28</sup> A full bibliography of Canadian academic writing can be compiled from the footnotes in Ogilvie, *supra*, note 2 for the period prior to and including *Hunter*. Since *Hunter*, there has been little written although the cases continue to accumulate; see: *Chitty on Contracts*, 28<sup>th</sup> edition (London: Sweet & Maxwell, 1999), ch. 14 and G.H.L. Fridman, *The Law of Contract*, 4<sup>th</sup> edition (Toronto: Carswell, 1999), ch. 15.

<sup>29</sup> [1956] 2 All E.R. 866 (C.A.).

deviation cases involving carriage of goods by sea or land and bailment.

However, the crackdown on the notion that fundamental breach is a substantive rule of law began in *Suisse Atlantique*<sup>30</sup> in which all the law lords agreed that the application of an exemption clause to any breach of contract was a matter of construction. But certain statements by Lord Reid<sup>31</sup> to the effect that an exemption clause might not apply where an innocent party elects to treat a contract as at an end, left the door open for the English Court of Appeal<sup>32</sup> to continue to treat fundamental breach as a rule of law until *Photo Production Ltd. v. Securicor Transport Ltd.*,<sup>33</sup> in which the House of Lords unanimously rejected the rule of law approach and expressly overruled earlier Court of Appeal decisions. Their lordships rejected the view that the contract came to an end in favour of the view that the exemption clause applied in the circumstances on construction. On the facts, Securicor was not liable for the action of their employee because the effect of the exemption clause was to reduce their liability to due diligence as an employer and to apportion significant risk for the deliberate action to the factory owner as reflected in the low cost of the services provided.

Several outstanding problems survived *Photo Production Ltd.*, of which the most important was the status of fundamental breach because none of the law lords expressly overruled the doctrine; would the House of Lords have enforced the exemption clause had the security guard deliberately set out to burn down the factory rather than “to start a little fire”? Would the House of Lords have enforced an exemption clause excluding liability for fundamental breach where the *proferens* deliberately did something so different from the contract as to render the contract illusory? Would the House of Lords expect the factory owner to continue to pay for Securicor’s services or permit the innocent party to rely on the fundamental breach to be relieved from further performance? Lord Diplock maintained that fundamental breach remained part of the law of contract to permit innocent parties to elect to terminate future performance when deprived of substantially the whole intended benefit of the contract.

In the second Securicor case, *Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd.*,<sup>34</sup> concerned with a clause limiting liability to £1,000

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<sup>30</sup> *Supra* note 5.

<sup>31</sup> *Ibid.* at 398. See also Lord Upjohn at 425.

<sup>32</sup> See, for example, *Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.*, [1970] 1 Q.B. 447 (C.A.).

<sup>33</sup> *Supra* note 5. See also M.H. Ogilvie, “The Reception of *Photo Production Ltd. v. Securicor Transport Ltd.* in Canada: *Nec Tamen Consumeatur*” (1982) 27 McGill L.J. 424.

<sup>34</sup> *Supra* note 5. See also M.H. Ogilvie, “Comment” (1984) 62 Can. Bar Rev. 389.



where actual damages were £55,000, the law lords stated that limitation clauses should be less stringently construed than exemption clauses and that they be construed in relation to the other terms in the contract. Since all such clauses are still to be construed strictly and *contra proferentem*, it is unclear what this means and it may open the possibility of using limitation clauses to restrict liability to derisory amounts when a substantial breach of contract occurs. However, in the final case in the House of Lords trilogy, *George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd.*,<sup>35</sup> in which the *proferens* supplied autumn cabbage seeds when winter cabbage seeds were ordered with the resulting crop proving worthless, the law lords held that a clause exempting from liability for all loss resulting from any seeds supplied exempted the *proferens* from liability. The House of Lords castigated any attempts to reintroduce fundamental breach through the back door. The net effect of this trilogy was that fundamental breach had been subsumed under the rule of construction for all exemption clauses.<sup>36</sup>

While the Supreme Court of Canada adopted *Suisse Atlantique* within a few years of that decision<sup>37</sup> and *Photo Production Ltd.* within a few months,<sup>38</sup> the net effect was uncertain because the court appeared to think that it could both apply the rule of construction and continue to think that exemption clauses should not survive the disintegration of their contractual setting when it was fair and reasonable to do something else. The status of fundamental breach in Canadian contract law seemed secure. The Supreme Court of Canada wanted to have it both ways and lower courts were left to struggle as best they could.<sup>39</sup>

*Hunter* did little to mitigate this legacy of doctrinal uncertainty. In *Hunter*, Dickson C.J.C. thought that fundamental breach should be eliminated because it caused too many games of characterization and there was no reason why exclusion clauses should have a special rule when contracts contained many other harsh terms. Wilson J. would retain

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<sup>35</sup> *Ibid.*

<sup>36</sup> In *Tor Line A/B v. Alltrans Group of Canada Ltd.*, [1984] 1 W.L.R. 48 (H.L.), Lord Roskill warned against exemption clauses which reduced contracts to statements of intent, thereby suggesting some lingering affection for fundamental breach. See also *Afivos Shipping Co. S.A. v. Pagnan & Fratelli*, [1983] 1 All E.R. 449 (H.L.) per Lord Diplock at 455.

<sup>37</sup> In *B.G. Linton Construction Ltd. v. C.N.R. Co.* (1974), 49 D.L.R. (3d) 548 (S.C.C.).

<sup>38</sup> *Beaufort Realities*, *supra* note 11.

<sup>39</sup> See, for example, *Peter Cortesis Jeweller Ltd. v. Purolator Courier Ltd.* (1981), 35 O.R. (2d) 39 (Ont. Co. Ct.); *Cathcart Inspection Services Ltd. v. Purolator Courier Ltd.* (1981), 128 D.L.R. (3d) 227 (Ont. H.C.); *aff'd* (1982), 139 D.L.R. (3d) 371 (Ont. C.A.); *Rose et al. v. Borisko Bros. Ltd.* (1983), 147 D.L.R. (3d) 191 (Ont. C.A.); *Punch v. Savoy's Jewellers Ltd. et al.* (1986), 26 D.L.R. (4th) 546 (Ont. C.A.).



fundamental breach as a residual ground for a court to strike down exemption clauses when unconscionability was too uncertain and also to give the innocent party a reason to stop performing when the outcome was substantially different from the promise. Dickson C.J.C. thought courts should proceed directly to construction of the clause and to enforce it if it provided for the events, or in appropriate circumstances, such as unequal bargaining power, to refuse to enforce it for unconscionability. Wilson J. also thought that construction was the first step but that an exemption clause ought not to be enforced where there was a fundamental breach and it was unreasonable to enforce it in the context of the circumstances after the breach; fundamental breach was the trigger to the step of assessment according to the reasonableness standard. Dickson C.J.C. posited the time for assessment as the time the contract was made; for Wilson J., the time was after the breach and in the circumstances of the breach.

Although the Supreme Court of Canada has retained too many controversial components, a refined mix-and-match approach to the two decisions in *Hunter* would yield this test: exemption clauses should be construed as at the time the contract is made and enforced on their terms except where it is unreasonable in all the circumstances to do so. Exemption clauses are risk allocation devices negotiated by the parties prospectively to cover the event which has occurred whereby the innocent party has not received some or all of the promise of the *proferens*. Construction may cover all breaches, including fundamental breach whatever that might mean, and if the event is expressly provided for, its characterization as a fundamental breach is superfluous. Subsequent circumstances may be relevant especially where a party has acted in such a way as to render the contract illusory, and reasonableness rather than unconscionability, which tends to be restricted to significant disparities in bargaining power, or significant abuses of that superior power. However, subsequent cases show that this has not been understood to be the *Hunter* legacy.

In *Kordas v. Stokes Seeds Ltd.*, liability on a sale of cabbage seeds was limited to the price of the seeds should a crop prove to be a failure, and the Ontario Court of Appeal upheld that clause and rejected an argument that the vendor was under a duty to advise the purchaser that a different type of seed was more suitable for his purposes. For the court, Finlayson J.A. thought “there is not much life left”<sup>40</sup> in the concept of fundamental breach, but also that there was no fundamental breach on the facts. The vendor’s conduct in not advising a different type of seed was at most negligence and negligence was covered by the clause. Moreover, the parties were equals operating at arms length and the breach did not go to the root of the contract or even to the quality of the product at all.<sup>41</sup> The

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<sup>40</sup> *Supra* note 3 at 134.

court acknowledged the different approaches in *Hunter* but declined to choose between them. The facts were resolved simply by construction of the exemption clause in a decision which leans to Dickson C.J.C. rather than Wilson J.

In *Fraser Jewellers Ltd.*, liability for a robbery at a jewellery store was also limited to the annual service fee under the limitation of liability clause which was enforced on its terms to the negligence in the slight delay by the security company in responding to a call, thereby facilitating the escape of the thieves. The delay was not a fundamental breach and this was a commercial transaction in which there was nothing unfair, unreasonable or unconscionable in enforcing the clause on construction. The contract called for the installation and monitoring of a security system and the jewellery store got that except for the one event. The contract continued in force after the robbery and the jewellery store did not elect to terminate it. For the court, Robins J.A. distinguished negligence from fundamental breach but found that even if there was a fundamental breach, the clause should still be enforced on its terms in the absence of unconscionability or unreasonableness.<sup>42</sup>

*Kordas and Fraser Jewellers Ltd.* showed that the courts before *Solway* thought *Hunter* to have eliminated fundamental breach and that they ignored the role it might still play in preserving an innocent party's right to elect to terminate a contract when substantial performance is no longer possible, as mooted by Lord Diplock and Wilson J. They also showed a preference for construction and enforcement of commercial contracts, notwithstanding that they paid lip-service to both judgements in *Hunter*. *Solway* is anomalous in light of how the Ontario Court of Appeal was refining the ambiguous legacy of *Hunter*.

#### *IV. Solway Again*

Neither the trial judge nor the majority in the Ontario Court of Appeal considered the construction of the limitation clause in the case, as *Hunter* required, probably because it clearly limited the liability of the bailees to \$0.60 per pound. The second step, on Wilson J.'s analysis, would be to ask if the breach was fundamental and the third step to ask if it was reasonable to enforce it in the post-breach circumstances. The second step on Dickson C.J.C.'s analysis would be to ask if it was unconscionable to enforce it. Both routes would result in enforcement. The allocation of risk in the whole contract was to transfer most of the risk to the bailors who were sophisticated enough to get insurance because they accepted that

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<sup>41</sup> *Ibid.*

<sup>42</sup> *Supra* note 4 at 504. See also *International Oxide-Fusion Inc. v. Exolon-Esk Co.* (1997), 77 C.P.R. (3d) 458 (Ont. Ct. (Gen. Div.)).

allocation at the time of making the contract. The contract was for storage and carriage not for insurance and the bailee's failure was negligence not a fundamental breach of contract. The contract was not unconscionable or a product of the abuse of a superior bargaining position at the time it was made, nor was its enforcement unreasonable in the post-breach circumstances. It would have been unreasonable had the contract been one of insurance but it was one of bailment and carriage. Most importantly, however, the clause was incorporated by legislative decision, and for that reason alone, the court ought to have enforced it.

*Solway* threw into doubt many first principles both of private law adjudication generally and the law of contract in particular. Carthy J.A.'s conclusion that the majority implicitly used a fundamental breach analysis points to the first doubt: has fundamental breach been reintroduced into exemption clause adjudication? Carthy J.A.'s observation must be correct because it is the only way to make sense of the majority decision; by finding that the clause was unreasonable and unconscionable in the circumstances, the majority had to dismiss it from application. *Solway* suggests that fundamental breach is alive and well in Canada's contract jurisprudence even if the courts do not talk about it any more.

Secondly, the failure to go through the motion of construing the clause might even lead to doubts about the status of the rule of construction. Even Lord Denning usually went to the trouble of deciding what a clause meant on construction before implying a conflicting provision into a contract to the effect that it was not to apply where there was a fundamental breach and then enforcing that provision.<sup>43</sup> Did the Ontario Court of Appeal seriously understand that an exemption clause is an integral part of the contract's risk allocation provisions indicating what the parties had themselves decided about risk bearing before the event of breach? *Solway* suggests not. Thus, thirdly, what is the status of freedom of contract in the law of contract?

Fourthly, the selective approach to the whole facts, by failure to account for all the facts as found by the trial judge, suggests that the majority paid lip-service to both judgments in *Hunter* which emphasized the importance of factual assessment in both unconscionability and unreasonableness findings. As Carthy J.A. observed, on the facts, it is probable that both Dickson C.J.C. and Wilson J. would have enforced the limitation clause against the bailees here.

Fifthly, as suggested earlier, even if this was simply a case about the enforcement of a statutory provision, a court would have been obliged to do so unless that court wished to show disdain for the legislative branch and the policy decision of the legislature implicit in the legislation. The

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<sup>43</sup> *Karsales*, *supra* note 29 is the classical example of this technique.

legislation did not bestow a statutory discretion on the courts to enforce the clause only if it thought the legislation reasonable.

### *V. Conclusion*

A cynical reading of *Solway* is that the Ontario Court of Appeal decided to undermine, without expressly saying so, the fundamental norm of contract law, the doctrine of freedom of contract, by recasting that part of it where the most scrupulous negotiation occurs, in the allocation of risks in the event of contract failure. By casting aside the limitation clause, the court suggested that it cared little for the legislated inclusion of the clause and the fact that it was, in some senses, freely bargained. The bailors could have made other private arrangements for their move rather than through a commercial mover. Many people do. Even if the bailors did not like the burden of risk they bore, they had the option of paying more to secure the actual market cost of the security they sought, either through the extra insurance offered by the bailee or through their own insurance providers. They understood the risk allocation and purchased extra insurance but failed to purchase enough to cover the actual value of the goods stolen which only they could know, and so subsequently cast about for another insurer, the bailee, to pay compensation. The Ontario Court of Appeal helped them to find another insurer.

The way in which the court did so may have done significant damage to the subtle balancing of principles built up during the 20<sup>th</sup> century by the Anglo-Canadian jurisprudence in relation to exemption clauses. If the unspoken goal was to put an end to the widespread use of such clauses by bestowing a discretion on future courts to uphold or reject them, then it should be asked whether that is a role for a court or for a legislature, especially where the clause is a legislated clause. There are precedents for such a substantial change in the law of contract by implementing reasonable and fairness tests for exemptions clauses; the most extensive are the U.K. *Unfair Contract Terms Act 1977*,<sup>44</sup> and the *Unfair Terms in Consumer Contracts Regulations 1999*,<sup>45</sup> implementing an E.U. Directive<sup>46</sup> of 1993, all adopting a reasonableness rather than an unconscionability standard for review.<sup>47</sup> How such a test should be crafted is another matter beyond the scope of the present comment, but carefully crafted such an approach should be.

*Solway v. Davis Moving and Storage Inc.* was a simple case but not quite as simple as the Ontario Court of Appeal seemed to think. The

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<sup>44</sup> c.50. See *Chitty on Contracts*, *supra* note 28 at 695-715.

<sup>45</sup> S.I. 1999/2083.

<sup>46</sup> 93/13/E.E.C., O.J. No. L. 95.21.

<sup>47</sup> See *Ogilvie*, *supra* note 2 for the superiority of reasonableness as the test.

implications of the majority judgement go to such fundamental issues about law that were never addressed, so that the result can only be described as bad law.

