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CONTRACTS, CAPABILITY, AND THE CLASSROOM

James C. Oldham*

THE CAPABILITY PROBLEM IN CONTRACT LAW. By *Richard Danzig*. Mineola, New York: The Foundation Press. 1978. Pp. x, 254. \$6.25.

Professor Danzig introduces his collection of readings on well-known contract cases with a pleasing metaphor. Most of traditional law school training, he says, deals with the engines of our legal system, their characteristics and values. But those engines traverse a road that is often rutted and sometimes barely passable. Danzig states: "The machinery of Justice responds as much to the road as to the engine. This book is about the road" (p. 2).

To describe the obstacles with which the road is strewn, Danzig has fashioned the term "capability problems." Principally he investigates these problems in the courtroom and in the events leading up to and following litigation. They constitute the systemic imperfections that deprive many individuals of access to the litigative process, that cause the process itself to go awry, and perhaps most importantly, that render courtroom victories pyrrhic because the judgments cannot be enforced.

The pretrial imperfections are best illustrated in the final section of the book—*Allen v. Quality Furniture* (p. 205). That episode, which did not reach trial, graphically describes the hopeless quagmire that can be encountered in striving to solve through the litigative process what would seem to be simple consumer problems. Appropriately, the supplementary comments to the section commence with a quote from Dicken's *Bleak House*.¹

The testimonial problems in the courtroom are treated in Parts I and VI: Part I presents a malpractice suit and Part VI a

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1. This is the Court of Chancery, which has its decaying houses and its blighted lands in every shire, which has its worn-out lunatic in every madhouse and its dead in every churchyard, which has its ruined suitor with his slipshod heels and threadbare dress borrowing and begging through the round of every man's acquaintance, which gives to monied might the means abundantly of wearying out the right, which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give—who does not often give—the warning, "Suffer any wrong that can be done you rather than come here!" [P. 223]

suit involving mental incapacity to enter into a contract.² Post-trial judgment collection problems are best illustrated in Parts II and V, cases dealing with injunctive relief on a covenant not to compete and collection under a contract tainted by illegality.³ The rest of the book deals with the measurement and award of damages. To illustrate the problem of assessing damages, Danzig uses two universally familiar contract cases: *Hadley v. Baxendale*⁴ and *Jacob & Youngs v. Kent*.⁵

Except for the final section of the book (where the case did not generate a court opinion), Danzig's scheme is to present the reported appellate opinion in the case, to follow the report with "first questions," then to provide supplementary comments delving into the trial phase of the case or into background facts, and to conclude with "further questions." Although the quality and depth of the various studies are uneven, the concept of the book is an appealing one, especially when viewed as an augmentation to a standard casebook.

Each of the case studies is interspersed with a variety of "capability problems." Sometimes these are quite simplistic—for example, the admonition that cases can be won or lost depending upon the quality of the lawyering.⁶ At other times, the meaning is subtle—for example, the treatment of the reliance damage component in the *O'Connor* case,⁷ or the suggestion that capability problems infect the analyses of the Chicago school of economics just as they do the litigation process.⁸ At still other times, sweeping questions are posed which suggest the outlines of Hart and Sacks's materials on legal process.⁹

Floating through these exercises is the repeated message that "the law in action will be different from the law on the books."¹⁰ To imbue students with an appreciation of this message in some

2. The cases are respectively, *Sullivan v. O'Connor*, 363 Mass. 579, 296 N.E.2d 183 (1973); *Ortelere v. Teachers' Retirement Bd.*, 25 N.Y.2d 196, 250 N.E.2d 460, 303 N.Y.S.2d 362 (1969).

3. Respectively, *Fullerton Lumber Co. v. Torborg*, 270 Wis. 133, 70 N.W.2d 585 (1955); *Karpinski v. Collins*, 252 Cal. App. 2d 711, 60 Cal. Rptr. 846 (1967).

4. 9 Ex. 341, 156 Eng. Rep. 145 (1854).

5. 230 N.Y. 239, 129 N.E. 889 (1921).

6. See, e.g., Further Questions 4, 5, and 8 following the Supplementary Comments to *Sullivan v. O'Connor*, 363 Mass. 579, 296 N.E.2d 183 (1973) [at pp. 42-43].

7. Further Question 5 (p. 43).

8. See Further Question 3 following the Supplementary Comments to *Hadley v. Baxendale* (p. 107).

9. H. HART & A. SACKS, *THE LEGAL PROCESS* (Tent. Ed. 1958).

10. The quote is Professor Danzig's paraphrase of a statement by Karl Llewellyn (p. 2).

depth is surely Danzig's principal goal.

Danzig may be saying merely, like Llewellyn and the legal realists,¹¹ that he is a "law school realist" and wants the law student to know the full contours of the game at an early stage. The impetus is the same as, or is similar to, the widespread movement some years ago in contracts casebooks to start with remedies.¹² Danzig's theme, however, is more basic. He seeks to reveal the arbitrariness, the fortuities, the surprises, the obstacles, and the skills that attend the crystallization of events into litigation. He then observes the slips between cup and lip in the litigation process itself and the frequent disintegration of the achieved result.

I have no quarrel with these objectives. My only worry is that the student not be demoralized completely. There really are lawsuits that succeed, just as there is occasionally successful, egalitarian legislation. Danzig asks the student to appraise an appellate judge's opinion in the first exercise and to assess whether it is "an over-subtle, pedantic, meaningless exercise" (p. 43). He then asks whether, if so, law school education can be similarly characterized, suffering as it is from an inbreeding of opinions of appellate judges selected in part by law professors (p. 43). These are legitimate questions, although they are hardly new ones. All who teach traditional casebook courses in the first year of legal education are conscious of the skewed impression left by the exclusive attention to common-law cases—often bad ones, at that.¹³ The trouble is that Danzig, after raising this problem repeatedly, gives the student very little countervailing support. No rehabilitation of student morale is provided, other than the quixotic gratifications reflected in the consumer fraud problem at the end of the book. The possibility emerges that Danzig is, in fact, an anti-theorist, inviting students to conclude that contract doctrine is empty. Such a nihilist viewpoint would have been *de rigueur* a decade ago, but it is surprising and a little disappointing to encounter it from as fresh and spirited a member of the contracts

11. See K. LLEWELLYN, JURISPRUDENCE (1962); W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1974).

12. For example, Professor Jackson proposes: "[B]y studying remedies first, a student will learn to 'keep his eye on the ball', i.e., attention will be appropriately focused on the lawyer's end-goal of a result that predictably can be obtained if the transaction or relationship becomes subject to litigation." J. JACKSON, CONTRACT LAW IN MODERN SOCIETY 12 (1973). Danzig's materials, of course, put into question the predictability to which Jackson refers.

13. See, e.g., Henderson, Book Review, 124 U. PA. L. REV. 1466, 1467 (1976) (reviewing C. REITZ, CASES AND MATERIALS ON CONTRACTS AS BASIC COMMERCIAL LAW (1975)).

community as Professor Danzig.¹⁴

Perhaps I overreact. After all, only a few years ago Danzig took Karl Llewellyn to task about what Danzig perceived to be the doctrinal and moral vacuity of Article II of the Uniform Commercial Code.¹⁵ Thus, Danzig's mission in his readings on contracts cases may be limited to describing the inevitable tension between the artifice of theory and the reality of trial. In this, his materials are successful.

Having unburdened myself about what I regard as the only truly disturbing feature of the book, I will turn to some of the specific case studies. In doing so, I will save the *Hadley v. Baxendale* piece until last, since that study stands apart in considerable measure.

The story of Alice Sullivan's cosmetic nose operations reflected in malpractice litigation captures the reader's attention quickly and provides a good opening case study. It is challenging, in that the supplementary comments invite the students' attention to the following: (1) the fact that the winning theory of the case was selected by the lawyers almost accidentally; (2) the highly untheoretical recollections of jury members, whose decisions were frequently at odds with jury instructions or the weight of the evidence; (3) the difficulty in distilling clear facts from ambiguous testimony; and (4) the extent to which testimonial expressions in a courtroom are influenced by factors completely extraneous to the case. These topics could easily spawn many reflective hours on the part of the student. Helping to channel and particularize this reflection are the "further questions," which are, on the whole, appropriately provocative. Occasionally, however, a further question is so broad that it may lose its utility. For example, Danzig instructs the student to do a legal autopsy on the *Sullivan* case and asks: "What lessons do you draw from [the materials] that might be relevant to your performance as an attorney? What capability problems arise as a result of the vari-

14. Professor Henderson has recently noted that "[j]udging from the advance sheets and the casebook marketplace, there is as yet scant evidence that salvation for the contracts course lies in some form of antidoctrine." *Id.* at 1469. Supporting Professor Henderson's statement is Gilmore, *Frederick Kessler*, 84 *YALE L.J.* 672, 681 (1975). In that engaging piece, Professor Gilmore lauds his colleague Kessler as "one of the very few men of his generation who, having decisively rejected the doctrinal orthodoxy of the period—the Restatement of Contracts and all that—seems never to have been tempted to go on to some form of antidoctrine as salvation." *Id.* Professor Gilmore observes, by the way, a resurgence of theoretical inquiry in the contracts literature during the 1970s.

15. Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 *STAN. L. REV.* 621 (1975).

ance in lawyers' skills?" (p. 42).

Sometimes this unproductive breadth of the questions filters into the "first questions" following the report of the appellate decision. I find this to be true of the questions following the second case study, *Fullerton Lumber Co. v. Torborg*.¹⁶ Danzig directs the student to "imagine" all the capability problems inherent in the situation presented by the case. It will be the rare first-year student who can do it; most students will not have the speculative ability or the experience to be able to respond meaningfully. Students can muse about the problems, to be sure, and such musings may be valuable in their way, but I think more helpful, particularized questions could be fashioned.¹⁷

To my mind the case study which is the least effective is that dealing with *Jacob & Youngs v. Kent*. I do not find the supplementary comments to be a particularly illuminating addition to the facts recited in the appellate opinion, and the "further questions" are little different from the standard series of questions one would pursue in analyzing Judge Cardozo's reasoning.¹⁸

To some extent the same is true of the *Karpinski v. Collins*¹⁹ study (pp. 129-47). The supplementary comments comprise a nice story providing a background to the case, but few additional insights are contributed. It is valuable, however, to learn from the supplementary comments of the case how the collection of the judgment was encroached upon by the bankruptcy proceedings against the corporate entity operated by the defendants.

Danzig's treatment of *Ortelere v. Teachers' Retirement Board*²⁰ describes the occasion prompting the California Supreme Court to "modernize" its approach to mental incapacity as a basis for avoiding contractual obligations. I have taught the case three times, and it is a wonderful one for first-year students.

16. 270 Wis. 133, 70 N.W.2d 585 (1955).

17. To illustrate, the first part of Danzig's third question about *Fullerton* is as follows: "Criticize the rule of law articulated by the Supreme Court in terms of the capability problems it will encounter" (p. 42). Would it not be more helpful to particularize this? For example: How will the court in future cases be able to decide how much protection from competition a plaintiff 'needs'? What does 'need' mean? Should it be established under generally accepted accounting principles? How much of a hypothetical diminution in profits would be required? What type of proof will be adequate to establish the necessary causal link between a future diminution in profits and a breach of a covenant not to compete?

18. For an especially potent set of inquiries about the Cardozo opinion, one laced with excursions into the background of New York law, see F. KESSLER & G. GILMORE, *CONTRACTS* 898-901 (1970).

19. 25 N.Y.2d 196, 250 N.E.2d 460, 303 N.Y.S.2d 362 (1969).

20. 252 Cal. App. 2d 711, 60 Cal. Rptr. 846 (1967).

Danzig's supplementary material, as in the Alice Sullivan case, highlights the contrast between murky testimony and the confident language and system of categorization in the appellate opinion.

The final selection in the book I have previously alluded to—*Allen v. Quality Furniture Co.* The facts are strikingly similar to those before Judge Skelly Wright in *Williams v. Walker-Thomas Furniture Co.*,²¹ except that the *Quality Furniture* facts never reached a litigated conclusion. A simulated interview is effectively done, and Danzig does not fail to compare the honest, forthright testimony of the uneducated Mrs. Allen with that of the devious Alice Sullivan, the dull-witted Mr. Ortelere and the incapacitated Mrs. Ortelere (p. 221). Following the simulated interview is a descriptive piece by Phil Schrag, which derives from his experience as an attorney for the National Office for the Rights of the Indigent. The piece is gripping. Highly suspenseful, the episode cannot fail to be illuminating, even to the most street-wise first-year law student. It is worthwhile to be privy to the formative stages of a test case, the strategy chosen, and the discovery phase, particularly when the test case attacks some of the unsavory features of commercial-credit practices in Harlem. Whether the story belongs in a first-year contracts course is debatable but largely academic; the contracts course is as good a first-year setting as any. For me, the only troubling aspect of the episode, the book's final selection, is the same difficulty raised by the first selection—that the first-year student may have been unduly demoralized by contract theory.

I come, finally, to Professor Danzig's analysis of *Hadley v. Baxendale*. Originally a legal history study,²² this chapter of Danzig's book is elaborately analytical—far more so than the other case studies. It is true that Danzig's study of *Hadley* reveals forces shaping the result that are largely invisible to the contemporary reader of the reported case, and in this way, he is dealing with "capability problems" as he has defined them. But his chief mission is that of an historiographer.

What Danzig does with *Hadley* is to examine the state of industrialization at the time of the case, to explore the characteristics and background of the counsel in the case and of the judges deciding the case on appeal, and to suggest plausible hypotheses

21. 350 F.2d 445 (D.C. Cir. 1965).

22. Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 2 J. LEGAL STUD. 249 (1975).

about why the case has loomed so large in contracts literature over the years. He also concludes that the case has outlived its importance. The insights provided the first-year law student by his analyses are valuable, both intrinsically and in terms of the importance of assessing a case in the context of the time and place in which it arose.

There are, nevertheless, several features of the study which are troublesome. Danzig seems to go out of his way to quibble with Professor A.W.B. Simpson, a contracts historian at the University of Kent, Canterbury. At issue between Danzig and Simpson is who in the *Hadley* drama most clearly relied on civil-law treatise writers Pothier and Sedgwick in their approach to damages. This exercise, while perhaps common in papers by historians striving for a correct interpretation of a historical event, seems out of place in these selected readings for contracts students.²³

In Part IV of his article on *Hadley*, Danzig attempts to demonstrate that changes in the judicial system in England in the mid-1800s probably led to an increase in contracts litigation in the lowest courts—the county courts—which were courts of limited jurisdiction. Danzig suggests that it would follow that questions of damages in contracts cases became more important because of the need to fix a jurisdictional amount in controversy. The theory is interesting, although the proof offered in support of the theory is scant. With regard to the *Hadley* case, Danzig extends his theory as follows:

By identifying the criteria by which damages were to be assessed, the *Hadley v. Baxendale* court enhanced the predictability of damages and therefore the correct allocation of cases between the systems. Moreover, since the rule of the case coupled this en-

23. Even granting the appropriateness of the passage to this book, the content of the quarrel is peculiar. Danzig states that Professor Simpson was short-sighted in concluding that Baron Parke was the principal actor in the *Hadley* drama to consult the civil law. Baron Parke admitted his own reliance upon Sedgwick, but Danzig indicates that it "seems clear" that Baxendale's flamboyant counsel, Willes, also was familiar with and relied upon the civil-law writers (p. 83). This speculative conclusion is then transformed by Danzig into a "fact that Willes had read Pothier and especially Sedgwick" (p. 83).

Professor Danzig next states what he regards as a more significant fault with Professor Simpson's thesis—that Simpson stops short in his analysis. Danzig suggests that Baron Parke's resort to the civil law must have been symptomatic of underlying dissatisfaction with the existing law, and Danzig searches for that underlying dissatisfaction. By this means, Danzig effects a smooth transition between Parts II and III of his article on *Hadley*, but perhaps he does so at the expense of Professor Simpson. There is no indication that Professor Simpson's goals in his references to *Hadley* were coextensive with Professor Danzig's.

hanced predictability with an assertion of limitations on recovery, it tended to shunt cases from the Superior Courts toward the County Courts and thus to protect the smaller system from at least a portion of the workload that if untrammelled would overwhelm it. [P. 93]

I find this suggestion highly speculative. It is not supported by statistical evidence. The only statistics offered are that the county court caseload grew from 429,000 cases in 1846 to 754,000 in 1857. This was a major increase, to be sure, but it seems dubious to me that a significant impetus to the expansion was the 1854 decision in *Hadley*, particularly given the time needed for *Hadley* to be felt in newly litigated cases.

Two other aspects of Danzig's *Hadley v. Baxendale* article give me pause. First, in discussing the jury in *Hadley*, Danzig notes that nine of the twelve were merchants "who must have suffered frustration or injury from the then-frequent occurrence of carrier error," and thus that these merchants "probably sympathized much more readily with the Hadleys than with Baxendale" (p. 94). Admittedly a certain amount of dissatisfaction surfaced during the mid- and early 1800s with special juries comprised of merchants, dissatisfaction largely due to the allegation that the composition of special merchant juries was subject to unchecked manipulation.²⁴ There was considerable evidence to suggest that this practice was occurring,²⁵ but presumably Baxendale could play the game as well as the Hadleys—particularly given the skill of Baxendale's counsel, Willes (pp. 83, 97). Thus, I do not think it fruitful to surmise whether the jurors were likely to be more sympathetic to the Hadleys than to Baxendale.

Secondly, Danzig evaluates the "notice" requirement of *Hadley* (that a breaching party will be responsible for special damages only if he was put on notice at the time the contract was entered into of the condition that might lead to such damages) and concludes that this feature of the case was, even when crafted, anachronistic. He points out that "in mass transaction situations a seller cannot plausibly engage in an individualized 'contemplation' of the consequences of breach and a subsequent tailoring of a transaction" (p. 100). And Pickford's, the carrier,

24. See, e.g., Bentham, *On the Art of Packing Special Juries* (1821), in 5 THE WORKS OF JEREMY BENTHAM 61 (1843); WOOLER, AN APPEAL TO THE CITIZENS OF LONDON AGAINST THE ALLEDGED LAWFUL MODE OF PACKING SPECIAL JURIES (1817).

25. See, e.g., "Report of the Especial Committee to Examine the Books and Lists of Persons Qualified to Serve on Juries in and for the City of London," Common Council Minutes, 11 December 1817; "Report from the Select Committee on Special and Common Juries," House of Commons, 7 July 1868.

is described as an "enormous mercantile establishment" with innumerable departments working largely autonomously (p. 100). How much more so is this true today of corporate enterprise: Yet the law continually engages in "notice" requirements, indulging in the fiction that a sprawling corporate entity has "knowledge" of and is therefore responsible for the acts of all its widely disseminated agents.²⁶ Danzig states that the fragmented and standardized nature of contemporary business makes it "self-evidently impossible to serve legally cognizable notice on, for example, an airline that a scheduled flight is of special importance or the telephone company that uninterrupted service is particularly vital at a particular point in a firm's business cycle" (p. 101). Yet there continue to be cases of liability for special damages in transmission of messages and like situations.²⁷

In fairness, Danzig does point out that the court's factual determination in *Hadley* that the defendant did not know that the mill was shut down may have been prompted by uncertainty in the law of agency. The court may have assumed that a "mere notice" to an agent could not bind the principal (p. 87). This doubt has long since disappeared, and perhaps had it disappeared prior to *Hadley*, the court would have been more concerned about the implications of its "notice" requirement.

Conclusion

I have always told my contracts students that, like truth, the appearance of certainty in the law may be as important as certainty itself. Having scrutinized cases with them until the cases crumble under our gaze, we strive to pull back a bit to realize that, with the proper perspective, the subject matter is intact and reasonably well integrated. Danzig's book is, he says, about the ruts in the road which the contracts vehicle traverses. On the whole, Danzig develops his theme ably, and it is a perspective infrequently emphasized in law school. My caution is merely to remember that the road *is* passable, and while this may be in part due to the yielding nature of the obstacles described by

26. A contemporary example under the Uniform Commercial Code is the machinery of § 2-207, especially § 2-207(2)(c). Under that provision, a merchant may be bound by additional terms contained in the other party's expression of acceptance unless "notification of objection to them has already been given or is given within a reasonable time after notice of them is received."

27. See Judge Cardozo's discussion in *Kerr S.S. Co. v. Radio Corp. of Am.*, 245 N.Y. 284, 157 N.E. 140 (1927) and cases collected and discussed in A. CORBIN, *CONTRACTS* §§ 1018, 1076 (1964).

Danzig, it is due as well to the resilience and durability of the doctrinal engines.