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Faute lourde and the Perfectly Drafted Exclusion Clause: A « civil» Response to a « Common » Problem with Special Reference to Contracts for the Provision of Security Services

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Article abstract

Devant la reconnaissance judiciaire accrue des clauses d'exonération clairement rédigées, il est devenu pratiquement impossible d'écarter l'application de telles clauses aux litiges en responsabilité. L'auteur affirme que le monde commercial a besoin de ces clauses, mais souligne qu'il faut également protéger la bonne foi entre les co-contractants afin d'assurer des normes minimales de rendement dans l'exécution des contrats. A cet égard, l'auteur pose le problème suivant : supposons que le demandeur engage une compagnie de sécurité pour protéger son usine contre les risques de vol et de feu. Une clause d'exonération parfaitement rédigée protège la défenderesse, la compagnie de sécurité, contre la responsabilité qu'elle pourrait encourir par sa négligence ou celle de ses préposés dans la garde des lieux. Un gardien de sécurité met feu intentionnellement à l'usine. Est-ce que la compagnie de sécurité est protégée par la clause ? Selon la jurisprudence des provinces canadiennes de common law et celle d'Angleterre, la réponse est affirmative, l'arrêt de principe (*Photo Productions* v. *Securicor)* est étudié à cet égard. Au Québec, selon l'auteur, la réponse serait négative : la responsabilité de la compagnie de sécurité serait engagée.

L'auteur prétend que cette différence substantielle s'explique par l'histoire et les conceptions théoriques de base qui ont donné lieu aux deux systèmes de droit. L'auteur examine la division retrouvée en common law entre le droit délictuel (*tort*) et contractuel (*contract*) par rapport à l'unité théorique de « responsabilité civile » du droit civil québécois. Il constate ensuite que les clauses d'exonération ont été facilement acceptées dans le droit des « contracts » de la common law mais qu'elles ont été jugées sévèrement en droit civil québécois en utilisant la notion de bonnes moeurs et d'ordre public.

Malgré les différences entre la common law et le droit civil québécois, les deux systèmes reconnaissent aujourd'hui les clauses de non-responsabilité. L'auteur soumet, cependant, que le droit civil québécois offre la meilleure réponse au problème exprimé ci-haut. Selon lui, lorsque l'exécution négligente d'une obligation contractuelle équivaut à un manque de bonne foi, elle doit donner lieu à la responsabilité civile malgré la clause d'exonération, vu la notion de « faute lourde » développée par la jurisprudence québécoise. Cette notion est comparée favorablement aux notions de *fundamental breach* de la common law et celle de l'obligation essentielle du droit civil.

Après avoir examiné et discuté de la notion de « faute lourde » en étudiant les arrêts québécois avec référence particulière aux contrats de sécurité/surveillance, l'auteur termine son étude en proposant que la common law a besoin de ce genre d'analyse pour redresser le problème des clauses de non-responsabilité parfaitement rédigées en évoluant vers une théorie générale des obligations et de la responsabilité civile.

Faute lourde and the Perfectly Drafted Exclusion Clause: A « civil » Response to a « Common » Problem with Special Reference to Contracts for the Provision of Security Services

John D. CROTHERS *

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Introduction

Born in the industrial revolution of nineteenth century England, the exclusion clause was hailed as the epitome of rational risk allocation in contracts. Its reception was less warm in the civil law of Quebec. A non-codal creature which purported to exclude liability, it was judicially perceived as contrary to public order. Ultimately, however, a combination of commercial expansion and judicial sleight of hand through *obiter* of the Supreme Court and Privy Council resulted in the grafting of exclusion clauses on to Quebec civil law.

Although essentially foreign to Quebec law, such clauses were quickly incorporated into our theory and practice. They remain enigmatic, however, and serve to emphasize several basic doctrinal debates in our law: public order v. the sanctity of contract, judicial intervention v. "*contrat fait la loi*", *option/cumul* v. "*la thèse du respect du régime contractuel*", the theoretical unity of civil responsibility v. the duality of contract and delict.

The exclusion clause has come of age in the 1980's. In both the common and civil law, these clauses can be found in most standard form contracts. Drafting of exclusion clauses has also improved, so much so that in the world of commercial contracts, judicial devices such as construction or adequate notice are no match for a well drafted clause.

It is submitted that the maturity of exclusion clauses is nowhere better evidenced than in contracts for the provision of security services. Indeed, the leading English and Quebec cases on exclusion clauses deal with these types of contracts. Although this article will focus on an analysis of such a specific type of contract, it is submitted that this detailed analysis also sheds light upon the general common law and civil law approaches to the ubiquitous exclusion clause.

Security companies are hired to guard against theft and fire, yet their standard form contracts inevitably exempt or limit liability for these very risks. Such a state of affairs may appear strange to the layman. Judging by the case law dealing with plaintiffs trying to avoid such clauses, the co-contractants in these contracts are often not satisfied when an exclusion clause is invoked. While it is true that security companies are not insurers, the expectations of the plaintiff must also be examined. He has "bargained" for the provision of services and at least would expect good faith performance.

It is precisely at the point of good faith in contracting that the common and civil law diverge. This paper will examine, from a comparative viewpoint, the history, theory and application of the respective approaches to the following problem : Plaintiff factory owner hires defendant security company to guard its premises against the risks of theft and fire. A well drafted exemption clause in the standard form contract excludes liability for acts of the the defendant's employees in carrying out these duties. The employee deliberately sets a fire and the factory is totally destroyed. At common law the security company would be protected by the exclusion. It is submitted that in the civil law of Quebec liability would ensue.

1. The Common Law Approach

1.1. Tort v. Contract : Theory and History

Professor Bridge, in his article "The Overlap of Tort and Contract" [1] speaks of the "theoretical duality and technical unity" of the common law system of civil liability, in contrast to Professor Crepeau's assertion of the theoretical unity and technical duality of regimes of responsibility in Quebec.

1. (1982) 27 *McGill L.J.* 872, p. 873.

At common law, where practice and the incremental growth of the law through accretion take precedence over theory and codification — lawyers tend to think in terms of the separation of contract and tort. As Bridge recognizes : "[T]heoretical unity is wholly absent..." [2]. Although Bridge goes on in an attempt to advance his thesis that in practice the hermetically-sealed compartments separating tort from contract are breaking down, he must reluctantly recognize that the leading Supreme Court of Canada case on security contracts and the use of exclusion clauses bluntly perpetuates the distinction [3].

Surprisingly enough, the historical antecedents of the tort/contract separation at common law point to their initial fusion in the writ system of forms of action. The source of modern contract law can be traced to the writ of trespass, which originally formed part of the law of tort [4]. By the early 14th century, an action would lie for breach of an express undertaking by a negligent act or commission.

The common law of contract diverged from tort at this point, however, focussing attention on the *undertaking* as opposed to the *injury*. Plaintiffs began to allege the failure to perform the undertaking as promised rather than liability for a misfeasance. Coterminous with the practicalities of pleading, an independent contractual vocabulary began to develop based on concepts of mutual promises by co-contractors, consideration and unique remedies for breach.

By the turn of the 19th century when the writ system was finally abolished, the boundary between tort and contract had become even more distinct. Common law theorists began to rationalize and systematize a separate area of rules under the rubric of "contract law".

The end result of the separate evolution of contract and tort is evident today. Common law courts tend to perpetuate the distinction between the "law of tort" and the "law of contract", especially in commercial situations. Where the parties have set out their rights and obligations in a contract, liability in an extra-contractual setting will not be lightly imputed.

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2. *Id.*
3. *J. Nunes Diamonds v. Dominion Electric*, [1972] S.C.R. 769. For another examination of the problems created by *Nunes Diamonds* and its perpetuation of the tort/contract distinction see B. REITER, "Contracts, Torts, Relations and Reliance", dans REITER et SWAN, *Studies in Contract Law*, Toronto, Butterworths, 1980.
4. BRIDGE, *supra*, note 1, p. 874.

1.2. Application of the Tort/Contract Distinction in Security Contracts: *Nunes Diamonds*

The apex of the isolation of contract and tort as separate systems of civil liability can be observed within the context of a modern Supreme Court judgment dealing with a contract for the provision of security services. In *J. Nunes Diamonds v. Dominion Electric*[5], a "civilian" Justice delivered the majority opinion and refused to recognize an attempt to overlap tortious and contractual regimes. Pigeon J. denied a plaintiff's claim in tort for damages that arose while the parties were governed by contractual obligations.

1.2.1. The Facts

The facts of *Nunes Diamonds* are well known:

The appellant diamond merchant had a contract with respondent, under which the latter supplied burglary protection for the appellant's premises. The contract limited the respondent's liability for breach of contract to $50. The contract also provided:

> 16. No conditions, warranties or representations have been made by Dominion Company, its officers, servants or agents other than those endorsed hereon in writing.

The premises of another diamond merchant were broken into and a large quantity of diamonds stolen. These premises were also protected by the defendant's system but the alarm had not gone off. The appellant became worried that his premises were not burglar-proof and asked someone from the respondent to inspect his system. He was assured that "even our own engineers could not go through this system without setting an alarm." The respondent also sent to the appellant copies of letters stating that the system installed at the other jewellers had performed its job properly, and that efforts were still being made to solve the burglary. Of course the appellant's premises were broken into by thieves who circumvented the alarm system, and a large quantity of diamonds was stolen.

A subrogated action was brought by the appellant's insurers for damages equal to the total value of the loss (which far exceeded $50).

1.2.2. The Majority Decision

In what can only be seen as an attempt to defend the "purity" of the tort/contract distinction, Pigeon J. would not allow recovery in tort for the

5. *Supra*, note 3.

post-contractual assurances of the security company. The appellant had attempted to characterize these assurances as negligent misstatements as to the quality of the alarm system upon which it relied to its detriment. Stressing that the contract alone governed relations between the parties, Pigeon J. went on to conclude:

> It is a case in which, the parties having mutually established their respective rights and obligations by contract, it is sought to impose upon one of them a much greater obligation than that fixed by the contract by reason of an alleged misrepresentation as to the infallibility of the system which it provides. [...] To make the protection company liable, in the case of the failure of its protection system, not for the stipulated nominal damages ($50) but for the full value of the goods to be protected, is a fundamental alteration of the contract.
>
> In my view, the representations relied on by appellant cannot be considered as acts independent of the contractual relationship between the parties. This can be readily verified by asking the question: Would these representations have been made if the parties had not been in the contractual relationship in which they stood? Therefore, the question of liability arising out of those representations should not be approached as if the parties had been strangers, but on the basis of the contract between them. Hence the question should be: May this contract of service be considered as having been turned into the equivalent of a contract of insurance, by virtue of inaccurate or incomplete representations respecting the actual value of the protection service supplied? In my view, there is no doubt that this question should be answered in the negative.[6]

1.2.3. The Dissent

It is interesting to note that Spence J., in his dissenting judgment suggested an alternative approach which goes against the independence of tort and contract. His opinion also purported to deal with the specific problem of how exclusion clauses fit into a regime which might allow injured plaintiffs to sue in contract or tort. Rather than automatically excluding a cause of action in tort merely because of contractual relations between the parties, Spence J. took a "civilian" approach[7]. After recognizing that the relationship between the parties was to some extent defined by the contract, he also pointed out that this relationship could give rise to a concomitant duty to take care not to injure the plaintiff. The question thus becomes not whether the existence of a contract wipes out tortious responsibility, but whether the particular contract had in fact excluded liability in tort as well as contract.

Spence J. went on to state that liability in negligence as well as contract may be excluded by a validly worded exemption clause, but that attempts to

6. *Id.*, p. 777-778.
7. For an outline of the "civilian" approach, see Part II, below.

exclude negligence would be strictly interpreted. By examining clause 16 of the contract, which stated that no representations "*have*" been made, in light of a strict interpretation test, Spence J. was able to avoid the exclusion clause and allow recovery :

> [I] have no hesitation in coming to the conclusion that clause 16 of the agreement between the appellant and the respondent cannot operate as a bar to a claim based on a tortious misrepresentation made many months after the contract which contained such clause had been executed.[8]

1.3. Conclusion

The practical effect of *Nunes Diamonds*, whatever its critiques [9], is that it will be difficult for a plaintiff in a contract for the provision of security services to rely on non-contractual remedies. Read at its widest, the case stands for the proposition that contractual relations will take precedence over tortious liability incurred within the contractual context. Even on the more narrow alternative reading, it could be said that as well drafted, an exclusion clause could have covered the tort in question.

The following section of this essay will thus examine possible *contractual* remedies open to common law plaintiff for the breach of a security agreement.

1.4. The Rise of Exclusion Clauses

1.4.1. History and Economic Theory

The rise of contract and contract law in early 19th century England can be traced to the demands of the industrial revolution. In an atmosphere of *laissez-faire*, contracts were used to maximize efficiency and reduce risk between businessmen intent upon turning a profit throught the exchange of resources [10].

While the technology of mass production was turning out standardized manufactured goods, another byproduct was standardized contracts. Rather than negotiating with every party in a classical bargaining environment to produce individual contracts for every need of a large scale business enterprise — standard forms were widely used for standard repetitive transactions.

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8. *Supra*, note 3, p. 810.
9. BRIDGE, *supra*, note 1, finds that it goes against his theory on the overlap of tort and contract.
10. See YATES, *Exclusion Clauses in Contracts*, (1982) 1–26.

The economics of producing standard forms for standard situations also dictated that standard risks inherent in the performance of a contract be identified and allocated. Good business sense suggested that the party putting forward the contract attempt to ensure that terms, which were by definition not open to negotiation, were favourable to that party. The success of this approach was of course conditioned by the degree of competition in the industry and the relative bargaining strength of the parties.

One of the key risks of any contract is that of liability for breach of a contractual obligation. Standard forms thus contained clauses which attempted to define precisely the obligations being undertaken by the stipulating party or alternately to transfer or limit the liability flowing from the breach of these obligations. Such contractual risk-shifting devices became known as exclusion, exemption or limitation clauses.

1.4.2. Doctrinal Analysis

From the *laissez-faire* era up to the present day, the common law has tolerated exclusion clauses in a commercial context as an application of the freedom of contract doctrine. Judges remain reluctant to interfere with the allocation of risk between commercial co-contractors. Unlike consumer situations, where negative aspects of standard forms such as the essentially "take it or leave it" thrust of the contract and the potential for abuse of superior bargaining power, are often taken into account, well drafted exclusion clauses in commercial contracts will not usually be tampered with. Nor has the existence of exclusion clauses at common law been seriously questioned by scholars.

The theoretical *purpose* of such clauses, economically based allocation of risk, has traditionally been recognized by theorists [11] and the courts [12]. The theoretical *nature* of the exclusion clause, on the other hand, has been examined by few authors. The major common law analyst of exclusion clauses, Coote [13], has suggested an approach that keeps squarely within the contractual setting. He differentiates between the procedural and substantive theories. The traditional view is characterized as a "procedural approach" [14]. In other words, an exception clause provides a shield to a claim for damages while the only relevance of the obligations undertaken by the promisor is that they have been breached. As Coote summarizes :

11. *Id.*
12. *Nunes Diamonds, supra*, note 3.
13. *Exception Clauses*, (1964).
14. *Id.*, p. 2.

> On this approach it is the duty of the courts, when confronted with a contract containing exception clauses, to look at the contract apart from the exempting clauses and see what are the terms express or implied which impose an obligation on the promisor. The exempting clauses will then operate, if at all, only as a defence to breaches of the obligation thus determined.[15]

An alternative analysis is the "substantive approach" [16], which ignores the promisee's "procedural" rights of enforcement of the contract and concentrates on the promises themselves. A valid contractual promise can be seen as creating a substantive primary right to performance of the promise and a correlative duty on the promissor to perform. A secondary substantive obligation to pay pecuniary compensation for breach of these promises also comes into being. Applying this approach to exclusion clauses, Coote states :

> In the first place, the function of all exception clauses, being substantive, is to place substantive limitations upon the rights to which they apply, and, accordingly, to help delimit and define those rights. In the second place, an exception clause which made purported contractual rights wholly unenforceable would not have effect merely as a shield to claims for damages. It would, in fact, prevent those rights from accruing in the first place. Suppose, for example, that I sell a horse which I say is sound for jumping, but provide in the written agreement that I accept no responsibility whatever if the horse should prove unsound. What I am doing is to ensure that the purchaser has no primary contractual right to call for a horse which is sound for jumping. I am not contracting that the horse is sound and giving myself a shield in case of breach. I am simply refusing to contract on the point at all.[17]

1.5. Application of History and Theory to Security Contracts : *Photo Productions*

Despite the economic rational and judicial acceptance of exclusion clauses or Coote's contention that there may not have been any promise made at all, plaintiffs unhappy with a total exemption or limitation of liability have attempted to qualify or avoid such clauses. Perhaps many businessmen might not consider themselves to be the *laissez-faire* bargainers or rationally allocating risk-takers that the common law courts most often see them to be.

1.5.1. The Facts

Again, a case involving the provision of security services provides us with an illustrative example. In *Photo Productions v. Securicor* [18] the plaintiff

15. *Id.*, p. 1.
16. *Id.*, p. 2.
17. *Id.*, p. 7.
18. [1980] A.C. 827.

contracted with the defendants for the provision of a night patrol service for their greeting card factory. The main perils which the parties had in mind were fire and theft. The contract, on the defendants' printed form, incorporated standard conditions which provided:

> 1. Under no circumstances shall the company be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer; nor, in any event, shall the company be held responsible for: (a) any loss suffered by the customer through [...] fire or any other cause, except insofar as such loss is solely attributable to the negligence of the company's employees acting within the course of their employment...[18a]

One of the defendants' employees entered the factory on patrol and lit a fire which burned down the factory. The employee, who had satisfactory references and had been employed by the defendants for some three months, later said that he had only meant to start a small fire but that it had got out of control.

The employee was subsequently convicted of maliciously damaging a building and sentenced to three years imprisonment. The plaintiff claimed substantial damages based on breach of contract, while the defendant used the exclusion clause to deny any liability.

In an effort to avoid the application of the exclusion clause, the plaintiff developed an argument based on the common law concept of "fundamental breach". After underlining the nature and purpose of the contract as the provision of a security service to safeguard its factory against theft and fire, the plaintiff identified as a "fundamental term" of the contract that while the security personnel were on the premises to discharge their contractual obligation they would not do any deliberate act calculated to damage customer's property. In other words:

> The act of setting fire to the customer's property is to be properly described as a total breach of contract...[19]

18a. *Id.*, p. 830.

19. *Id.*, p. 835. In arguing "fundamental breach", the plaintiff was attempting to invoke a line of common law cases wherein concepts of "consumer protection" had begun to blur more traditional contractual analyses. Plaintiffs who wished to claim damages, could not as a result of the contractual context claim a remedy for breach of a duty of care. Nor, on the other hand, did they wish merely to repudiate the contract and claim return of monies paid. Rather, plaintiffs wished full compensation for *serious consequences* ensuing from deficient performance of the contract — despite clear protection of the defendant by an exclusion clause. Certain judges were prepared to grant this.
Denning L.J. (as he then was) extended the concept of "fundamental breach" from its initial creation in Maritime charterparty cases [*Hain Steamship v. Tate*, (1936) 41 Comm C. 350; *Chandris v. Isbrandsen-Moller*, [1951] 1 K.B. 240] into the general area of commercial

Such a wilful breach of the contract, the argument concluded, results as a rule of law in the repudiation of the contract and with it the exclusion clauses. Since the contract no longer exists, the exclusions no longer apply and the plaintiff would be entitled to compensation for the total damages suffered.

1.5.2. The Majority Decision

Lord Wilberforce, with whom three of the five law Lords concurred, did not accept the plaintiff's argument. In an implicit application of the "procedural" or "shield" approach to exclusion clauses he began by dismissing the contention that "fundamental breach" was a rule of law under which courts could eliminate exclusion clauses along with the contract. Rather, it was merely a question of construction looking at the contract as a whole, as to whether the exclusion clause covered the particular breach. Even if the exclusion did not cover the breach in question he continued, the contract survives and the parties are only excused from future performance. Damages must be claimed under the contractual limitations. Finally, it was held that a carefully drafted clause may exclude liability for both contractual breach (failing to ensure the safety and security of the premises which burned down) and tort (vicarious liability for negligent or deliberate acts of servants burning down the premises).

Applying these rules to the facts, his Lordship was able to construe the clause as clearly exempting the security company from responsibility for the damages suffered:

> In these circumstances nobody could consider it unreasonable, that as between these two equal parties the risk assumed by Securicor should be a modest one, and that the respondents should carry the substantial risk of damage or destruction.[20]

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contracts and consumer protection. While in the case of *Karsales (Harrow) Ltd. v. Wallis*, [1956] 1 W.L.R. 936, his brother Law Lords were developing an analysis which resembled the civilian "obligation essentielle" (*infra*, 2.4.4.2.) wherein an exclusion clause could be read out when the proferens could not be said to have performed his contract *at all*, Lord Denning was examining breaches going "to the root of the contract." As extended in *Charterhouse Credit v. Tolly*, [1963] 2 Q.B. 683, courts of first instance began to use this doctrine as a rule of substantive law, whereunder an exclusion clause, no matter how well drafted, could not be used to avoid liability where "fundamental breach" was found. [For an excellent analysis of the development of this doctrine, see YATES, *supra*, note 10, p. 219-236].

20. *Id.*, p. 846.

1.5.3. An Alternative Approach : Lord Diplock

Lord Diplock agreed with the majority view that fundamental breach was a rule of construction which did not extinguish the contract. He also concluded that the exclusion clause as drafted exempted the security firm from liability. The judgment is notable, however, for the substantive approach used by his Lordship to explain the nature of the common law contract and the purpose of exclusion clauses.

He began by recognizing the basic commonsense of the factory owner's arguments as set out above :

> It is not disputed that the act of Securicor's servant, Musgrove, in starting a fire in the factory which they had undertaken to protect was a breach of contract by Securicor; and since it was the cause of an event, the destruction of the factory, that rendered further performance of the contract impossible it is not an unnatural use of ordinary language to descrite it as a "fundamental breach".[21]

To explain why Securicor was not liable for the breach, however, required an examination of Coote's theory of primary and secondary obligations :

> My Lords, it is characteristic of commercial contracts, nearly all of which today are entered into not by natural legal persons, but by fictitious ones, i.e., companies, that the parties promise to one another that some thing will be done ; for instance, [...] that services of a particular kind will be provided. Such a contract is the source of primary legal obligations upon each party to it to procure that whatever he has promised will be done is done.[22] [...]
>
> Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach...[23]

Recognizing the principle of freedom of contract, Lord Diplock continued by stating that parties were free to agree for themselves whether primary and secondary obligations were to be incorporated modified or rejected. A fundamental breach can thus be defined using this analysis :

> Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract, the party not in default may elect to put an end to all primary obligations of both parties remaining unperformed. (If the expression "fundamental breach" is to be retained, it should, in the interests of clarity, be confined to this exception.) [...]

21. *Id.*, p. 846-847.
22. *Id.*, p. 848.
23. *Id.*, p. 849.

> Where such an election is made (a) there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay monetary compensation to the other party for the loss sustained by him in consequence of their non-performance in the future and (b) the unperformed primary obligations of that other party are discharged. This secondary obligation is additional to the general secondary obligations; I will call it "the anticipatory secondary obligation".[24]

Even in cases of fundamental breach, however, the secondary obligations of paying damages and/or electing to put the contract to an end may be excluded or modified by express words. The above analysis, based solely on contract law has the advantage of not having to resort to a tort *and* contract analysis of the exclusion clause, as Lord Wilberforce had done. Rather, where the primary obligation is the provision of a service by the security company:

> ... performance of the promise necessitates procuring a natural person to do it; but the legal relationship between the promisor and the natural person by whom the act is done, whether it is that of master and servant, or principal and agent, or of parties to an independent sub-contract, is generally irrelevant. If that person fails to do it in the manner in which the promisor has promised to procure it to be done, as, for instance, with reasonable skill and care, the promisor has failed to fulfil his own primary obligation. This is to be distinguished from "vicarious liability" — a legal concept which does depend upon the existence of a particular legal relationship between the natural person by whom a tortious act was done and the person sought to be made vicariously liable for it. In the interests of clarity the expression should, in my view, be confined to liability for tort.[25]

Applying his analysis to the facts before him, his Lordship concluded:

> ... in the absence of the exclusion clause [...] a primary obligation of Securicor under the contract, which would be implied by law, would be an absolute obligation to procure that the visits by the night patrol to the factory were conducted by natural persons who would exercise reasonable skill and care for the safety of the factory. That primary obligation is modified by the exclusion clause. Securicor's obligation to do this is not to be absolute, but is limited to exercising due diligence in its capacity as employer of the natural persons by whom the visits are conducted to procure that those persons shall exercise reasonable skill and care for the safety of the factory.[26]

Since *Securicor* was not in breach of this modified primary obligation having received good references before hiring the employee, no liability could be claimed.

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24. *Id.*
25. *Id.*, p. 848.
26. *Id.*, p. 851.

1.6. Limitation Clauses

After upholding the exclusion clause in a "fundamental breach" situation in *Photoproductions*, the House of Lords further pronounced upon the sanctity of limited liability clauses in security contracts in the case of *Ailsa Craig Fishing v. Malvern Fishing*[27]. The same defendant, Securicor, was involved.

In this case the hapless security guard hired to patrol the harbour on New Year's Eve went off for a drink and allowed a boat to be wrecked by the rising tide, the risk he was hired to prevent. The defendant admitted fault, and that the vessel was a total loss. The Court found a total failure to perform the contract. Nevertheless the defendant relied on a limitation of liability clause in their contract :

> If, pursuant to the provisions set out herein, any liability on the part of the Company shall arise (whether under the express or implied terms of this Contract, or at Common Law, or in any other way) to the customer for any loss or damage of whatever nature arising out of or connected with the provision of, or purported provision of, or failure in provision of, the services covered by this Contract, such liability shall be limited to the payment by the Company by way of damages of a sum [...] not exceeding £1,000.[28]

The Court upheld the clause, finding it "perfectly clear" since

> The relevant words must be given, if possible, their natural, plain meaning. Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion ; this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives and possibly also the opportunity of the other party to insure.[29]

1.7. Conclusions

The results of both analyses of the *Photo Productions* court and *Ailsa Craig* is that under common law, the principle of freedom of contract has triumphed over the use of "fundamental breach" to modify the potential for harsh application of exclusion clauses.

Based on Lord Wilberforce's approach, an exclusion clause if properly drafted can exclude liability in tort and contract, for acts that are negligent or deliberate, even though the consequences of such acts may go to the heart of the bargain in the eyes of the plaintiff.

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27. [1983] 1 All E.R. 101.
28. *Id.*, p. 103.
29. *Id.*, p. 102-103.

Using Lord Diplock, an absolute contractual duty to use reasonable efforts and keep the guarded premises safe from fire or theft may be modified through clear words. An apparent breach of the fundamental obligation to safeguard thus becomes no breach at all, since the security company has not promised that the watchman will in fact watch the factory, nor that its watchmen will not decide to do the exact deeds they were hired to prevent. Rather, the security company has only contracted to use reasonable care in the selection of its employees. Such an agreement still retains the characteristics of a contract, so the courts will enforce it.

After the *Ailsa Craig* decision, limitation clauses in security service contracts are to be given an even more peremptory scrutiny by judges. Courts recognize the principle that in the presence of clear words, limited liability represents a valid allocation of risk with the limited damages being proportional to the sums paid for the service rather than the possible losses that may result.

The security contract cases, *J. Nunes Diamonds, Photo Productions*, and the *Ailsa Craig* clearly reveal the philosophical underpinnings and historical evolution of the common law. Based on commercial ideals of *laissez-faire*, freedom of contract and allocation of risk, common law courts give effect to "clear words" in standard form contracts that exclude or limit liability. Tortious liability can at best be ignored or at least contracted out of.

The theme of commercial risk allocation allows the enforcement of clauses which would seem to belie the basic purposes of the contract entered into. An alarm that does nothing when represented as foolproof, a guard that does not guard, or a guard that deliberately causes the damages he was hired to prevent — all are protected. Plaintiffs are denied the option of suing in tort to escape the exclusion, or if a distinction is made between tortious damages and breach of contract, the clause can exclude both. Attempts to characterize the breach as "fundamental" either in terms of the gravity of damage or the denial of the basic purpose of contracting will not be needed. At common law a properly worded clause is sacrosanct.

2. The Civil Law Approach

2.1. The Exclusion Clause: Theory and History

Although a codified system, the *Civil Code of Lower Canada* does not deal specifically with exemption clauses. Due to this *lacuna* in the Code, and especially the potential conflict with existing codal provisions — the evolution of Quebec jurisprudence on such clauses has been a slow and painful process.

Two major theoretical debates contributed to the slow development of a satisfactory response to exemption clauses in Quebec, both of which were overcome early in the common law : the problem of "public order and good morals", and the problem of "*la zone d'influence de chacun des deux régimes de responsabilité civile*" [30].

2.1.1. Public Order and Good Morals

By art. 13 C.C. :

> "On ne peut déroger par des conventions particulières aux lois qui intéressent l'ordre public ou les bonnes mœurs."

In keeping with the minimalist wording of the Civil Code, the terms "public order and good morals" are nowhere specifically defined. The practical result, as Mignault [31] points out, is that the wisdom of our judges define these vague terms. Thus, civilian judges have never hesitated in rejecting exclusion clauses in circumstances of personal or bodily injury to the plaintiff. There has always existed as well the potential for judicial interference in "private agreements" which attempt to exclude or limit liability for damage to goods. The latter approach must be contrasted to that of the common law, as set out above, where judges gave full support to the themes of freedom of contract, sanctity of the bargain and risk allocation, thus refusing to intervene in commercial contracts.

Professor Crépeau is forced to qualify his sweeping statements on freedom of contract in Quebec in recognition of this potential for judicial interference :

> Le droit contractuel repose, en droit civil canadien, sur le principe de l'autonomie de la volonté *dans le respect de l'ordre public et des bonnes mœurs.* Le contrat valablement formé fait la loi des parties. C'est donc dire que, *dans la mesure où elles respectent l'ordre public*, les parties ont la possibilité de librement façonner leurs relations contractuelles au mieux de leurs intérêts.[32] (my emphasis)

Since by definition the Quebec system allows only a *limited* freedom of contract due to art. 13 C.C., it is not surprising that exclusion clauses, which could be characterized as attempts to exclude liability to compensate for damages, did not initially thrive under judicial scrutiny. It is respectfully submitted that Prof. Crépeau was historically inaccurate when he attempted

30. CRÉPEAU, "Des Régimes contractuels et délictuels de responsabilité civile en droit civil canadien", (1962) *R. du B.* 503.

31. *Droit civil canadien*, t. 1, Montréal, C. Théoret, 1895, p. 121.

32. CRÉPEAU, *supra*, note 30, 552.

to use the example of exclusion clauses to support his "*contrat fait la loi*" theory :

> Les parties peuvent aussi s'exonérer, par une clause expresse, de toutes les conséquences juridiques qui découleraient de l'inexécution non intentionnelle des obligations découlant du contrat. *Ce droit est définitivement consacré par la jurisprudence qui, depuis le début du siècle*, affirme que de telles clauses d'exonération de responsabilité ne sont pas contraires à l'ordre public.[33] (my emphasis)

In reality, it was only ten years prior to the writing of Crépeau's article, in other words the middle of the twentieth century, before exemption clauses gained unqualified judicial recognition.

2.1.2. *Glengoil v. Pilkington*

The turn of the century jurisprudence in favor of the validity of exclusion clauses referred to by Crépeau, was in fact limited to an *obiter dictum* in the case of *Glengoil Steamship v. Pilkington*[34]. In *Glengoil* a bill of lading for carriage of glass by sea purported to exclude liability for breakage due to "negligence, rough handling or any other cause whatsoever"[35].

Both the trial judge and the Court of Appeal held that such a clause was contrary to public order. The Supreme Court based its decision on the finding that damage was caused by improper stowage, a fault not excluded by the clause in question. It was only in *obiter* that Taschereau J. commented on exclusion clauses, in a manner that cannot be described as either a ringing endorsement or particularly faithful to Quebec antecedents :

> The learned judge who, for the court, gave the reasons for the judgment, holds that the stipulation in question is illegal, because it is immoral and contrary to public interest. Such, he says, is the uniform jurisprudence in the Province of Quebec. Assuming that to be so, [...] for us to blindly follow that jurisprudence here, though more pleasant and far less onerous, would be to forget our duties. We have to scrutinize and review it, mindful always, I need not say, of the high consideration it is entitled to. It strikes one as an astounding proposition, to say the least, that what is undoubtedly licit in England, under the British flag, which covers over two-thirds of the maritime carrying trade of the world, should be immoral and against public order in the Province of Quebec, and that what is sanctioned by law in six of the Provinces of this Dominion, should be prohibited in the seventh because of its immorality. [...]
>
> However, as we have come to the conclusion that the appeal fails upon another ground, I will not here dwell more at length upon this question, [...][36]

33. *Id.*, p. 553.
34. (1898) 28 R.C.S. 146.
35. *Id.*, p. 154.
36. *Id.*, p. 155 à 157.

Despite the existence of *Glengoil*, lower courts in Quebec often continued to use public order arguments to avoid exemption clauses well into the twentieth century. As one commentator concluded :

> Nous pouvons dire que le principe posé dans l'affaire *Glengoil* s'est établi avec peu d'enthousiasme dans la jurisprudence québécoise.[37]

2.1.3. *Canada Steamship Lines*

It was not until 1952 that the Privy Council finally ended the controversy and concluded that public order and good morals could exist in an era of exemption clauses.

In *Canada Steamship Lines v. The King* [38] the plaintiff, a tenant, sued the Crown as landlord over the destruction of the premises in question, a Montreal warehouse. Due to the negligent use of a torch by the defendant's servants during repairs on the warehouse, fire broke out and destroyed the building and contents. The Crown claimed protection behind an exemption clause in the lease which provided :

> [T]hat the lessee shall not have any claim or demand against the lessor for [...] damage [...] to the said shed [...] or to any [...] goods [...] at any time [...] being [...] in the said shed.[39]

Ignoring the appellants contention that "citations from the English law do not appear to have any direct bearing on the problem", the Privy Council proceeded to use a common law approach to solving the issue. Despite the ambiguities in the *Glengoil* case the Court held that the issue of public order and good morals had been definitively laid to rest in 1897 :

> (1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called "the proferens") from the consequence of the negligence of his own servants, effect must be given to that provision. Any doubts which existed whether this was the law in the Province of Quebec were removed by the decision of the Supreme Court of Canada in *The Glengoil Steamship Company v. Pilkington*.[40]

Although fifty years of uncertainty in the Quebec civil law had just been clarified, this was still an *obiter dictum* upholding the *obiter* in *Glengoil* since the Court went on to hold that *Glengoil* did not apply on the facts before it. Rather, a common law construction test was used, based on the codified *contra proferentum* rule of art. 1019 C.C. read with *Alderslade v. Hendon Laundry* [40a] under which a proferens who does not exclude liability for

37. SARNA, *Traité de la clause de non-responsabilité*, Toronto, De Boo, 1975, p. 74.
38. [1952] A.C. 192.
39. *Id.*, p. 203.
40. *Id.*, p. 208.
40a. [1945] 1 All E.R. 244.

negligence, will be bound if the clause could be read as reasonably excluding other heads of damage.

As if to underline the essentially common law ratio of the case, the Privy Council concluded by analysing the bargain between the parties on a risk allocation model, nowhere canvassed in the lower court decisions :

> It is difficult to imagine the Crown saying to the company, when the lease was being negotiated : "Notwithstanding that the Crown agrees to maintain the shed, at its own expense, throughout the term of the lease, and notwithstanding that such an agreement implies an obligation to use due care in its performance, if the Crown's servants set about the work of repair in such a negligent manner that the shed and all the goods therein are destroyed, you are to have no claim for damages against the Crown", and if the Crown had made such a suggestion, it seems unlikely that the company would have accepted it.[41]

2.1.4. Conclusion

The result of *Glengoil* as rehabilitated by *Canada Steamship*, is that "public order and good morals" cannot be used as a bar to exclusion of liability for mere negligence of employees. Far from being a satisfactory examination of the antecedent jurisprudence and doctrine in Quebec, this tacit recognition of exclusion clauses in *Canada Steamship* was the result of an *obiter* upon an *obiter*, both emulating the common law response which shared neither a theoretical unity or common history.

2.2. The Boundaries of Contract and Delict : Theory and History

2.2.1. Unity of Regimes

While it took the civil law of Quebec until the mid-twentieth century to "clarify" the relationship between public order and exclusion clauses, it was not until 1981 that the second major theoretical problem that touched upon such clauses was decided. The boundaries of contract and delict in a system which stresses the unity of regimes of civil responsibility required extended judicial and doctrinal soul searching.

As outlined above, the common law is based upon the theoretical duality of the contract and tort regimes. The civil law of Quebec, on the contrary, is based upon the theoretical unity of contract and delict. Referring again to the seminal work of Crépeau :

> On s'accorde à reconnaître que la responsabilité civile repose essentiellement sur la violation d'une obligation juridique, qu'il s'agisse d'un devoir contractuel ou d'une prescription légale.[42]

41. *Supra*, note 38, p. 210.
42. *Supra*, note 30, p. 503.

Although Crépeau goes on to argue for the *de facto* duality of regimes, his thesis is again weakened in reference to exclusion clauses. He must recognize that the area of exclusion clauses amounts merely to a "différence *contestable* entre les régimes de responsabilité" [43].

At the theoretical level, exclusion clauses in Quebec must also be contrasted to the French approach. In France, as Mazeaud points out, the duality of regimes is evident :

> La jurisprudence distingue, quant à la validité de ces conventions, entre la responsabilité contractuelle et la responsabilité délictuelle. Tandis qu'elle frappe de *nullité* les conventions qui suppriment ou limitent la *responsabilité délictuelle*, elle pose le principe de la *validité* des clauses d'exonération totale ou partielle d'une *responsabilité contractuelle*.[44]

Quebec, on the contrary, does not follow the dualist approach of France but allows exclusion clauses, with certain limitations, to work in both the domains of contract and delict. To quote Crépeau :

> Dans la mesure où une telle clause est valable, elle ne peut avoir qu'un seul effet : l'exonération totale du défendeur de toute responsabilité.[45]

2.2.2. *Option/Cumul*

Since by definition "civil responsibility" covers both contract and delict, the regimes are not exclusive and the boundaries often hard to distinguish. The result of unclear boundaries has been a doctrinal and judicial debate over *option and cumul.* As defined by Crépeau :

> Le problème de l'option pose la question de savoir si le demandeur, créancier d'une obligation contractuelle, peut, à son gré, invoquer le régime contractuel ou délaisser ce dernier et invoquer le régime extra-contractuel de responsabilité, selon que l'on ou l'autre lui est plus favorable. Il s'agit donc d'un choix par le créancier entre l'action contractuelle et l'action extra-contractuelle. Le problème du cumul pose, lui, la question de savoir si le demandeur, créancier d'une obligation contractuelle, peut intenter une "action hybride", invoquant à la fois les deux régimes de responsabilité, mais en puisant dans l'un et l'autre les règles qui lui sont davantage favorables. Il s'agit, on le voit, d'une sorte d'action contracto-délictuelle [...] [46]

The Supreme Court of Canada in *Wabasso Ltd. v. National Drying Machine* [47] has chosen to perpetuate the overlap of contract and delict by allowing a plaintiff to use *option.*

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43. *Id.*, p. 513.
44. H., L. et F. MAZEAUD, *Leçons de droit civil*, Paris, Éd. Montchrestien, 1962, par. 633.
45. *Supra*, note 30, p. 517.
46. *Id.*, p. 529-530.
47. [1981] 1 R.C.S. 578.

One of the authorities cited by the Court in this case was the Quebec security contract case of *Alliance Assurance Co. v. Dominion Electric Protection*[48] where Pigeon J., in contrast to his common law judgment in *J. Nunes Diamonds (supra)*, was held to have "clearly" expressed the opinion that

> ... the existence of contractual relations does in no way exclude the possibility of a delictual or quasi-delictual obligation arising out of the same fact.[49]

2.2.3. Critique of *Option*

It is unclear whether Pigeon J.'s statement in *Alliance* as used in *Wabasso* represents an explicit or intentional distinction on his part between the civil law and the common law. Some critics of *Wabasso*, however, use arguments similar to those advanced by Pigeon J. in the *Diamonds* case. Both Crépeau (prior to *Wabasso*)[50] and Jobin[51] protest that to allow the plaintiff the option to ignore the contract diminishes the importance of the theory that the contract "makes the law" between parties:

> ... grâce à cette gymnastique intellectuelle, elle "répudie" le contrat. Permettre l'option, c'est donc permettre la violation du principe de la force obligatoire du contrat.[52]

2.2.4. Response

For the purpose of this paper on the exclusion clause in Quebec, a critique of option as destroying respect for the contractual regime cannot be supported. The unity of civil responsibility in the *Civil Code* which has resulted in judicial approval of option, to the possible detriment of a defendant who wishes to stay within the contract, has also resulted in a practical solution to the problem. While the Quebec system of civil responsibility recognizes option, it is also up to the contracting parties to exclude liability in both delict and contract.

Thus, in *Madill v. Sommer*[53] the Supreme Court came full-circle from the effects of *Canada Steamship Lines* (*supra*). In the latter, it will be recalled, exclusion clauses were legitimized in *obiter*, while a construction test was being used to ground liability in negligence where the clause was silent. The

48. [1970] S.C.R. 168.
49. *Id.*, p. 173.
50. *Supra*, note 30, p. 553.
51. "Wabasso: Un Arrêt Tristement Célèbre", (1982) 27 *McGill L.J.* 813.
52. *Id.*, p. 829.
53. [1978] 1 R.C.S. 999.

Madill court, on the contrary, faced with a lengthy, modern exclusion clause which left no grounds for construction — held that a defendant, through the use of such a clause may validly exclude liability in both contract *and* quasi-delict. Thus, while a Quebec defendant risks delictual liability even within a contractual relationship, a well-drafted exoneration clause will prevent this option — and preserve respect for the contractual regime governing the parties.

2.2.5. Conclusion

As the above analysis has shown, the notion of "public order" and the threat of *option/cumul* have *not* encroached completely into the contractual regime to the detriment of a bargain analysis. Not all exclusion clauses are against public order, while the use of such clauses actually offsets one of the negative effects of option.

In the common law, where the duality of contract and tort is stressed in such decisions as *Nunes Diamonds* and *Photo Productions*, no satisfactory response is given to the possibility that a tortious or contractual action may arise out of the same breach. Ogilvie[54] correctly criticizes *Photo Productions* on this point, while Spence J.'s dissent in the *Diamond* case takes the same approach. In practice, however, freedom of contract at common law will allow an exemption clause to exclude liability in both regimes. The civil law of Quebec, on the contrary is at least internally consistent since its overall theory of civil responsibility can recognize both option and exemption.

2.3. *Faute lourde*

2.3.1. Introduction

The previous sections outlined the duality of the common law with its compartmentalized regimes of tort and contract. The exclusion clause, although practically situated in contract is allowed to exclude tortious liability. Although no theoretical justification is given for this anomaly, it would appear to be the result of the *laissez-faire*/freedom of contract analysis which is the true basis of the common law of contract — unfettered by judicial interference based on notions of public order.

The civil law of Quebec, by comparison, remains theoretically unified. Previous sections of this Part examined how exclusion clauses can allow exemption of liability in both delict and contract through implicit *cumul*.

54. "The Reception of *Photo Productions* in Canada", (1982) 27 *McGill L.J.* 424, p. 432.

Such clauses also belie the "contract as law" arguments of those who favor the clear separation of regimes. "Public Order", as a tool for judicial intervention in contracts, still remains a possible argument for plaintiffs, although only in exceptional circumstances.

Despite the differences in theory and history between the common and civil law approaches to exclusion clauses, both systems have ultimately arrived by the 1980's at a common recognition of such clauses. Concomittant with the maturity of exclusion clauses, however, comes potential problems. Just how much can a clearly drafted clause exclude ? Here, the common law and the civil law diverge, with the common law response proving unsatisfactory to many commentators, judges and legislators.

After the death of the "heresy" of fundamental breach in *Photo Productions*, a pro-defendant/proferens bias has been created in the common law. The protection of a clearly drafted exclusion clause will extend to cover *any* breach in contract or tort falling short of fraud. In the words of one common law commentator :

> Standard form contracts and exclusion clauses have come of age. [...] In any case, use of the magical words "howsoever", "whensoever" and so on, as well as "negligence", will usually assure complete re-allocation of contractual risk to the plaintiff from the proferens.[55]

Although the factory-owner plaintiff in *Photo Productions* would probably subscribe to an allocation of risk theory for "mere" negligence in relation to security guard service, it would be surprising to find a plaintiff prepared to accept a contract that excluded liability for *deliberate* destruction of the premises. This is exactly the post *Photo Productions* situation, however.

Common law plaintiffs would probably echo the words of Ogilvie :

> ... but more important still, remains the question of judicial tolerance of deliberate as well as unintentional non-performance of positive contractual obligations. The courts seem determined to permit the creation of illusory obligations in the name of freedom of contract in commercial transactions.
>
> Yet, given the transactional realities of modern contract making, such a policy is questionable from the perspectives of both the parties themselves and of the general public interest.[56]

It is submitted that the civil law of Quebec, by contrast, adequately deals with this problem. Through the use of the concept of *faute lourde* — the addition of fault in contractual analysis — protection of the public interest, the plaintiff and a true (as opposed to illusory) bargain are assured. This

55. "Contract-Limitation and Exclusion Clauses", (1984) 62 *Can. Bar. Rev.* 389, p. 396.
56. *Id.*, p. 401.

again exemplifies the basic civil law theme set out above, the theoretical and practical unity of civil responsibility, and ensures that interventionist judges, armed with public order arguments can restore a balance to contractual relations in the era of "mature" exclusion clauses.

2.3.2. The Rule

The Court of Appeal in *Ceres Stevedoring v. Eisen und Metall*[57] set down the clearest statement of the use of *faute lourde* in the contractual context:

> I have always taken it to be an established principle under our law that a clause contracting out of liability for negligence is ineffective with respect to gross negligence or *faute lourde* on the ground that it is against public order.[58]
>
> [and later]
>
> If the principle has not yet been clearly stated by this Court it is time that such a statement was made. I would hold that a clause contracting out of responsibility for negligence is invalid with respect to gross negligence or *faute lourde* as being contrary to public policy. This would be subject to Pothier's definition of *faute lourde* — which should limit the application of the doctrine to very rare cases.[59]

2.3.3. History

Pothier's definition of *faute lourde* is taken from his *Œuvres*[60] where he states:

> ... [L]a *faute lourde, lata culpa*, consiste à ne pas apporter aux affaires d'autrui le soin que les personnes les moins soigneuses et les plus stupides ne manquent pas d'apporter à leurs affaires. Cette faute est opposée à la *bonne foi.*

Faute lourde in its historical sense formed one third of the *théorie de la prestation des fautes*[61], derived from Roman Law, under which each contract was characterized by its object and a corresponding degree of fault attached.

Under this theory, the contract of deposit, for example, was characterized as undertaken for the sole interest of the creditor. A debtor would thus be obligated to exercise mere good faith and would be responsible only in the event of his *faute lourde.*

The second degree of fault, *faute légère*, was equivalent to "*le soin que le commun des hommes apporte ordinairement à ses affaires*" and applied in

57. [1977] C.A. 56.
58. *Id.*, p. 63.
59. *Id.*, p. 64.
60. POTHIER, *Œuvres*, t. 2, par BUGNET, Paris, Cosse et Marchal, 1861, p. 497.
61. *Id.*

contracts such as sale which have as their object the reciprocal interest of the parties. Finally "*faute la plus légère*" required the highest degree of care in contracts such as *commodatum* (*prêt à usage*) where only the debtor's interest is at stake.

Although this theory engendered centuries of controversy [62] in France, it was abandoned by the *Code Napoléon* and has disappeared almost entirely in French law and practice. As Planiol points out:

> En premier lieu, on n'a plus à rechercher si les deux parties sont intéressées dans le contrat, ou si une seule l'est, et qui elle est : dans tout contrat, et même dans toute obligation, quelle qu'en soit la source, le débiteur est tenu d'apporter à l'exécution de la dette les soins d'un bon père de famille, selon la formule de l'art. 1137.[63]

2.3.4. Application of *faute lourde* in Quebec

Quebec did not inherit Pothier's theory of *prestation des fautes*. It did inherit *faute lourde*. Far from being an isolated and archaic remnant of another legal system, however, *faute lourde* now plays an important role in the law of exclusion clauses.

Despite its use in the contractual setting, however, *faute lourde* is neither a purely contractual concept nor a uniquely contractual remedy for exclusion clauses, rather it once again underlines two basic themes in Quebec civil law — judicial intervention despite freedom of contract and the overlap of delict and contract.

2.3.4.1. Theory of Faults

Much of the French doctrine attempts to define *faute lourde* as a purely contractual concept. This is due to the theory of duality of fault which occupies theorists since the death of the theory of *prestation des fautes*. As explained by Planiol:

> 883. Opinion commune — Dans l'opinion commune on prétend trouver, à ce point de vue, une différence entre la faute contractuelle et la faute délictuelle. Les auteurs qui croient à la dualité des fautes disent qu'en matière contractuelle la faute n'est prise en considération qu'autant qu'elle présente un certain caractère de gravité, tandis qu'en matière délictuelle toute distinction disparaît, et l'on doit tenir compte même de la faute la plus légère. Et ils citent à ce propos un texte du Digeste : *In lege Aquilia et culpa levissima venit* (Liv. XLIV, tit. 9, fr. 2).[64]

62. PLANIOL, *Traité élémentaire de droit civil*, Paris, Librairie Gén. de droit et de jurisprudence, 1926, par. 235.
63. *Id.*, par. 239.
64. *Id.*, par. 883.

Unlike, the French who appear to have abandoned one ancient Roman theory, only to take up another, Quebec has taken a more practical approach.

Rather than attempting to distinguish contractual and delictual fault by a purported gradation of degree, *faute lourde* in Quebec sets a *minimum* standard of conduct between parties for fault that may arise from delict or contractual breach. No exclusion clause may validly exempt or limit liability resulting from faulty performance falling below this minimum, regardless of the regime. Above the minimum standard, however, the law allows the parties the right of implied *cumul* under which the contract may delineate the standard of conduct in contract and delict. Here, the dualist notion of degree of fault is not essential. As Planiol, a French author who does not subscribe to the duality of fault theory, correctly points out :

> Il s'agit donc de savoir, non pas dans quelle mesure le débiteur a manqué à son obligation, mais bien dans quelle mesure il se trouvait lié et quelle somme de diligence il était tenu de fournir.[65]

2.3.4.2. Fundamental Breach and *obligation essentielle* Distinguished

Faute lourde is not "contractual fault" as the above analysis points out nor is it a contractual *remedy* to a breach of contractual obligations. It differs from the "contractual remedy" of fundamental breach at common law since it examines *performance* through a fault standard as opposed to an analysis of the *consequences* of a breach which could be characterized as a total failure of consideration going to the root of the contract.

Through the use of fault, Quebec courts have also largely avoided the difficult problem of defining the *obligation essentielle* of a contract. This approach is outlined by Sarna :

> Un contractant ne peut pas dans un même contrat, assumer une obligation et s'exonérer de l'inexécution totale de cette obligation. C'est logique que nul ne puisse se soustraire à toute responsabilité pour défaut d'exécuter l'obligation essentielle qui fait l'objet d'un contrat. C'est une règle de droit et non une règle d'interprétation.[66]

The approach of *obligation essentielle*, a substantive analysis of the contractual content, allows the court to avoid the application of an exclusion clause which purports to unbind the basis of the contract. In this sense it is similar to the fundamental breach at common law. As Sarna[67] recognizes,

65. *Id.*, par. 884.
66. *Supra*, note 37, p. 163.
67. *Id.*

however, *obligation essentielle* has not been much developed in Quebec. It has only been applied to a rental contract [68] and lease of a thing [69].

Faute lourde has two advantages over *obligation essentielle* which may account for the relative obscurity of the latter doctrine.

First of all, courts can examine a particular standard of contractual performance much more easily than they can extract the "essential" element from various types of contracts, or more importantly from the particular contract in question. Rather than interpreting the "bargain" between the parties through substantive examination of whether the parties have created an illusory contract, the simple examination of the facts of performance using *faute lourde* provides a remedy.

Secondly, *obligation essentielle* and fundamental breach if used as rules of law have the often unwanted result of destroying the contractual basis in an effort to avoid an exclusion clause. If the "root" of the contract or its "essential" nature are denied then *no contract exists* between the parties. By examining fault in performance, however, the basis of the contract and thus the contract itself continues to exist — the exclusion clause is merely read down.

3. *Faute lourde* in security contracts

3.1. Introduction

The Quebec case law on contracts for the provision of security services can be divided into three basic situations where plaintiffs have attempted to avoid exclusion clauses that would deny or limit liability for breach. The following sections of this Part will examine 1) mere negligence, 2) *faute lourde*, and 3) bad faith.

3.2. Mere Negligence

Laiterie Artic v. Dominion Electric [70] represents a case of mere negligence in performance of the security contract, that as it is submitted would engender the same result at common law and civil law.

The plaintiff entered into a "Watchman and Manual Fire Alarm Service" agreement with the defendant security company under which the company undertook to receive a telephone signal at stated intervals from the

68. *Fried v. Blum*, J.E. 78-738 (C.S.).
69. *Equilease v. Bouffard*, [1979] C.S. 191.
70. [1972] C.A. 244.

plaintiff's watchman. If the signal was not received, the security company was to investigate or phone police. The standard form contract contained a limitation of liability clause :

> it is agreed by and between the parties hereto that Dominion Company is not an insurer, and that the rates hereinafter named are based solely on the probable value of the service in the operation of the system described, and in case of failure to perform such service and a resulting loss its liability hereunder shall be limited to and fixed at the sum of $50 as liquidated damages.[71]

Of course the watchman was overcome by thieves who blasted the plaintiffs safe stealing $6,500. The watchman would not transmit his signal as a result, but the defendant's employee in charge of receiving signals took no action, being "confused" as to when the signal was due.

The limitation clause was upheld, however, and plaintiff's claim limited to $50. The Court held that

> [defendant's employee] could easily have checked to determine on which day this signal was due, and his failure to do so was certainly a fault, but was it so far beyond the normal range of human carelessness as to constitute *faute lourde*?
>
> Judges are constantly confronted with evidence of human fallibility. Instances of carelessness in the best organized law firms come to light, and mistakes are sometimes made by the most experienced counsel. Judges are themselves fallible ; otherwise there would be small need for courts of appeal. The conduct of this employee, who relied on a faulty memory when he might have consulted records available to him, does not impress me as so far beyond the range of ordinary carelessness as to be something that the parties could not have contemplated when they contracted. I wonder what type of "failure to perform" might have been contemplated by clause 6 if it were not some carelessness such as that.[72]

Most commentators would agree "confusion" on the part of security employees or even judges, can be planned for through the use of validly worded exclusion clauses. The fault of the employee from a delictual point of view, if there were no contract, would be non-existent. Although the contract purported to limit liability for *any* "failure to perform" it could be construed to apply to the mere omission on the facts. A more serious breach would not be protected by such a clearly worded clause, if such a breach could be characterized as *faute lourde.*

J.A. Provost Inc., another Quebec security company obviously was well advised by its lawyers. It included a direct translation of the *Dominion Electric* clause in its standard form contracts :

71. *Id.*, p. 245.
72. *Id.*, p. 245-246.

> Il est bien compris entre les contractants que la Compagnie n'est pas un assureur, les montants spécifiés dans ce contrat n'étant que pour couvrir les frais d'installation et de service. Advenant le cas où judiciairement la Compagnie serait tenue responsable, sa responsabilité sera limitée à un maximum de cinquante dollars.[73]

When Daniel Sevigny, a Longueuil jeweler had a Provost alarm system installed in his store with a direct hook-up to the security company's central alarm board, he probably thought his jewels were safe. After the theft of his inventory, it was found that the central alarm system did work as expected, but the security company employee:

> ... d'alors a vu la lumière allumée, a observé un rythme irrégulier dans cet allumage et a conclu que le système était défectueux après avoir communiqué avec l'autre préposé dans la même pièce qui lui était de beaucoup senior.[74]

The Court held this conclusion to be a mere error of judgment and the limitation clause was applied.

In both *Laiterie Artic* and *Sevigny* the advocates of rational allocation of risk and freedom of commercial contract and probably many businessmen as plaintiffs or defendants would grant the validity of the limitation clause. Such situations, whether mere omissions or mere errors of judgment, are in all probability the type of risks meant to be covered by even the most basic exclusion clause.

3.3. *Faute lourde*

As the previous examination of the *Ailsa Craig* case at common law showed us, ports are unsafe places. It would appear that the Port of Montreal is especially prone to theft and requires the protection of security guards and locked warehouses and yards. The *Ceres Stevedoring* case (*supra*) is an example of *faute lourde* defeating an exclusion clause in the docks of Montreal.

The plaintiff consignee, under a contract of carriage, did not sue the carrier in contract, but the carrier's agents who were the operators of a container terminal at Montreal. The terminal operators had received shipment of the plaintiffs goods but as the judgment of the Court points out, took few security precautions:

> When the defendants received the container at the terminal and accepted custody they left it in the open beside a public road unprotected by fencing and totally unguarded. The heavy container weighing more than 40,000 lbs could only be moved by the use of a 25 ton lifter. The only 25 ton lifter in the area of

73. *Sevigny v. J.A. Provost*, [1979] C.S. 648, p. 649.
74. *Id.*

> shed 33 was left unattended by Ceres' employees with the engine running and they key in the ignition.[75]

The whole container was stolen. Armed with an exoneration clause that was in no way ambiguous or subject to any tricks of judicial construction the defendants pleaded lack of contractual privity, lack of negligence or alternatively exoneration under a clause in the bill of lading which stated:

> It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in *any circumstances whatsoever* be under any liability *whatsoever* to the shipper, consignee or owner of the goods or to any holder of this Bill of Lading *for any loss, damage or delay of whatsoever kind* arising or resulting directly or indirectly *from any act, neglect or default* on his part while acting in the course of or in connection with his employment [...][76] (emphasis added)

Although divided upon the issue of whether the damage was delictual or contractual the Court of Appeal was unanimous in finding that the acts of the defendent amounted to *faute lourde* and that the exclusion clause could not be relied upon. In the words of Owen J.:

> In the present case the acts of the employees of Overseas and Ceres amounted to a failure to give to the plaintiff's container while in their possession the care which the least careful and the most stupid persons would not fail to give to their own property. The delictual acts of the employees of Overseas and Ceres constituted the very opposite of good faith and practically amounted to fraud.
>
> The most careless and the most stupid person would not in good faith leave a container weighing over 40,000 lbs with contents worth more than $70,000 in an unfenced area beside a public road with a 25 ton lift, having a key in the ignition and the motor running, beside the container.[77]

Based on the *Ceres Stevedoring* approach to *faute lourde*, it is the contention of this author that *Photo Productions* if decided in Quebec, would hold the security company liable. Whether on the majority judgment of Lord Wilberforce using the exclusion as shield from breach argument, or the substantive approach of Lord Diplock — the actions of the defendants employee in deliberately lighting a fire in a paper factory would amount to *faute lourde*. As such, the exemption clause would automatically be avoided and the plaintiffs could recover the cost of their factory destroyed by fire.

Although *Ceres* and *Photo Productions* involve commercial parties and large liability claims — an examination of the gravity of the negligence involved would lead to the conclusion that the defendant should not be allowed to exclude liability for acts negating the commercial purpose of

75. *Supra*, note 57, p. 57.
76. *Id.*, p. 58.
77. *Id.*, p. 63.

contracting in the first place. *Faute lourde* thus restores a balance to the potential power of a clearly drafted exclusion clause applying in delict and contract. A minimum standard of performance is preserved.

3.4. Bad Faith

Between the clear extremes of mere omission/error of judgment on the one hand *faute lourde* on the other, a middle ground of security cases also exist in Quebec. These cases present problems to judges applying the "rate" (*Ceres, supra*) *faute lourde* standard.

Professor Tetley [78] commented on the problem of exclusion clauses and the lack of security in the Port of Montreal:

> But is it not *faute lourde* if there is continued theft and lack of care in the port of Montreal with the result that Montreal's reputation is unenviable? Is it not fraudulent for carriers to intentionally maintain, year after year, their admittedly negligent practices in the port of Montreal?
>
> Does not the same negligence with abandon and intent over a period of time become gross negligence? Is there good faith (*bonne foi*) in accordance with Pothier's definition? Is it not fraudulent for carriers, stevedores and terminal agents who are aware of the conditions in the port and their own lack of care, not to change their practices? [79]

In the *Prinz Wilhelm III* [80] consignee of a bill of lading sued the carrier, ships agent and stevedores when the latter received 37 cartons of ski boots at their port of Montreal shed but only delivered 18½ cartons three days later. It was found by the trial judge and not disputed by the defendants that the goods were pilfered.

The defendants relied on an exemption clause in the bill of lading which stated:

> 2. PERIOD OF RESPONSIBILITY. The carrier's responsibility [...] shall terminate without notice as soon as the goods leave the ship's tackle.
>
> Goods in custody of the carrier, [...] after discharge, and whether awaiting shipment, landed or stored [...] shall be deemed to be in such custody at the entire risk of the shipper and/or consignee.[81]

An exemption clause in the stevedores advice notice also passed on the risk:

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78. "The Himalaya Clause *stipulation pour autrui*, Non-Responsibility Clauses and Gross Negligence under the *Civil Code*", (1979) 20 *C. de D.* 449.
79. *Id.*, p. 465.
80. [1973] 2 Lloyds L.R. 124 (Que. C.A.).
81. *Id.*, p. 127.

> The above-mentioned goods have arrived and remain at owners' risk of fire, flood, pilferage or damage from any cause whatsoever. If goods are not removed within five days from time of loading they may be trucked to store at Owner's Risk and expense.[82]

The plaintiff brought its action in both delict and contract but was unsuccessful on all counts. The carrier's contractual liability was held to be limited by the bill of lading and a *faute lourde* argument was rejected since no negligence was found. The ships agents and stevedores were held not at fault in contract or delict and thus it became unnecessary to even consider the exemption clauses.

A finding of total lack of fault is somewhat surprising in the circumstances. One commentator summed up this case in the following manner:

> The Court did not believe there was any fault on behalf of stevedores or terminal agent although there was considerable evidence in the record of confusion in the shed, of elderly underpaid watchmen who testified that they only "watched" but did not act if they saw any pilfering because they were only paid as "watchmen", etc. The chaos was considered negligence but normal all the same.[83]

In the *Federal Schelde*[84] when 5 tons of copper wire were stolen from nine 5,000 lb shipping containers in the port of Montreal, the defendant stevedores relied upon the carriers "Himalaya clause" in the bill of lading. The clause was well drafted and contained sufficient mentions of "whatsoever", "any loss", "any damage" and "any act neglect or default"[85]. The trial judge recognized Montreal's "not particularly good" reputation[86] in terms of theft and noted that the *Ceres Stevedoring* container was stolen at approximately the same time. Security precautions taken by the defendant were described as "minimal"[87] with storage in an unfenced and poorly guarded area:

> Reverting for a moment to the quality of the special guards hired by the private security firm retained by defendant Stevedoring. These men appeared to have been all of a certain age who normally during the winter months would work as guards in institutions in order to avoid outside work during the cold Montreal winter months. The guard assigned to the 12 hour watch would certainly have been obliged to leave the place under his scrutiny during those 12 hours. If he was seated in an automobile, his eyes might have been closed by sleep or he might have been threatened or paid to keep them closed.

82. *Id.*, p. 125.
83. TETLEY, *supra*, note 78, p. 467.
84. [1978] 1 Lloyds L.R. 285 (C.S.).
85. *Id.*
86. *Id.*, p. 286.
87. *Id.*

> Admittedly, one seems here to be entering the realm of conjecture but when reminded that this theft involved the removal of at least five tons of material, the probabilities are that some "inside" co-operation must have been achieved by the thieves to effect the abstraction of such heavy and cumbersome material. And, again, such a possibility is consistent with the record of heavy loss of cargo at the port of Montreal during that time.[88]

The trial judge found clear negligence on the part of the stevedores. Their "imprudence neglect and want of skill"[89] was evidenced in the unprotected area of storage and lack of efficient guards considering the valuable merchandise. Applying Pothier's definition in *Ceres* (*supra*) and *Laiterie Artic* (*supra*), however, no *faute lourde* was found. Since in fact a security service *had been used*, albeit a less than sufficient or reasonable service, the defendants action was characterized as negligent but not grossly negligent or amounting to *faute lourde.*

The *Tarantel*[90] is the final port of Montreal security case to be examined in this section. Ninety-four cartons of electrical goods, weighing between 20–30 lbs a carton were stolen from the defendant stevedore's warehouse. To avoid the protection of a Himalaya clause purporting to exclude liability, the plaintiffs claimed gross negligence/*faute lourde* in the provision of security services for the goods.

The trial judge began by examining regulations of the National Harbours Board which required minimum security checks at two hour intervals in all sheds, inspection of trucks leaving the premises, and padlocked security lockers. The defendant had in response to these requirements hired Pinkertons Ltd. to provide uniformed guard service. The contract called for the provision of one guard to protect four sheds. This guard could make his rounds in a manner that met the minimum requirements of the Harbours Board. No additional guards were hired, however, due to cost considerations.

On the facts before him, Walsh J. found clear negligence on the part of the stevedores in providing security services which were characterized by one expert as insufficient to the point of non-existence. Due to an anomaly in the Himalaya clause, however, the question of claiming protection under the exclusion of liability was not answered and pure delictual responsibility was found. Had the exclusion been applicable, however, the court went on to observe in *obiter* that

> [The defendants]
>
> ... knew or must be deemed to have known of the frequency of thefts from sheds in the Port of Montreal at the time, they had been warned in advance that

88. *Id.*, p. 288.
89. *Id.*, p. 289.
90. [1978] 1 F.C. 269.

> cargo of a nature to be easily stolen would be in their sheds at a certain time and requested to place same in the special security locker which was done. Having done this they were content to protect this merchandise at night by merely having one guard normally stationed at a gate nearly half a mile from the shed in question and who only made inspection tours of the shed every two hours at regular intervals. The presence of another guard during the night for the shed in question, or more specifically in the vicinity of the security locker in the shed, would certainly have made the theft, in the manner in which it was apparently carried out, impossible. I am inclined to believe that even the least careful and most stupid person would have engaged another guard at least for the nights in question, and that the theft was a direct consequence of failure to do this.[91]

3.4.1. Discussion

It is clear from an examination of the above three cases, that the Port of Montreal is not a safe place. Often, it is the stevedoring companies who are responsible for this state of affairs: in the *Prinz Wilheim III*, watchmen watch pilfering but do not stop it, in the *Federal Schelde* security guards of a "certain age" whose eyes were closed by sleep or money on a 12 hour shift failed to see the theft of 5 tons of material, and in the *Tarentel*, one guard was expected to patrol a one half mile route because the stevedoring company didn't want to hire more.

Trial judges, when presented with evidence as to the sorry state of affairs on the docks have taken three different approaches. In the *Prinz Wilheim III*, pilferage was seen as so normal as to give rise to no responsibility for the defendant. The inadequate guard service in the *Federal Schelde* was found to have amounted to negligence on the part of the defendants, but since a guard had in fact been supplied, this negligence was characterized as at least befitting the least careful and most stupid member of society. It was only in the *Tarantel* that the perfunctory provision of a guard, who by definition could not guard, was recognized as amounting to *faute lourde.*

Perhaps in situations such as that of Montreal's port area the second aspect of Pothier's definition of *faute lourde* should not be ignored. Not only must the "least careful and most stupid" test be satisfied, but as Pothier continued, "Cette faute est opposée à la *bonne foi*"[92] [emphasis in the original].

An unsafe dock does not become so as a result of mere errors of judgment or omissions as in the *Laiterie Artic* and *Sevigny* cases discussed

91. *Id.*, p. 295.
92. *Supra*, note 60.

above. On the contrary, where the dock is "known" as unsafe due to theft and pilferage — good faith in contracting requires *extra* security to protect plaintiff's goods.

In most security contracts, when viewed separately, the mere provision of guard service would meet the admittedly low standard of "least careful and most stupid". Deliberate acts of theft or pyromania by the security guards should of course amount to *faute lourde*. The requirement of "good faith" in security service may, however, entail that defendants in problem areas such as the port of Montreal, do something *more* to meet the minimum. Watchmen that merely watch theft, or who don't detect the theft of 5 tons of heavy and cumbersome goods when stationed beside the goods, or who might as well be non-existent ; all should not be able to shelter behind an exclusion clause. As Professor Tetley points out, such situations when viewed from their inception rather than in isolation become tainted with bad faith :

> It is submitted that the Courts should no longer accept as "normal" or *la coutume* the intentional confusion in the port of Montreal, the intentionally low paid, unqualified, often token watchmen, [...] the intentional disregard for care of cargo. This system, this repetition of events is not negligence but gross negligence or *faute lourde*. [...] opposed to good faith. It is submitted that it is not good faith because it is a condition that carriers and their agents — the stevedores and terminal agents — intentionally take advantage of and are responsible for.[93]

Conclusion

Article 300 of the *Draft Civil Code* would codify the jurisprudential rule on *faute lourde* and exclusion clauses :

> 300. No person may exclude or limit his responsibility when it results from intentional or gross fault.

Although it may appear anachronistic that a late twentieth century codal revision purports to distinguish degrees of fault or bring fault analysis into contract law — it has been the thesis of this paper that the civil law of Quebec uses judicial intervention through public order and the unity of delict and contract to ensure that freedom of contract can survive the well drafted exclusion clause.

Faute lourde as defined by Pothier and applied in Quebec has withstood the test of time and evolved into a useful tool in the commercial setting. It is submitted that the definition as used by Quebec courts is superior to more modern approaches, for example, the statutory "*faute équivalente au dol*" or

93. *Supra*, note 78, p. 482.

"*faute inexcusable*" as used in air law [94]. The latter concept, which is defined as "deliberate fault involving knowledge of the probability of damage and its reckless acceptance without valid reason" — approaches wilfull misconduct, and could *very* rarely be applied. *Faute lourde*, although rare, would be more useful to preserve good faith in contracting and to provide a remedy for conduct falling short of wilfull breach.

The Quebec Court of Appeal in *Telemontage Inc. v. Air Canada* [95], perhaps in a recognition of this critique, was willing to use Pothier's definition of *faute lourde* to avoid a limitation of liability, when interpreting the phrase "*faute équivalente au dol*" as it appears in the unamended article 25 of the *Warsaw Convention.*

The Federal Court, trial division, in *Swiss Bank Corporation v. Air Canada* [96], on the other hand, chose to adopt an "international" definition which was sufficient to ground liability in the circumstances, but would normally be much too restrictive.

Whereas the defendant, Air Canada, was held to have provided inadequate security precautions for the protection of valuable banknotes in their care, this did not amount to an act or omission "done with intent to cause damage or recklessly and with knowledge that damage would probably result" [97]. The defendant was held liable only because the above standard also applied to the acts of its employees, and the court found that employees had stolen the banknotes.

Such an approach would have caught the pyromaniac watchman in *Photo Productions*, but is unclear whether the negligent employees in *Ceres Stevedoring*, who did not steal the goods themselves, would have been held to have been "reckless". *Faute lourde*, on the other hand, is sufficient to catch both situations.

Fault analysis allows the judge to apply a simple test to contractual performance, and avoids the difficulties of common law fundamental breach or civil law *obligation essentielle*. By using a deliberately low standard of "most stupid and least careful", interference by judges in contractual allocation of risk will be rare — but the deliberate act of the *Photo Productions* watchman would result in liability. Use of the "good faith" section of Pothier's definition should also allow recovery where "business as usual" in a particular area may require a higher standard. Application of this latter refinement should not open the floodgates of judicial intervention.

94. For an analysis of these concepts see HAANAPPEL, "Note", (1982) 7 *Annals A. and S.L.* 533.
95. (1982) Annals A. and S.L. 592 (Que. C.A.).
96. (1982) 129 D.L.R. (3d) 85 (F.C.T.D.).
97. *Id.*, p. 105.

At common law, attempts to insert equity into the law of contracts through rules of construction or fundamental breach have not survived *Photo Productions*. A well drafted clause can exclude or limit liability in tort or contract for anything short of fraud. Far from upholding freedom of contract, it is submitted that in certain cases, denial of responsibility in a standard form exclusion clause may destroy the basis of the bargain in the eyes of the plaintiff. A security guard hired to prevent fires who instead deliberately lights one would be a good example.

To some extent, the common law is attempting to allow redress to plaintiffs. In post-*Photo Production*, Great Britain judges may look to statutes such as *The Unfair Contract Terms Act* or the "fair and reasonable" requirement of the *Sale of Goods Act*. Applying the latter *Act* in the leading post-*Photoproductions* exclusion clause case of *George Mitchell (Chesterhall) v. Finney Lock Seeds*[98] the House of Lords first reiterated its statements on the sanctity of exclusion clauses, then struck down the clause as not fair or reasonable under the statute. Rather than applying an abstract test of reasonableness the court looked at factors that could also used to describe the beginnings of a *faute lourde* analysis :

> The question whether it is fair or reasonable to allow reliance on a term excluding or limiting liability for a breach of contract can only arise after the breach. The nature of the breach and the circumstances in which it occurred cannot possibly be excluded from "all the circumstances of the case" to which regard must be had.[99]

The Canadian common law has also tentatively begun to use a non statutory concept of unreasonableness as a bar to enforceability of an exclusion clause in some circumstances. In the security services case of *Davidson v. The Three Spruces Realty Ltd.*[100] the plaintiffs deposited valuables in the defendant's safety deposit vaults. The defendant represented to depositors that absolute safety was assured and that it was even unnecessary to insure valuables stored.

An exclusion clause in the written contract, excluded liability for :

> ... any theft, robbery, embezzlement, loss or destruction of, or any injury or damage whatsoever to any papers or property which may at any time be deposited or stored in the box or held by the lessor under clause 11 below, or for any act, neglect, or omission whatsoever of the lessor or its officers, agent and servants, or of the tenant or any deputy or any stranger.[101]

98. [1983] 2 All E.R. 737.
99. *Id.*, p. 743.
100. (1978) 79 D.L.R. (3d) 481 (B.C.S.C.).
101. *Id.*, p. 487.

Defendant attempted to rely on this clause after the inevitable robbery, even though negligence was proven which amounted to almost non-existent security. Persons were free to enter the vaults without identification, thefts had in fact taken place but none of the plaintiffs were warned, indeed the defendant brought no evidence to show that *any* precautions had been taken to protect plaintiff's valuables from theft.

Applying a test of "reasonableness" the exemption clause was struck out. Mr. Justice Anderson held that :

> The point has been reached in the development of the common law where, in my opinion, the Courts may say, in certain circumstances, that the terms of a contract, although perfectly clear, will not be enforced because they are entirely unreasonable. [...] [And further,] Even if the limitation clause was such as to protect the bailee against conduct amounting to a fundamental breach, the clause is, in all the circumstances, so offensive to all right-thinking persons that the Courts will hold that to allow the bailee to rely on the limitation clause would be unconscionable and an abuse of freedom of contract.[102]

It is submitted that when common law courts begin using phrases such as "all the circumstances", "offensive to all right thinking persons" and "abuse of freedom of contract", they are moving closer to examining faulty performance through the optic of public order and a contractual standard of care of good faith. Such an approach is necessary if the common law is to move towards a more general "law of obligations," as one commentator suggests [103] wherein traditional compartments separating tort and contract give way to a general theory and practice of "civil liability".

Quebec civil law accepted the exclusion clause only reluctantly. From the beginning, exclusion of liability conflicted with concepts of public order. The "weighty" jurisprudence in such clauses until the mid-twentieth century amounted to two *obiter* unabashedly embracing the common law.

Despite this inauspicious beginning, the ubiquitous clauses have become an aspect of commercial reality in the 80's. The common law, however, is now stymied by its reliance upon freedom of contract theories in an age of the perfectly drafted exclusion clause. Legislators and judges are now searching for a new method to avoid unreasonable results. Quebec by comparison has evolved *beyond* the common law, yet has remained true to the doctrinal roots of the civilian system.

Although a hybrid of delict and contract, *faute lourde* has proven its usefulness in the regulation of contractual relations. Unlike fundamental breach or *obligation essentielle*, courts need not examine the root of the bargain — destroying the contract in the process. Like the exclusion clause,

102. *Id.*, p. 492–494.

103. REITER, *supra*, note 3, p. 310.

it crosses the boundaries of delict and contract. A combination of public order and Roman concepts of contractual fault — *faute lourde* is now in renaissance.

Ultimately, *faute lourde* also preserves the sanctity of freedom of contract even when invalidating exclusion clauses. By ensuring a minimum standard of performance and a minimum of good faith the plaintiff does not feel totally cheated of his "bargain". In a era of the perfect exclusion clause even the least careful and most stupid businessman would not hire a pyromaniac to protect his factory from fire.