Whose conscience? Unconsciousability in the common law of obligations

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Unconsciousability is the golden thread which ties together the common law of equitable obligations in many jurisdictions. It is a word which is often used by judge, legislature and commentator but it hides a myriad of meanings. The different uses of this single word in various jurisdictions means that, whilst there may appear to be a convergence of equitable principles and remedies, on closer inspection there is significant divergence; we are divided by a common equitable language. At the heart of the debate about the use and abuse of ‘unconsciousability’ is divergence about whose conscience is relevant. Is it the objective conscience of the court or the subjective conscience of the defendant? Lord Walker in Pitt v Holt [2013] UKSC 26, considered that ‘unconscionableness’ should be evaluated objectively, but that is not consistent with other contexts where it is determined with reference to the defendant’s conscience.

This paper will draw on the function and definition of unconsciousability in a variety of jurisdictions to determine areas of convergence and divergence. In doing so much more fundamental debates will be revealed, concerning the true theoretical foundations of contemporary Equity and the scope and legitimacy of judicial discretion in formulating equitable claims and fashioning equitable remedies to secure just results.