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Opening the Gate: The Steven Case and the Doctrine of Reasonable Expectations

By Martin Kamarck*

Overwhelming is the realization of how far a law still built in the ideology of Adam Smith has been meshed into the new order of mass-production, mass-relationships. Overwhelming in no less measure is the conviction that broad forms of words are chaos, that only in close study of the facts salvation lies.

Against these conclusions stand others. The ad hoc approach of case-law courts is sane, it cuts close to need, it lives, it grows. And the work of law and lawyers in the contract field, however little of the whole it constitutes, has vital meaning. It is both hinge and key of readjustment. And how, without it, shall the great gate swing open?

Slightly more than ten years ago, George A. Steven purchased a round trip airline ticket from Los Angeles to Dayton, Ohio and deposited $2.50 in coins in an airport vending machine, thereby purchasing a life insurance policy in the principal amount of $62,500. Following the printed instructions mounted on the vending machine, Mr. Steven completed and executed the policy form, naming his wife as beneficiary. Whether Mr. Steven bothered to read the terms and conditions of the printed policy form before mailing it to his wife is not known.

Several days later, on his return trip from Dayton, Mr. Steven’s scheduled flight from Terre Haute to Chicago was cancelled. With the assistance of the airline’s ticket agent in Terre Haute, Mr. Steven managed to charter an unscheduled flight on an “air-taxi” service to Chicago. The plane crashed en route, and Mr. Steven sustained fatal injuries. Relying upon a provision of the policy’s “insuring clause” that limited coverage to flights on “scheduled air carriers,” as that

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term was defined in the policy, the insurance company refused to pay benefits, and Mr. Steven's widow sued.

The trial court sustained the insurer's contention that the policy was a "contract" by which the beneficiary was bound and that its provisions excluded coverage for the particular circumstances of the insured's death. On appeal to the California Supreme Court, a divided court reversed. The ultimate decision in Steven v. Fidelity and Casualty Co.\(^2\) should not prove surprising to anyone familiar with the litigation record of insurance companies in the appellate courts, and the decision could be dismissed as yet another "insurance case," in which a court strains to find a rule of law that will operate to the benefit of the widow and orphans.\(^3\)

In fact, however, the opinion in Steven is worthy of note because Justice Tobriner, writing for the majority, was not content to rest the rationale of the decision solely upon the ancient and familiar maxims that too often obscure the actual reasoning of the courts in this area of the law. Rather than relying upon the mechanistic application of second hand doctrines, Tobriner in Steven looks through these accretions to the heart of the law of contract and articulates a fresh principle to accommodate the facts of the case.

To the extent that the opinion departs from the traditional approach, its application is certainly within "the leeway of precedent,"\(^4\) particularly because it is carefully limited to the "special circumstances" of the case at bench.\(^5\) While the rationale in Steven has been criticized as being a "[b]ack-door" and "semi-covert" technique of misconstruction of contracts,\(^6\) it nevertheless represents a new direction in the law of contract. Justice Tobriner's opinion, in the highest tradition of jurisprudence, builds upon established contract doctrine while still following the lead provided by recent judicial distrust of insurers. The plight of Mr. Steven's widow did not exist in a vacuum; rather, its resolution represents a forward step in the historical development of contract law and, for purposes of this Symposium, an insight into Justice Tobriner's particular vision of the continuing process of readjustment.

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5. 58 Cal. 2d at 868-69, 377 P.2d at 288, 27 Cal. Rptr. at 176.
Background

The Theory: Freedom of Contract

The impact of the *Steven* decision is most fully appreciated within the context of the deep reverence with which Anglo-American jurisprudence regards the "contract." The notion that private individuals, bargaining among themselves, can create and determine rights and duties in each other that are enforceable or at least compensable is compelling. More than a pragmatic concomitant to a sophisticated system of commerce, the idea reflects a profound faith in the un fettered responsibility of the individual. In fact, by permitting parties freely to enter into contracts and by enforcing the terms thereof, contract law amounts to a delegation by the sovereign of its power to make the law for a particular transaction.

The law of contract has both assisted and subsumed powerful commercial and social forces in Anglo-American history. The famous dictum by Maine in 1861, that society progresses from status to contract, reflects his belief that these forces are ineluctable and inherently beneficial. In the development of contract law itself, Sir George Jessel carried this faith in the forces underlying contract law one step further when he said, "[I]f there is one thing which more than another public policy requires, it is that . . . contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice." This elevation of legal principle to holy writ has placed an unfortunate emphasis upon enforcement in the development of contract law. Courts have often invoked the doctrine of freedom of contract in sustaining the power of a party to enforce contract terms. The more historically forceful and conceptually valid interpretation, however, may be that there is a privilege to enter into a contractual relation

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9. H. Maine, Ancient Law 170 (London 1861); 6A Corbin on Contracts § 1376 (1962); see Tobriner & Grodin, supra note 7, at 1251-52.

and perform thereunder. That privilege is exemplified in the con-
tractual relationship by the principle of voluntarism: "Contract is that
part of our legal burdens that we bring on ourselves." 11 A court must
display continuing sensitivity to the need for voluntarism within the
contractual relationship and distinguish those ostensibly contractual
relationships that offer only the "freedom" to "accept the terms offered
or else take the consequences." 12

A purblind emphasis upon the sanctity of contractual obligations,
without any examination of the relationships from which they arise,
leads not to contractual freedom but rather to contractual anarchy and
the attendant risk of tyranny. 13 As Professor Williston noted more
than fifty years ago, "Observation of results has proved that unlimited
freedom of contract, like unlimited freedom in other directions, does
not necessarily lead to public or individual welfare . . . ." 14 The
problem, then, lies in the need to protect the obvious benefits of con-
tractual freedom while, at the same time, guarding against its abuses.
Those abuses are nowhere more apparent than in the modern phe-

omenon of the standardized, printed form contract. The judicial
attempts to accommodate traditional doctrines to problems arising
from the form contract illustrate the conceptual limitations of the law
of contract.

The Problem: Contracts of Adhesion

Standardized form contracts have developed to satisfy a prac-
tical commercial need. 15 Widespread use of such contracts has oc-
casioned much scholarly comment about their relative advantages and
disadvantages. 16

Two aspects of the form contract are significant in the context of

11. M. R. COHEN & F. S. COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHI-
LOSOPHY 102 (1951).
12. M. R. COHEN, supra note 7, at 86.
13. See, e.g., Pollock & Maitland's description of the feudal era's "free," if formal,
contract: "[T]he law of contract threatened to swallow up all public law. . . . The
idea that men can fix their rights and duties by agreement is in its early days an un-
ruly anarchical idea. If there is to be any law at all, contract must be taught to
know its place." 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 233 (2d
ed. reissued 1968). Bus see Holmes, The Path of the Law, 10 HARV. L. REV. 457
(1897).
15. Kessler, supra note 8, at 632.
16. See, e.g., Isaacs, The Standardizing of Contracts, 27 YALE L.J. 34 (1917); Llewellyn,
Book Review, 52 HARV. L. REV. 700 (1939); Shawson, Standard Form Con-
tracts and Democratic Control of Lawmaking Power, 84 HARV. L. REV. 529 (1971).
their mass use. First, like all contractual relationships, the contract created by a standardized form creates law insofar as it defines within certain limits the rights and duties of the respective parties. Because the raison d'être of the form contract is the economy of scale and because the form contract is designed to be utilized only on the mass level, however, form contracts, in effect, create law in wholesale lots. One commentator has even compared the significance of this mass produced body of law to the other modern phenomena of "codifications and restatements." The courts are required to interpret and enforce this law.

The second aspect of the form contract is merely a corollary of the first. The law created in bulk by such contracts is by definition indiscriminate in that it is intended for general, and not particular, application. Thus the practical economies of scale associated with use of the form contract, such as generalized terms, devolve upon the identification, standardization, and limitation of risk. Moreover, because only one party to the transaction drafts the form, he predictably includes generalized terms that cut broadly and uniformly in his favor.

These two aspects of standardized contracts are, of themselves, neutral from the standpoint of public policy and the imperatives of contract law. Standardization is an economic necessity and even a social good, and the dynamics of the marketplace can control overreaching that falls short of actual or constructive fraud. Although the terms of a standardized contract are not usually subject to bargaining, the essence of freedom of contract and the controls of the market are preserved if the prospective offerees are truly free to accept or reject the offered form in its entirety. An additional factor, however, often intrudes into this analysis, which severely strains the conceptual framework of contract law. Courts have had to face the fact that, to varying degrees, parties of significantly greater economic power have foisted or imposed form contracts upon offerees who have no meaningful alternatives. This absence of voluntarism, of course, characterizes the contract of adhesion. The doctrine of adhesion contracts was con-
ceived in order to impose certain extracontractual standards on the
eights and duties of the parties to such a transaction.22

Although the attention given to the standardized contract is often
initially directed towards the terms of the contract, the doctrine of ad-
hesion contracts properly focuses its principles upon the relationship
of the parties to the putative contract. A contract of adhesion, which
forces one party to submit to its terms, violates the fundamental prin-
ciple of voluntarism, which is the essence of the contractual relation.23

In circumstances in which that element is totally lacking, of course,
the case is easy, because there is no contract at all.24 Yet, rarely does
the "take-it-or-leave-it" characteristic of an adhesion contract amount
to outright duress. The problem for the courts, therefore, is how to
adjudicate the relative rights and duties of the parties to a "contract"
when traditional precepts may operate to pervert the basic principles
from which the legal relation arises.

The Judicial Response: Legal Fictions

The nature of the problem presented by contracts of adhesion has
long been recognized, but the courts, bound by their sense of the im-
perative of freedom of contract, have generally not responded to the
problem in a creative or analytic fashion. Instead, in the time-honored
tradition of the common law, they have reacted to the equities of
particular cases, cloaking the result in legal fictions.25 As Kessler
noted:

[A]pparently, the realization of the deepgoing antinomies in the
structure of our system of contracts is too painful an experience
be permitted to rise to the full level of our consciousness. Con-
sequently, courts have made great efforts to protect the weaker
contracting party and still keep "the elementary rules" of the law
of contracts intact.26

22. See 6A CORBIN ON CONTRACTS § 1376 (1962); Kessler, supra note 8; Meyer,
 supra note 6; Patterson, The Interpretation and Construction of Contracts, 64 COLUM.
L. REV. 833, 855-61 (1964); Comment, Contracts of Adhesion under California Law,
1 U.S.F.L. REV. 306 (1967). Although one court implicitly suggested that the nature
of the form contract itself controls, Windsor Mills, Inc. v. Collins & Aikman Corp., 25
Cal. App. 3d 987, 993, 101 Cal. Rptr. 347, 351 (2d Dist. 1972), such a contention
was expressly rejected in Madden v. Kaiser Foundation Hosps., 17 Cal. 3d 699, 552

23. See note 11 & accompanying text supra. See Tobriner & Grodin, supra note
7, at 1252.


25. See Keeton, supra note 3, at 961; Meyer, supra note 6, at 1180; Comment,

Courts have resorted to a number of doctrinal vehicles to accomplish this result.\textsuperscript{27} One example of particular interest, because it constitutes the ostensible ground for the decision in Steven, is the principle that any ambiguities in a form contract, which is written by a party in a superior bargaining position, will be construed against the drafter.\textsuperscript{28}

This rule is simple and clear and falls well within the traditional boundaries of contract law. Often, however, the defect in the contractual relationship is not ambiguity per se but rather the lack of notice to the weaker party that the contract contains unfair advantage to the drafter.\textsuperscript{29} The court which rests its analysis on ambiguity alone invites inconsistency and uncertainty in adjudication. For example, in one case a court reluctantly found that it could not stretch the concept of ambiguity to include opaque contract language that was taken verbatim from a controlling statute.\textsuperscript{30} In other cases, courts may invent ambiguity where none actually exists and then construe the ambiguity "contrary to the plainly expressed terms of the contract."\textsuperscript{31} Hence, the court which adheres mechanically to the rule of construing ambiguity against the draftsman has the option either of allowing perceived "wrongs" to go unremedied or of creating "remedies" based on strained factual interpretation.

The Steven Case and Beyond: The Doctrine of Reasonable Expectation

With only the guiding principles discussed above to work with, the Steven case came before the California Supreme Court. The opinion commences with a discussion of the insurance policy in question and, in particular, the provisions that purportedly excluded coverage. Although the court found ambiguity, the decision, written by Justice Tobriner, does not rest upon a mechanistic analysis but recognizes at the outset that the rule of construing ambiguities against the draftsman has the option either of allowing perceived "wrongs" to go unremedied or of creating "remedies" based on strained factual interpretation.

\textsuperscript{27} See, e.g., Meyer, supra note 6, at 1188-89.
\textsuperscript{28} 58 Cal. 2d at 868, 377 P.2d at 288, 27 Cal. Rptr. at 176; see Tobriner & Grodin, supra note 7, at 1274.
\textsuperscript{31} Keeton, supra note 3, at 972.
contract, the court can often resolve it in more than just one way. For the court to construe ambiguous terms in favor of the weaker party, it must derive that construction from an implicit finding that the weaker party reasonably expected such a construction. Thus, the court first examined the question of ambiguity in the light of the purpose and intent of the parties in entering into the contract, Mr. Steven's knowledge and understanding as a reasonable layman, his normal expectation of the extent of coverage of the policy and the effect, if any, of the substitution of the transportation upon the risk undertaken by the insurer.

The court noted that the insured's purpose in purchasing the policy was clearly to obtain coverage for the contemplated trip. Because interruptions in flight service are foreseeable contingencies, the court held that a reasonable person in Mr. Steven's situation would reasonably assume that coverage would also extend to substitute transportation. Moreover, because the risk of injury on a substitute conveyance would "in many cases" be no greater than the risk on the scheduled flight, upholding the insured's expectations in this regard would not expand the obligation undertaken by the insurer.

The court next found that coverage was expressly extended to substitute transportation but only via "land conveyance" arranged by a scheduled air carrier. If, therefore, the court had mechanically applied the neutral maxim, *expressio unius est exclusio alterius*, in "construing" the purported contract, it would have defeated the insured's expectation of coverage, "protection for the whole, not part of, the trip." Instead, however, the court frankly acknowledged that the "rule of resolving ambiguities against the draftsman is itself a legalism apparently did not faze the court, because it disposed of other pertinent provisions of the policy under that rubric.

32. *Id.* at 969.
33. 58 Cal. 2d at 869, 377 P.2d at 288, 27 Cal. Rptr. at 176 (footnotes omitted).
34. *Id.* at 870, 377 P.2d at 289, 27 Cal. Rptr. at 177.
35. *Id.* at 870-71, 377 P.2d at 289, 27 Cal. Rptr. at 177.
36. The rule *expressio unius* means that "the mention of one matter implies the exclusion of all others." *Id.* at 871, 377 P.2d at 279, 27 Cal. Rptr. at 177.
37. *Id.* at 869, 377 P.2d at 288, 27 Cal. Rptr. at 176. The court could have relied upon casuistry to avoid defeat of the insured's expectation and achieve the desired result.
38. *Id.* at 871, 377 P.2d at 290, 27 Cal. Rptr. at 178.
39. *Id.* The fact that the rule requiring construction of ambiguities against the draftsman is itself a legalism apparently did not faze the court, because it disposed of other pertinent provisions of the policy under that rubric.
Having established that "the classic rules of interpretation lead to the conclusion that the policy afforded coverage here," the court discussed those fundamental considerations of policy that lay at the heart of its analysis.

A thorough discussion of the development of the doctrine of adhesion contracts supported the court in holding that

[the company so arranged this transaction that Mr. Steven could not possibly read the policy before purchase and could not practically consult the policy after purchase. The language of the policy in itself was insufficient to afford the necessary notice of noncoverage. ... While the insurer has every right to sell insurance policies by methods of mechanization, and present-day economic conditions may well justify such distribution, the insurer cannot then rely upon esoteric provisions to limit coverage. If it deals with the public upon a mass basis, the notice of noncoverage of the policy, in a situation in which the public may reasonably expect coverage, must be conspicuous, plain and clear.]

Although the holding in Steven is framed as merely an extension of the familiar principle that courts will construe ambiguities against the drafter of a standardized contract, the emphasis throughout the opinion upon the reasonable expectations of the weaker party, as exemplified in the passage quoted above, suggests that some larger principle is at work.

This subtle shift in emphasis from a mechanical construction against the draftsman to an approach respecting those reasonable expectations of the weaker party was continued by the court in Gray v. Zurich Insurance Co. In another opinion by Justice Tobriner, the supreme court held that a liability insurer was obliged to defend the insured in an action for assault, notwithstanding a purported exclusion from coverage in the policy for intentional torts. The opinion provides that the "meaning" of the policy should be tested according to the insured's reasonable expectations of coverage. Applying this reasoning, the court found that "the duty to defend [is] a primary one and since the insurer attempts to avoid it only by an unclear exclusionary clause, the insured would reasonably expect, and is legally entitled to, such protection." The court then discussed the doctrine of adhesion contracts, noting that, inter alia, "[o]bligations arising from such

40. Id. at 877, 377 P.2d at 293, 27 Cal. Rptr. at 181.
41. Id. at 871, 377 P.2d at 290, 27 Cal. Rptr. at 178.
42. Id. at 877-84, 377 P.2d at 293-98, 27 Cal. Rptr. at 181-86.
43. Id. at 878, 377 P.2d at 294, 27 Cal. Rptr. at 182.
44. 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966).
45. Id. at 268, 419 P.2d at 171, 54 Cal. Rptr. at 107.
a contract inure not alone from the consensual transaction but from the relationship of the parties."46

Significantly, citations both to Steven and to Tunkl v. Regents of University of California47 support the quoted passage. The latter case invalidated an exculpatory clause under which the defendants sought to avoid liability for the negligence of their hospital employees. One of the grounds for the decision in Tunkl was the court’s finding that a hospital was “affected by the public interest” and was thus held to certain higher standards in dealing with the public.48

Read together, these three cases suggest that the reasonable expectations doctrine is more than a rule of interpretation which courts apply when faced with contractual ambiguities. The doctrine appears rather to impose a positive duty upon the stronger party to an adhesion contract to honor the reasonable expectations of the weaker party, at least as to the scope and substance of significant obligations under the contract, unless the stronger party has clearly and conspicuously disclaimed that duty.49

The traditional analysis of contract law can accommodate the doctrine of reasonable expectations as expressed by the Steven case. Courts can look to the facts and circumstances of a particular case, the substance and language of the contract at bench, the subjective intent of the parties, and the familiar standard of the reasonable man to find the duty imposed by the doctrine and to test the contract terms against it.50 Because the scope of the reasonable expectations doctrine is not entirely encompassed within contract theory, however, its application may provide courts with the opportunity to develop fresh principles of adjudication which are outside of, or at least ancillary to, conventional contract law.

46. Id. at 269, 419 P.2d at 171, 54 Cal. Rptr. at 107 (emphasis added).
47. 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).
48. Id. at 101-02, 383 P.2d at 447, 32 Cal. Rptr. at 39.
50. Interinsurance Exch. of Auto. Club v. Velji, 44 Cal. App. 3d 310, 319, 118 Cal. Rptr. 596, 601 (2d Dist. 1975). For courts that stress this interpretative approach, the crucial issue is whether a particular “expectation” of the adhering party is “reason-
The opinion in Gray quotes with approval Professor Kessler’s admonition that the task of the courts is to “determine what the weaker contracting party could legitimately expect by way of services according to the enterpriser’s ‘calling’ . . . .” Mathew Tobriner, speaking as a scholar, rather than as a Justice, has suggested that “courts may derive the reasonable expectations of the parties from their relationship or status rather than from the consensual transaction itself.”

The crux of the relationship between the parties to an adhesion contract is, of course, their disparity in economic power; the use of the complex and allusive concept of status in this context denotes Justice Tobriner’s belief that certain fundamental obligations should inhere in and provide a limitation for the stronger party’s power.

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1. Id. at 318, 118 Cal. Rptr. at 601. This inquiry is often fact-specific and leads to difficulties in adjudication. See Roberts v. Fidelity & Cas. Co., 452 F.2d 981 (9th Cir. 1971); Keeton, supra note 3, at 970 n.15. Justice Traynor dissented from the court’s opinion in Steven, for example, on the ground that an insured would not reasonably have expected coverage for the “other than scheduled” charter flight. 58 Cal. 2d at 885, 377 P.2d at 298, 27 Cal. Rptr. at 186. The particularly murky logic of the Interinsurance Exchange decision demonstrates the inherent problems of adjudicating this issue in a principled manner. The court stated that although the insured was entitled to assume that she had uninsured motorist coverage for her own vehicle, it was doubtful whether she could reasonably expect coverage for herself when riding in her husband’s uninsured car. 44 Cal. App. 3d at 319, 118 Cal. Rptr. at 601-02.

2. In another case, the First District Court of Appeal relied upon the principle of expressio unius est exclusio alterius, discounted in the Steven case, to find that special notice of a certain exclusion from coverage in an insurance policy gave rise to a reasonable expectation that no other exclusions existed. The court overruled the trial court’s understandable holding that a reasonable insured would expect the consequences of felony drunk driving to be excluded from coverage under an accidental death policy. Logan v. John Hancock Mut. Life Ins. Co., 41 Cal. App. 3d 988, 116 Cal. Rptr. 528 (1st Dist. 1974). By contrast, the Second District took judicial notice of “the well known hazards of Mexican driving” in finding that an expectation of coverage under an automobile insurance policy was unreasonable. Farmers Ins. Exch. v. Harmon, 42 Cal. App. 3d 805, 810, 117 Cal. Rptr. 117, 120 (2d Dist. 1974), hearing denied, id. at 816, 117 Cal. Rptr. at 124 (Tobriner, J., dissenting).

3. 65 Cal. 2d at 270, 419 P.2d at 172, 54 Cal. Rptr. at 108, (quoting Kessler, supra note 8, at 637).

4. Tobriner & Grodin, supra note 7, at 1273 (emphasis added).


6. See Tobriner & Grodin, supra note 7, at 1252-54; Rintala, The Supreme Court of California 1968-69, Foreword: “Status” Concepts in the Law of Torts, 58 Calif. L. Rev. 80 (1970). One scholar noted over 50 years ago that “the question is not so much one of status and contract as it is of a broader classification that embraces those concepts: standardized relations and individualized relations . . . . [A] relation results in which the details of legal rights and duties are determined not by reference to the particular intentions of the parties, but by reference to some standard
Justice Tobriner has been deeply concerned with the responsibility of the law to protect the individual from the abuses of concentrated economic power, and his opinions in Steven and Gray are informed with an understanding that the adhesion contract is but a manifestation of this larger problem. As discussed above, the contract of adhesion is to some extent a perversion of freedom of contract. To the same extent, the judiciary may have to refer to principles outside the ambit of traditional contract law in order to resolve that problem. Further, the stronger party to an adhesion contract may occupy a position vis-a-vis the public analogous to that of a monopoly or a public service enterprise. Fortunately such status has traditionally carried concomitant responsibilities under the common law. In fashioning the doctrine of reasonable expectations, Justice Tobriner has provided the conceptual framework for developing similar protections against abuses of the adhesion contract.

To the extent that the principle of voluntarism is respected in such a contract and the obligations of the stronger party conform to the reasonable expectations of the subscribing public, courts should respect the law of the contract and hold the parties to their bargain. If the terms of the contract defeat such expectations, the imperative of freedom of contract will still preserve the contract's validity if the weaker party had notice and therefore an adequate opportunity to evaluate the contract's shortcomings. The vocation of a particular party or its bargaining power may also create certain expectations that are extrinsic to the contractual relation. Courts should enforce such expectations regardless of the contract's terms. Justice Tobriner has demonstrated the potential scope of this aspect of the reasonable expectations doctrine.

set of rules made for them. In origin, these relations are, of course, contractual; in their workings, they recall the regime of status." Isaacs, The Standardizing of Contracts, 27 Yale L.J. 34, 39 (1917) (footnote omitted).

56. See notes 22-23 & accompanying text supra.
60. See note 54 supra.
61. The court determines the reasonable expectations of the weaker public from the facts and circumstances of each particular case. See note 50 supra.
Although Steven specifically involved an insurer, its decision suggests that the stronger party to any similar adhesion contract "cannot by the most certain and understandable language negate the essence of his bargain." A court may find that one party to a purported contract is subject, by virtue of his "status," to a certain irreducible duty or fundamental obligation which he cannot disclaim, notwithstanding the express terms of the contract. Within the framework of the doctrine of reasonable expectations, this holding could be based upon the court's finding that any disclaimer would be so "fundamentally unconscionable" as to defeat the expectations of the vast majority of adhesion contract offerees. The foregoing speculation illustrates the potential scope and flexibility of the doctrine which Justice Tobriner incrementally developed through the Steven, Gray, and Tunkl decisions.

The world today is very different from that which shaped the narrow notion of freedom of contract, and the glacial movement of the common law must accommodate the changes. Justice Tobriner's broader understanding of both the nature and setting of the problem provides, for those who choose to accept it, the conceptual tools with which the careful "work of law and lawyers" can forge the "key of readjustment."

62. Tobriner & Grodin, supra note 7, at 1275, 1278 (emphasis added).
64. Keeton, supra note 3, at 968-69.