

**THE *ETRIDGE* INFLUENCE  
ON UNDUE INFLUENCE:  
ATTEMPTS AT FUSION WITH  
DURESS AND  
UNCONSCIONABILITY**

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## **ABSTRACT**

The doctrine of undue influence has undergone reconsideration by the House of Lords in *Royal Bank of Scotland v Etridge (No 2)* [2004] 4 All ER 449. The case was an attempt by the House of Lords to clarify the law and dispel some of the misconceptions that have developed in the law over the last 200 years.

This thesis will examine the law of undue influence. It will examine the theoretical basis of undue influence, the general misconceptions in the law, the impact of the *Etridge* case, and related doctrines of duress and unconscionability. Given the developments in the law due to *Etridge*, issues regarding simplification of the law will be examined. The three doctrines share much in common, and issues of fusion of one or all of the existing doctrines will be considered, and whether this would lead to a better understanding of the law in this area.

**CHAPTER 1**

**INTRODUCTION**

In 1807 Lord Eldon in *Huguenin v Baseley*<sup>1</sup> held that undue influence is a doctrine utilised by the courts of equity to set aside a transaction that has been obtained by the use of undue influence, in the sense that the transaction was not the pure voluntary and well understood act of the influenced party, but a transaction entered into without knowledge of the effect, nature and consequence. Such transactions are against public policy. Nearly two centuries later Sir Martin Nourse in *Hammond v Osborn*<sup>2</sup> held that there were continuing misconceptions surrounding the doctrine of undue influence. The passage of time and the body of case law has not assisted with the understanding of the doctrine. Todd writes that “in recent times the Courts have debated at length about how the doctrine operates and how best to arrange and explain the cases.”<sup>3</sup> This thesis will examine the doctrine of undue influence, and the closely related doctrines of duress and unconscionability.

The thesis will begin with an examination of the theoretical basis of undue influence, which is whether it is concerned with the wrongful conduct of the influencing party, or the excessively impaired consent of the plaintiff. The recent focus of the courts utilising public policy as the fundamental basis has clouded this inquiry. How public policy interacts with the defendant or plaintiff based arguments will be considered.

The evolution of undue influence will be examined. This will consider how undue influence has been established in pre-*Etridge* law, the misconception of the effect of the presumptions that existed, and the role and misunderstanding of manifest disadvantage. The *Etridge* case and the restatement of the law by the House of Lords will be analysed. Then, in light of *Etridge* the elements required to prove undue influence will be examined with post-*Etridge* cases. This will determine whether any meaningful understanding of the law has developed, or whether the continuing misconceptions in the law continue to plague it.

In the final chapters of this thesis, the doctrines of duress and unconscionability will be examined. These doctrines are closely related to undue influence, and there is substantial overlap between the three. The elements of establishing duress and unconscionability will be examined. Issues relating to the amount and type of pressure in the doctrines will be raised, illustrating the similarities that exist within the three doctrines. In order to simplify and clarify the law, the debate concerning whether some or all of these doctrines can be merged will be considered in the conclusion.

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<sup>1</sup> [1803-13] All ER Rep 1, per Lord Eldon, p 13.

<sup>2</sup> [2002] EWCA Civ 885.

<sup>3</sup> S Todd, Burrows Finn & Todd, *Law of Contract in New Zealand* (3<sup>rd</sup> ed 2007), p 351.



**CHAPTER 2**

**THE THEORETICAL BASIS  
OF UNDUE INFLUENCE**

## INTRODUCTION

In 1887 Lindley LJ posed the question:<sup>4</sup>

What then is the principle [of undue influence]? Is it that it is right and expedient to save persons from the consequences of their own folly? or (*sic*) is it that it is right and expedient to save them from being victimised by other people?

Over a hundred years later, that question is still debated by judges and academics. What is the theoretical basis for undue influence? Is the doctrine plaintiff based, that is, centred on the impaired consent of the plaintiff? Or is it defendant based, that is, “... the law ... seeks to prevent ‘victimisation’ or improper conduct by one party that results in the victim entering into a transaction without free and informed consent.”<sup>5</sup>

Before that question can be answered, the definition of undue influence should be considered. Finding the definition of undue influence has proved to be remarkably elusive.<sup>6</sup> “As no Court has ever attempted to define fraud, so no Court has ever attempted to define undue influence...”<sup>7</sup> However despite the lack of a comprehensive definition, it can be said that:

“Influence” ... is the ascendancy acquired by one person over another. “Undue influence” is the improper use by the ascendant person of such ascendancy for the benefit of himself or someone else, so that the acts of the person influenced are not, in the fullest sense of the word, his free, voluntary acts.<sup>8</sup>

Similar comments can be found in *Royal Bank of Scotland v Etridge (No 2)*;<sup>9</sup> that “undue influence has a connotation of impropriety. In the eye of the law, undue influence means that influence has been misused.”

## DEFENDANT BASED ARGUMENTS

*Allcard v Skinner*<sup>10</sup> has been referred to as the orthodox view of undue influence.<sup>11</sup> Lindley LJ made the distinction between two types of influence a defendant may exercise over a plaintiff:

First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some over-reaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor...

The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such cases the Court throws upon the donee the burden of proving that he has not abused his position, and of proving that the *gift made to him has not been brought about by any undue influence on his part*. In this class of cases it has been considered

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<sup>4</sup> *Allcard v Skinner* (1885) 36 Ch D 145, at p 182.

<sup>5</sup> M Pawlowski and J Brown, *Undue Influence and the Family Home*, (2002), p 7.

<sup>6</sup> R Bigwood, *Exploitative Contracts* (2003), p 378.

<sup>7</sup> *Allcard v Skinner* above n 4, per Lindley LJ p 183.

<sup>8</sup> *Union Bank of Australia Ltd v Whitelaw* [1906] VLR 711 per Hodges J at p 720.

<sup>9</sup> [2001] 4 All ER 449 per Lord Nicholls p 462.

<sup>10</sup> (1885) 36 Ch D 145.

<sup>11</sup> *National Westminster Bank plc v Morgan* [1985] 1 All ER 821, per Lord Scarman at p 830.

necessary to shew that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made.<sup>12</sup> (Emphasis added)

For the purposes of this thesis, the terminology of the forms of undue influence to be adopted is actual undue influence for the first category described above, and the evidential presumption of undue influence in respect of the second category.<sup>13</sup>

The argument that actual undue influence is based on the influence the defendant exercises over the plaintiff is “fairly uncontroversial”<sup>14</sup> and well supported by academics<sup>15</sup> and authority.<sup>16</sup> The defendant exerts actual pressure on the plaintiff so that the plaintiff’s will is overborne.<sup>17</sup> Similarities between actual undue influence and duress have been drawn.<sup>18</sup> The difficulty arises in cases relying on the evidential presumption of undue influence. In these cases there is often no clear pressure applied to the plaintiff. However, while the defendant exerts an influence over the plaintiff:

the will of the victim is not ‘overborne’. There may have been misplaced trust or reliance, but the victim still acts ‘intentionally’, perhaps even acceding to the transaction euphorically ... what the ascendant party does in the undue influence context ... *is wrongfully make the option put to the subservient party (ie, of entering into the transaction in question) appear to be a reasonable thing to do in the circumstances.*<sup>19</sup> (Emphasis added)

In many cases there has been no wrong doing on the part of the defendant. Such a case is *Allcard v Skinner*.<sup>20</sup> Miss Allcard joined a sisterhood, took the vow of poverty, and undertook not to “seek advice

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<sup>12</sup> *Allcard v Skinner* (1885) 36 Ch D 145, per Lindley LJ at p 181.

<sup>13</sup> See discussion below on the decision of *Royal Bank of Scotland v Etridge (No2)* [2001] 4 All ER 449 at p 35-9.

<sup>14</sup> R Bigwood, *Exploitative Contracts* (2003), p 382.

<sup>15</sup> R Bigwood, *Exploitative Contracts* (2003), p 382; N C Seddon and M P Ellinghaus, *Cheshire and Fifoot’s Law of Contract*, (8<sup>th</sup> Australian ed, 2002); J Cartwright, *Unequal Bargaining* (1991); M Pawlowski and J Brown, *Undue Influence and the Family Home*, (2002); M Cope, *Duress, Undue Influence and Unconscionable Bargains* (1985); P Vout, (ed and Current Updating Author), *Unconscionable Conduct The Laws of Australia* (2006); J McGhee, *Snell’s Equity* (31<sup>st</sup> ed 2005); G H L Fridman, *The Law of Contract in Canada* (5<sup>th</sup> ed, 2006); G Andrews, and R Millett, *Law of Guarantees* (4<sup>th</sup> ed 2005), p 160; and N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 9-005.

See discussion by S Todd, Burrows Finn & Todd, *Law of Contract in New Zealand* (3<sup>rd</sup> ed 2007), p 350-1.

<sup>16</sup> *Allcard v Skinner* (1887) 36 ChD 145; *National Westminster Bank plc v Morgan* [1985] 1 All ER 821; *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449; *Goodman Estate v Geffen* 81 DLR (4<sup>th</sup>) 211, [1991] 2 SCR 353; *Brandon v Brandon* 2001 WL 454384 (Ont SCJ), [2001] OJ No 2986200, (cited CarswellOnt 2688, Westlaw); and *Canadian Imperial Bank of Commerce v Finlan* [1999] OJ No 54, 78 OTC 241, (cited 1999 CarswellOnt 80, Westlaw).

<sup>17</sup> P Birks, and N Y Chin, ‘On the Nature of Undue Influence’ in J Beatson and D Friedmann (ed), *Good Faith and Fault in Commercial Law* (1995), p 76. Birks and Chin concede that cases of actual relational undue influence have all been examples of pressure. See also discussion by Bigwood, above n 14 p 384.

Despite the overwhelming authority that cases of actual undue influence involve pressure from the defendant, there is recognition that actual undue influence may be unintentionally exerted, see *Hittinger v Turgeon* 2005 Alta DJ 2293, 2005 Alta DJ LEXIS 140 (cited Lexis.com, at 20 October 2006), per Belzil J, para 78 where he stated that “I accept that my finding the Plaintiffs did not intentionally place undue influence on the Defendant is not dispositive of the issue in that the law recognizes that undue influence may be unintentionally (*sic*) exerted.” Such cases by its nature will be very rare, and no successful case on the issue has been found during the course of research on this thesis.

See discussion below p 45-7 on issues regarding extreme submissiveness. However the cases in the discussion do not illustrate unintentional actual undue influence.

<sup>18</sup> M D J Conaglen, ‘Duress, Undue Influence, and Unconscionable Bargains – The Theoretical Mesh’ (1999) 18(4) NZULR 509, p 514; P Vout, (ed and Current Updating Author), *Unconscionable Conduct The Laws of Australia* (2006), para 35.8:1.

<sup>19</sup> R Bigwood, ‘Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation’?’ (1996) 16 Oxford J Legal Stud 503, p 511.

<sup>20</sup> *Allcard v Skinner* above n 12.

of any extern without the superior's leave."<sup>21</sup> In order to achieve poverty status, she was required to give away all her property. The rules did not require her to give it to the sisterhood; she could have gifted it to the poor or to her relations. Miss Allcard gifted all her property to the sisterhood. When she left the sisterhood she sought the return of her property.

Lindley LJ approached the theoretical basis of undue influence as defendant based. "Courts of Equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors."<sup>22</sup> The behaviour that the plaintiff needs to be protected from is "from being forced, tricked or misled in any way by others into parting with their property."<sup>23</sup> Despite endorsing the defendant based approach, Lindley LJ found that there was no form of objectionable conduct on behalf of Miss Skinner (the lady superior who received all of Miss Allcard's property). There was no pressure placed on Miss Allcard, except the pressure of vows and rules. There was no deception practiced on her, no unfair advantage taken of her, and the money was used for legitimate purposes of the sisterhood. In effect, *Allcard v Skinner* can be seen as an illustration of the plaintiff based approach. However, ultimately it was held that Miss Allcard was under an external influence - the influence of her vows, and it was a pressure which she could not resist until it was removed (that is, when she left the sisterhood).<sup>24</sup>

The House of Lords in *Royal Bank of Scotland v Etridge (No 2)*<sup>25</sup> has revisited the whole doctrine of undue influence. The Lords favoured undue influence as based on the wrongful conduct of the defendant. "The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited."<sup>26</sup> The defendant based approach was approved in *Li Sau Ying v Bank of China (Hong Kong) Ltd*,<sup>27</sup> where Lord Scott held that the evidence must prove "an abuse by the allegedly dominant party of the trust and confidence reposed in him by the

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<sup>21</sup> *Allcard v Skinner* (1885) 36 Ch D 145, per Lindley LJ, p 177.

<sup>22</sup> *Ibid*, per Lindley LJ, p 182.

<sup>23</sup> *Ibid*, per Lindley LJ, p 183. This was cited with approval by Lord Scarman in *National Westminster Bank plc v Morgan* [1985] 1 All ER 821 p 828, and Slade LJ in *Bank of Credit and Commerce International SA v Aboody* [1992] 4 All ER 955 p 967.

<sup>24</sup> Ultimately, Miss Allcard's claim was defeated by her delay in seeking a remedy.

<sup>25</sup> [2001] 4 All ER 449.

<sup>26</sup> *Ibid*, per Lord Nicholls p 458. L Ho, 'Undue Influence: When and How it Matters to Banks and Solicitors' [2002] *Singapore Journal of Legal Studies* 617, p 623 argued that the House of Lords stopped short of endorsing either of the two different theoretical bases of undue influence.

For other English High Court cases endorsing the defendant based approach see *Dunbar Bank plc v Nadeem* [1998] 3 All ER 876, and *Rosenfeld v Ransley* [2004] EWHC 2962 (Ch). In Canada, the Supreme Court of Canada has endorsed the defendant sided analysis in *Goodman Estate v Geffen* 81 DLR (4<sup>th</sup>) 211, [1991] 2 SCR 353 per Wilson J, para 41.

<sup>27</sup> [2005] 1 HKLRD 106. See discussion below p 77.

allegedly subservient party”<sup>28</sup> and by the Privy Council in *National Commercial Bank (Jamaica) Limited v Hew*,<sup>29</sup> where Lord Millett held that:

Undue influence is one of the grounds on which equity intervenes to give redress where there has been some unconscionable conduct on the part of the defendant. It arises whenever one party has acted unconscionably by exploiting the influence to direct the conduct of another which he has obtained from the relationship between them.<sup>30</sup>

The doctrine may seem settled in New Zealand, in favour of the defendant sided approach,<sup>31</sup> for example *Brusewitz v Brown*,<sup>32</sup> and *O’Conner v Hart*,<sup>33</sup> where Lord Brightman held that “a Court of equity did not restrain a suit at law on the ground of “unfairness” unless the conscience of the plaintiff was in some way affected. This might be because of actual fraud ... or constructive fraud ... traditionally considered under its more common manifestations of undue influence, abuse of confidence, unconscionable bargains and frauds on a power.” Similarly in *Contractors Bonding v Snee*<sup>34</sup> Richardson J held that there must be “some unfair and improper conduct, *some coercion from outside ...*” Implicit in that statement is a rejection of the impaired will concept, because the plaintiff still needs to be under an external influence. The approach in *Snee* was recently cited with approval by the Court of Appeal in *Hogan v Commercial Factors Limited*.<sup>35</sup>

However, in *ASB Bank Ltd v Harlick*<sup>36</sup> Gault J described the Birks and Chin<sup>37</sup> article in favour of a plaintiff sided approach as “helpful” and conceded that “the precise bounds of the doctrine of undue influence are not easily extracted from the decided cases.”<sup>38</sup> Gault J ultimately decided that:

This case can be decided without the need to settle any more precise test than the relationship must involve such a degree of reliance and trust as suggests a real risk that a disadvantageous transaction has not resulted from the kind of informed and independent decision to be expected from a person in the position of the party seeking relief but rather from the influence the other party to the relationship has in that position.<sup>39</sup>

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<sup>28</sup> *Li Sau Ying v Bank of China (Hong Kong) Ltd* [2005] 1 HKLRD 106, per Lord Scott, para 34.

<sup>29</sup> [2003] UKPC 51, Privy Council The Court of Appeal of Jamaica.

<sup>30</sup> *Ibid*, per Lord Millett, para 28.

<sup>31</sup> S Todd, Burrows, Finn & Todd, *Law of Contract in New Zealand* (2<sup>nd</sup> ed, 2002), p 375, citing *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157.

P D Finn, ‘The Fiduciary Principle’ in T G Youden (ed), *Equity, Fiduciaries and Trusts* (1989), p 44-5. Finn contends that the dominant theme in Australian and English law is the overborne will theory, similarities with duress were drawn. In contrast, the dominant theme in the United States, New Zealand and Canada is the protection of one person’s trust and confidence in another from possible abuse, “and has thus perceived the law’s purpose in conventional fiduciary terms: affecting another’s “will” is merely one way in which an advantage can be taken in a relationship of ascendancy or trust.”

<sup>32</sup> [1923] NZLR 1106.

<sup>33</sup> [1985] 1 NZLR 159, per Lord Brightman, p 171.

<sup>34</sup> [1992] 2 NZLR 157, per Richardson J, p 165, emphasis added.

<sup>35</sup> [2006] 3 NZLR 618.

<sup>36</sup> [1996] 1 NZLR 655. *Harlick* was cited with approval in *Rac v Miliszewski* HC WN CP No 293/93 [4 April 1996].

<sup>37</sup> P Birks, and N Y Chin, ‘On the Nature of Undue Influence’ in J Beatson and D Friedmann (ed), *Good Faith and Fault in Commercial Law* (1995). See discussion on plaintiff sided-analysis below p 8-14.

<sup>38</sup> [1996] 1 NZLR 655, p 658.

<sup>39</sup> *Ibid*, per Gault J, p 659.

*Harlick* has been cited as endorsing the Birks and Chin line of reasoning.<sup>40</sup> However, one cannot regard those statements as approval and adoption of the excessive dependence approach. It is more an acknowledgment that there are two lines of thought and the law is not entirely settled as to which approach is correct.<sup>41</sup> By contrast, the Court of Appeal in *Carey v Norton*<sup>42</sup> and the High Court in *Rabobank New Zealand Limited v Balderston*<sup>43</sup> have come out in favour of the plaintiff based approach. This will be discussed in the next section.

## PLAINTIFF BASED ARGUMENTS

The derivation of the plaintiff based approach originates in cases that have drawn the distinction between undue influence and unconscionability. It is contended that undue influence is based on the impaired consent of the plaintiff whereas unconscionability is based on the wrongful exertion of pressure by the defendant. An illustration of this is the Canadian case of *Morrison v Coast Finance Ltd.*<sup>44</sup> In the case, a widow, age 79 years old was persuaded by two men to borrow money, secure it on her house by a mortgage, and to lend it to them for a business venture. She did not have a close relationship with the men. One of the men was her tenant, and the other was his friend. She had no means of repaying the money. Her house was her only substantial asset, and she had no independent advice. The two men did not repay the money she borrowed. She brought action to have the mortgage set aside on the basis of undue influence and unconscionable bargain. In discussing the distinction between undue influence and unconscionable bargains it was held that:

The equitable principles relating to undue influence and relief against unconscionable bargains are closely related, but the doctrines are separate and distinct. The finding here against undue influence does not conclude the question whether the appellant is entitled to relief against an unconscionable transaction. A plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker.<sup>45</sup>

The trial judge found that there was no undue influence. On appeal it was held by the majority that it was “extreme folly”<sup>46</sup> for Mrs Morrison to borrow money which she could not repay, and to lend it to strangers, with no expectation of reward or profit. Coast Finance Ltd knew the essential facts and prepared the relevant documents. It was held that “[f]or them to take advantage of her obvious ignorance and inexperience in order to further their respective businesses, raises a presumption of fraud

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<sup>40</sup> N Richardson, ‘Presumed Undue Influence’ [1996] NZLJ 338, and C Rickett, ‘Equity’ (1996) 7 BCB 142.

<sup>41</sup> M D J Conaglen, ‘Duress, Undue Influence, and Unconscionable Bargains – The Theoretical Mesh’ (1999) 18(4) NZULR 509, p 519.

<sup>42</sup> [1998] 1 NZLR 661.

<sup>43</sup> HC Wellington, Civ-2006-485-117, [4 May 2006].

<sup>44</sup> (1965) 55 DLR (2d) 710.

<sup>45</sup> *Ibid*, per Davey JA, p 713.

<sup>46</sup> *Ibid*, per Davey JA, p 714.

within the above authorities.”<sup>47</sup> The mortgage was set aside without requiring Mrs Morrison to repay the money on the basis that the transaction was unconscionable.

Birks and Chin<sup>48</sup> are the most prominent advocates of the concept that undue influence is about the excessively impaired consent of the plaintiff. By their own admission “[it] is not a view that has many supporters.”<sup>49</sup> The authors agree with the cases that make a clear distinction between undue influence which is plaintiff sided, and unconscionable conduct which is defendant sided.<sup>50</sup> They place particular reliance on *Commercial Bank of Australia Ltd v Amadio*,<sup>51</sup> and the judgment of Mason J:<sup>52</sup>

Although unconscionable conduct ... bears some resemblance to the doctrine of undue influence, there is a difference between the two. *In the latter the will of the innocent party is not independent and voluntary because it is overborne.* In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.<sup>53</sup> (Emphasis added)

With respect to the authors, it seems that they have taken Mason J’s comments out of context. Mason J clearly states that in the case of undue influence, the will of the innocent party is not independent and voluntary because it is *overborne*. For someone’s will to be overborne, this suggests that there must be some external force, more essentially, from the defendant.

Secondly, the authors argue that cases involving the evidential presumption of undue influence rarely have anything to do with pressure. Instead the focus should be on the weakness of the plaintiff which in turns creates excessive dependence on the defendant that results in “the lack of capacity for self-management...”<sup>54</sup> The authors cite cases where the defendant has done nothing overtly wrong. In

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<sup>47</sup> *Morrison v Coast Finance Ltd* (1965) 55 DLR (2d) 710, per Davey JA, p 714. Sheppard JA decided the case on the basis that the men were in a fiduciary position in relation to Mrs Morrison and had acted as her agent and fiduciary. It was held that there was a breach of fiduciary duty when the men borrowed the money and used it for their own profit rather than in the business that they had represented to Mrs Morrison. The defendant companies knowingly participated in the breach of trust and were subject to the same liability as the trustee.

<sup>48</sup> P Birks, and N Y Chin, ‘On the Nature of Undue Influence’ in J Beatson and D Friedmann (ed), *Good Faith and Fault in Commercial Law* (1995).

<sup>49</sup> *Ibid* p 58.

In support of the plaintiff based view, see also R P Meagher, J D Heydon, and M J Leeming, *Meagher, Gummow and Lehane’s Equity Doctrines and Remedies* (4<sup>th</sup> ed 2002), chapter 16; P D Finn, ‘The Fiduciary Principle’ in T G Youden (ed), *Equity, Fiduciaries and Trusts* (1989), at p 44-5; and R Flannigan, ‘The Fiduciary Obligation’, (1989) 9 OJLS 285. Flannigan writes that “no domination or dominating influence need be present. No ‘dishonest persuasion’ or ‘conscious abuse of power’ must occur. It is enough if the trust gives rise to ‘influence’. That ordinary and unqualified ability to ‘influence’ will alone constitute the relationship a fiduciary one” p 303.

<sup>50</sup> Birks and Chin, above n 48 p 59-60.

<sup>51</sup> (1983) 151 CLR 447.

<sup>52</sup> Birks and Chin also cite Deane J’s judgment. R Bigwood, *Exploitative Contracts* (2003) p 472, argues that “Deane J’s distinction merely illustrates the flip sides of the exploitation coin; it does not, it seems to me, reveal the foundational difference that Birks and Chin want to claim.”

<sup>53</sup> (1983) 151 CLR 447, p 461.

<sup>54</sup> Birks and Chin, above n 48 p 67.

particular, they rely on *Allcard v Skinner*<sup>55</sup> where they argue that Miss Allcard's weakness was her impaired capacity. However, Lindley LJ considered that Miss Allcard was under an external pressure, which was the pressure of the vows that she had taken, and this constituted the influence on Miss Allcard.<sup>56</sup>

The undue influence, which Courts of Equity endeavour to defeat is the undue influence of one person over another; not the influence of enthusiasm on the enthusiast who is carried away by it, unless indeed such enthusiasm is itself the result of external undue influence.

A similar approach was found in a recent Australian case with a spiritual influence, *Hartigan v International Society for Krishna Consciousness Inc.*<sup>57</sup> The plaintiff donated her only substantial asset, a farm, to the defendant. At the time of the gift, she had two children and was pregnant with her third. The plaintiff was not initiated and did not enter into a relationship of devotee with any spiritual master or undertake any formal obligations of discipleship. However, she had advice, counselling and instruction, in Krishna Consciousness beliefs. This led to her misunderstanding regarding deprecating materialism. Divesting one self of material possessions was not one of the tenets of faith. The correct philosophy was that possessions should be utilised in the service of the Lord. Bryson J found that there was no deliberate attempt by the defendant or anyone related to the defendant to "get the better of the plaintiff, to overbear her or deceive her, or to deprive her of the opportunity of making up her own mind. Nobody was insidiously working to make the plaintiff behave contrary to her own interests."<sup>58</sup>

However, it was held that there was a relationship of trust and confidence between the two representatives of the defendant and the plaintiff when discussions began regarding the gift. The representatives were under a duty to advise the plaintiff that she had misunderstood one of the tenets of faith, and she was not provided with independent legal advice. Those events, coupled with the "extremely unworldly improvidence"<sup>59</sup> of the gift raised the presumption of undue influence. This presumption was not rebutted by the defendants and the gift was set aside. In what amounted to a rejection of the impaired will argument,<sup>60</sup> Justice Bryson held that "[i]t may be unconscionable to accept and rely on a gift which was fully intended and understood by the donor and originated in the

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<sup>55</sup> (1887) 36 Ch D 145 at 182-3.

<sup>56</sup> *Ibid*, per Lindley LJ, at p 183.

<sup>57</sup> [2002] NSWSC 810.

<sup>58</sup> *Ibid*, per Bryson J, at para 37.

<sup>59</sup> *Ibid*, per Bryson J, at para 74. The gift had left the plaintiff without any assets to provide for her young children.

<sup>60</sup> P Ridge, 'The Equitable Doctrine of Undue Influence Considered in the Context of Spiritual Influence and Religious Faith: *Allcard v Skinner* Revisited in Australia' (2003) 26(1) UNSW Law Journal 66, p 75.



donor's mind, where the intention to make the gift was produced by religious belief." This is in line with the external influence reasoning in *Allcard v Skinner*.<sup>61</sup>

In *Nel v Kean*<sup>62</sup> property was transferred to a "group" of like-minded persons, with loose elements of spiritualism. Arguments that the group was a cult were rejected by Simon J, as were arguments that the relationship between the influencer and the influenced was spiritual leader and follower. However, there was evidence that led to a finding that there was a strong evidential inference of undue influence. It was held that there needed to be some implicit criticism of the defendant's conduct, "[t]here may be cases in which the courts will be strongly critical of particular conduct. Other cases will fall to be decided simply on the basis that a civil wrong has been proved."<sup>63</sup>

Thirdly, Birks and Chin argue that the requirement on the defendant to rebut the presumption of undue influence<sup>64</sup> by showing that the plaintiff did not lack autonomy indicates a plaintiff based approach. The defendant must show that the plaintiff made his or her own judgment emancipated from any dependence on the defendant, not by showing "that he had no unconscientious intention to take advantage of the other ..."<sup>65</sup> However this point could easily be made in support of the defendant based approach. What needs to be shown before the presumption can be rebutted is that the plaintiff made independent judgment *free from the influence of the defendant*.<sup>66</sup> "The problem is not lack of understanding but lack of independence."<sup>67</sup>

This argument must be viewed in light of *Etridge*. In *Etridge* the House of Lords made it clear that the presumptions are only evidential presumptions, and "[w]hen a plaintiff succeeds by this route he does so because he has succeeded in establishing a case of undue influence."<sup>68</sup> In Lord Clyde's words:<sup>69</sup>

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<sup>61</sup> *Khan v Khan* [2004] NSWSC 1189 is an illustration of a case that involving a spiritual advisor and follower which did not rely on the presumption of undue influence. It was argued successfully on the basis of actual undue influence when the Mufti placed pressure on a Moslem woman (Mrs Sadiq) to sign an agreement to sell her share of a property following an oral agreement to sell. He was a person of authority, particularly in relation to Islamic law or duty, and seen as capable of affecting her prospects in the "after life." Mrs Sadiq knew that she was not bound to sell until a written agreement had been entered into.

<sup>62</sup> [2003] EWHC 190 (QB).

<sup>63</sup> *Ibid*, per Simon J, para 86.

<sup>64</sup> Using pre-*Etridge* terms as Birks and Chin used in the article.

<sup>65</sup> P Birks, and N Y Chin, 'On the Nature of Undue Influence' in J Beatson and D Friedmann (ed), *Good Faith and Fault in Commercial Law* (1995), p 75.

<sup>66</sup> In *Trusts & Guarantee Co v Hart* 32 SCR 553, (cited 1902 CarswellOnt 673, Westlaw at 11 October 2006), para 31, Davie J in his dissent explained the law. It does not matter whether the donor understood what he or she was doing the result is unaffected, the presumption of undue influence still exists.

<sup>67</sup> J A McGhee, *Snell's Equity* (31<sup>st</sup> ed, 2005), para 8-30.

<sup>68</sup> *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449 per Lord Nicholls, p 459.

<sup>69</sup> *Ibid*, per Lord Clyde, p 478.

At the end of the day, after trial, there will either be proof of undue influence or that proof will fail, and it will be found that there was no undue influence. In the former case, whatever the relationship of the parties and however the influence was exerted, there will be found to have been an actual case of undue influence.

Therefore, if finding that there was no wrongful conduct on the part of the defendant will defeat a claim of actual undue influence, then the position should be the same where the plaintiff relies on an evidential presumption.<sup>70</sup>

While arguments can be produced to support the defendant based approach, when it comes to rebutting the evidential presumption, it is conceded that this point strongly supports arguments that undue influence is not based *purely* on the conduct of the defendant. If it was, then the defendant may rebut the evidential presumption of undue influence by showing that he had done nothing wrong, that he had acted with a clear conscience.<sup>71</sup> This is not the case. It must also be shown that the plaintiff understood the transaction, intended to enter into it, and freely did so.<sup>72</sup>

Lastly Birks and Chin concede that certain doctrinal facts support the argument that undue influence is defendant based, (such as defendant's knowledge of plaintiff's excessive dependence, third parties are protected unless they have knowledge, and manifest disadvantage). Birks and Chin simply justify these elements as 'defensible cut-off points' to ensure that there is not too much restitution given.

It is submitted that the requirement to show manifest disadvantage is more than simply a defensive cut off point. As later discussion will show, manifest disadvantage (or a transaction that calls for explanation) is not a requirement for actual undue influence because there is evidence of the defendant's wrongdoing. However, when relying on the evidential presumption of undue influence, it may be difficult to prove the wrongdoing, and proving a transaction that calls for explanation is the mechanism in which to show the wrongfulness of the transaction.<sup>73</sup>

There are recent cases that support the view that undue influence is plaintiff based. The cases clearly establish that to merely show that the defendant acted in good faith, and with a clear conscience is not enough to rebut the evidential presumption of undue influence. In *Cheese v Thomas*<sup>74</sup> Mr Cheese was an elderly man, and Mr Thomas his great nephew. They agreed to buy a house together so Mr Cheese could live in it for the remainder of his life. Mr Cheese provided money towards the purchase price and Mr Thomas contributed by providing the balance by way of a mortgage. Mr Thomas soon fell behind in

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<sup>70</sup> K Scott, 'Taking the "Undue" Out of Presumed Undue Influence?' [2003] LMCLQ 145, p 147-148.

<sup>71</sup> See discussion below on rebutting the evidential presumption p 64-73, and p 122-4.

<sup>72</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 12-003.

<sup>73</sup> M Pawlowski and J Brown, *Undue Influence and the Family Home*, (2002), p 70.

<sup>74</sup> [1994] 1 All ER 35.

mortgage repayments, and when Mr Cheese discovered this, he sought to have the transaction set aside on the grounds of undue influence. The Court of Appeal made it clear that Mr Thomas had not behaved improperly, or tricked, or took any advantage of his aged uncle. However, this did not preclude them from finding that due to Mr Thomas' younger age and more business experience, he had an actual influence over Mr Cheese, and undue influence was to be presumed.<sup>75</sup>

*Hammond v Osborn*<sup>76</sup> concerned an elderly man Mr Pritler, who gave away almost £300,000 to a woman, Mrs Osborn, who had befriended him, and gave him home help. The trial judge held that there was no wrongdoing by Mrs Osborn. On appeal the transactions were set aside. The reasons for doing so was: that Mrs Osborn failed to draw to Mr Pritler's attention to the size of the gift, the fact that it represented 91.6% of his liquid assets; he would only be left with a small amount to live on (had he lived); and there were huge tax implications resulting from the realisation of assets which would have used up the residue of the money left with Mr Pritler. The question before the court was whether "the gift was made by Mr Pritler only after full, free and informed thought about it."<sup>77</sup> The Court of Appeal was focusing on the consent of the plaintiff rather than the wrongdoings of the defendant. However, even though Mrs Osborn was found not to have done anything wrong, the transactions were still set aside on the basis of undue influence, because Mrs Osborn failed to ensure that Mr Pritler received any independent advice about the gift that he was making.

In *Carey v Norton*<sup>78</sup> the New Zealand Court of Appeal decisively rejected the view that undue influence was based purely on the improper conduct of the influencer. The case concerned the testamentary disposition of Mrs Meehan. She changed her will three weeks before her death on the advice of her two brothers. Her previous will had benefited her half sister, and niece. Her revised will benefited all her nieces and nephews, with a slightly larger portion given to her half sister and niece (to recognise their financial hardship). It was held by Elias J at first instance that the brothers acted with the utmost rectitude. This finding was not disturbed by the Court of Appeal. Despite the absence of any wrongful conduct by the brothers, undue influence was still found to be exercised. Thomas J held that:

First, while I accept that the use of the word "benign" is not inappropriate to describe the unavoidable influence of persons who proffer advice to a testator relating to the terms of his or her will, I consider that this influence ceases to be benign as soon as it becomes "undue" as a matter of law. That point is reached when it can no longer be said that the will represents the testator's independent and informed judgment. Irrespective of the fact the persons advising the testator may not be motivated by self-interest, or any other ulterior or baleful consideration, the influence is then undue influence and is no longer benign ... The question is not whether the person giving the

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<sup>75</sup> *Cheese v Thomas* [1994] 1 All ER 35 p 39.

<sup>76</sup> [2002] EWCA Civ 885.

<sup>77</sup> *Ibid*, per Sir Martin Nourse at para 25.

<sup>78</sup> [1998] 1 NZLR 661.

advice was innocent or well-meaning (and benign in that sense) but whether the influence exerted prevented the testator from exercising an independent and informed judgment when making his or her will.<sup>79</sup>

Williams J conceded that the case was unusual, because the influence was found to be benign and arose from Mrs Meehan's passivity and deference to her brothers' advice, coupled with the brothers' lack of insight into what Mrs Meehan sought to achieve with her testamentary dispositions, and the brothers' failure to discuss further options with her. His Honour rejected the argument that there needed to be coercion in order to make a finding of undue influence. He held that in this case, influence existed, and that it was undue:

plaintiffs must be able to demonstrate that on the balance of probabilities some person had the power unduly to overbear the testator's will and exercised that power, and that, as a result, the resulting testamentary disposition, though valid on its face, was not the free exercise of the testator's independent will.<sup>80</sup>

More recently in *Rabobank New Zealand Limited v Balderston*<sup>81</sup> Associate Judge Gendall again endorsed the plaintiff based approach. The case concerned a guarantee given by a wife to support her husband's business debts. She was a guarantor in her personal capacity and in her capacity of trustee of a trust that held the shares in the company. The relationship of marriage was described as a "relatively old fashioned marriage", with all the business matters left to the husband. Despite the fact that the husband did not use any "unacceptable means", improper pressure or malicious intent to procure his wife's execution of the guarantee, this did not prevent a finding that undue influence was exercised. Influence can be undue simply by taking advantage of another's trust, dependence and vulnerability. Associate Judge Gendall used the phrases "excessive dependence" and "extreme loss of autonomy" to describe the wife. It was conceded that this was a case of summary judgment, and therefore the evidentiary threshold on the defendant was lower.<sup>82</sup>

## **PUBLIC POLICY ARGUMENTS**

In *Hammond v Osborn*,<sup>83</sup> Sir Martin Nourse made clear that to focus the issue on whether there had been wrongful conduct on the part of the defendant is one of the "continuing misconceptions"<sup>84</sup> regarding the law of undue influence. Sir Martin Nourse cited Cotton LJ in *Allcard v Skinner* for the proposition that the court interferes not because there has been a wrongful act committed, but on the

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<sup>79</sup> *Carey v Norton* [1998] 1 NZLR 661, per Thomas J, p 663.

<sup>80</sup> *Ibid*, per Williams J, p 673.

<sup>81</sup> HC Wellington, Civ-2006-485-117, [4 May 2006].

<sup>82</sup> For a critique of the judgment see D Webb, 'Commercial Law Undue Influence' [2007] NZLR 387.

<sup>83</sup> [2002] EWCA Civ 885.

<sup>84</sup> *Ibid*, per Sir Martin Nourse at para 1.

grounds of public policy.<sup>85</sup> What must be proved is “that the donor’s trust and confidence in the donee has not been betrayed or abused.”<sup>86</sup>

This principle has been seized upon by more recent cases.<sup>87</sup> In *Niersmans v Pesticcio*,<sup>88</sup> the respondent, Bernard Pesticcio was mentally and physically disadvantaged for the majority of his life. He lived most of his life with his mother. His mother inherited a house from her late husband, and gifted the house to Bernard. Bernard suffered a serious fall and was admitted to hospital. He was in a coma and suffered brain damage. While in hospital, Bernard was visited by one of his sisters’ solicitors and eventually gifted his house to his sister Maureen Niersmans. It was this transaction which Bernard sought to set aside because it was procured by undue influence.

One of the arguments in support of the appellant was that she had “done nothing wrong”.<sup>89</sup> However, this argument was held to be an “instance of the “continuing misconceptions.””<sup>90</sup> Instead of analysing the issue from either a defendant or plaintiff based approach, Lord Justice Mummery relied on the ground of public policy:<sup>91</sup>

Although undue influence is sometimes described as an "equitable wrong" or even as a species of equitable fraud, the basis of the court's intervention is not the commission of a dishonest or wrongful act by the defendant, but that, as a matter of public policy ... The court scrutinises the circumstances in which the transaction, under which benefits were conferred on the recipient, took place and the nature of the continuing relationship between the parties, rather than any specific act or conduct on the part of the recipient. A transaction may be set aside by the court, even though the actions and conduct of the person who benefits from it could not be criticised as wrongful.

The presumption arising from the trust and confidence between the parties meant that Bernard did not have to show that Maureen actually had influence over him; he did not have to show that she in fact exercised undue influence or applied improper pressure on him. It was held that whether or not Maureen’s conduct could be described as wrongful was not the issue, the issue was whether or not the donor’s trust and confidence in the donee has been betrayed or abused.

*Niersmans v Pesticcio* was cited with approval in *Jennings v Cairns*,<sup>92</sup> *Macklin v Dowsett*,<sup>93</sup> and *Randall v Randall*.<sup>94</sup> In *Randall* Edward Bartley Jones QC held that “questions such as what more

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<sup>85</sup> *Hammond v Osborn* [2002] EWCA Civ 885; per Sir Martin Nourse at para 1. Lord Halisham LC in *Inche Noriah v Shaik Allie bin Omar* [1929] AC 127 also acknowledged the public policy arguments at p 133.

<sup>86</sup> *Ibid*, per Sir Martin Nourse at para 32.

<sup>87</sup> See also *Padgham v Rochelle* 2002 WL 31413932 (cited Westlaw at 31 July 2006).

<sup>88</sup> [2004] EWCA Civ 372.

<sup>89</sup> *Ibid*, per Lord Justice Mummery, para 20.

<sup>90</sup> *Ibid*.

<sup>91</sup> *Ibid*.

<sup>92</sup> [2003] EWCA Civ 1935.

<sup>93</sup> [2004] EWCA Civ 904.

could the donee had done, or insistence upon the donee having done nothing wrong, were matters which addressed the wrong issue.”<sup>95</sup> This was despite the Judge finding that the defendant was “self-justifying and self-righteous ... in short, he had all the hallmarks of a bully.”<sup>96</sup>

## 1. Meaning of Public Policy

In order to completely understand what is really meant by “public policy” one must return to the discussion in *Allcard v Skinner*. The starting point begins with Cotton LJ. After dividing cases into two categories, the first requiring actual influence by the donee, and the second category requiring a relationship of influence; his Honour went on and explained that “[i]n the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy and to prevent the relations which existed between the parties and the influence arising therefrom being abused.”<sup>97</sup> This was expanded upon further by Lindley LJ and Bowen LJ. The influence one person has over the mind of another is very subtle, and sometimes it is almost impossible to prove the actual exercise of influence. It is in these cases that Courts of Equity have made an available remedy to persons subjected to such influence.<sup>98</sup> The public policy ground is not a fetter on the donor’s right to deal with his or her property, “it is a fetter placed upon the conscience of the recipient of the gift, and one which arises out of public policy and fair play.”<sup>99</sup> In *Hammond v Osborn*. Sir Martin Nourse conceded that what transpired in the case was not fair play. “That is why public policy informs the doctrine.”<sup>100</sup>

*Liles v Terry*<sup>101</sup> was an early case that discussed the public policy basis. The case concerned an elderly lady who made an assignment of property in favour of her niece, who was married to the acting solicitor. Kay LJ expressed the rule as:

... a rule of public policy of great importance that, while a person in consequence of a confidential relation between them, that other person cannot accept from him a gift of any kind, unless it is shewn to have been made with competent independent advice, which I take to mean independent advice of a professional nature.<sup>102</sup>

Subsequent cases have treated the public policy basis to be analogous to abuse of confidence cases, or a breach of a relationship of trust and confidence.<sup>103</sup> These relationships have a fiduciary element, and

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<sup>94</sup> *Randall v Randall* [2004] EWHC 2258 (Ch).

<sup>95</sup> *Ibid*, per Edward Bartley Jones QC, para 39.

<sup>96</sup> *Ibid*, per Edward Bartley Jones QC, para 55.

<sup>97</sup> *Allcard v Skinner* (1885) 36 Ch D 145, per Cotton LJ, p 171.

<sup>98</sup> *Ibid*, per Lindley LJ, p 183.

<sup>99</sup> *Ibid*, per Bowen LJ, p 190.

<sup>100</sup> *Hammond v Osborn* [2002] EWCA Civ 885, para 65.

<sup>101</sup> [1895] 2 QB 679.

<sup>102</sup> *Ibid*, per Kay LJ, p 685.

are designed to protect a class of persons who are at risk of others taking advantage of them.<sup>104</sup> Similar views were expressed in *Lloyds Bank Ltd v Bundy*,<sup>105</sup> that the public policy ground is based on the premise that once a special relationship is shown to exist, then the benefit that a fiduciary obtains from a transaction cannot be retained unless it is shown that fiduciary care has been fulfilled. The public policy basis of undue influence has also been explained as necessary to protect certain relationships, “or points within relationships,”<sup>106</sup> that transcend “mere commercialism.”<sup>107</sup>

Such a case is *Norberg v Wynrib*.<sup>108</sup> The case involved an elderly doctor, Dr Wynrib, and his patient Ms Norberg, who was addicted to painkillers. Dr Wynrib knew of her addiction and suggested a sex-for-drugs arrangement. Ms Norberg brought an action against Dr Wynrib for sexual assault, negligence, breach of fiduciary duty and breach of contract. La Forest J<sup>109</sup> held that the sexual assault in this case fell under the tort of battery. In discussing the tort of battery, La Forest J also considered the nature of consent, consent being a defence to battery, and whether principles of undue influence could be applied to negate the consent to the battery. The defence argued that Ms Norberg consented to the battery because she wanted the drugs, and she played on Dr Wynrib’s loneliness. It was held that it was immaterial to decide whether the basis for relief lies in the inequality of bargaining power,<sup>110</sup> or the basis that the weaker party to a contract retains the ability to give consent, but the law provides relief

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<sup>103</sup> *Goldsworthy v Brickell* [1987] Ch 378, per Nourse LJ, p 400; *Tolhurst v Smith* [1994] EMLR 508 (High Court, Chancery Division), per Chadwick J, p 533; *In Re Craig, Decd.* [1971] Ch 95, per Ungood-Thomas J, p 104; *Maguire v Makaronis* (1997) 144 ALR 729, per Brennan CJ, Gaudron, McHugh and Gummow JJ, p 738; *Johnson v Buttress* (1936) 56 CLR 113, per Latham CJ, p 123, and McTiernan J, p 143; and *Louth v Diprose* (1992) 110 ALR 1, per Brennan J, p 6.

See also M Halliwell, *Equity & Good Conscience in a Contemporary Context* (1997), p 57.

<sup>104</sup> M Pawlowski and J Brown, *Undue Influence and the Family Home*, (2002), p 89; and P Ridge, ‘Uncertainties Surrounding Undue Influence: Its Formulation, Application, and Relationship to Other Doctrines’ [2003] NZ Law Review 329.

However, others have argued that breach of fiduciary duty and undue influence are two distinct grounds for relief, P Birks, and N Y Chin, ‘On the Nature of Undue Influence’ in J Beatson and D Friedmann (ed), *Good Faith and Fault in Commercial Law* (1995), p 92; P D Finn, ‘The Fiduciary Principle’ in T G Youden (ed), *Equity, Fiduciaries and Trusts* (1989), p 42-46; and J Cartwright, *Unequal Bargaining* (1991), at p 179 where he warns against using the fiduciary label in the context of undue influence.

<sup>105</sup> [1975] QB 326, per Sir Eric Sachs, p 342.

<sup>106</sup> D Tiplady, ‘The Limits of Undue Influence’ 48 Mod L Rev 579 1985, p 582.

<sup>107</sup> *Ibid.*

<sup>108</sup> 1992 CarswellBC 155, 92 DLR (4<sup>th</sup>) 449, Supreme Court of Canada.

<sup>109</sup> With Gonthier and Cory JJ concurring.

<sup>110</sup> La Forest J centered his consideration of the doctrine of undue influence on Lord Denning MR’s formulation of “inequality of bargaining power” in *Lloyds Bank Ltd v Bundy*. The doctrine of inequality of bargaining power has been rejected by the House of Lords in *Morgan*, and has little judicial support in England, G H Treitel, *The Law of Contract* (11<sup>th</sup> ed 2003), p 421. However, in Canada, the principle has “enjoyed greater esteem and employment”, and seen to be interchangeable, or even an updated version of unconscionable bargains, G H L Fridman, *The Law of Contract in Canada* (5<sup>th</sup> ed, 2006), p 324, and 328.

See also discussion by B M McLachlin ‘The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: A Canadian Perspective’ in D W M Waters (ed), *Equity, Fiduciaries and Trusts* (1993), p 45; and *Campbell v Campbell* (1990) 83 Nfld & PIER 340.

on the basis of public policy. Ultimately it was held that the grounds of public policy negated the legal effectiveness of the contract.<sup>111</sup>

The leading Supreme Court of Canada case of *Goodman Estate v Geffen*<sup>112</sup> is able to provide some guidance in this debate. In her discussion on undue influence, Wilson J<sup>113</sup> addressed the issue of what purpose the doctrine of undue influence serves. She was clearly of the opinion that undue influence was designed to curb abuse. However, she further subdivided the classes of cases under the abuse theory into two further classes; the first is “that the doctrine of undue influence was meant only to curtail abuses of trust or confidence which resulted in significant and measurable disadvantage to the person influenced.”<sup>114</sup> This was termed “result focused approach.”<sup>115</sup> The second is that “the doctrine of undue influence aims not at preventing “bad bargains” but at addressing abuses of trust, confidence for power”;<sup>116</sup> that is, to “control the *process* rather than the *outcome* of transactions.”<sup>117</sup> Given that undue influence may apply to a wide variety of transactions; from pure gifts to classic contracts, it was held that neither approach fully captured the true purport of undue influence. The decision as to which approach to adopt was left open, but in any event, it must be flexible enough to encompass a wide variety of transactions. It is the second class that according to Wilson J, encompasses the public policy argument. It involves the abuse of the process. This is consistent with the defendant based approach which focuses on the mechanics of how the transaction was entered into, or “procedural unfairness”,<sup>118</sup> rather than the fairness of the contractual terms, or any “contractual imbalances.”<sup>119</sup>

## 2. Efficacy of Public Policy

It is submitted that while the public policy ground may represent an easy and tidy option to judges to decide undue influence cases without being drawn into the debate, it creates an unsatisfactory situation as far as precedent is concerned. The principle has been described as “vague,”<sup>120</sup> and it will allow judges to give a remedy where they see fit without recourse to fundamental underlying principles. The

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<sup>111</sup> McLachlin J (with L’Heureux-Dube J concurring) criticised La Forest J for forcing the case into “the ill-fitting molds of contract and tort” (para 96), and for using the contractual doctrine of undue influence to negate the consent that Ms Norberg gave. Instead McLachlin J characterized the relationship as fiduciary.

<sup>112</sup> 81 DLR (4<sup>th</sup>) 211, [1991] 2 SCR 353.

<sup>113</sup> With Cory J concurring.

<sup>114</sup> Above n 112, per Wilson J, para 38.

<sup>115</sup> Ibid para 40. La Forest J (with McLachlin J concurring) also declined to choose between the two opposing options, para 86.

<sup>116</sup> Above n 112, per Wilson J, para 38.

<sup>117</sup> Ibid.

<sup>118</sup> M Pawlowski and J Brown, *Undue Influence and the Family Home*, (2002), p 8.

<sup>119</sup> Ibid.

<sup>120</sup> *National Westminster Bank plc v Morgan* [1985] 1 All ER 821, per Lord Scarman, p 828; *Engle v Carswell* 1995 ACWSJ LEXIS 46937, 1995 ACWSJ 632249, 53 ACWS (3d) 1282, (cited Lexis.com at 20 October 2006), per Miller J, p \*44.



danger in failing to adhere to principles will invite judges to simply conclude that undue influence will be recognised when present, that is, they will know it when they see it. Tipping J in *Bowkett v Action Finance Ltd*<sup>121</sup> held that “even a Court of equity cannot in my respectful view throw up its hands and say: I don’t know how to describe the beast but I will tell you when I see one.”<sup>122</sup>

While public policy arguments have enjoyed a recent resurgence, the approach is not without its critics. In *National Westminster Bank plc v Morgan*<sup>123</sup> Lord Scarman considered the public policy arguments from *Allcard v Skinner* but held that in addition to establishing a relationship of influence, there must also be evidence that the transaction was wrongful in the sense that one party took advantage of the other party. Lord Scarman also criticised Sir Eric Sachs in *Lloyds Bank Ltd v Bundy*<sup>124</sup> for his acceptance of the public policy principle<sup>125</sup> without also addressing the issue as to whether the transaction was wrongful in the sense that one party must be victimised by the other party.<sup>126</sup> This was cited with approval in *CIBC Mortgages v Pitt*.<sup>127</sup> More recently, the public policy approach was rejected in *Nel v Kean*.<sup>128</sup>

In *Pao On v Lau Yiu Long*<sup>129</sup> there was discussion regarding public policy in relation to duress. Counsel in the case attempted to argue that if a dominant party threatened to repudiate a pre-existing contractual obligation, this amounts to an abuse of a dominant bargaining position, and is contrary to public policy, even if economic duress cannot be proved.<sup>130</sup> Lord Scarman considered American authorities and concluded a rule based on public policy would be unhelpful because it would create uncertainty in the law. Bargains negotiated at arms length should be upheld unless a party’s consent is vitiated.

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<sup>121</sup> [1992] 1 NZLR 449, p 457.

<sup>122</sup> This is effectively the present situation with regard to the definition of undue influence. Lord Clyde in *Etridge* held that “no Court has ever attempted to define undue influence.’ It is something which can be more easily recognized when found that exhaustively analysed in the abstract.” [2001] 4 All ER 449, per Lord Clyde, p 477. David Tiplady describes such an approach as an “impressionist attitude”, D Tiplady, ‘The Limits of Undue Influence’ 48 Mod L Rev 579 1985, p 580.

<sup>123</sup> [1985] 1 All ER 821.

<sup>124</sup> [1975] QB 326.

<sup>125</sup> It is submitted that while Lord Scarman’s treatment of the public policy principle is correct, his interpretation of Sir Eric Sachs’ approach is not accurate. Sir Eric Sachs cites the public policy discussion from *Allcard v Skinner*, but he does not rely on it. Instead he concludes that “once the special relationship has been shown to exist, no benefit can be retained from the transaction unless it has been positively established that the duty of fiduciary care has been entirely fulfilled”, and in his opinion, does not depend on a wrongful intention by the defendant, *Lloyds Bank Ltd v Bundy* [1975] QB 326, per Sir Eric Sachs, p 342.

<sup>126</sup> *National Westminster Bank plc v Morgan*, above n 123, per Lord Scarman, p 828, and p 830. This was cited with approval in *Shotter v Westpac Banking Corporation* [1988] 2 NZLR 316 per Wylie J, p 334, and *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449, p 457, per Tipping J, p 457.

<sup>127</sup> [1993] 4 All ER 433, per Lord Browne-Wilkinson, p 438.

<sup>128</sup> [2003] EWHC 190 (QB).

<sup>129</sup> [1979] 3 WLR 435.

<sup>130</sup> *Ibid*, per Lord Scarman, p 632.

### 3. Public Policy Conclusion

The benefit of utilising the public policy doctrine is that the concept of public policy “is not static”<sup>131</sup> and can be adapted to reflect society’s prevailing values and mores. If the *Geffen* approach is accepted, the public policy doctrine can be conceptualised as a subset within the wider rubric of the defendant based approach. This is how the defendant based approach can be reconciled with the public policy arguments originating from *Allcard v Skinner*. *Allcard* itself was a case concerned with a gift. A gift is, by its very nature, disadvantageous to the donor. Miss Allcard’s actions were to her disadvantage. The size of the gift required explanation, and there was an obligation on the sisterhood to ensure that Miss Allcard received independent advice and was freed from the influence of her vows when the gift was made. Therefore, one must conclude in the situation of gifts, the wrong has been committed, or alternatively, to restrict public policy arguments only to gifts.

Support for the argument that public policy is a subset of the defendant based approach is evident in *Mutual Finance Ltd v John Wetton & Sons Ltd*,<sup>132</sup> where Porter J was faced with the issue of drawing the distinction between acceptable forms of coercion and persuasion, and unlawful coercion and persuasion. In an attempt to avoid specifically stating the level or type of pressure required, he opted instead to rely on public policy. He held that contracts may be invalid because its substance or purpose may be contrary to public policy. In a similar vein, he held that contracts may be “invalid because it is contrary to public policy in respect of the coercive method of its procurement.”<sup>133</sup> Therefore, despite relying on public policy, there is still an element of coercion on the part of the defendant.

There is academic support for the view that public policy and the defendant based approach are related. Bigwood argues that public policy and victimisation are not incompatible with one another. Public policy is in effect the exemplification of victimisation. “It is against public policy to victimize the very person whose interests one is duty bound loyally to serve and protect.”<sup>134</sup> Ultimately Bigwood considers that public policy is not “the operative reason for exculpation in this area”:<sup>135</sup>

... although ‘public policy’ explains the ‘presumptive’ effect given to D’s wrongdoing in this context, the exculpatory nature of relief is ultimately founded on bilateral *transactional* considerations, namely, D’s actual (which includes ‘inferred’) exploitation of the special opportunities (to influence or persuade) that he enjoyed in virtue of his ‘fiduciary’ control over P’s will or decision-making in the transaction in question.<sup>136</sup>

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<sup>131</sup> *Chamberlains v Sun Poi Lai* [2006] NZSC 70, SC 19/2005, per Elias CJ, para 2.

<sup>132</sup> [1937] 2 KB 389.

<sup>133</sup> *Ibid*, per Porter J, p 394-5.

<sup>134</sup> Bigwood, R, *Exploitative Contracts* (2003), p 391.

<sup>135</sup> *Ibid* p 401.

<sup>136</sup> *Ibid*.

If public policy is accepted to be the operative reason for the basis of undue influence, then the post-*Etridge* requirement of a transaction that calls for explanation would become superfluous, because it would be against public policy to unduly influence a weaker person even if the transaction did not call for an explanation. Commentators have argued that this would “bring the rationale of undue influence into line with that of other vitiating factors in the formation of contracts”,<sup>137</sup> such as duress, misrepresentation<sup>138</sup> and abuse of confidence.<sup>139</sup> However, it is submitted that such a result is undesirable as duress and misrepresentation requires proof of wrongdoing from the defendant, whereas arguments based on public policy attempt to circumvent the issue.<sup>140</sup> In undue influence terms, the more suspicious the transaction, and the greater the disadvantage, are evidence supporting the exercise of influence.<sup>141</sup> Secondly the abuse of confidence doctrine is a very narrow doctrine, applying only to a limited number of situations. Undue influence applies to wide range of transactions,<sup>142</sup> and it would be undesirable to open the flood gates.

## RECONCILING THE AUTHORITIES

Precedent and academic opinion favour the defendant based approach. However, it fails to address the undeniable tension between the cases that rely on the impaired consent approach. Common sense also supports the defendant based approach. If the plaintiff sided analysis is adopted, then this can create the novel situation where a plaintiff may avoid a transaction even when the defendant has done nothing wrong and may be completely ignorant of the influence he or she exercises over the plaintiff. The defendant’s conduct (or misconduct) must be linked<sup>143</sup> in some way to the “[plaintiff]’s plight.”<sup>144</sup> Bigwood argues that all involuntary agreements<sup>145</sup> have a common thread running through them – they all involve objectionable forms of advantage taking or exploitation.<sup>146</sup>

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<sup>137</sup> M Oldham, ‘Neither a borrower nor a lender be’ – the life of *O’Brien*’ (1995) 7 Child and Family LQ 104, p 109.

<sup>138</sup> Oldham, above n 137; M Pawlowski and J Brown, *Undue Influence and the Family Home*, (2002), p 89.

<sup>139</sup> Oldham, above n 137.

<sup>140</sup> With regard to manifest disadvantage, Lord Hobhouse in *Etridge* held that the concept was evidential. It is relevant to determine whether any issue of abuse could be raised, and to determine whether or not abuse had occurred, p 482.

<sup>141</sup> *Goodman Estate v Geffen* 81 DLR (4<sup>th</sup>) 211, [1991] 2 SCR 353 and *Brandon v Brandon* 2001 WL 454384 (Ont SCJ), [2001] OJ No 2986200, (cited CarswellOnt 2688, Westlaw).

<sup>142</sup> *Goodman Estate v Geffen* 81 DLR (4<sup>th</sup>) 211, [1991] 2 SCR 353, per Wilson J.

<sup>143</sup> See also M D J Conaglen, ‘Duress, Undue Influence, and Unconscionable Bargains – The Theoretical Mesh’ (1999) 18(4) NZULR 509, p 519.

<sup>144</sup> R Bigwood, *Exploitative Contracts* (2003), p 475. Bigwood goes on to argue that if undue influence is wholly plaintiff sided, it affords too much weight to the plaintiff’s bargaining impairment while affording too little weight to the defendant’s contractual freedom and expectation.

<sup>145</sup> Bigwood subdivides involuntary agreements into two categories: the first is defects in the promisor, that is ignorance, mistake, incapacity, drunkenness; and the second is defects brought on by the promisee, that is, fraud and force. R Bigwood, ‘Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation’?’ (1996) 16 Oxford J Legal Stud 503, p 507.

<sup>146</sup> Bigwood, *ibid*.

This begs the question of how to deal with the cases that support the plaintiff sided analysis. How should they be reconciled with the defendant sided analysis? Goff and Jones argue that the defendant should be deemed in equity to be a wrongdoer, or in other words, “their actions are characterised in equity as wrongful.”<sup>147</sup> In effect, the assumption is that abuse has occurred.<sup>148</sup>

It is submitted that the cases can be reconciled by treating them as either cases of passive exploitation,<sup>149</sup> failure to ensure that the plaintiff was independently advised, or failing to ensure that the plaintiff knew exactly what he or she was doing. Failing to do this can constitute evidence of the wrongful conduct necessary to support the finding of undue influence.<sup>150</sup> “Passive exploitation, while seemingly less ‘wicked’, is no less ‘exploitation’, hence no less ‘wrongdoing’ in the eye of equity.”<sup>151</sup>

Scott<sup>152</sup> argues that if *Cheese v Thomas* was to be decided today based on current precedent, (that is in light of *Etridge*) it would be decided differently. However, she suggests *Cheese v Thomas* and *Etridge* are reconcilable, because it could be argued that Mr Thomas failed to ensure that Mr Cheese was independently advised, and this is evidence of the wrongful conduct necessary to conclude that there was undue influence.<sup>153</sup> Similarly in *Niersmans v Pesticcio* the role of the solicitor was found wanting, and the advice given insufficient to allow Bernard to make his own independent decision. In relation to *Hammond, Todd*<sup>154</sup> argues that abuse can occur in circumstances where the defendant has failed to give information or ensure that the plaintiff was properly informed about the transaction. Therefore, Mrs Osborn’s failure to provide Mr Pritler with advice and information could be construed as an abuse of her position of influence. In a later article,<sup>155</sup> Scott argues that this broad approach changes the obligation on the defendant, from a “negative obligation” to refrain from the wrongful conduct to a “positive obligation” to ensure that the plaintiff has independent advice.<sup>156</sup>

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<sup>147</sup> Goff and Jones, *The Law of Restitution* (6<sup>th</sup> ed 2002), at para 11-002.

<sup>148</sup> P Ridge, ‘The Equitable Doctrine of Undue Influence Considered in the Context of Spiritual Influence and Religious Faith: *Allcard v Skinner* Revisited in Australia’ (2003) 26(1) UNSW Law Journal 66, p 74.

<sup>149</sup> R Bigwood, *Exploitative Contracts* (2003), p 465.

<sup>150</sup> See also *In re Brocklehurst’s Estate* [1978] Ch 14, p 41. Bridge LJ gave his view on Cotton J’s statement in *Allcard*. His Honour did not interpret the passage to suggest that undue influence may exist in a case where the conduct of the donee is not open to criticism. Instead, he took the opposite view, “in which positive wrongful conduct is proved affirmatively by evidence with those in which an abuse, which may no doubt consist either of a positive act or an omission to act, is presumed unless the donee proves affirmatively that he has acted with propriety throughout.”

<sup>151</sup> Bigwood, above n 149 p 474.

<sup>152</sup> K N Scott, ‘Evolving Equity and the Presumption of Undue Influence’ (2002) 18 JCL 15, 2002 JCL LEXIS 15 (cited Lexis.com at 10 February 2006) p 12.

<sup>153</sup> *Ibid*, p 14.

<sup>154</sup> S Todd, Burrows, Finn and Todd, *Law of Contract in New Zealand* (3<sup>rd</sup> ed 2007), p 358-9.

<sup>155</sup> K Scott, ‘Taking the “Undue” Out of Presumed Undue Influence?’ [2003] LMCLQ 145.

<sup>156</sup> *Ibid*, p 150. This can be contrasted with a proposed “narrow approach”, p 149. This involves treating actual undue influence and class 2B cases as situations of wrongful conduct. Due to the fiduciary characteristics of class 2A, this would see an imposition of a fiduciary obligation to ensure that the plaintiff made “full, free and informed decision”. Scott

## CONCLUSION

The debate between the philosophical bases of undue influence will continue, despite the weight of authority in favour of the defendant based approach.<sup>157</sup> The analyses all centre on detailed breakdowns of judgments and the words that judges used. The academics who engage in this conduct warn against the practice.<sup>158</sup> Despite all the arguments raised by the academics, they too realise that their arguments are interrelated. Bigwood<sup>159</sup> concedes that any distinction between the debate of impaired consent or wicked exploitation is superficial, and that the concepts are “inextricably linked.”<sup>160</sup> Birks and Chin describe dependence and influence as “two sides of the same coin.”<sup>161</sup> Bigwood describes it as “flipsides of the exploitation coin,”<sup>162</sup> and that:

The practical fact, therefore, is that the question of whether P gave a valid consent (under the plaintiff-sided version of relational undue influence) is virtually indistinguishable from the question of whether D (knowingly) used his special influence over P to (actively) obtain or (passively) receive the impugned benefit.<sup>163</sup>

Even though *Etridge* is interpreted to favour the defendant based approach, Lord Nicholls in his description of undue influence conceded that there are indeed two sides to the doctrine:<sup>164</sup>

Several expressions have been used in an endeavour to encapsulate the essence [of undue influence]: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.<sup>165</sup>

The American case of *Odorizzi v Bloomfield School District*<sup>166</sup> also acknowledges that the concepts are interlinked. In the case, Fleming J held that the elements of undue influence consisted of a combination of elements: the “susceptibility in the servient person and the excessive pressure by the dominating

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concedes that this approach is not without its difficulties. Firstly, cases such as *Hammond* cannot be reconciled under this approach as the relationship between Mr Pritler and Mrs Osborn was not fiduciary in nature. Secondly there will be difficulty in identifying fiduciary relationships.

<sup>157</sup> P Birks, ‘Undue Influence as Wrongful Exploitation’ LQR 2004, 120 (JAN), 34-37, p 36. In this article, Birks welcomes the decision in *Hammond* in support of his arguments and claims “[t]hat the door has not finally banged shut.”

<sup>158</sup> P Birks, and N Y Chin, ‘On the Nature of Undue Influence’ in J Beatson and D Friedmann (ed), *Good Faith and Fault in Commercial Law* (1995), p 78 and 86 and R Bigwood, *Exploitative Contracts* (2003), p 470. Phang argues that: “... whilst it is perfectly logical to analyse given situations from the respective standpoints of the parties concerned, insofar as all the doctrines [undue influence, common law duress, and unconscionability] are concerned, one has to look at the perspectives or standpoints of *all* the parties to the given transaction.” A Phang, ‘Undue Influence Methodology, Sources and Linkages’ [1995] JBL 552, p 569.

<sup>159</sup> R Bigwood, ‘Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation’?’ (1996) 16 Oxford J Legal Stud 503.

<sup>160</sup> Ibid p 504.

<sup>161</sup> P Birks, and N Y Chin, above n 158 p 86.

<sup>162</sup> R Bigwood, *Exploitative Contracts* (2003), p 472.

<sup>163</sup> Ibid p 478.

<sup>164</sup> See L Ho, ‘Undue Influence: When and How It Matters to Banks and Solicitors’ [2002] Sing J Legal Stud 617; F R Burns, ‘Undue Influence Inter Vivos and the Elderly’ 26 Melbourne ULR 499; and F R Burns, ‘The elderly and undue influence inter vivos’ 23 Legal Stud 251 2003. These authors maintain that *Etridge* does not provide any definitive statement as to whether undue influence is plaintiff or defendant based.

<sup>165</sup> *Royal Bank of Scotland v Etridge (No. 2)* [2001] 4 All ER 449, per Lord Nicholls, p 458. N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 7-007 cites *Etridge* as supporting both the “complainant-sided and defendant-sided” approach, and argues that both elements must be present. This approach to establishing undue influence was applied by William Young J in *Hogan v Commercial Factors Limited* [2006] 3 NZLR 618.

<sup>166</sup> 246 Cal.App.2d 123, 54 Cal.Rptr. 533, District Court of Appeal, California.

person.”<sup>167</sup> More recently in New Zealand Willy J cited Birks and Chin with approval in *McNicholl v Ter Veer*.<sup>168</sup> He acknowledged that there needed to be some degree of reduced autonomy on the part of the influenced party, and a corresponding degree of control or ascendancy on the part of the stronger party.

Given the latest authorities on this issue, it appears that Judges are reluctant to be drawn into the philosophical debate, and are content to rely on public policy. Conceptually public policy is part of the defendant based approach. Use of words such as ‘wicked exploitation’<sup>169</sup> and ‘wrongdoings’ should be abandoned as this often confuses the issue and clouds the focus of inquiry. While in the majority of cases the defendant has engaged in some sort of wrongdoing, in other cases the defendant has often done nothing explicitly wrong, but has simply passively accepted the benefits conferred to him or her by the plaintiff. This is enough to support a claim of undue influence, but the conduct cannot be regarded as “wicked.” In other situations, the defendant may have done nothing wrong, and may have even acted with good intentions, but this does not mean that the defendant did not exercise an influence over the plaintiff.

Ultimately, the best approach is to “avoid epithets”<sup>170</sup> altogether, however if a term is required, then the conduct should be described as unconscientious;<sup>171</sup> or, in a longer form, (so as to not confuse it with the doctrine of unconscionability), conduct by the defendant exercised without a clear conscience. This would encompass passive exploitation cases such as *Hammond v Osborn*. While Mrs Osborn was described as having done nothing wrong, her conduct could not be described as wholly honest. After Mr Pritler’s death, she tried to “cover up both her involvement in Mr Pritler’s affairs and the gift he had made to her.”<sup>172</sup> Similarly in *Padgham v Rochelle & Searle*<sup>173</sup> the son who was found to have exercised undue influence on his father was uneasy and embarrassed about the agreement he entered into. The agreement was clearly acting on his conscience after his father’s death.

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<sup>167</sup> *Odorizzi v Bloomfield School District* 246 Cal.App.2d 123, 54 Cal.Rptr. 533, per Fleming J, p 131.

<sup>168</sup> [2001] DCR 168.

<sup>169</sup> R Bigwood, ‘Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation’?’ (1996) 16 Oxford J Legal Stud 503. Exploitation may not appear ‘wicked’ in any sense of the word, it may simply be a passive exploitation, p 512.

<sup>170</sup> *Nel v Kean* [2003] EWHC 190 (QB), per Simon J, para 86.

<sup>171</sup> Richardson J in *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157, at p 165 also talked about the stronger party gaining an unfair advantage by the unconscientious use of power. Similarly, Dixon J in *Johnson v Buttress* (1936) 56 CLR 113, at p 134 described the basis of undue influence as “the prevention of an unconscientious use of any special capacity or opportunity that may exist or arise of affecting the alienor’s will or freedom of judgment in reference to such matter.” However, W M C Gummow J, ‘Equity: too successful?’ (2003) 77 ALJ 30 writes that the terms “unconscionable” and “unconscientious” are overused in equity cases.

<sup>172</sup> [2002] EWCA Civ 885, per Martin Nourse, para 21.

<sup>173</sup> 2002 WL 31413932 (cited Westlaw at 31 July 2006). See discussion below p 63.

At the risk of appearing to sit on the fence, it may be unnecessary or undesirable to reconcile the two approaches.<sup>174</sup> It can be accepted that undue influence is a doctrine that encompasses both themes: it “respond[s] to vices which occur in relationships in which an ascendancy or influence is acquired, and dependence or trust conceded.”<sup>175</sup> Simply because the defendant based approach can account for the majority of cases does not mean that the plaintiff based approach should be discounted. This is particularly so when one considers the methods utilised to rebut the evidential presumption of undue influence. It is this uniqueness to the doctrine of undue influence that may indicate that it should not be merged with any other doctrines, such as duress or unconscionability.

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<sup>174</sup> See also discussion by P D Finn, ‘The Fiduciary Principle’ in T G Youden (ed), *Equity, Fiduciaries and Trusts* (1989), at p 45.

<sup>175</sup> *Ibid.*

**CHAPTER 3**

**THE EVOLUTION OF  
UNDUE INFLUENCE**



## THE CONCEPT OF UNDUE INFLUENCE

The concept of undue influence is well established. It is:

... the gaining of an unfair advantage by an unconscientious use of power by a stronger party against a weaker in the form of some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by the stronger party.<sup>176</sup>

Although the general concept is well established, pinning down a definition of undue influence or the precise limits of the court's jurisdiction is much more difficult. In the oft cited passage from Lord Scarman in *National Westminster Bank plc v Morgan*<sup>177</sup> “[t]his is the world of doctrine, not of neat and tidy rules.”

The starting point for any discussion on undue influence must begin with *Allcard v Skinner*.<sup>178</sup>

Following *Allcard* significant developments in the law of undue influence came in *Barclays Bank Plc v O'Brien*<sup>179</sup> and the requirement to show that there is manifest disadvantage to the weaker party.<sup>180</sup> The most recent development came in the House of Lords decision, *Royal Bank of Scotland v Etridge (No 2)*.<sup>181</sup>

## THE PRE-ETRIDGE CLASSES OF UNDUE INFLUENCE

The two forms of undue influence can be traced back to *Allcard v Skinner*.<sup>182</sup> In *Allcard*, Cotton LJ held that undue influence could be established by proving that “the gift was the result of influence expressly used by the donee”,<sup>183</sup> or, where the relations between the donor and donee was such as to raise a presumption that the donee had influence over the donor.<sup>184</sup> The two forms became more commonly known as actual undue influence and presumed undue influence. In a broad sense, the distinction between the two forms of influence was that in the case of actual undue influence, something was “done to twist the mind of the donor.”<sup>185</sup> In the case of presumed undue influence, the influence derives from the “relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage.”<sup>186</sup>

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<sup>176</sup> *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157, p 165.

<sup>177</sup> [1985] 1 All ER 821, per Lord Scarman, p 831.

<sup>178</sup> (1885) 36 Ch D 145.

<sup>179</sup> [1993] 4 All ER 417.

<sup>180</sup> S Todd, Burrows, Finn and Todd, *Law of Contract in New Zealand* (3<sup>rd</sup> ed 2007), p 351.

<sup>181</sup> [2001] 4 All ER 449.

<sup>182</sup> (1885) 36 Ch D 145.

<sup>183</sup> *Allcard v Skinner* (1885) 36 Ch D 145, per Cotton LJ, at p 171.

<sup>184</sup> *Ibid.*

<sup>185</sup> *Daniel v Drew* [2005] EWCA Civ 507, per Ward LJ, para 31.

<sup>186</sup> *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, per Lord Nicholls, p 458.

Presumed undue influence was developed to plug an “evidential gap”. There were situations where, due to the relationship between the parties, there was a level of dependency and ascendancy present. Unfair advantage was gained by one person over another, without any overt acts of persuasion.<sup>187</sup> In *Allcard v Skinner* it was held that in these cases the burden is placed on the donee to prove that she has not abused her position and to show that the gift was not brought about by any undue influence on her part.<sup>188</sup>

Traditionally “presumed” undue influence was further subdivided into “classes.” In *Bank of Credit and Commerce International SA v Aboody*<sup>189</sup> Slade LJ adopted the classification class 1 for actual undue influence, and class 2 for presumed undue influence.<sup>190</sup> Class 2 was further subdivided into class 2A for “well-established categories of relationships,”<sup>191</sup> where the relationship gave rise to the presumption. However, a “logical extrapolation”<sup>192</sup> was made that there should be class 2B to cover those cases that did not fall into class 2A, but where it was proved that one party had in fact reposed trust and confidence in the other.<sup>193</sup> Slade LJ made it clear that the presumption was merely a ‘tool’ to be used to overcome evidential difficulties.<sup>194</sup> It was conceded that the difference between class 1 and class 2B was slender.

*Barclays Bank plc v O’Brien*<sup>195</sup> adopted the classification laid down in *Aboody*.<sup>196</sup> With regard to “Class 2” it was held to be unnecessary to produce evidence that actual undue influence was exerted. The complainant need only show that there was a relationship of trust and confidence between the parties so that it was fair to presume that the wrongdoer abused the relationship and that procured the transaction. The burden then shifted to the wrongdoer to prove that the complainant entered into the impugned transaction freely.

The relationship of trust and confidence was established in one of two ways. The first was by showing a relationship within “class 2A”, relationships where the law presumed that undue influence had been exercised. These were:<sup>197</sup> trustee and cestui que trust, guardian and ward, parent and child, religious

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<sup>187</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 9-002.

<sup>188</sup> *Allcard v Skinner* (1885) 36 Ch D 145, per Lindley LJ p 181.

<sup>189</sup> [1992] 4 All ER 955.

<sup>190</sup> *Bank of Credit and Commerce International SA v Aboody* [1992] 4 All ER 955 per Slade LJ p 964.

<sup>191</sup> *Ibid.*

<sup>192</sup> *Royal Bank of Scotland v Etridge (No. 2)* [2001] 4 All ER 449, per Lord Hobhouse p 482-483.

<sup>193</sup> *Ibid.*

<sup>194</sup> Above n 189, p 964.

<sup>195</sup> [1993] 4 All ER 417.

<sup>196</sup> Above n 189.

<sup>197</sup> S Todd, Burrows, Finn & Todd, *Law of Contract in New Zealand*, (3<sup>rd</sup> ed 2007), p 351-2.

adviser and disciple, doctor and patient, and solicitor and client.<sup>198</sup> These relationships established an irrebuttable presumption of a relationship of trust and confidence.<sup>199</sup> There was no presumption between husband and wife,<sup>200</sup> employer over employee, or child over parent.

The second route was to prove a relationship where the complainant generally reposed trust and confidence in the wrongdoer. Upon proof of such a relationship the presumption that undue influence had been exercised was established.<sup>201</sup> Unless there was evidence disproving the undue influence, the complainant would succeed by merely proving the relationship, “without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence.”<sup>202</sup> This was labelled “class 2B”.

## 1. The Presumption of What?

The phrase “presumption of undue influence” itself contains an inherent ambiguity in that “it can mean either that such influence is presumed to *exist* or that it is presumed to be *exercised*.”<sup>203</sup> Over time this led to a misconception over the nature of the presumption of undue influence. In relation to class 2A, the misconception was that there were specific types of relationships that automatically gave rise to a presumption of *undue influence*. That is, proving the relationship gave rise to the presumption that one party had influence over another and that undue influence had been exercised.<sup>204</sup> This misconception is illustrated in cases such as *Aboody* and *O’Brien*.

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<sup>198</sup> A presumption in favour of engaged couples has been raised in a number of cases, see *Louth v Diprose* (1992) 110 ALR 1, per Brennan J, p 7; and *Goodman Estate v Geffen* 81 DLR (4<sup>th</sup>) 211, [1991] 2 SCR 353, per Wilson J, para 29. However, the value of this presumption has been doubted, and justified as reflecting the values of society in earlier times, see *Engle v Carswell* 1995 ACWSJ LEXIS 46937, 1995 ACWSJ 632249, 53 ACWS (3d) 1282, (cited Lexis.com at 20 October 2006), per Miller J, para \*\*95; and P Vout, (ed and Current Updating Author), *Unconscionable Conduct The Laws of Australia* (2006), para 35.8:31.

The difficulty of recognising a presumption in engaged couples is illustrated in *Bradley v Crittenden* [1932] SCR 552, [1932] 3 DLR 193 (cited 1932 CarswellAlta 75 Westlaw at 11 October 2006) it was held by a majority of 3/2 that a presumption of undue influence does not extend to relationships of pure friendship, even if it is one of deep affection, and when one reposes trust and confidence in the other (that is, a relationship akin to an engaged couple). The minority relied on public policy grounds and held that a presumption was raised. The donor and donee were not formally engaged, but the donor was greatly in love with the donee and wished to make her his wife. The lack of formal engagement was not material.

<sup>199</sup> *Royal Bank of Scotland v Etridge (No 2)* [1998] 4 All ER 705 (Court of Appeal), per Stuart-Smith LJ, para 6.

<sup>200</sup> More recently in *Engle v Carswell* above n 198, Miller J held that as there is no presumption of influence between husband and wife, there should be no presumption where the relationship is a “common law” one, p \*50.

<sup>201</sup> G H Treitel, *The Law of Contract* (11<sup>th</sup> ed 2003), p 414-5.

<sup>202</sup> *Barclays Bank plc v O’Brien* [1993] 4 All ER 417 per Lord Browne-Wilkinson, p 423.

<sup>203</sup> Treitel, above n 201, p 409.

<sup>204</sup> N Enonchong, ‘Presumed Undue Influence: Continuing Misconceptions’ LQR 2005, 121 (Jan), 29-33, p 29; N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 10-004.

In relation to class 2B, the misconception was that proof of the de facto existence of a relationship of trust and confidence raised the presumption of undue influence. If there was no evidence to disprove the undue influence, then the complainant succeeded, without having to prove that actual undue influence was exercised, or that there had been any abuse of the trust and confidence reposed.<sup>205</sup>

The misconception that the law had developed into was illustrated by Stuart-Smith LJ, in the Court of Appeal in *Royal Bank of Scotland v Etridge (No 2)*<sup>206</sup> where his Honour held that actual undue influence and presumed undue influence are distinct alternatives to each other, and that it was incorrect to conceptualise the difference between the classes as merely a difference “by which the exercise of undue influence is proved.”<sup>207</sup> It was held that Mr Etridge did not exercise actual undue influence on Mrs Etridge, yet there was presumed undue influence within class 2B.<sup>208</sup> This was purely based on the fact that Mrs Etridge reposed trust and confidence in Mr Etridge as she would sign anything put in front of her by her husband, without reading or questioning it. There was no consideration as to whether that trust and confidence was abused in any way.<sup>209</sup>

A further example was *Dailey v Dailey*.<sup>210</sup> *Dailey* was heard at the Court of Appeal before *Etridge* was decided and at the Privy Council after *Etridge* was decided. The case concerned Mr and Mrs Dailey who were in divorce proceedings. Mrs Dailey transferred matrimonial property from their joint names, into Mr Dailey’s sole name for the consideration of \$100,000. She later claimed that she did so because of the undue influence of her husband. The trial judge held that no undue influence was exercised in relation to the transfer of the property. This was reversed by the Court of Appeal. The Court of Appeal applied *O’Brien* and held that a relationship of trust and confidence had been proved, and therefore, there was a presumption of undue influence. Proof of the relationship was taken as proof that the relationship was abused. As Mr Dailey could not prove that the transaction was at arms length, and that she had independent advice, he failed to rebut the presumption. This finding was reversed by the Privy

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<sup>205</sup> *Barclays Bank plc v O’Brien* [1993] 4 All ER 417, per Lord Browne-Wilkinson, p 423.

<sup>206</sup> *Royal Bank of Scotland v Etridge (No 2)* Court of Appeal [1998] 4 All ER 705. See also D Sim, ‘Burden of Proof in Undue Influence: Common Law and Codes on Collision Course’, 2003 EvPro 7(221) (cited Lexis.com at 10 February 2006), also analysed the pre-*Etridge* law as falling into three categories of undue influence.

<sup>207</sup> [1998] 4 All ER 705, per Stuart-Smith LJ, p 711-712.

<sup>208</sup> This approach was also followed in *National Westminster Bank plc v Gill* [1988] 4 All ER 705.

<sup>209</sup> See also *National Westminster Bank plc v Gill* [1988] 4 All ER 705, this was one of the cases that formed the eight appeals in *Etridge*. It was held that the claim of actual undue influence failed, yet the case under the presumption of undue influence under class 2B succeeded.

<sup>210</sup> 2003 WL 22187642, [2003] UKPC 65.

Council, which applied *Etridge* principles. It was held that the evidence showed that before the marriage broke down, there was a sound working partnership between the parties, and that Mrs Dailey was not so compliant to Mr Dailey that she could not bring an independent mind to transactions.

## 2. Manifest Disadvantage

### (a) History

Proof that the defendant had an influence over the plaintiff was insufficient in itself to succeed in proving undue influence. Manifest disadvantage had to be shown. The origins of manifest disadvantage can be traced back to *Allcard v Skinner*<sup>211</sup> where Lindley LJ considered the size of the gift. In the case of small gifts, even if a confidential relationship exists between the parties, actual undue influence must be proved. In the case of larger gifts that cannot “be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift.”<sup>212</sup> Therefore, if an unaccountable gift could be shown, the burden would shift to the donee to prove emancipation of the donor from the influence.

It was Lord Scarman in *National Westminster Bank plc v Morgan*<sup>213</sup> that coined the phrase “manifest disadvantage”. His Lordship held that there was no reported authority where a transaction was set aside that was not manifestly disadvantageous to the person influenced.<sup>214</sup> The concept was not limited to gifts, but was held to apply to inequitable agreements, ‘immoderate or irrational’ transactions and sales at undervalue.<sup>215</sup> It was held that the disadvantage must be serious enough to require evidence to rebut the presumption that the transaction was procured by the exercise of undue influence. *Morgan* has been criticised for extending the requirement for unfair advantage into manifest disadvantage,<sup>216</sup> and for relying on *Poosathurai v Kannappa Chettiar*.<sup>217</sup> *Poosathurai* was a case based on s16 of the Indian Contracts Act 1872, which statutorily required manifest disadvantage.<sup>218</sup> Subsequent authorities have been criticised for relying on *Morgan* because the comments in *Morgan* are strictly *obiter*.<sup>219</sup>

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<sup>211</sup> (1885) 36 Ch D 145.

<sup>212</sup> *Ibid*, per Lindley LJ, at p 185.

<sup>213</sup> [1985] 1 All ER 821.

<sup>214</sup> Lord Scarman was incorrect when he stated that there was no reported authority that did not require manifest disadvantage to be shown. In *Lloyds Bank Ltd v Bundy* [1975] QB 326 there was no discussion about any need to show manifest disadvantage. In *Wright v Carter* [1903] 1 Ch 27 it was held that any questions as to the fairness (or manifest disadvantage) of the transaction was not relevant to raise the presumption, but was relevant when considering whether the presumption had been rebutted.

<sup>215</sup> Above n 213, per Lord Scarman, p 827.

<sup>216</sup> *Barclays Bank plc v Coleman* [2000] 1 All ER 385, per Nourse LJ, p 389.

<sup>217</sup> (1919-1920) L.R. 47 IAR 1920 PC 65.

<sup>218</sup> *Barclays Bank plc v Coleman* [2000] 1 All ER 385, per Nourse LJ, p 389; A Phang, ‘Undue Influence Methodology, Sources and Linkages’ [1995] JBL 552; A Phang, ‘Vitiating Factors in Contract Law – The Interaction of Theory and

*Bank of Credit and Commerce International SA v Aboody*<sup>220</sup> took the requirement for manifest disadvantage even further, and held that manifest disadvantage should be proved even in cases of actual undue influence. In the case it was held that Mrs Aboody was subjected to the actual undue influence of Mr Aboody. However, she could not show that the transactions were to her manifest disadvantage, so her appeal failed. The requirement to prove manifest disadvantage in cases of actual and presumed undue influence was adopted into New Zealand by the Court of Appeal in *Contractors Bonding Ltd v Snee*.<sup>221</sup>

The requirement to prove manifest disadvantage in cases of actual undue influence was later overruled by *CIBC Mortgages plc v Pitt*.<sup>222</sup> It was held unnecessary to prove manifest disadvantage in cases of actual undue influence. If actual undue influence was proved, then the plaintiff was entitled to have the transaction set aside as of right, since actual undue influence is a species of fraud. *Pitt* also signalled that the concept of manifest disadvantage would have to be reconsidered in the future, especially in relation to abuse of confidence cases.<sup>223</sup>

### **(b) Meaning of Manifest Disadvantage**

What is the meaning of manifest disadvantage? Lord Scarman in *Morgan* did not give a definition of manifest disadvantage but described it as “a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence.”<sup>224</sup>

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Practice’ 10 SAclJ 1 (1998), p 42; A Phang, and H Tjio, ‘The Uncertain Boundaries of Undue Influence’ (2002) 2 (May) LMCLQ 231; and A M N Ayus, ‘Proof of Undue Influence: An Overview of Trends and Issues in its Development’, [2004] 4 MLJA 52.

Yaakub and McGee argue that reliance on *Poosathurai* by the House of Lords in *Morgan* was not incorrect. The House was free to consider the matter from first principles, and did not solely rely on the Indian Statute. Lord Scarman considered other English authorities concerning manifest disadvantage. Further, the Indian Statute was intended to reflect English law as it was. N I Yaakub and A McGee, ‘Undue Influence in Bank-Lending Transactions – Confusions Continue’ [2007] JIBLR 394, p 402-3.

<sup>219</sup> It may be recalled that Mrs Morgan’s relationship with the bank manager was held to have not progressed beyond a normal banking relationship. Therefore, any further comments made in relation to manifest disadvantage did not form part of the ratio decidendi of the case. B Dale, ‘Undue Influence and Manifest Disadvantage’ Conv PL 1998, Nov-Dec 441-445 (cited Westlaw at 15 August 2006); and C Callaghan, ‘Manifest disadvantage in undue influence: An analysis of its role and necessity’ 25 VUWLR 25(3) Oct (1995) 289-313, p 298.

<sup>220</sup> [1992] 4 All ER 955.

<sup>221</sup> [1992] 2 NZLR 157. Given recent developments in the law, this is no longer the correct view. See also A Beck, ‘Contract’ 2002 NZ Law Review 81. However, *Snee* was cited with approval in recent cases such as *Gaillard v Kappos* [2002] DCR 16; and *Coon and Hansen v Bull and Taylor* HC AK CIV-2003-404-7240 [1 June 2004].

<sup>222</sup> [1993] 4 All ER 433.

<sup>223</sup> *Ibid*, per Lord Browne-Wilkinson, p 439.

<sup>224</sup> *National Westminster Bank plc v Morgan* [1985] 1 All ER 821, per Lord Scarman, p 827.

Slade LJ in *Aboody* endorsed the meaning used by the trial judge:<sup>225</sup>

I regard “victimization” (the word used only by Lindley LJ) and “unfair advantage” (the words used by Lord Scarman) to be examples of the creation of a disadvantage and I would hold that a disadvantage would be a manifest disadvantage if it would have been obvious as such to any independent and reasonable persons who considered the transaction at the time with knowledge of all the relevant facts.

Slade LJ went on to add that the beneficial and detrimental features of the transaction needed to be weighed up, and that manifest disadvantage must be obvious. The question was to be answered by balancing “two factors, namely (a) the seriousness of the risk of enforcement to the giver in practical terms, and (b) the benefits gained by the giver in accepting the risk.”<sup>226</sup>

In the case of a gift, manifest disadvantage was not difficult to establish.<sup>227</sup> In other cases it was much more difficult. Slade LJ described a hypothetical case:

...of an old lady induced by her solicitor under strong pressure to sell him a large and inconvenient family home at full market value. Manifest disadvantage might be difficult to demonstrate in such a case. But, as a matter of principle, should she be left without any remedy?<sup>228</sup>

His Honour felt that the answer to that question from a solicitor/client relationship was that she would have no remedy under the law of undue influence. However, a remedy would be available under abuse of confidence doctrine. The position of a person relying on the abuse of confidence line of authority was considered by His Honour to be much stronger than one who relied on undue influence.<sup>229</sup>

It is submitted that Slade LJ’s view placed a purely monetary definition on manifest disadvantage. If the house had sentimental value to the old woman, then the transaction would be to her manifest disadvantage because she would not have sold the house had the pressure not been applied to her. Even if the weaker party received adequate consideration, she may have wanted to retain the property.<sup>230</sup>

In *Cheese v Thomas*<sup>231</sup> the Court of Appeal took a more “relaxed”<sup>232</sup> attitude to manifest disadvantage and took into account other factors beyond the monetary element. In assessing whether the transaction was manifestly disadvantageous to Mr Cheese, Sir Donald Nicholls VC held that the drawbacks outweighed the benefits. The drawbacks were that: all his capital was tied up in the house, he could not

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<sup>225</sup> *Bank of Credit and Commerce International SA v Aboody* [1992] 4 All ER 955, per Slade LJ p 974.

<sup>226</sup> *Ibid.*

<sup>227</sup> *Ibid* p 971.

<sup>228</sup> *Ibid.*

<sup>229</sup> Slade LJ made the distinction between undue influence, and cases involving abuse of confidence. Abuse of confidence is an equitable jurisdiction of the court which allows a commercial transaction to be set aside even though no manifest disadvantage has been shown. It was conceded that the doctrine of abuse of confidence was limited in application because the relationships that it has been applied to were limited to that of trustee and beneficiary, principal and agent, solicitor and client and of persons in similar positions, *Ibid*, p 973. This reasoning was approved in *Pitt*.

<sup>230</sup> P Vout, (ed and Current Updating Author), *Unconscionable Conduct The Laws of Australia* (2006) para 35.8:11. See also *Khan v Khan* [2004] NSWSC 1189.

<sup>231</sup> [1994] 1 All ER 35. See discussion above p 12-3.

<sup>232</sup> M Chen-Wishart, ‘Loss Sharing, Undue Influence and Manifest Disadvantage’ LQR 1994 110(Apr) 173-178, p 174.

choose to live elsewhere, he could not compel Mr Thomas to sell the house or return his money, and he would be in financial jeopardy if the mortgage payments were not made.<sup>233</sup>

### **(c) Problems With Manifest Disadvantage**

The requirement that a plaintiff demonstrate manifest disadvantage came under heavy criticism.<sup>234</sup> One of the main criticisms of manifest disadvantage was determining the degree of disadvantage required to constitute “manifest”.<sup>235</sup> In *Barclays Bank plc v Coleman*<sup>236</sup> Nourse LJ criticised the fact that the authorities on this matter “have now got into a very unsatisfactory state, the concept of manifest disadvantage [was] elusive and often difficult to apply to the facts of individual cases.”<sup>237</sup> He felt that it was judicial courtesy that prevented Lord Browne-Wilkinson in *Pitt* from dispensing with manifest disadvantage in cases of presumed undue influence in addition to actual undue influence.

In any event, Nourse LJ had to concede that establishing manifest disadvantage was a requirement, but in effect he lowered the threshold. Manifest disadvantage must be a disadvantage, and it must be “clear and obvious. But that does not mean that it must be large or even medium-sized. Provided it is clear and obvious and more than de minimis the disadvantage may be small.”<sup>238</sup> The fact that the wife had undertaken a greater financial risk than she could have known was held to be to her manifest disadvantage. *Barclays Bank v Coleman* set the stage for reconsideration of the requirement of manifest disadvantage in *Etridge*.

Despite the criticisms of manifest disadvantage as a necessary element in proving undue influence, it does have some place in the law. Stuart-Smith LJ<sup>239</sup> held that establishing manifest disadvantage had dual significance: “(i) it assists the complainant in establishing her claim against the wrongdoer in a case of presumed undue influence; and (ii) it is relevant to the way in which the transaction appears to a third party and thus assists her in establishing that the third party had constructive notice of the impropriety.”<sup>240</sup>

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<sup>233</sup> [1994] 1 All ER 35, p 38.

<sup>234</sup> *Goodman Estate v Geffen* 81 DLR (4<sup>th</sup>) 211, [1991] 2 SCR 353, per Wilson J, para 36.

<sup>235</sup> S M Cretney, ‘Mere Puppets, Folly and Imprudence: Undue Influence for the Twenty First Century’ [1994] RLR 3, p 8.

<sup>236</sup> [2000] 1 All ER 385.

<sup>237</sup> *Ibid* p 397.

<sup>238</sup> *Ibid* p 400.

<sup>239</sup> *Royal Bank of Scotland v Etridge (No2)* [1998] 4 All ER 705 Court of Appeal.

<sup>240</sup> *Ibid*, per Stuart-Smith LJ, para 15.

There has been a divergence in approach to manifest disadvantage in English, Australian and Canadian law. It is enough to note that manifest disadvantage is not a requirement in Australian law, see *Johnson v Buttress* (1936) 56 CLR 113, and *Baburin v Baburin* [1990] 2 QdR 101. In *Johnson v Buttress* Dixon J (p 135) discussed the notion of a “substantial gift of property” in a similar vein to Lindley LJ in *Allcard v Skinner*. It was held that in transactions other than gifts, for example business contracts, then the adequacy of consideration becomes an important question as to the propriety



## THE *ETRIDGE* CASE

In *Royal Bank of Scotland v Etridge (No 2)*<sup>241</sup> the House of Lords decision re-examined the doctrine of undue influence. *Etridge* was a combined appeal of eight cases. Seven of the cases involved wives charging their interests in the family home to secure the business debts of their spouses. The wives contended that the guarantee was signed under the undue influence of their husbands. The eighth case was concerned with a wife suing the solicitor who advised her before she entered into the guarantee.

Lord Nicholls delivered the leading speech with which Lords Bingham, Clyde, Hobhouse and Scott expressly agreed. Lord Nicholls reiterated the starting point for any analysis was the two forms of unacceptable conduct: the first was overt acts of improper pressure or coercion; and the second arose out of a relationship between two parties where one acquired an influence or ascendancy over the other, and then unfair advantage was taken by the stronger party.<sup>242</sup> His Lordship recognised that the law needed to protect these types of “relationship” cases, even when there was no evidence of overt acts of persuasive conduct. The types of relationships referred to were held to be infinitely various, and could not be listed exhaustively. Instead, the question should be “whether one party has reposed trust and confidence in the other.”<sup>243</sup>

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of the business deal. That is, sufficiency of consideration is weighed to determine whether the presumption is rebutted, not to raise the presumption.

There has been limited approval manifest disadvantage in *Farmers’ Co-operative Executors & Trustees Ltd v Perks* (1989) 52 SASR 399 where it held that manifest disadvantage is required in both cases of actual and relational undue influence. However, despite this authority, manifest disadvantage has not “taken root” in Australian law, see P Birks, and N Y Chin, ‘On the Nature of Undue Influence’ in J Beatson and D Friedmann (ed), *Good Faith and Fault in Commercial Law* (1995), p 95; N C Seddon, and M P Ellinghaus, *Cheshire and Fifoot’s Law of Contract* (8<sup>th</sup> Australian ed, 2002), p 677-679; and P Vout, (ed and Current Updating Author), *Unconscionable Conduct The Laws of Australia* (2006) para 35.8:10.

The Canadian approach is illustrated in *Goodman Estate v Geffen* 81 DLR (4<sup>th</sup>) 211, [1991] 2 SCR 353. *Geffen* treated the requirement of manifest disadvantage as applicable only to commercial transactions and not to gifts. Gifts by their very nature are disadvantageous to the giver, and it is enough to establish the presence of a dominant relationship. If manifest disadvantage was a requirement, it will create a limitation on the doctrine of undue influence. However, cases of undue influence in commercial transactions require proof of the required relationship, and proof of manifest disadvantage. Any issues regarding the magnitude of disadvantage are relevant evidence to determine whether the influence was exercised. This is to balance the principle of freedom to contract, and pursuit of self-interest inherent in commercial transactions. See further discussion of the Canadian law in *Coish v Walsh* 2001 NFCA, 203 Nfld & PEIR 226, 610 APR 226, 40 ETR (2d) 204, (cited 2001 CarswellNfld 221, Westlaw).

However, J D McCamus, *Essentials of Canadian Law The Law of Contracts* (2005), p 391-5, argues that the status of manifest disadvantage in Canadian law remains unresolved. He notes that Wilson J’s comments in *Geffen* were strictly obiter, and maintains that it would be more beneficial for Canadian law not to adopt the requirement of manifest disadvantage.

G H L Fridman, *The Law of Contract in Canada* (5<sup>th</sup> ed, 2006), p 316-17 maintains that manifest disadvantage is a requirement of Canadian law.

<sup>241</sup> [2001] 4 All ER 449.

<sup>242</sup> Ibid, per Lord Nicholls p 457.

<sup>243</sup> Ibid, per Lord Nicholls p 458.

Lord Nicholls then went further, and discussed the burden of proof and presumptions of undue influence. He held that the question is one of fact, and the burden of proof rests on the person who claims to have been wronged. The complainant must prove that trust and confidence was placed “in the other party in relation to the management of the complainant’s financial affairs.”<sup>244</sup> Alternatively, the plaintiff may prove a certain type of relationship which the law adopts a “sternly protective attitude” towards. These relationships were in a special class, previously referred to as class 2A. In these cases the law “presumes, irrebuttably, that one party had *influence* over the other. The complainant need not prove he actually reposed trust and confidence in the other party. It is sufficient for him to prove the existence of the type of relationship.”<sup>245</sup> Lord Nicholls noted that in the past, this process became conventionally known as “one in which a presumption of undue influence arises.”<sup>246</sup> However, if a plaintiff succeeds by this route, it is because the plaintiff has succeeded in establishing a case of undue influence:

The court has drawn appropriate inferences of fact upon a balanced consideration of the whole of the evidence at the end of a trial which the burden of proof rested upon the plaintiff. The use, in the course of the trial, of the forensic tool of a shift in the evidential burden of proof should not be permitted to obscure the overall position. These cases are the equitable counterpart of common law cases where the principle of *res ipsa loquitur* is invoked. There is a rebuttable evidential presumption of undue influence.<sup>247</sup>

Lord Nicholls held that this evidential presumption of *undue influence* must be distinguished from the irrebuttable presumption of *influence*. “The irrebuttable presumption relates to the *existence* of the influence, the rebuttable evidential presumption to its *exercise*.”<sup>248</sup>

The second requirement to raise the evidential presumption of undue influence is a transaction that calls for explanation. Lord Nicholls discussed many of the criticisms of manifest disadvantage as an element in proving undue influence. It was a label that was difficult to apply, and had given rise to misunderstanding. He thought that the label was being understood and applied in a way which did not accord with the meaning intended by its creator, Lord Scarman.<sup>249</sup> In straightforward cases, such as a sale at gross undervalue, or a large gift, it was easy to apply. However, in the case of a wife who guaranteed her husband’s business debts, the answer was not so easy. In a “narrow sense” the transaction was to the manifest disadvantage of the wife. She had undertaken a serious financial obligation, and received nothing personally.<sup>250</sup> In a wider sense she would benefit from the transaction,

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<sup>244</sup> *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, per Lord Nicholls p 459.

<sup>245</sup> *Ibid.*

<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid.*

<sup>248</sup> G H Treitel, *The Law of Contract* (11<sup>th</sup> ed 2003), p 412-413. “A rebuttable presumption ... is a rule of law by which, on proof of the basic fact(s), the presumed fact is assumed to exist in the absence of evidence negating (or “rebutting”) its existence.” at p 409.

<sup>249</sup> Above n 244 p 461-462.

<sup>250</sup> *Ibid* p 462.

as “the fortunes of husband and wife are bound up together.”<sup>251</sup> If the husband’s business was successful, then she would benefit financially from that.

Lord Nicholls held that the requirement of manifest disadvantage makes good sense. Otherwise Christmas gifts given by children to their parents could be called into question. Agreements between clients and their solicitors or patients and their doctors to be paid reasonable fees may also be questioned.<sup>252</sup> Further, the nature of the doctrine of undue influence meant that questions of undue influence would not normally arise if the transaction is “innocuous,” or to the advantage of the plaintiff.<sup>253</sup> Despite the role manifest disadvantage has played,<sup>254</sup> it should not be used as a “divining rod” to detect whether a transaction was procured by undue influence or not. It was simply a description of a transaction which could not be explained by reference to the ordinary motives by which people are accustomed to act.<sup>255</sup>

As a consequence, the *label* “manifest disadvantage” was discarded and instead the test of “a transaction that calls for explanation” was adopted. This test was intended to follow more closely the test laid down in *Allcard* and then adopted in *Morgan*. In *Allcard v Skinner* a questionable transaction was one that “cannot be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary men act”. The test extracted from *Morgan* was that “it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the parties’ relationship, it was procured by the exercise of undue influence.”<sup>256</sup> Lord Nicholls reinforced *Pitt* and held that proving a transaction that calls for explanation is not necessary for cases of actual pressure.<sup>257</sup>

The remaining members of the House, expressed agreement with Lord Nicholls, but each took a slightly different approach. Lord Clyde acknowledged the difficulty in defining undue influence. He was critical of the use of the terms actual undue influence and presumed undue influence. In particular, presumed undue influence was unclear in its meaning. Did it mean the “the existence of an influence or of its quality being undue”?<sup>258</sup> The attempt to build up classes or categories has lead to confusion; and

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<sup>251</sup> *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, per Lord Nicholls, p 462.

<sup>252</sup> *Ibid* p 461.

<sup>253</sup> *Ibid* p 458.

<sup>254</sup> See discussion on the Court of Appeal decision in *Etridge* by Stuart-Smith LJ above p 34.

<sup>255</sup> Above n 251 per Lord Scott, p 513.

<sup>256</sup> Above n 251, per Lord Nicholls, p 461. See R Bigwood, ‘Undue Influence in the House of Lords: Principles and Proof’ (2002) 65 (3) MLR 435, p 449-50, where Bigwood argues that this test is too high.

<sup>257</sup> Above n 251, per Lord Nicholls, p 459.

<sup>258</sup> Above n 251, per Lord Clyde p 477.

the confusion was aggravated when the names used to identify the classes do not correspond to their actual meaning. He also doubted the benefit of further subdividing presumed undue influence into subcategories. “All these classifications ... add mystery rather than illumination.”<sup>259</sup> Lord Clyde held that:

At the end of the day, after trial, there will either be proof of undue influence or that proof will fail, and it will be found that there was no undue influence. In the former case, whatever the relationship of the parties and however the influence was exerted, there will be found to have been an actual case of undue influence. In the latter there will be none.<sup>260</sup>

Lord Scott took a similar approach. His Lordship specifically criticised the class 2B classification.<sup>261</sup> The mere existence of the relationship did not mean that that relationship had been abused. He went further and questioned whether the class 2B classification should have even existed:

the judge must decide on the totality of the evidence before the court whether or not the allegation of undue influence has been proved. In an appropriate case the presumption may carry the complainant home. But it makes no sense to find, on the one hand, that there was no undue influence but, on the other hand, that the presumption applies. If the presumption does, after all the evidence has been heard, still apply, then a finding of undue influence is justified. If, on the other hand, the judge, having heard the evidence, concludes that there was no undue influence, the presumption stands rebutted. A finding of actual undue influence and a finding that there is a presumption of undue influence are not alternatives to one another. The presumption is, I repeat, an evidential presumption. If it applies, and the evidence is not sufficient to rebut it, an allegation of undue influence succeeds.<sup>262</sup>

The paradox of pleading in the alternative actual undue influence and “presumed” undue influence is that on the one hand, the plaintiff would need to argue that his or her will had been overborne by the influencer, and on the other hand, the plaintiff will have to contend that he or she placed trust and confidence in the influencer. The two contentions are at odds with each other.<sup>263</sup>

Lord Scott held that the weight of the evidential rebuttable presumption would vary from case to case. It would depend on the nature of the relationship between the parties and on the nature of the transaction. Correspondingly, the type and weight of evidence required to rebut the presumption depends on the weight of the presumption. Whether the complainant received independent advice from a third party is relevant and is weighed up with all the other evidence. The importance of such advice depends on the circumstances of the case. In the normal course of events, independent advice is

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<sup>259</sup> *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, per Lord Clyde p 477.

<sup>260</sup> *Ibid*, p 478.

<sup>261</sup> Lord Scott felt that the adoption in *O'Brien* of the 2B presumption in surety wife cases had set the law on the wrong track. The relationships contemplated by class 2B are fiduciary in nature, and the relationship of husband and wife does not fall into this category. A certain degree of trust and confidence between husband and wife is the norm, not something special.

<sup>262</sup> Above n 259, per Lord Scott, p 513.

<sup>263</sup> This was the argument that Lord Scott (p 530) relied on when discussing *Barclays Bank v Coleman*, [2001] 4 All ER 449. N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 12-012 argues that it is open for a claimant to argue actual and “presumed” undue influence in the alternative. However, it is open to the court to find whether or not undue influence has been established or not, but the court cannot make alternative findings of actual or “presumed” undue influence.

sufficient to give the complainant sufficient understanding of the transaction. However, there are exceptional cases where a person may understand the proposed transaction, yet still be acting under the undue influence of another.

Lord Hobhouse also criticised the use of the terminology of “presumed undue influence”:

It is a fallacy to argue from the terminology normally used, ‘presumed undue influence’, to the position, not of presuming that one party reposed trust and confidence in the other, but of *presuming* that an abuse of that relationship has occurred; factual inference, yes, one the issue has been properly raised, but not a *presumption*.<sup>264</sup> Lord Hobhouse criticised the “language of presumption”<sup>265</sup> used in *Aboody* and *O’Brien*, because it was more likely to confuse rather than assist. Class 2B presumption was rejected because it was considered not to be a useful forensic tool.

Despite the differences in the judgments, Lord Nicholls’ judgment is regarded “as the leading exposition of the law of undue influence.”<sup>266</sup> However, whether or not it is regarded as such in practice will be examined further. Despite the differences, the intention of the House of Lords was to clarify the law on undue influence. The case establishes that “there is only one cause of action of undue influence, although there are two means of proving it.”<sup>267</sup> Further, that the presumption of undue influence is not a substitute for finding that undue influence has been proved: it is merely a step in making such a finding.<sup>268</sup>

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<sup>264</sup> *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, per Lord Hobhouse p 482.

<sup>265</sup> *Ibid* p 483.

<sup>266</sup> S Todd, Burrows, Finn & Todd, *Law of Contract in New Zealand*, (3<sup>rd</sup> ed 2007), p 354-5.

<sup>267</sup> P Vout, (ed and Current Updating Author), *Unconscionable Conduct The Laws of Australia* (2006), para 35.8:1.

<sup>268</sup> *Greene King Plc v Stanley* [2001] EWCA Civ 1966, para 108.

**CHAPTER 4**

**PROVING UNDUE  
INFLUENCE**

## ACTUAL UNDUER INFLUENCE

To succeed in pleading actual undue influence, the person who alleges it must prove that the “wrongdoer exerted undue influence on the complainant to enter into the particular transaction.”<sup>269</sup> It is the exercise of pressure that indicates similarities between actual undue influence and duress.<sup>270</sup> Actual undue influence is established by proving:

- (a) that the other party to the transaction (or someone who induced the transaction for his own benefit) had the capacity to influence the complainant; (b) that the influence was exercised; (c) that its exercise was undue; (d) that its exercise brought about the transaction.<sup>271</sup>

In *Royal Bank of Scotland v Etridge (No 2)*<sup>272</sup> Lord Hobhouse held:

Actual undue influence presents no relevant problem. It is an equitable wrong committed by the dominant party against the other which makes it unconscionable for the dominant party to enforce his legal rights against the other. It is typically some express conduct overbearing the other party’s will ... Actual undue influence does not depend upon some pre-existing relationship between the two parties though it is most commonly associated with and derives from such a relationship. He who alleges actual undue influence must prove it.

The nature of actual undue influence was described by Lord Hobhouse as straight-forward. However, the difficulty is determining the type of pressure, and the level of pressure required to prove actual undue influence. One must make the distinction between acceptable influence which one encounters in everyday commercial and family life, and unacceptable influence which warrants the intervention of equity. The difficulty is compounded when one considers duress. What is the difference in the pressure required to prove actual undue influence as compared with duress. By lay definition alone, “pressure” is a stronger act than “influence”. To influence a person is a more subtle persuasion than pressure.<sup>273</sup>

The nature of the doctrine has been described as “unfair persuasion rather than coercion.”<sup>274</sup>

The similarities between actual undue influence and duress are apparent in some cases. *Contractors Bonding Ltd v Snee*<sup>275</sup> involved a widow, Mrs Snee who gave a mortgage and guarantee to secure the business debts of her son Mr Savage. It was found by Gallen J that Mrs Snee was mentally impaired because of her alcoholism and did not understand the documents that she was signing. He also found

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<sup>269</sup> *Bank of Credit and Commerce International SA v Aboody* [1992] 4 All ER 955; and *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, per Lord Hobhouse, p 481.

<sup>270</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 4-003; and N C Seddon, and M P Ellinghaus, *Cheshire and Fifoot’s Law of Contract* (8<sup>th</sup> Australian ed, 2002), p 655.

<sup>271</sup> *Bank of Credit and Commerce International SA v Aboody* [1992] 4 All ER 955 per Slade LJ, p 976. Cited with approval in *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157.

<sup>272</sup> [2001] 4 All ER 449, per Lord Hobhouse, p 481.

<sup>273</sup> Sir Raymond Evershed MR in *Tufton v Sporni* [1952] 2 TLR 516 at p 525 expressed “the question is not of domination but of influence, well short, no doubt, of domination...” E A Farnsworth, *Farnsworth on Contracts* (Vol I 2<sup>nd</sup> ed, 1998), p 496 writes that unfair persuasion fall short of what is required for duress. See also *Re P’s Bill of Costs* (1982) 45 ALR 513.

<sup>274</sup> J M Perillo, *Corbin on Contracts* (Revised Edition 2002).

<sup>275</sup> [1992] 2 NZLR 157.

that Mrs Snee had strong ties to her family and would have agreed to any proposal put forward by any family member, even if it was not to her advantage. It was held that Mr Savage procured the execution of the documents by his mother on the basis of actual undue influence.<sup>276</sup>

In *Farmers' Co-operative Executors & Trustees Ltd v Perks*<sup>277</sup> the relationship that existed between the husband and wife was one of long term violence and abuse. They lived on an isolated farm, their nearest neighbour several miles away. It was the combination of those factors that allowed the defendant to exercise “considerable influence and dominion”<sup>278</sup> over this wife and children. The defendant was later convicted of murdering his wife. Before she died, she had transferred to the defendant her interest in a farming property jointly owned by the couple. Duggan J found that the evidence raised the presumption of undue influence, and the presumption had not been rebutted.<sup>279</sup> However, Duggan J held that the evidence went further and it established a case of actual undue influence.

## 1. Impairment of Free Will

The issue of how much influence is too much influence has been expressed as “pressure or persuasion which overcomes the will without convincing the reason.”<sup>280</sup> Therefore, to constitute actual undue influence, the plaintiff must have entered into the transaction because the will to resist had been worn down, not because he or she was convinced, however reluctantly that the course of action was the right one. For example, in *Bank of Scotland v Bennett*<sup>281</sup> Mrs Bennett executed the legal charge not because she was convinced that it was the right thing to do, but because her resistance had been worn down by use of insulting language, allegations of disloyalty, and a fear that her marriage would be in jeopardy. Similarly in *Daniel v Drew*<sup>282</sup> it was held that the “donor may be led but she must not be driven.”<sup>283</sup>

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<sup>276</sup> The independent advice given by the solicitor was not sufficient to remove the influence the son had over the mother. However, the guarantee and mortgage was enforced because the financier did not have actual or constructive knowledge of the undue influence, and Mr Savage could not be construed as an agent of the financier.

<sup>277</sup> (1989) 52 SASR 399.

<sup>278</sup> Ibid, per Duggan J, p 409.

<sup>279</sup> It was not established that the wife had received any legal advice prior to the transaction.

<sup>280</sup> *Bank of Scotland v Bennett* (1999) 77 P & CR 447, per Chadwick LJ, \*459 citing the trial judge's comments. See also N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 8-004.

<sup>281</sup> (1999) 77 P & CR 447. This case was one of the appeals to the House of Lords in *Etridge*.

<sup>282</sup> [2005] EWCA Civ 507.

<sup>283</sup> Ibid, per Ward LJ, para 36.



*Williams v Bayley*<sup>284</sup> considered what is meant by undue pressure.<sup>285</sup> The case involved a son, who forged his father's signature on bills and promissory notes drawn at the bank. When the bank discovered that the signatures were forgeries, pressure was put on the father to take responsibility for the debt. Lord Cranworth LC made the distinction between legitimate pressure and illegitimate pressure. If the bank had simply informed the father that they would reserve their legal entitlement against the father and son, to sue for the debt, then this would be legitimate pressure. However, the bank placed pressure on the father to take responsibility for the son's debt, or the bank would have prosecuted the son for forgery, and had him transported for life. This amounted to pressure that was not legal and the father would not be acting with freedom to create a valid transaction. *Williams v Bayley* was cited with approval in *Public Service Employees Credit Union Co-Operative Ltd v Champion*.<sup>286</sup> *Champion* had similar facts to *Williams v Bayley*, and it was held that such undue pressure constitutes undue influence, but was not enough to constitute duress.

*Williams v Bayley* was also cited with approval in an early New Zealand case on undue pressure, *Banks v The Cheltenham Co-operative Dairy Company (Limited)*.<sup>287</sup> In *Banks* the relationship between the plaintiff (Mr Banks, who undertook the obligation to pay) and the person who misappropriated the funds (Mr Ross) was more remote than in *Williams v Bayley*. Mr Banks was the brother in law of Mr Ross. However it was held that Mr Banks and his mother were "brought to book in a state of terror" that Mr Ross would be prosecuted. It was held that due to the pressure, Mr Banks was not a free agent when he repaid the amounts, and the payment was recovered.

Guidance can also be found in an American authority *Odorizzi v Bloomfield School District*.<sup>288</sup> The plaintiff Odorizzi was a school teacher who wanted to rescind his resignation on the grounds of undue influence. He submitted his resignation after he had been arrested on criminal charges of homosexual activity which were subsequently dismissed. The resignation was procured by school officials immediately after Odorizzi had been arrested, questioned by the police, booked, and released on bail. He had not slept for 40 hours, and complained he was under severe mental and emotional strain. It was held by Fleming J that:

... overpersuasion is generally accompanied by certain characteristics which tend to create a pattern. The pattern usually involves several of the following elements: (1) discussion of the transaction at an unusual or inappropriate

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<sup>284</sup> (1866) LR 1 HL 200.

<sup>285</sup> Lord Denning MR in *Lloyds Bank Ltd v Bundy* [1975] QB 326, cited *Williams v Bayley* as a case that illustrated the category of "undue pressure". Lord Denning considered that the category of undue pressure was separate from duress and undue influence, yet they all belonged to a wider doctrine of inequality of bargaining power.

<sup>286</sup> (1984) 56 ACTR 39.

<sup>287</sup> (1910) 29 NZLR 979.

<sup>288</sup> 246 Cal. App. 2d 123, 54 Cal. Rptr. 533 (1966).

time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on untoward consequences of delay, (5) the use of multiple persuaders by the dominant side against a single servient party, (6) absence of third-party advisers to the servient party, (7) statements that there is no time to consult financial advisers or attorneys. If a number of these elements are simultaneously present, the persuasion may be characterized as excessive...<sup>289</sup>

In terms of the difference between acceptable pressure and unacceptable influence, Fleming J gave an example of a woman who buys a dress on impulse. If she later regrets that transaction because the dress was less fashionable than she thought, she cannot avoid the transaction on the ground of undue influence, even if the saleswoman “used all her wiles to close the sale.”<sup>290</sup> Fleming J likened “[t]he difference between legitimate persuasion and excessive pressure, like the difference between seduction and rape.”<sup>291</sup>

An illustration of how the elements from *Odorizzi* can be applied<sup>292</sup> is the case of *Daniel v Drew*.<sup>293</sup> In the case, an aged aunt alleged that her nephew, Mr Daniel, procured her resignation from a family trust by the exercise of actual undue influence. Mr Daniel chose to see his aunt at her house, visiting with his mother because his aunt would have refused to see him on his own. When the deed of resignation was signed, Mr Daniel bypassed his aunt’s son and solicitors, and sought her signature himself. She was alone, and Mr Daniel brought a witness along for her signature. He knew that she disliked confrontation and was afraid of him, and he threatened her with court action if she did not sign. It was held that Mr Daniel exercised undue influence on his aunt.

Similarly, in *Rac v Miliszewski*,<sup>294</sup> the transaction was “done hurriedly in an unaccustomed way in the midst of the dentist’s busy professional day.”<sup>295</sup> The dentist was interrupted and was asked urgently to sign documents. The documents included a mortgage and guarantee to secure the debts of the dentist’s

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<sup>289</sup> *Odorizzi v Bloomfield School District* 246 Cal.App.2d 123, 54 Cal.Rptr. 533, per Fleming J, p 133.

<sup>290</sup> *Ibid* p 132.

<sup>291</sup> *Ibid* p 134.

<sup>292</sup> There are also many Canadian cases applying this concept in the case of prenuptial agreements. An illustration is *Pye v Pye* 2005 ACWSJ 10397, 140 ACWS (3d) 681, 2005 NLUFC 26 (cited 2005 ACWSJ LEXIS 4605, Lexis.com at 20 October 2006) and the authorities discussed in the case. In *Pye* it was held that undue influence was present. The wife was not given the opportunity to see the contract until the day before the wedding. She was not given a copy of it after it was signed, and she was not given an opportunity to consider the contract as the wedding was scheduled for the next day, and the husband maintained that he would not marry the wife if she did not sign the contract.

For a New Zealand example see *Gemmell v Harlow* HC AK CIV 2005-404-002993 [4 July 2006]. The case concerned a de facto property agreement to displace the Property (Relationships) Act 1976. It was held that threats by the de facto husband to end the relationship and evict the de facto wife and her daughter amounted to duress and undue influence.

See also *NA v MA* [2006] EWCH 2900 (Fam), where a post-nuptial agreement was signed by the wife under undue and unacceptable pressure by her husband after he discovered she was having an affair with his best friend. It was held that the pressure constituted undue influence.

<sup>293</sup> [2005] EWCA Civ 507.

<sup>294</sup> HC WN CP No 293/93 [4 April 1996].

<sup>295</sup> *Ibid*, per Greig J, p 13.

brother. It was accepted by Greig J that the dentist was aware that he was signing legal documents, but was unaware of the details because he was relying on his brother, who was a solicitor. The process of execution of the documents, coupled with misleading information from the brother about the transaction lead Greig J to the conclusion that actual undue influence was exercised.

The question of how much pressure is enough to constitute undue influence would also depend on the constitution of the complainant. This would include looking at the personalities of the parties, and whether there were any particular vulnerabilities, age, physical or mental illness.<sup>296</sup> Therefore in *Daniel v Drew* the threat of court action for an elderly, vulnerable aunt, who was unversed in business from a younger, insensitive, forceful and disrespectful nephew, amounted to improper pressure.

Submission to domination can also be “self-willed”.<sup>297</sup> In *Sutton v Mishcon De Reya and Gawor & Co*<sup>298</sup> Mr Staal wanted to be a “slave” to Mr Sutton. This involved transferring to Mr Sutton a considerable amount of his assets, and entering into a cohabitation agreement. It was held that Mr Staal’s subjection to Mr Sutton’s domination could have been self-willed. However, if the actual domination was apparent to Mr Sutton, then the agreement would be unenforceable “however much independent legal advice he might have had.”<sup>299</sup> *Allcard v Skinner* was also an example of self-willed domination. It was recognised by Lindley LJ that the submission to the vows and rules of the sisterhood was undertaken voluntarily, and without pressure.<sup>300</sup>

Therefore, the pressure required to constitute actual undue influence is not as excessive as required by duress. However, this raises the question of whether no pressure, or excessive submissiveness is sufficient to constitute actual undue influence.

## 2. Indirect Pressure

Indirect pressure can be enough to constitute the pressure required for actual undue influence.<sup>301</sup> This is a crucial distinction between the doctrine of undue influence and duress. As far as indirect pressure is

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<sup>296</sup> E A Farnsworth, *Farnsworth on Contracts* (Vol I 2<sup>nd</sup> ed, 1998), p495-6; and N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 8-003.

<sup>297</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 8-013.

<sup>298</sup> [2003] EWHC 3166 (Ch).

<sup>299</sup> *Ibid*, per Hart J, para 25.

<sup>300</sup> (1885) 36 Ch D 145, per Lindley LJ, p 180.

<sup>301</sup> Enonchong, above n 297, para 8-004.

concerned, this can be further subdivided into cases of excessive submissiveness, and concealment of material facts.”<sup>302</sup>

*Bank of Montreal v Stuart*<sup>303</sup> was a case of a wife suffering from extreme submissiveness towards her husband. This resulted in her acting as surety to various banks, to secure her husband’s business debts. Her husband’s more solvent business associates were unwilling to provide the guarantees. The result of the transactions was that Mrs. Stuart surrendered to the bank all her estate, and was left without any means of her own. It was held that the husband exercised undue influence on his wife. This was despite the fact that under cross-examination she declared that she was not acting under the undue influence of her husband, and that he did not put any pressure on her. She went further to say that “she acted of her own free will to relieve her husband in his distress.”<sup>304</sup> However, this was interpreted by Lord Macnaughten as an illustration of “how deeprooted and how lasting the influence of her husband was.”<sup>305</sup> The influence one has over another can be subtle, yet so great that there is no apparent evidence of pressure. It was also held that the solicitor who advised the wife took unfair advantage of her. The solicitor in the case acted for the wife, husband and the bank. He was also a director, secretary, shareholder and creditor of the company.<sup>306</sup> He knew the financial position of the company, and was unwilling to risk his own money. It was held that since the bank entrusted the completion of the transaction in the solicitor’s hands, it was answerable for his actions.

Birks and Chin<sup>307</sup> have criticised the decision in *Bank of Montreal v Stuart* because it did not specifically address the issue of whether excessive submissiveness is sufficient in itself without any outward evidence of abuse.<sup>308</sup> However, the case does recognise that in terms of excessive submissiveness, the complainant’s free will can be dominated where the relationship between the complainant and wrongdoer is such that the complainant simply does what the wrongdoer tells the complainant to do, without any outward appearance of abuse.<sup>309</sup> This may be due to a fear of the “perceived consequences of refusing to do what the defendant requested.”<sup>310</sup>

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<sup>302</sup> F R Burns, ‘Undue Influence Inter Vivos and the Elderly’ 26 Melbourne ULR 499; and N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 8-008.

<sup>303</sup> [1911] AC 120.

<sup>304</sup> *Ibid*, per Lord Macnaughten, p 137.

<sup>305</sup> *Ibid*.

<sup>306</sup> See discussion below n 470.

<sup>307</sup> P Birks, and N Y Chin, ‘On the Nature of Undue Influence’ in J Beatson and D Friedmann (ed), *Good Faith and Fault in Commercial Law* (1995), p 76.

<sup>308</sup> *Ibid*.

<sup>309</sup> See also *Tufton v Spemi* [1952] 2 TLR 516; and *Dunbar Bank Plc v Nadeem* [1998] 3 All ER 876.

<sup>310</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 8-009.

The second type of indirect pressure takes the form of concealment of material facts. The effect of failing to disclose all material facts to the plaintiff impairs his or her autonomy and free will, because it prevents the plaintiff from making a fully informed decision. In *Turnbull v Duval*<sup>311</sup> it was held by Lord Lindley that what is required is pressure and concealment of material facts (as opposed to pressure and lack of independent advice). It would appear that concealment alone is not enough.

However, in *Bank of Credit & Commerce International SA v Aboody*<sup>312</sup> Slade LJ held that deliberate concealment of the risks involved in the transaction can amount to actual undue influence. In the case, Mr Aboody chose to say nothing about the risks, rather than misrepresent them. There is suggestion in *Aboody*, although it is not elaborated on, that concealment of material facts coupled with an “invitation”<sup>313</sup> that the wife enter into the transaction is enough to constitute pressure that amounts to undue influence.<sup>314</sup>

*Dunbar Bank plc v Nadeem*<sup>315</sup> discussed *obiter* the issue of extreme submissiveness and concealment of material facts.<sup>316</sup> It was held that “neither coercion, or pressure, nor deliberate concealment is a necessary element in a case of actual undue influence.”<sup>317</sup> The domination in the case was likened to the actual domination, or complete domination. Therefore, there can be a case of actual undue influence without any pressure because the influence one person has over another is simply so strong, no pressure or deliberate concealment is necessary. The situation was aptly described as “although the pen may have been the pen of Mrs Nadeem, the mind was the mind of Mr Nadeem.”<sup>318</sup> In *Tufton v Sporni*<sup>319</sup> Jenkins LJ<sup>320</sup> and Morris LJ<sup>321</sup> expressed the question as to whether the plaintiff’s mind was “a mere channel through which the” will or wishes of the defendant flowed.

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<sup>311</sup> [1902] AC 429.

<sup>312</sup> [1992] 4 All ER 955.

<sup>313</sup> *Ibid*, per Slade LJ at p 978.

<sup>314</sup> See also N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 8-008, where Enonchong writes that the act of deliberate concealment in itself is enough to constitute undue influence, without the need for bullying or pressure.

<sup>315</sup> [1998] 3 All ER 876.

<sup>316</sup> It was unnecessary to decide the position as it has held that Mr Nadeem did not take an unfair advantage of his position.

<sup>317</sup> Above n 315, per Millett LJ, p 883.

<sup>318</sup> *Ibid*.

<sup>319</sup> [1952] 2 TLR 516. This was applied in *Aboody*, Mrs Aboody being the channel through which Mr Aboody’s wishes flowed.

<sup>320</sup> *Ibid* p 530.

<sup>321</sup> *Ibid* p 532.

Examples of deliberate concealment cases include *Nicholl v Ryder*<sup>322</sup> where the contents of a management contract were deliberately concealed. Mr Nicholl was dyslexic, abusing drugs, and “freaked out by paperwork.” It was known by the prospective managers that Mr Nicholl would be high on cannabis when recording, and that was when they sought execution of the management contract without disclosing the contents. *Greene King plc v Stanley*<sup>323</sup> where the son did not tell his elderly parents that he had failed to raise the money elsewhere, he was many months in default, and had been served with specific performance proceedings. He also did not make it clear that it was unlikely that the loan would be repaid quickly. *UCB Corporate Services Ltd v Williams*<sup>324</sup> where it was held that the husband influenced his wife by failing to disclose matters that would have enabled her to make an informed decision.

There is some overlap between undue influence from the concealment of material facts and fraudulent misrepresentation,<sup>325</sup> for example, in *UCB Group Ltd v Hedworth*<sup>326</sup> undue influence and misrepresentation were pleaded in the alternative. In *Canadian Imperial Bank of Commerce v Finlan*<sup>327</sup> it was held that misrepresentation was a part of undue influence, in addition to being a separate ground.<sup>328</sup>

### 3. Causation

To be successful in claiming undue influence, it must be shown that the undue influence caused the plaintiff to enter into the transaction. The causation issue is illustrated in *Couch v Branch Investments (1969) Ltd*<sup>329</sup> where Mrs Couch did not enter the contract because of the threats made by the finance company; she did so because of pressure from her husband. Therefore arguments of undue influence and duress were rejected.

The difficulty with this issue is to determine how much of a causative factor the influence was. In *Barton v Armstrong*<sup>330</sup> there were threats of violence, and threats to have Mr Barton murdered. However, this was not the only reason why the agreement was entered into by Mr Barton. He also

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<sup>322</sup> [2000] EMLR 632.

<sup>323</sup> [2001] EWCA Civ 1966.

<sup>324</sup> [2002] EWCA Civ 555.

<sup>325</sup> *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, per Lord Nicholls, p 462-3, cited with approval in *UCB Corporate Services Ltd v Williams* [2002] EWCA Civ 555, per Jonathan Parker LJ, para 87.

<sup>326</sup> [2003] EWCA Civ 1717.

<sup>327</sup> [1999] OJ No 54, 78 OTC 241, (cited 1999 CarswellOnt 80, Westlaw).

<sup>328</sup> *Ibid*, per Crane J, para 48.

<sup>329</sup> [1980] 2 NZLR 314.

<sup>330</sup> [1975] 2 All ER 465, Privy Council.

wanted to remove Mr Armstrong from the company. It was held that the threats and unlawful pressure need not be the sole reason for signing the documents; it only needs to contribute to the decision to sign.<sup>331</sup>

*Aboody* and *UCB Corporate Services Ltd v Williams*<sup>332</sup> considered the question of whether a victim of undue influence is entitled as of right to have the transaction set aside, or whether the victim needs to go further and show that in the absence of the wrongdoing, the victim would not have entered the transactions.<sup>333</sup> *Aboody* held in favour of the latter.<sup>334</sup>

In *UCB v Williams*, Jonathan Parker LJ considered the divergence between *Aboody* and *Pitt*. In *Pitt* it was held that a victim of undue influence is entitled to have the transaction set aside as of right, which was taken to mean “regardless of other considerations.”<sup>335</sup> Jonathan Parker LJ preferred the approach taken in *Pitt*. Therefore, it was held that it was unnecessary for the complainant to prove that he or she would not have entered into the transaction if there had been no undue influence.<sup>336</sup> The approach in *UCB v Williams* was approved in *UCB Group Ltd v Hedworth*.<sup>337</sup>

It is submitted that the correct approach is that undue influence should be *a* cause of the reason to enter into the transaction, and that it is unnecessary to go on to prove that if it had not been for the influence, the complainant would not have entered into the transaction. The difficulty with adopting this approach as far as New Zealand authority is concerned, is that *Aboody* was cited with approval in *Contractors Bonding Ltd v Snee*.<sup>338</sup> There has been no New Zealand case citing *UCB Corporate Services Limited v Williams* and therefore, no discussion regarding the divergence of approaches, and which approach is correct.

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<sup>331</sup> See discussion below p 96-7. In terms of causation in cases of duress, Mance J held in *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd’s Rep 620 that the illegitimate pressure must at least be a significant cause inducing the party into the contract.

<sup>332</sup> [2002] EWCA Civ 555.

<sup>333</sup> This issue was unaddressed in *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449.

<sup>334</sup> *Bank of Credit & Commerce International SA v Aboody* [1992] 4 All ER 955, per Slade LJ, p 979.

<sup>335</sup> Above n 332, per Jonathan Parker LJ, para 91.

<sup>336</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 8-030.

<sup>337</sup> [2003] EWCA Civ 1717.

Enonchong, above n 336 para 8-031-4. Enonchong argues that the *Aboody* approach should be rejected. This is based on the argument that the *Aboody* approach is unsupported by authority; that the basis of undue influence is to protect from the abuse of influence, not to “do justice to the complainant” ([1992] 4 All ER 955, per Slade LJ, p 979); when innocent third parties are involved, wider issues rather than causation become relevant; and consistency with the law of duress. It is submitted that consistency with the law of duress is a weak argument to follow such an approach in undue influence. The two doctrines are distinct, and the continued survival of the doctrines relies on differences, not similarities between the two. See also H G Beale *Chitty on Contracts*, (29<sup>th</sup> ed 2004) para 7-057 regarding the causation issue.

<sup>338</sup> [1992] 2 NZLR 157. *Snee* was subsequently cited with approval in *Appeal by Ngahuia Tawhai* [1998] NZAR 459.

## THE EVIDENTIAL PRESUMPTION OF UNDUE INFLUENCE

In *Etridge* Lord Nicholls held that the second route to establish undue influence is to utilise the evidential presumption of undue influence. The burden of proof lies with the person who claims to have been wronged. The evidential presumption of undue influence arises where it is proved that there was a relationship of trust and confidence coupled with a transaction that calls for explanation. Proof of those facts establishes that there is prima facie evidence that the transaction was procured by undue influence. The evidential burden then shifts to the stronger party to counter the inference drawn that he or she exercised undue influence on the weaker party.

A shift in the evidential burden does not involve shifting the legal burden of proof. The difference between the legal burden and evidential burden is that:

The evidential burden has been defined as the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue. The legal burden, “burden of proof”, “probative” or “persuasive” burden has been defined as the obligation of a party to meet the requirement of a rule of law that a fact in issue must be proved or disproved.<sup>339</sup>

The burden of proof in an undue influence case always lies with the person alleging undue influence. This can be achieved by proof of actual abuse of influence, or by proof of a relationship of trust and confidence coupled with a transaction that calls for explanation. Proof via the latter route is in effect raising the equitable counterpart of *res ipsa loquitur* which literally means “the event speaks for itself.”<sup>340</sup> Therefore, in lieu of further evidence of abuse of the relationship of trust and confidence, the matter will be presumed.<sup>341</sup> The finding of the presumed fact then casts the provisional or evidential burden onto the opponent of the presumed fact: “in other words the party proving the basic fact is likely to win on the issue to which the presumed fact relates in the absence of evidence to the contrary adduced by the other.”<sup>342</sup>

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<sup>339</sup> D L Mathieson, *Cross on Evidence* (8<sup>th</sup> ed 2005), p 159.

<sup>340</sup> S Todd, *The Law of Torts in New Zealand* (4<sup>th</sup> ed 2005), p 335.

<sup>341</sup> Mathieson, above n 339 p 167.

<sup>342</sup> *Ibid* p 161.

Despite Lord Nicholls clearly stating the effect of the evidential presumption, Sim contends that the position is unclear: D Sim, ‘Burden Of Proof In Undue Influence: Common Law And Codes On Collision Course’ (2003) *EvPro* 7(221), (cited Lexis.com at 10 February 2006, at p 3). Sim incorrectly argues that “*Etridge* failed to articulate clearly whether the revised presumption of undue influence was one of law, casting the evidential burden upon the alleged dominant party to disprove the finding of undue influence, or simply one of fact, shifting the tactical burden.” It is submitted that the author has incorrectly analysed the *Etridge* decision and incorrectly concluded that *Etridge* is inconclusive as to the evidential significance of the evidential presumption of undue influence.



This issue was discussed recently by Glazebrook J in *Accident Compensation Corporation v Ambros*:<sup>343</sup>

... the term burden of proof has been used in two quite distinct senses ... The first is a reference to the legal burden. The legal burden is what must ultimately be proven by a person in order to win the case. Equally, it can refer to the evidential burden. The term evidential burden is, in turn, used to refer to two quite distinct notions. In the first sense, it means the burden of adducing evidence on an issue on pain of having the trial Judge determine the issue in favour of the opponent. The second sense in which the phrase is used refers to the burden resting upon a party who appears to be at risk of losing on a given issue at a particular point in a trial. This merely involves a tactical evaluation of who is winning at a particular point which can shift depending upon the trial dynamics. This is often referred to as the tactical burden.

## 1. Relationship of Trust and Confidence

The relationship of trust and confidence can be proved by an established relationship, recognised by law, that is: trustee and cestui que trust, guardian and ward, parent and child, religious adviser and disciple, doctor and patient, and solicitor and client.<sup>344</sup> Once the relationship has been proved, the law presumes irrebuttably that a relationship of influence exists between the parties. Secondly, the relationship of influence can be proved on the facts of the case. What needs to be proved is “a relationship of “trust and confidence, reliance, dependence or vulnerability on [one side] and ascendancy, domination or control on [the other side]” as a result of which” the vulnerable party was disposed to agree with the course of action proposed by the dominant party and the relationship was exploited by the dominant party.<sup>345</sup> In terms of the evidential presumption, it is not a “conditioned state of dependence.”<sup>346</sup> What is “undue” about the influence is not its existence but its use. It is the abuse of trust that is critical.

In *Macklin v Dowsett*<sup>347</sup> Auld LJ held that in some circumstances it may be appropriate to work from the transaction, and the inexplicability of it, and find a relationship of ascendancy and dependency.<sup>348</sup> In terms of principle, this approach is fundamentally flawed. One cannot start from the conclusion and then work backwards in order to find the relationship to justify the conclusion. If one were to approach cases in such a fashion, then it would be easier to find the relationship of ascendancy and dependency. This approach was criticised by Jenkins LJ in *Tufton v Sporni*.<sup>349</sup> It was held that it would be wrong to

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<sup>343</sup> CA 172/05 [2007] NZCA 304, per Glazebrook J, para 55.

<sup>344</sup> S Todd, Burrows, Finn & Todd, *Law of Contract in New Zealand*, (3<sup>rd</sup> ed 2007), p 351-2.

<sup>345</sup> *Hogan v Commercial Factors Limited* [2006] 3 NZLR 618, per William Young J, para 41. In *Rutherford v Bank of New Zealand* HC Wellington, Civ-2006-485-1345, [5 February 2007], Associate Judge Gendall noted the difference in approaches taken in *Wilkinson v ASB Bank* [1998] 1 NZLR 674 (which was a pre-*Etridge* case), and *Hogan* (which was a post-*Etridge* case). It was held that *Hogan* approved the shift in approach taken in *Etridge*.

<sup>346</sup> *McGregor v Michael Taylor & Co* [2002] 2 Lloyd's Rep 468, per Judge Chambers QC, para 25.

<sup>347</sup> [2004] EWCA Civ 904.

<sup>348</sup> *Ibid*, per Auld LJ para 25.

<sup>349</sup> [1952] *The Times* LR 516, per Jenkins LJ, p 530.

work backwards from an unconscionable bargain, and attempt to construct a fiduciary relationship between those parties in order to set the transaction aside.

In identifying what types of relationships give rise to trust and confidence, Todd writes that “many of the cases involve taking advantage of those who are young and impressionable, or elderly, or under some degree of physical or mental incapacity.”<sup>350</sup> The crucial question to be answered is “what measure of confidence and trust suffices to put the donee in a position to exert undue influence.”<sup>351</sup> The distinguishing characteristics that give rise to the measure of trust and confidence are “a duty on the donee to advise the donor, or a position of actual or potential dominance of the donee over the donor.”<sup>352</sup> In all undue influence cases, either one or both of those characteristics are present. When identifying relationships, lists are particularly unhelpful. Relationships that give rise to trust and confidence “cannot be listed exhaustively. Relationships are infinitely various ... the question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type.”<sup>353</sup>

In *Credit Lyonnais Bank Nederland NV v Burch*<sup>354</sup> a relationship of trust and confidence sufficient to raise the presumption of influence had developed between an employee and her employer. The employee not only worked during the day (which sometimes finished at 10pm) but she babysat in the evenings, visited the family on weekends, and for holidays in Italy. The employer was 10 years older than the employee. She regarded him as a successful business man, and trusted him. *In Re Craig, Decd*<sup>355</sup> the relationship was again one of employer and employee, but the employee was in the position of dominance of her elderly and dependent employer.

There are an increasing number of cases involving the elderly.<sup>356</sup> This changing demographic with a growing population of elderly, and a large portion of their wealth tied up in residential property raises

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<sup>350</sup> S Todd, Burrows Finn & Todd, *Law of Contract in New Zealand* (3<sup>rd</sup> ed 2007), p 356. See pages 356-7 for examples.

<sup>351</sup> *In re Brocklehurst's Estate* [1978] Ch 14, per Bridge LJ, p 42.

<sup>352</sup> *Ibid.*

<sup>353</sup> *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, per Lord Nicholls, p 458.

<sup>354</sup> [1997] 1 All ER 144.

<sup>355</sup> [1971] Ch 95.

<sup>356</sup> See also *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281; *Greene King plc v Stanley* [2001] EWCA Civ 1966; *Humphreys v Humphreys* [2004] EWHC 2201; *Popowski v Popowski* [2004] EWHC 668; *In re Estate of James Allen Hendrix* 134 WashApp 1007, (cited 2006 WL 2048240, Westlaw), (Wash.App. Div. 1); and *Janson v Janson* [2007] NSWSC 1344.

the importance of undue influence in this category.<sup>357</sup> In *Niersmans v Pesticcio*<sup>358</sup> Mummery LJ gave his observation to this trend:

With the increase in home ownership and the rising value of residential property more people have more property to dispose of in their lifetime and on death and more people expect to benefit substantially from inheritance. As people live longer, the inheritors have to wait longer. There is, however, the unwelcome prospect that the longer the wait, the greater the risk that even a modest estate will be seriously diminished by the high cost of care in the old age or infirmity of the home owner, and by the impact of inheritance tax on death. The elderly and infirm in need of full time residential care are vulnerable to suggestions that they should dispose of the home to which they are unlikely to return. In my view, these social trends are already leading to a renewed interest in the law governing the validity of life time dispositions of houses, both in and outside the family circle, by the elderly and the infirm.

In *Vale v Armstrong*<sup>359</sup> an elderly uncle, Mr Vale transferred to his great nephew, Mr Armstrong, his house at a discounted value in return for the right to live in his home, free of rent, mortgage payments, expenses or maintenance. The transaction was entered into not long after the death of Mrs Vale. It was held that Mr Vale was in shock after the death of his wife, and the legal and financial matters were normally dealt with by the wife. The right to occupy the property for the remainder of Mr Vale's life was never recorded in any agreement. One year later, Mr Armstrong requested that Mr Vale vacate the house. Although the Judge found that Mr Vale was not "stupid or entirely incapable",<sup>360</sup> it would have been a struggle for him to understand the transaction. Therefore, he had to rely on Mr Armstrong to do what was best for him. A relationship of trust and confidence was established.

In *Aldridge v Turner*<sup>361</sup> a relationship of trust and confidence arose, when an increasingly incapacitated father relied on his son and daughter-in-law for his daily care and financial management. In *Lee v Damesh Holdings Ltd*<sup>362</sup> a relationship of trust and confidence was established between an elderly widow who had no business experience and her son when she mortgaged her house to support her son's business debts. She was particularly vulnerable to her son's influence following her husband's death. This coupled with her age, health and lack of business experience meant that she simply did what he told her to.<sup>363</sup>

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<sup>357</sup> See discussion in F R Burns, 'Elders and Testamentary Undue Influence in Australia' (2005) 28(1) UNSWLJ 145; F R Burns, 'Undue Influence Inter Vivos and the Elderly' 26 Melbourne ULR 499; and F R Burns, 'The elderly and undue influence inter vivos' 23 Legal Stud 251 2003.

<sup>358</sup> [2004] EWCA Civ 372, per Mummery LJ, para 4.

<sup>359</sup> [2004] EWHC 1160. See discussion below p 68 and 82.

<sup>360</sup> Ibid, per Evans-Lombe J, para 42.

<sup>361</sup> [2004] EWHC 2768.

<sup>362</sup> [2003] 2 NZLR 422. See discussion below p 69.

<sup>363</sup> The decision in *Lee v Damesh Holdings* was appealed to the Court of Appeal: CA 77/03 [30 September 2003]. It was held that the High Court judgment should be set aside and the case remitted to the High Court because the case proceeded on the narrow pleadings that if *Wilkinson v ASB Bank* [1998] 1 NZLR 674 applied, Mrs Lee could not succeed, whereas if *Etridge* represents the law in New Zealand, Mrs Lee should succeed. The disparity between the process detailed in *Etridge* and *Wilkinson v ASB Bank* related to the issue of whether the financier was put on notice regarding Trevor's exercise of undue influence on his mother, not to issues of establishing the presence of undue influence.

The relationship of trust and confidence need not be between an elderly person and a younger person. *Ganderton v Behre*<sup>364</sup> was a case that involved two elderly people. The plaintiff, Mrs Ganderton was aged 88. The defendant, Mr Behre was aged 74. Mr Behre was one of the tenants in one of Mrs Ganderton's rental properties. Over the years trust and confidence developed between Mrs Ganderton and Mr Behre, and their finances became inextricably linked. As Mrs Ganderton aged and her medical conditions became more complicated, her dependence on Mr Behre increased. As this dependence grew, so did the financial pressure that Mr Behre placed on Mrs Ganderton. It was held that there was a relationship of trust, that some of the transactions entered into were highly unusual, and therefore, undue influence was exercised in relation to those transactions.

The relationship of trust and confidence can arise from the interaction in a single transaction. In *Investors Compensation Scheme Limited v West Bromwich Building Society*<sup>365</sup> a relationship of trust and confidence arose between elderly investors and the financial adviser responsible for the promulgation of an equity release mortgage scheme.

Not every relationship of an elderly person with a younger person is necessarily one of trust, confidence and dependence. In *Re Brocklehurst's Estate*<sup>366</sup> the relationship between the elderly man and younger companion was that of dominance by the elderly gentleman. Therefore, when the elderly man granted a 99 year lease of unrestricted shooting rights over his estate, it was held that there was no relationship of trust and confidence.

Another interesting social trend is the increase of different cultures in western societies. The different cultures introduce different expectations regarding family and social interactions and relationships. The consideration of the cultural factors may mean that the relationship of trust and confidence is more easily established. However, cases of this nature should not be given any special treatment; the elements of undue influence still need to be established. In *Appeal by Ngahuia Tawhai*<sup>367</sup> one of the issues on appeal was whether the trial judge had been correct in taking judicial note of certain Maori beliefs in respect of Maori land, and applying those beliefs to the case. It was held that the "nature and effect of the transaction needs to be established."<sup>368</sup> While the Court may be entitled to take judicial notice of tikanga or custom, the assumption should not be made that everyone adheres or ascribes to

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<sup>364</sup> HC ROT CIV 2004-463-000614 [23 September 2005].

<sup>365</sup> [1999] Lloyd's Rep PN 496.

<sup>366</sup> [1978] Ch 14.

<sup>367</sup> [1998] NZAR 459 (Maori Appellate Court).

<sup>368</sup> *Ibid*, per Smith J, p 466.

that custom. The Court should judge each case on the evidence before it.<sup>369</sup> Similarly in *Alirezai v Australian and New Zealand Banking Group Limited*<sup>370</sup> there was a close friendship between borrower and surety based on shared cultural and religious values. The appellant was Iranian, and lived his life by Islamic beliefs. He felt obligated to financially help his friend, because his friend had helped him financially in the past. It was held that adherence to Muslim faith and Iranian customs may have explained the appellant's feeling of moral obligation to guarantee his friend's debt. There was a relationship of trust and friendship. However, it did not create a special relationship that would distinguish it from an ordinary guarantee situation.

Women in other cultures may be less emancipated than those in the west.<sup>371</sup> Allegations of undue influence become further complicated with issues of extreme submissiveness due to cultural issues, intermixed with western values. In *Bank of Credit and Commerce International SA (In Compulsory Liquidation) v Hussain*<sup>372</sup> Hart J had to weigh up the evidence of a conservative Islamic woman. She gave evidence that she was totally dominated by her husband, who subjected her to physical and emotional humiliation. She was expected to undertake a traditional Moslem role of raising children and looking after the home. Opposing counsel contended that the evidence to establish her as a typical conservative Moslem wife were at odds with her western values. She had studied four years at Harvard, her marriage was not arranged, and she took the initiative to purchase their latest matrimonial property (which was against her husband's wishes). However, Hart J held that he did not believe that Mrs Hussain would craft such a story, thus the cultural factors that Mrs Hussain was brought up with overshadowed the western cultural factors she came into contact with later in life.<sup>373</sup>

In *Barclays Bank v Coleman*<sup>374</sup> Mrs Coleman was a Hasidic Jew. Despite growing up in the United States, she was brought up in a Hasidic community and she was expected "to accept a position of subservience and obedience to the wishes of her husband."<sup>375</sup> Lord Scott found that it would have been

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<sup>369</sup> *Appeal by Ngahuia Tawhai* [1998] NZAR 459, per Smith J, p 469. On the issue of undue influence, it was referred back to the lower court for rehearing.

<sup>370</sup> [2004] QCA 6, [2004] Q ConvR 54-601, (cited 2004 WL 227507, Westlaw at 10 February 2006).

<sup>371</sup> In *Bank of Credit and Commerce International SA v Aboody* [1992] 4 All ER 955 Mrs Aboody was an Iraqi Jew. In accordance with her upbringing, she left all business matters to her husband. She was a co-director and secretary of the family business, but was not involved in any of the day to day running of the business. She would simply sign documents when presented to her by her husband. The trial judge found that Mr Aboody exercised undue influence over Mrs Aboody, and this was not challenged on appeal. However, as Mrs Aboody could not show that the transactions were to her manifest disadvantage, her appeal failed.

<sup>372</sup> 1999 WL 1425708 High Court, Chancery Division (cited Westlaw at 30 January 2008).

<sup>373</sup> However, the case against the bank failed as the bank did not have constructive notice of any irregularities with the execution of the documents.

<sup>374</sup> [2001] 4 All ER 449.

<sup>375</sup> *Ibid*, per Lord Scott, p 524.

difficult for her to question her husband's business or financial decisions. He held that a presumption of undue influence arose out of the relationship not because Mrs Coleman was disinclined to second-guess her husband, but because she felt obliged not to do so. Lord Hobhouse held that this was a case of actual undue influence.

The difficulty in some cases is that the relationship between the parties may be considered in two different categories, and which one takes precedence needs to be decided. In *Bar-Mordecai v Hillston*,<sup>376</sup> the case concerned the transfer of property from an elderly woman, Mrs Hillston, to her doctor, Dr Bar-Mordecai. Dr Bar-Mordecai was the treating physician to Mrs Hillston's deceased husband, and to Mrs Hillston herself up until her death. Mrs Hillston was a lawyer, intelligent, and an experienced business person. She was 36 years older than Dr Bar-Mordecai. It was held that the doctor-patient relationship raised the presumption of influence. This was despite the fact that Dr Bar-Mordecai tried to argue that the parties were in a de facto relationship, there being no presumption between "husbands" and "wives". It was held that the doctor-patient presumption outweighed the possibility of a de facto couple argument. The fact that a doctor-patient relationship becomes sexual means that there is a heightened need for security.<sup>377</sup> Similarly in *Markham v Karsten*<sup>378</sup> the parties cohabited in a de facto relationship. However, Mrs Karsten also acted as Mr Markham's solicitor. The case was an appeal from a bankruptcy order. The Registrar who heard the bankruptcy order held that the relevant relationship was the domestic relationship and that the solicitor, client relationship was irrelevant. On appeal, Briggs J held that the relationship between a solicitor and client should not be irrelevant "merely because they are also in another well-recognised relationship in which influence, or the reposing of trust and confidence, may arise. On the contrary ... the influence which is presumed to exist between solicitor and client may be strengthened if they are also in a marriage or domestic partner relationship."<sup>379</sup> It was held that there was a triable issue as to whether undue influence existed in relation to the execution of documents where Mr Markham acknowledged that he owed Mrs Karsten money and that he held a property on trust for her.

It is questionable whether mutual trust and confidence is sufficient to raise the evidential presumption of undue influence. In *Nel v Kean*<sup>380</sup> it was held that it was insufficient. However, Enonchong argues that *Etridge* did not establish a general principle that mutual trust and confidence is insufficient. The

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<sup>376</sup> [2004] NSWCA 65.

<sup>377</sup> *Bar-Mordecai v Hillston* [2005] HCATrans 82 (3 March 2005), an application to appeal to the High Court of Australia was dismissed by McHugh J and Heydon J.

<sup>378</sup> [2007] EWHC 1509 (Ch).

<sup>379</sup> *Ibid*, per Briggs J, para 35.

<sup>380</sup> [2003] EWHC 190 (QB).

essential fact is finding that there is a relationship of trust and confidence. Mutuality of trust and confidence does not alter the fact that trust and confidence exists, “for even in a relationship where trust and confidence is mutual, one party may acquire a greater degree of influence over the other.”<sup>381</sup> It is submitted that both views must be incorporated to correctly apply the principle of undue influence. On the one hand, *Nel v Kean* is in a sense correct, because of the general nature of undue influence. One must prove that the other party has gained an ascendancy over the other. However, *Enonchong* is also in a sense correct, because it is the abuse of that trust and confidence (which may be mutual) which brings into play the equitable principles.

## 2. A Transaction That Calls For Explanation

The second element that needs to be proved before the evidential presumption of undue influence can be raised is a transaction that calls for explanation. The fact that a transaction may be unusual does not make it one that calls for explanation. The explanation goes “towards the possible exercise of undue influence.”<sup>382</sup> If a transaction is one that calls for explanation, then the explanation should be considered before the evidential presumption can be raised.<sup>383</sup> If a sufficient explanation is given, the evidential presumption does not arise.

The test of a transaction that calls for explanation is an objective test. The analysis is fact specific,<sup>384</sup> and to be analysed as between the two parties.<sup>385</sup> In determining whether a transaction is one that calls for explanation, “the question is whether, on the facts of the particular transaction and in light of the parties’ relationship, the transaction can be explained by ordinary motives,”<sup>386</sup> or explained in “terms other than those of undue influence.”<sup>387</sup> In *Etridge* Lord Nicholls held that the relative advantages and disadvantages are relevant, “the greater the disadvantage to the vulnerable person, the more cogent must be the explanation.”<sup>388</sup> In order to determine whether a transaction is one that calls for explanation, the transaction must be viewed as a whole. The House of Lords formulated the test to closely resemble the tests from *Allcard v Skinner* and *Morgan*.<sup>389</sup> It may be recalled that in *Allcard v*

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<sup>381</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 10-040.

<sup>382</sup> *Turkey v Awadh* [2005] EWCA Civ 382, per Buxton LJ, para 29.

<sup>383</sup> Enonchong, above n 381 para 11-019.

<sup>384</sup> *Humphreys v Humphreys* [2004] EWHC 2201, per Rimer J, para 91.

<sup>385</sup> *National Commercial Bank (Jamaica) Limited v Hew* [2003] UKPC 51.

<sup>386</sup> P S Atiyah and S A Smith, *Atiyah’s Introduction of the Law of Contract* (6<sup>th</sup> ed 2005), p 286-7.

<sup>387</sup> Above n 382 per Buxton LJ, para 20.

<sup>388</sup> [2001] 4 All ER 449, per Lord Nicholls, para 24. See also *Humphreys v Humphreys* [2004] EWHC 2201, per Rimer J, para 91; and N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 11-009.

<sup>389</sup> G Andrews, ‘Undue Influence – Where’s the disadvantage’ Conv 2002, Sept/Oct, 456-469, (cited Westlaw at 10 February 2006), p 4. Andrews argues that the tests in *Allcard* and *Morgan* are different concepts. *Allcard* limited the doctrine of presumed undue influence by requiring proof of actual undue influence for small transactions and in transactions

*Skinner* a questionable transaction was one that “cannot be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary men act”. The test extracted from *Morgan* was that “it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the parties’ relationship, it was procured by the exercise of undue influence.”<sup>390</sup>

However, the tests derived from *Allcard* and *Morgan* differ in focus. The test that arises from *Morgan* focuses on the relative advantages and disadvantages of the transaction. There may be a tendency to revert back to applying the test of manifest disadvantage. Further, the test from *Morgan* is somewhat circular in reasoning, because in order to prove undue influence, the transaction must be “explicable only on the basis that undue influence had been exercised to procure it”.<sup>391</sup> On the other hand, the *Allcard v Skinner* test focuses on what can be justified as an acceptable transaction between the two parties to the transaction, and thus leads to questions as to whether the transaction can be explained or not. The relative advantage or disadvantage is simply an element to be considered.

In *Chater v Mortgage Agency Services Number Two Limited*<sup>392</sup> a distinction was drawn between the tests in *Morgan* and *Etridge*. The *Morgan* test was considered a “higher test”, but the *Etridge* test was preferred.<sup>393</sup> In *Clarke v Marlborough Fine Art (London) Limited*<sup>394</sup> it was held that *Etridge* had succeeded in restoring the position to that stated in *Allcard v Skinner*.<sup>395</sup>

The shift in *Etridge* from a test of manifest disadvantage to a transaction that calls for explanation has been criticised by some commentators. Ho argues that the new label “simply restates the conclusion of the analysis, whereas the old one of “manifest disadvantage” focuses attention on the essential criterion

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which can be readily explicable. *Morgan* went further by creating a prerequisite of manifest disadvantage, which extended to all transactions involving presumed undue influence. It is submitted that the tests in *Allcard* and *Morgan* do not differ in the way that Andrews describes. *Allcard* required proof of actual undue influence in the case of small transactions because it could not be “presumed” that undue influence could have been exercised. Without the large immoderate gift, the wrong could not be presumed, and had to be proved. In the case of a large immoderate gift, the “wrong” is more obvious. *Morgan* required manifest disadvantage to be shown for all cases of presumed undue influence. In effect this was another way of proving the wrongfulness of the transaction whether the value was large or small.

<sup>390</sup> *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, per Lord Nicholls p 461. See R Bigwood, ‘Undue Influence in the House of Lords: Principles and Proof’ (2002) 65 (3) MLR 435, p 449-50, where Bigwood argues that this test is too high.

<sup>391</sup> [2001] 4 All ER 449, per Lord Nicholls, p 461. See also discussion from Lord Scott at p 501.

<sup>392</sup> [2003] EWCA Civ 490.

<sup>393</sup> *Chater v Mortgage Agency Services Number Two Limited* [2003] EWCA Civ 490, per Scott Baker LJ, para 30.

<sup>394</sup> [2002] EWHC 11.

<sup>395</sup> *Ibid*, per Patten J, para 12.



that leads to the conclusion.”<sup>396</sup> It was argued that the new label will not offer any useful guidance to the courts, as it encounters the same issues of vagueness as manifest disadvantage. The decision of a wife to guarantee her husband’s business debts may be inexplicable on the basis of the marriage bond, but also may be explicable because the wife will derive a financial benefit from her husband’s business success.

By contrast, Scott argues that the benefit of the new test is that it is not “*inherently* limited to financially disadvantageous transactions.”<sup>397</sup> This means that non-financial factors may be taken into account when assessing a transaction. One may recall the discussion earlier of the elderly lady who sells her house to her solicitor for full market value. The fact that the house had sentimental value to the woman would be taken into account when assessing the inexplicability of the transaction, but not in a narrow test of manifest disadvantage. “In this sense, the test of inexplicability is in fact *wider* than that of manifest disadvantage.”<sup>398</sup>

The crucial question is whether the new test is a genuine change of approach or is merely cosmetic.<sup>399</sup> In theory, there is a difference between the concepts of manifest disadvantage and a transaction that calls for explanation. A transaction may benefit the influenced party, yet still call for an explanation. Similarly, a large gift between parties where there is a relationship of trust and confidence may, in certain circumstances, not call for an explanation.<sup>400</sup> In the pre-*Etridge* case of *Steeple v Lea*<sup>401</sup> Millett LJ used the terms manifest disadvantage and a transaction that calls for explanation interchangeably. In this case, a transaction where a receptionist was providing security for her employer’s debts was not something she would have been expected to do, and therefore was a transaction that called for explanation.

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<sup>396</sup> L Ho, ‘Undue Influence: When and How it Matters to Banks and Solicitors’ [2002] *Singapore Journal of Legal Studies* 617, p 622.

<sup>397</sup> K N Scott, ‘Evolving Equity and the Presumption of Undue Influence’, 2002 JCL LEXIS 15 (cited Lexis.com at 10 February 2006), [\*22] – [\*23].

<sup>398</sup> Ibid.

<sup>399</sup> G Andrews, ‘Undue Influence – Where’s the disadvantage’ Conv 2002, Sept/Oct, 456-469, (cited Westlaw at 10 February 2006), p 3.

Yaakub and McGee argue that the requirement of showing “a transaction that calls for explanation” suffers from the same vagueness as manifest disadvantage. The authors further criticise *Etridge* because while the label, manifest disadvantage has been rejected, in reality, the actual requirement of a manifest disadvantage had not. It was argued that the label, manifest disadvantage was simply replaced with the label, of a transaction that calls for explanation, and that although Lord Nicholls rejected the old label, he actually embraced the principle. N I Yaakub and A McGee, ‘Undue Influence in Bank-Lending Transactions – Confusions Continue’ [2007] JIBLR 394, p 404.

<sup>400</sup> G H Treitel, *The Law of Contract* (11<sup>th</sup> ed. 2003), p 410-11; N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 11-011.

<sup>401</sup> (1998) 76 P & CR 157.

The test of a transaction that calls for explanation is comprised of two facets: the relative advantages and disadvantages; and an inexplicable transaction based on the relationship between the two parties. The problem with post-*Etridge* cases applying the test of a transaction that calls for explanation is that the majority have focused on only one of those facets.<sup>402</sup>

To correctly apply the test of a transaction that calls for explanation, the alignment needs to follow closely the test from *Allcard v Skinner*: ordinary motives of ordinary persons in that relationship. *Chater v Mortgage Agency Services Number Two Limited*<sup>403</sup> held that a parent guaranteeing the business debts of one of their children is not normally a transaction that calls for explanation. “Capital is frequently passed on from one generation to the next. It is perfectly normal for a parent to wish to help a child financially. Many parents put money into their child’s business.”<sup>404</sup> However, in *Chater* the specific features in the case that called for explanation were: it was a 25 year mortgage for a woman of 61; the true purpose of the loan was not stated on the loan application; the house was transferred from the mother’s sole name into the joint names of mother and son; and the mother had put the whole equity in her home at risk, even though she had a daughter which she intended to benefit equally in the event of her death. Similar considerations were applied in *Abbey National Bank plc v Stringer*<sup>405</sup> where an elderly, illiterate mother, with only limited spoken English, guaranteed her son’s business debts. Lloyd LJ applied the concept of disadvantage and inexplicability of the transaction interchangeably. In *Lee v Damesh Holdings Ltd*<sup>406</sup> the transaction was also one that called for explanation. Mrs Lee failed to understand the transaction, she ran the risk of losing her Queenstown property, and the transaction was from the outset high risk.

In *Simon v Westpac Banking Corporation*<sup>407</sup> it was held that the plaintiff failed to adduce enough evidence to prove the existence of undue influence. There was not a greater element of trust and confidence by the parents to their daughter than was normally expected between parents and adult children. It was further held that there was nothing unusual about the transaction: it is not unusual for a parent to help their children in their business ventures.

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<sup>402</sup> See discussion below, p 80.

<sup>403</sup> [2003] EWCA Civ 490.

<sup>404</sup> Ibid, per Scott Baker LJ, para 30.

<sup>405</sup> [2006] EWCA Civ 338.

<sup>406</sup> [2003] 2 NZLR 422. See discussion above p 53 and below p 69.

<sup>407</sup> HC WN CIV-2003-485-2594 [14 May 2004].

In *Leeder v Stevens*<sup>408</sup> the relationship between the parties was one of married man and mistress. The relationship lasted over a number of years and at the time of the transaction the parties considered that the relationship would continue indefinitely. Ms Leeder's sole asset was her house. Mr Stevens paid off the mortgage, and paid for the maintenance, insurance and some improvements on the house. In return he received a half interest in the house. It was held that there was a relationship of trust and confidence. It was a long term relationship, and was to continue into the indefinite future. As far as the test of a transaction that calls for explanation, *Leeder* applies both facets of the test. Initially Jacob LJ appeared to revert back to questioning whether the transaction was "manifestly disadvantageous" to Ms Leeder. She gave away half her house for a small investment of capital. However, the Judge went further and held in terms of the relationship between the parties "[i]t was a transaction which cried out for explanation other than going beyond merely a loving relationship."<sup>409</sup>

The fact specific analysis of a transaction that calls for explanation gives more flexibility to a court to judge the relationship between the parties.<sup>410</sup> An example is *Anneveld v Robinson*.<sup>411</sup> The case concerned an action between an unmarried couple, Miss Anneveld and Mr Robinson. They had a daughter together. The couple purchased a property in their joint names with the intention to develop it and use it as a family home. However, Miss Anneveld met another woman on the internet, and Mr Robinson alleged they began a lesbian relationship, which Miss Anneveld denied. In any event, it was recognised that the relationship had reached a crisis point. Mr Robinson felt that Miss Anneveld needed to prove her feelings and commitment to him, and he proposed that she transfer her half of the property into their daughter's name. If the relationship survived, then Miss Anneveld's name would be reinstated on the title. When Miss Anneveld signed the transfer, she was reliant on Mr Robinson's representations, and her half of the property was transferred not to her daughter, but to Mr Robinson. Further, the mortgage that she was responsible for was also removed.

It was held that Miss Anneveld failed to establish undue influence. Given the personalities of the parties and their relationship, it was held that this was not a transaction that called for explanation, and could be accounted for by the motives of an ordinary person in that relationship.<sup>412</sup> Further, it was held

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<sup>408</sup> [2005] EWCA Civ 50.

<sup>409</sup> Ibid, per Jacob LJ, para 17.

<sup>410</sup> See also In *Goodchild v Bradbury* [2006] EWCA Civ 1868 where a gift of land from an elderly man to his great-nephew was not explicable on the basis of their relationship, or as a gift in contemplation of the great-nephew's marriage. The transfer was set aside.

<sup>411</sup> 2005 WL 3142400 (cited Westlaw, at 18 July 2006, Staines County Court).

<sup>412</sup> See also *Aldridge v Turner* [2004] EWHC 2768 where there was a large number of small transactions from an increasingly incompetent father to his son and daughter-in-law who were caring for him. Mr Michael Briggs QC considered

that the absence of independent advice would not have affected Miss Anneveld's decision to enter into the agreement to sign her share of the property into her daughter's name. Batcup DJ conceded that independent advice would have affected the way the documents were drawn up (that is the property would be transferred to the daughter rather than Mr Robinson). However, it was held that whether or not Mr Robinson was trying to cheat Miss Anneveld was another issue. It was held that he did not cheat her out of anything (apart from the "dream" of the family property) because at the time, her interest in the property was valueless. The property was extremely run-down, and the large proportion of the work developing the property was personally undertaken by Mr Robinson. At the same time, she was relieved of all her liabilities to the bank. Therefore, she had not really lost anything. Miss Anneveld's contention was that her half share remained hers. Mr Robinson's contention was that the transfer was valid, and Miss Anneveld had no interest in the property. In conclusion, the Judge held that as undue influence was not established, the original intention that half the property be held on trust for the daughter was upheld.

In *Attorney-General for England and Wales v R*<sup>413</sup> a soldier, R, was a member of the United Kingdom SAS forces. He was required to sign a confidentiality agreement to "prevent unauthorised disclosure"<sup>414</sup> following publication of books and the making of films concerning operations of the SAS. If he did not sign the confidentiality agreement he would be unable to stay in the regiment and would be required to return to unit. Involuntary return to unit was regarded as a penalty. R signed the confidentiality agreement without any independent advice, but the agreement was accompanied by an explanatory memorandum which consisted of frequently asked questions. He felt that he had to sign the agreement if he wanted to remain in the SAS. However, he changed his mind less than two weeks later and applied for a premature voluntary release. Later, he wanted to write a book about his experiences. The Attorney-General commenced proceedings claiming an injunction to stop the publication, damages and an account of profits. In his defence, R claimed *inter alia* that the agreement was signed under undue influence.

With regard to the question of undue influence, the Privy Council cited *Etridge* and held that the military hierarchy, strong regimental pride and personal admiration for the commanding officer gave rise to a relationship of influence. However, the nature of the transaction, namely signing the confidentiality agreement did not "give rise to an inference that it was obtained by an unfair

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each transaction individually as to whether it constituted a transaction that called for explanation. In doing so, he applied both facets of the test to the case.

<sup>413</sup> [2004] 2 NZLR 577.

<sup>414</sup> *Ibid*, per Lord Hoffmann, p 580.

exploitation of that relationship”,<sup>415</sup> that is, given the nature of serving in the SAS, it was not a transaction that called for explanation. It was held that the absence of legal advice did not affect the fairness of the transaction.

*Padgham v Rochelle*<sup>416</sup> illustrates how the test from *Etridge* is in substance different from manifest disadvantage, and has lowered the threshold to find undue influence.<sup>417</sup> The case concerned an elderly farmer who had become dependent on his son for his day to day care. He granted his son an agricultural tenancy over land and buildings on a property he purported to leave to two of his grandchildren in his will. The effect of a valid grant of tenancy would reduce the value to the grandchildren in the event of a sale. The son was also given a right of pre-emption to purchase the property in the will. It was held that the tenancy agreement was a transaction that called for explanation. It was not a gift which could be accounted for on the grounds of ordinary motives, given the conflict between a tenancy agreement and the father’s will. The claim of undue influence succeeded because the father did not receive any independent advice. It is submitted that if the old test of manifest disadvantage had been applied, the outcome of the case might be different. The father received a benefit from the transaction. He was looked after in his old age. Without his son’s help, he would have needed to move into an old peoples’ home. The son had worked on the land since he was 10 years old and full time since he was 15. If the advantages and disadvantages were weighed up, given the history between the parties, it would be open to conclude that the transaction was not manifestly disadvantageous to the father. It is interesting to note that it was held by Henderson QC that the agreement was highly advantageous to the son but had no advantages to the father. However, it was not *manifestly* disadvantageous to the father.

The test of a transaction that calls for explanation also introduces a subjective element, because of the focus on what is or is not readily explicable by the relationship of the parties. The subjective element looks at what would be a normal transaction specifically between the two parties concerned.<sup>418</sup>

Therefore, if one person was overcome by religious faith, and wished to donate all of his or her property to the church, then this may be considered an explicable transaction given the relationship of

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<sup>415</sup> *Attorney-General for England and Wales v R* [2004] 2 NZLR 577, per Lord Hoffmann, p 584-585.

<sup>416</sup> 2002 WL 31413932 (cited Westlaw at 31 July 2006).

<sup>417</sup> This is despite the view of Scott, in ‘Evolving Equity and the Presumption of Undue Influence’ (2002) 18 JCL 15, 2002 JCL LEXIS 15 (cited Lexis.com at 10 February 2006), where she argues that the House of Lords intended to raise the threshold for establishing the evidential presumption of undue influence, p 22. However, her justification for this conclusion may be limited to raising the evidential presumption in husband-wife guarantee situations. In *Rutherford v Bank of New Zealand* HC Wellington, Civ-2006-485-1345, [5 February 2007] Associate Judge Gendall held at para 47 that *Etridge* has raised the threshold for presumed undue influence because more was required than simply a relationship of trust and confidence. However, it is respectfully submitted that Judge Gendall has omitted from the analysis the previous requirement of proving manifest disadvantage.

<sup>418</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 11-015.

the parties, that is, of spiritual leader and follower. Difficulties may also arise in cases involving fundamentalist cultural beliefs. A more balanced approach may be to follow the suggestion of Ridge<sup>419</sup> and to apply an objective test that follows closely the test derived from *Allcard v Skinner*: a gift that cannot “reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act”,<sup>420</sup> with particular emphasis on “ordinary motives” of “ordinary men”.

Therefore, cases have adopted the test of a transaction that calls for explanation, and illustrate that the test of a transaction that calls for explanation is wider than manifest disadvantage.<sup>421</sup> To ensure that the true test from *Etridge* is applied, it is particularly important that both facets to the test are applied. Reverting back to the old test of manifest disadvantage, or simply weighing up the relative advantages and disadvantages should be avoided.

## REBUTTING THE EVIDENTIAL PRESUMPTION

### 1. General Principles

The effect of successfully establishing the evidential presumption is that it shifts the onus from the influenced party to the dominant party to rebut the presumption. The weight of the presumption varies from case to case, and “will depend both on the particular nature of the relationship and on the particular nature of the impugned transaction.”<sup>422</sup> The corollary of that is that “the type and weight of evidence needed to rebut the presumption will obviously depend upon the weight of the presumption itself.”<sup>423</sup> Similarly, Dixon J in *Johnson v Buttress*<sup>424</sup> held that the influence that grows from different relationships varies in kind and degree. Therefore, the facts required to prove that the donor was freed from the influence will correspondingly differ.<sup>425</sup> Lord Scott in *Etridge* gave the example of *Allcard v Skinner*. The presumption raised in *Allcard* would have been a very heavy one, and strong evidence would have been required to rebut it, given the nature of the influence – religion. Lord Scott doubted if independent advice would have sufficed, unless there was also proof that Miss Allcard would have been free to act on the advice given to her.

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<sup>419</sup> P Ridge, ‘The Equitable Doctrine of Undue Influence Considered in the Context of Spiritual Influence and Religious Faith: *Allcard v Skinner* Revisited in Australia’ (2003) 26(1) UNSW Law Journal 66.

<sup>420</sup> *Allcard v Skinner* (1885) 36 Ch D 145, per Lindley LJ, p 185.

<sup>421</sup> See also P S Atiyah and S A Smith, *Atiyah’s Introduction of the Law of Contract* (6<sup>th</sup> ed 2005), p 286.

<sup>422</sup> *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, per Lord Scott, p 500.

<sup>423</sup> *Ibid.*

<sup>424</sup> (1936) 56 CLR 113.

<sup>425</sup> *Ibid* p 134.

In order to rebut the evidential presumption of undue influence, one must first return to the principles in *Allcard v Skinner*. The defendant must show that:

... in fact the gift was the spontaneous act of the donor acting under circumstances which enable him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will.<sup>426</sup>

In *Allcard*, the rule that Miss Allcard could not seek the advice of any extern counted against the defendant, because Miss Allcard could not obtain independent advice if she wished for it.<sup>427</sup> In *Brandon v Brandon*,<sup>428</sup> it was held that when considering whether the presumption is rebutted, it is relevant to find the source of the impugned decision, "as well as the nature and degree of the benefit bestowed upon the donee and the nature of the entire transaction including the donee's special perspective and goals."<sup>429</sup>

The presumption is not rebutted by establishing that the plaintiff knew and understood what he or she was doing, but it must be established that he or she was free from the influence of the defendant. In the oft cited passage from *Huguenin v Baseley*,<sup>430</sup> Lord Eldon LC expressed the question as "not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced."<sup>431</sup> The onus is on the donee to show "that the donor either was emancipated, or was placed, by the possession of independent advice, in a position equivalent to emancipation."<sup>432</sup> It is not enough to establish understanding of the transactions. It must be shown that the donee took no advantage of the donor, and that the gifts were an independent and well understood act of a person "in a position to exercise a free judgment based on information as full as that of the donee"<sup>433</sup>

The passage from Lord Eldon can be construed as taking a defendant based approach to undue influence: the donor must be emancipated from the influence of the donee, in other words, the influenced party must be freed from any influence or wrongdoing of the stronger party. However, this reflects only one side of the question. If a purely defendant based approach is adopted, then merely proving that the influencing party has done nothing wrong should suffice to rebut the evidential

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<sup>426</sup> *Allcard v Skinner* (1887) 36 ChD 145, per Cotton LJ, p 171.

<sup>427</sup> *Ibid*, per Lindley LJ, p 184 and per Bowen LJ, p 190.

<sup>428</sup> 2001 WL 454384 (Ont SCJ), [2001] OJ No 2986200, (cited CarswellOnt 2688, Westlaw).

<sup>429</sup> *Ibid*, per Howden J, para 54.

<sup>430</sup> [1803-13] All ER Rep 1, per Lord Eldon LC p 13

<sup>431</sup> This was cited with approval in *Banco Exterior International v Mann* [1995] 1 All ER 936, per Hobhouse LJ p 946; and *Royal Bank of Scotland v Etridge (No 2)* (CA) [1998] 4 All ER 705, per Stuart-Smith LJ p 714.

<sup>432</sup> *Powell v Powell* (1899) [1900] 1 Ch 243, per Farwell J, p 246.

<sup>433</sup> *Bar-Mordecai v Hillston* [2004] NSWCA 65, per the Court, comprising Mason P, Tobias JA and Davies AJA, para 167. See also comments of Millett LJ in *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, p 156.

presumption.<sup>434</sup> As the following cases show, this is not entirely correct. Issues of rebuttal centre on the apparent consent of the weaker party. Was free will exercised? Was sufficient independent advice provided? Was the weaker party a sufficiently informed and educated person such that the influence exercised, or the lack of independent advice provided immaterial? These issues reinforce the conclusion that undue influence encompasses both defendant and plaintiff based aspects.

## 2. Independent Advice

The most prominent way to ensure that the plaintiff exercised his or her own free will is the provision of independent legal advice.<sup>435</sup> However, in *Inche Noriah v Shaik Allie bin Omar*<sup>436</sup> it was held that independent advice is not the only way in which the presumption can be rebutted. Their Lordships also held that it is not necessary to show that the advice, if given would be followed.<sup>437</sup> In *Etridge* it was held that:

In the normal course, advice from a solicitor or other outside advisor can be expected to bring home to a complainant a proper understanding of what he or she is about to do. But a person may understand fully the implications of a proposed transaction, for instance, a substantial gift, and yet still be acting under the undue influence of another. Proof of outside advice does not, of itself, necessarily show that the subsequent completion of the transaction was free from the exercise of undue influence. Whether it will be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence, is a question of fact to be decided having regard to all the evidence in the case.<sup>438</sup>

Therefore notwithstanding receiving independent advice, a person can be under undue influence.<sup>439</sup>

In *Credit Lyonnais Bank Nederland NV v Burch*<sup>440</sup> Millett J held that independent advice “is neither always necessary nor always sufficient. It is not a panacea. The result does not depend mechanically on the presence or absence of legal advice.”<sup>441</sup> His Honour went further and explained the intended effect of legal advice:

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<sup>434</sup> See also discussion above p 12-14 on cases where it was established that the defendant had done nothing wrong, however undue influence was still established: *Cheese v Thomas* [1994] 1 All ER 35; *Hammond v Osborn* [2002] EWCA Civ 885; *Carey v Norton* [1998] 1 NZLR 661; and *Rabobank New Zealand Limited v Balderston* HC Wellington, Civ-2006-485-117, [4 May 2006].

<sup>435</sup> See *Johnson v Buttress* (1936) 56 CLR 113, per Latham CJ, p 120; *Royal Bank of Scotland v Etridge (No 2)* (CA) [1998] 4 All ER 705, per Stuart-Smith LJ p 714.

<sup>436</sup> [1929] AC 127, per Lord Hailsham LC, p 135-136.

<sup>437</sup> In *Powell v Powell* (1899) [1900] 1 Ch 243 it was held that it is not enough that independent advice is given, but that advice must be acted upon. This was rejected in *Coomber v Coomber* [1911] 1 Ch 723.

<sup>438</sup> [2001] 4 All ER 449, per Lord Nicholls, p 460.

<sup>439</sup> See *Harrison v Harrison* [2004] NZFLR 832, per Fogarty J, p 863. In *Ganderton v Behre* HC ROT CIV 2004-463-000614 [23 September 2005] it was held that following *Etridge* a person may receive independent advice, be fully aware of what they are doing, yet still be acting under the influence of another. An important aspect that indicated that the solicitor's advice was insufficient to remove that taint of undue influence was the fact that the solicitor was merely drafting the agreements that reflected the position that the parties had already agreed to themselves. This is far removed from the situation where the solicitor negotiates on behalf of the client.

<sup>440</sup> [1997] 1 All ER 144.

<sup>441</sup> *Ibid*, per Millett LJ, p 155-6.



It is not sufficient that the solicitor has satisfied himself that the complainant understands the legal effect of the transaction and intends to enter into it. That may be a protection against mistake or misrepresentation; it is no protection against undue influence ... Accordingly, the presumption cannot be rebutted by evidence that the complainant understood what she was doing and intended to do it. The alleged wrongdoer can rebut the presumption only by showing that the complainant was either free from any undue influence on his part or had been placed, by the receipt of independent advice, in an equivalent position. That involves showing that she was advised as to the propriety of the transaction by an adviser fully informed of all the material facts.<sup>442</sup>

In *MacKenzie v Royal Bank*<sup>443</sup> Lord Atkin discussed the timing of independent advice. To be of value, it must be given before the transaction is entered into. If the advice is given after the event, then the party is already bound, and the point of view, or the mind set of the adviser and the client take on a different position. The advice is given under completely different circumstances.<sup>444</sup>

The adviser need not be a lawyer (although it is commonly so). It can be another professional or expert.<sup>445</sup> If a lawyer is involved, the solicitor's retainer is relevant.<sup>446</sup> In many situations, financial advice may also be required. This is especially where the financial viability of a business is called into question.<sup>447</sup> In *Wadlow v Samuel (p.k.a. Seal)*<sup>448</sup> it was acknowledged that Seal had received independent advice from his new manager, Mr Cavallo who was not a lawyer, but an industry expert.

### 3. Inadequate Independent Advice

In order for any independent advice to be sufficient “the adviser must be fully informed of all the material facts ... [and] the advice that is given must in fact be meaningful”.<sup>449</sup> The solicitor must advise on the unusual provisions of the agreement.<sup>450</sup> The duty of the solicitor is “to protect the donor against himself, and not merely against the personal influence of the donee.”<sup>451</sup> Independent advice in the context of an adult, who is competent to form an opinion, means “that the advice shall be removed entirely from the suspected atmosphere; and that from the clear language of an independent mind, they should know precisely what they are doing.”<sup>452</sup>

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<sup>442</sup> *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, per Millett LJ, p 156.

<sup>443</sup> [1934] 2 WWR 620, [1934] AC 468, [1934] 4 DLR 1, (cited 1934 CarswellOnt 118, Westlaw at 11 October 2006 Judicial Committee of the Privy Council).

<sup>444</sup> *Ibid*, per Lord Atkin, para 5.

<sup>445</sup> P Vout, (ed and Current Updating Author), *Unconscionable Conduct The Laws of Australia* (2006), para 35.8:47.

<sup>446</sup> *Investors Compensation Scheme Limited v West Bromwich Building Society* [1999] Lloyd's Rep PN 496.

<sup>447</sup> G Andrews, and R Millett, *Law of Guarantees* (4<sup>th</sup> ed 2005), p 181. See also *Wilkinson v ASB Bank Ltd* [1998] 1 NZLR 675 at 691, and *Alirezai v Australian and New Zealand Banking Group Limited* [2004] QCA 6, [2004] Q ConvR 54-601, (cited 2004 WL 227507, Westlaw at 10 February 2006), per Wilson J, para 111.

<sup>448</sup> [2006] EWHC 1492.

<sup>449</sup> P Vout, (ed and Current Updating Author), *Unconscionable Conduct The Laws of Australia* (2006), para 35.8:47. See also G H Treitel, *The Law of Contract* (11<sup>th</sup> ed 2003), p 419.

<sup>450</sup> Above n 446.

<sup>451</sup> *Powell v Powell* (1988) [1900] 1 Ch 243, per Farwell J, at p 247.

<sup>452</sup> *Coomber v Coomber* [1911] 1 Ch 723, per Fletcher Moulton LJ, p 730.

There are many examples of clients, receiving independent advice, which was not sufficient to remove the taint of undue influence.<sup>453</sup> In *Inche Noriah v Shaik Allie bin Omar*,<sup>454</sup> the lawyer advising the appellant did not appreciate that she was parting with virtually all her property, and failed to advise her that she could have benefited her nephew in a more prudent way, without any risk to herself during her lifetime. In *Brandon v Brandon*,<sup>455</sup> Mr Brandon left an island to his wife, Mrs Brandon as to 50%, and 25% to each son on his death. Mrs Brandon later created an arrangement whereby she benefited one son and his family to the exclusion of the other son as to her 50% share of the island. The excluded son alleged undue influence. It was held that the solicitor appreciated that undue influence could have been an issue at the time the documents were executed. Therefore, simply explaining the effect of the documents was not enough. The solicitor failed to understand that the source of the influence was her son. The influencing son controlled information passed to her: he handled her mail, and read letters to her. The solicitor failed to establish who was paying the legal bills, inquire into her present and future financial position, and advise her of the consequences and the inequity of her disposition.<sup>456</sup>

If the solicitor is unfamiliar with the client, then the need to take time to get to know the client's background, and the surrounding circumstances to the transaction cannot be overemphasized. In *Vale v Armstrong*<sup>457</sup> an elderly man, Mr Vale, transferred his home to his great nephew. The lawyer failed to spend the time to talk to Mr Vale about wider issues, to get to know him, and understand his relationship with Mr Armstrong. Although he explained the transaction, he did not advise Mr Vale to enter into a contract to protect his right to occupy the property for his life and, that such a document was capable of registration, nor did he advise Mr Vale that there were alternatives to the proposed transaction that would also achieve the objective sought. The legal advice given was found wanting.<sup>458</sup> In *Brusewitz v Brown*<sup>459</sup> the solicitor knew nothing about the transaction until he interviewed Mr Brusewitz. The transaction was a transfer from Mr Brusewitz to Mr Brown of his mortgage, (which represented his whole estate) in consideration for an annuity. The mortgage was due to be repaid in another four years. Mr Brusewitz died four months after entering into the transaction. The solicitor was employed by Mr Brown. He did not make inquiries about Mr Brusewitz's health (he was dying of cirrhosis of the liver), the standing of Mr Brown as grantor of an unsecured annuity, and the value of

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<sup>453</sup> See for example *Contractors Bonding v Snee* [1992] 2 NZLR 157.

<sup>454</sup> [1929] AC 127.

<sup>455</sup> 2001 WL 454384 (Ont SCJ), [2001] OJ No 2986200, (cited CarswellOnt 2688, Westlaw). The decision was approved in the Ontario Court of Appeal in *Brandon v Brandon* 6 ETR (3d) 210, (cited 2003 CarswellOnt 4828, Westlaw).

<sup>456</sup> Mrs Brandon felt that the only way to keep the island in the family was to ensure male succession. However, in the event of the death of her only grandson, she ultimately benefited the female granddaughters on one side of the family.

<sup>457</sup> [2004] EWHC 1160.

<sup>458</sup> See above p 53 and below p 82 for further facts and discussion on the case.

<sup>459</sup> [1923] NZLR 1106. See discussion below p 117.

the annuity in relation to the value of the mortgage transferred. It was held that the solicitor was not in a position to give informed advice and the transaction was set aside on the grounds of undue influence.

In *Lee v Damesh Holdings Ltd*,<sup>460</sup> Mrs Lee was taken to see a solicitor to whom she was unfamiliar. She was advised not to enter into the transaction, but did so despite the advice given. The events leading up to the signing of the mortgage moved quickly and the consultation with the solicitor was hurried. Further, her son, Trevor (the dominant party) was present for most of the interview. The solicitor had limited opportunity to investigate the transaction, and did not have complete information regarding the deal, other than it was a “financial transaction.” These elements meant that the independent legal advice did not remove the undue influence. Similarly in *Contractors Bonding Ltd v Snee*<sup>461</sup> the interposition of the solicitor did not remove the undue influence of the son. The solicitor did not have adequate opportunity to investigate the transaction, and did not have sufficient financial information about the business in order to advise his client fully. In a recent case of *Gemmell v Harlow*<sup>462</sup> the independent advice received by a de facto wife before she signed an agreement governing the division of property with her de facto husband was insufficient. The solicitors advising the de facto wife were unable to ascertain what assets were involved and what the assets were worth. The independent advice given was held to be “no better than a formality.”<sup>463</sup>

#### **4. Effect of a Conflict of Interest**

The adviser must be independent of the influencing party. In *Powell v Powell*<sup>464</sup> it was held that the solicitor “must be independent of the donee in fact, and not merely in name, and this he cannot be if he is solicitor for both” the donor and donee.<sup>465</sup> The difficulty in some cases is that the solicitor acts for more than one party. The question becomes, how independent must the advice be in order to remove the taint of undue influence? In *Etridge* Lord Nicholls observed that this question cannot be answered by reference to reported decisions. The answer lies in balancing the factors in the case. As a general rule “independent advice would suggest that the solicitor should not be acting in the same transaction for the person who, if there is any undue influence, is the source of that influence.”<sup>466</sup> In some cases the solicitor can act for both the influenced party and the influencer where the solicitor is satisfied that the

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<sup>460</sup> [2003] 2 NZLR 422. See discussion above p 53, 60.

<sup>461</sup> [1992] 2 NZLR 157.

<sup>462</sup> HC AK CIV 2005-404-002993 [4 July 2006].

<sup>463</sup> *Ibid*, per Keane J, para 75.

<sup>464</sup> (1899) [1900] 1 Ch 243, per Farwell J p 246.

<sup>465</sup> See also P Vout, (ed and Current Updating Author), *Unconscionable Conduct The Laws of Australia* (2006), para 35.8:47.

<sup>466</sup> *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, per Lord Nicholls, p 471.

best interests of the influenced party can be satisfied and there are no conflicts of duty or interest. However, in other cases the solicitor cannot act for both the influenced party and the influencer. The solicitor may consider the influencer the main client and rank the interests of the influenced party lower on his or her scale of priorities. Further, the influenced party may feel inhibited in discussions with the solicitor. Lord Scott seems to suggest that if there is suspected undue influence or impropriety between two people, then a solicitor cannot properly advise the influenced party. Advice from a solicitor independent of the dominant party needs to be sought.<sup>467</sup>

*National Westminster Bank Plc v Breeds*<sup>468</sup> concerned independent advice given to a wife who mortgaged her home and gave a guarantee to support her husband's business. The solicitor who advised Mrs Breeds was also acting for the husband, the borrowing company, and was the company secretary. He was also actively involved with obtaining finances, and company affairs. It was held by the trial judge that Mr Breeds had exerted undue influence on Mrs Breeds, and the "independent" advice received from the solicitor was insufficient to dispel the undue influence that Mr Breeds exercised over his wife.<sup>469</sup> It was held that a solicitor should not act for two clients where there is a real risk that there may be a conflict of interest between them. The independence required of a solicitor means that the ability to give advice without fear that the party would not enter into the transaction needs to be retained. The client must understand that any terms of the transaction are negotiable. Any conflicts of interest are generally for the solicitor to resolve.<sup>470</sup>

In *Mahoney v Purnell*<sup>471</sup> the solicitor acted for the buyer and seller of shares, and the company in which those shares were held. The seller alleged the buyer had exercised undue influence over him. It was held that the presumption of undue influence had been proved. In terms of rebutting the presumption, it

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<sup>467</sup> *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, per Lord Scott, p 506.

<sup>468</sup> [2001] Lloyd's Rep Bank 98, (cited 2001 WL 14971 Westlaw).

<sup>469</sup> *Ibid*, per Collins J, para 74.

<sup>470</sup> *Ibid* para 73.

See discussion on *Bank of Montreal v Stuart* [1911] AC 120 above p 46. In the case, the solicitor who acted on all or most of the transactions acted for the wife, the husband who was exerting the undue influence, and the bank. He was also a director, secretary, shareholder and creditor of the company. It was held that the solicitor was not in a position to act fairly and to competently advise the wife, and certainly not in a position to remove any allegations of undue influence. The solicitor was so inextricably involved in the transaction that it was found that not only the husband took unfair advantage of Mrs Stuart's confidence, but the solicitor did also. The proper course of action would be to advise the husband that his wife needed to be separately advised.

In *Newell v Tarrant* [1911] AC 120 the solicitor acted for both husband and wife, and also as the banker in respect of lending. Mr Newell ignored the conflict of interest and treated the husband and wife as if they were one person. Mr Newell also omitted to advise the wife to seek independent legal advice. In applying *Etridge* it was held that the transaction could be impugned on the basis of undue influence.

<sup>471</sup> [1996] 3 All ER 61.

was held that the seller did not in fact receive independent advice, and the finding of undue influence was not rebutted.

In *Clark Boyce v Mouat*<sup>472</sup> it was held that a solicitor can act for parties with conflicting interests if the solicitor had the informed consent of both parties. What is meant by informed consent is that each party knows that the solicitor is in a position of conflict which may result in the solicitor being unable to disclose knowledge, or to give advice which may conflict with the interests of the other party. If both parties are content with that basis, then the solicitor can proceed to act. It is submitted that such an approach may be appropriate in general cases, but inappropriate in undue influence cases. If a person was under the influence of another, then whether they have a sufficient independent frame of mind in order to decide whether or not another adviser is needed is doubtful. The influence of the dominant party may adversely affect their ability to make an appropriate decision about entering into the proposed transaction as well as whether another solicitor needs to be retained.

## **5. Lack of Independent Advice is Not Fatal**

If the complainant did not receive any independent advice, it is difficult to rebut the presumption.<sup>473</sup> However, a lack of independent advice is not fatal. The absence of legal advice is not decisive in any case of undue influence. In other words, it may not be unfair exploitation of one party to a transaction if independent legal advice is absent.<sup>474</sup> In *Gold v Rosenberg*<sup>475</sup> Sopinka J held that whether or not someone requires independent advice depends on two factors: do they understand the transaction that is proposed to them, and are they free to decide in accordance with their own will. If both of these factors are answered in the positive, then independent advice is not required, and any lack thereof is not fatal to the enforcement of the transaction. The focus here in essence, is on whether the plaintiff's ability to consent to the transaction is in any way impaired, by any influence exercised by the defendant.

This is illustrated in a number of cases. In *Bank of Montreal v Courtney*<sup>476</sup> the wife, Mrs Courtney had completed one year of university and obtained a legal secretarial diploma. She worked as a secretary for 10 years. It was held that she had a good educational background and appreciation of financial and business matters. Mrs Courtney borrowed various amounts of money from the bank as co-borrower with her husband and as principal borrower, with her husband as guarantor. When the bank sought

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<sup>472</sup> [1993] 4 All ER 268. *Clark Boyce v Mouat* was cited with approval in *Mahoney v Purnell* [1996] 3 All ER 61.

<sup>473</sup> See *Hammond v Osborne* [2002] EWCA Civ 885.

<sup>474</sup> *Attorney-General for England and Wales v R* [2003] 2 NZLR 577.

<sup>475</sup> 152 DLR (4<sup>th</sup>) 385, [1997] 3 SCR 767 (cited 1997 CarswellOnt 3273, Westlaw at 11 October 2006).

<sup>476</sup> 261 DLR (4<sup>th</sup>) 665 (cited 2005 CarswellNS 506, Westlaw at 31 July 2006).

repayment of the loans, the wife claimed that she was harassed by her husband to sign the loans, and that she was given no independent legal advice. It was held that she had a sophisticated understanding of financial matters, and any influence exercised on her by her husband did not constitute undue influence. The lack of independent advice was not fatal to the enforcement of the loan transaction.

In *Bank of Montreal v Duguid*<sup>477</sup> the defendant wife was a real estate agent. She was a co-signer of a loan with her husband, which her husband used for a tax-driven real estate investment. When the husband became bankrupt, the bank sought to enforce the loan against Mrs Duguid. She argued that she did not receive any independent legal or financial advice, and Mr Duguid had exercised undue influence over her to procure her to sign. The majority held that Mrs Duguid had failed to establish a case of actual or presumed undue influence. The features of the evidence that suggested that there was no presumption of undue influence also pointed to rebutting any presumption that may have arisen. Mrs Duguid was a real estate agent. She would have known the risks of her husband's investments and the significance in being a co-signer to his promissory note. Independent advice was not necessary.

In *Attorney-General for England and Wales v R*<sup>478</sup> a soldier signed a confidentiality contract without independent legal advice. On the facts of this case, it was not unfair exploitation of the soldier when he did not receive independent legal advice. He understood the contract, (which an explanatory memorandum was provided). At most, any legal advice would have caused him to reflect as to whether he should sign, but he could have made that decision without legal advice. Lord Scott dissented and held that if the Ministry of Defence wished to impose obligations on its soldiers after they leave the armed services, then they must make independent advice available to the soldiers.<sup>479</sup>

Independent advice is not the only means to rebut the presumption.<sup>480</sup> Any evidence that shows informed and free exercise of will on the part of the weaker party will suffice.<sup>481</sup> In *Bank of Montreal v Duguid*<sup>482</sup> it was held that other circumstances such as “commercial knowledge, experience, general

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<sup>477</sup> 185 DLR (4<sup>th</sup>) 458, 5 BLR (3d) 1, (cited 2000 CarswellOnt 1306, Westlaw).

<sup>478</sup> [2003] 2 NZLR 577.

<sup>479</sup> See A Beck, ‘Contract’ 2004 NZ Law Review 145, at p 150. Beck argues that the emphasis given by Lord Scott as to the role of legal advice is too great; it elevates it into a mandatory requirement. Beck prefers the approach of the majority.

<sup>480</sup> See *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, per Lord Scott, p 500; and *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 at 135, [1928] All ER Rep 189 at 193.

<sup>481</sup> *Allcard v Skinner* (1885) 36 Ch D 145, p 171. See also Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 12-009.

<sup>482</sup> 185 DLR (4<sup>th</sup>) 458, 5 BLR (3d) 1, (cited 2000 CarswellOnt 1306, Westlaw).

sophistication or independence”<sup>483</sup> may be enough. Other circumstances may include education, and “any previous dealings in the type of transaction in question.”<sup>484</sup>

Therefore, from the discussion above, issues on rebutting the presumption and the provision of independent advice do not only focus on the conduct of the defendant. The consent of the plaintiff, and whether that consent is impaired, or whether the independent advice was sufficient to restore the plaintiff’s ability to give consent are factors. Otherwise, the defendant could discharge their duty, and ensure a clear conscience simply by ensuring that the plaintiff received independent advice, without any consideration as to the effect of the advice on the plaintiff. This again, highlights the tension between the defendant and plaintiff based approaches. It serves to illustrate and reinforce that both elements are present in any undue influence case.

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<sup>483</sup> 185 DLR (4<sup>th</sup>) 458, 5 BLR (3d) 1, (cited 2000 CarswellOnt 1306, Westlaw), per Osborne ACJO, para 25.

<sup>484</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para12-009.

**CHAPTER 5**

**THE LEGACY OF**  
***ETRIDGE***



## INTRODUCTION

The intention of the House of Lords in *Etridge* was to clarify and dispel some of the misconceptions in the law. It is the treatment of *Etridge* by the courts, and the interpretation given to it by the commentators, that show in some cases *Etridge* has not been interpreted and applied as the House of Lords intended.

## THE “PRESUMPTION” OF UNDUE INFLUENCE

A continuing source of confusion is the treatment of the “presumption” of undue influence. Goff and Jones<sup>485</sup> still contend that *Etridge* has retained the “irrebuttable presumption of undue influence” where “there are certain relationships where the law irrebuttably presumes *undue* influence”,<sup>486</sup> (emphasis added). *Etridge* clarifies the position that there is an irrebuttable presumption of influence, and a rebuttable evidential presumption of undue influence. The irrebuttable presumption of influence is a tool in establishing one of the two requirements to raise the evidential presumption of undue influence.<sup>487</sup>

With regard to terminology, post-*Etridge* decisions still utilise the terms “actual undue influence” and “presumed undue influence” as a short hand to distinguish the two classes. However, it must be understood that reference to “presumed undue influence” is reference to the evidential presumption.<sup>488</sup> In many post-*Etridge* cases, despite citing *Etridge* and analysing Lord Nicholls’ speech, it seems that the point that Lord Nicholls was making has been entirely misinterpreted.<sup>489</sup> Those cases perpetuated the misconception of the old law that particular relationships give rise to a presumption of *undue* influence, that is “the relationship by itself gives rise to a presumption not only that one party had influence over another but that undue influence had been exercised.”<sup>490</sup>

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<sup>485</sup> Goff and Jones, *The Law of Restitution* (6<sup>th</sup> ed 2002), at 11-006.

<sup>486</sup> *Ibid.*

<sup>487</sup> N Enonchong, ‘Presumed Undue Influence: Continuing Misconceptions’ LQR 2005, 121 (Jan), 29-33, p 32.

<sup>488</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 7-009.

<sup>489</sup> See for example *Niersmans v Pesticcio* [2004] EWCA Civ 372 and *Randall v Randall* [2004] EWHC 2258 (Ch).

<sup>490</sup> Enonchong, above n 487, p 29; and above n 488, para 10-005.

For an example see *Eftimovski v Faris* 23 RPR (4<sup>th</sup>) 184, 48 BLR (3d) 93, (cited 2004 CarswellOnt 3351, Westlaw), the Ontario Superior Court of Justice in Canada seems to have confused a presumption of undue influence and the evidential presumption. Cameron J began his discussion on undue influence by looking at the old presumptions and classifications from *Barclays Bank plc v O’Brien* [1993] 4 All ER 417, *Bank of Montreal v Duguid* 185 DLR (4<sup>th</sup>) 458, 5 BLR (3d) 1, (cited 2000 CarswellOnt 1306, Westlaw), and *Goodman Estate v Geffen* 81 DLR (4<sup>th</sup>) 211, [1991] 2 SCR 353: “the presumption of undue influence will arise in circumstances where there is a relationship of trust and confidence of such a nature that it is fair to infer the dominant party abused that relationship in procuring the impugned transaction.” (para 81). Cameron J then goes on to cite *Etridge* and *CIBC Mortgage Corp v Rowatt* 2002 CarswellOnt 3586, 220 DLR (4<sup>th</sup>) 139 and discusses the rebuttable evidential presumption of undue influence, without fully appreciating the misconception highlighted by *Etridge* that proof of a relationship of trust and confidence is not proof that the influence was abused.

In a further confusion regarding the interaction of pre-*Etridge* and post-*Etridge* presumption of undue influence, Ridge argues<sup>491</sup> that following *Etridge*, there are two formulations of undue influence in case law. The first is the “traditional” formulation from *Aboody* that treats presumed undue influence as an application of fiduciary law, and actual undue influence as coterminous with duress. The second formulation derived from *Etridge* regards “presumed undue influence” as an evidential tool for proving actual undue influence.<sup>492</sup> Similarly McCamus<sup>493</sup> writes that *Etridge* has created a further category of undue influence. He adopted the *Aboody* classification of undue influence, Type 1 for actual undue influence, and Type 2A and 2B. However, he asserts that *Etridge* has created another category, which he calls Type 3, “non-presumptive relational undue influence”.<sup>494</sup>

It is respectfully submitted that the law on undue influence cannot be conceptualised in this way. The effect of the “presumption of undue influence” from pre-*Etridge* cases such as *Aboody* should be understood in light of *Etridge*, that all cases of undue influence are cases of actual undue influence. There are simply two ways of proving it.

## **CLASS 2B**

A further issue that has provided ready fodder for debate is whether “class 2B” has survived *Etridge*.<sup>495</sup> The basis for this is Lord Nicholls’ judgment, where he does not make any express reference to class 2A and 2B cases. However he does make a distinction in a case where a weaker party has to prove that trust and confidence was placed in another person; and cases where it need not be proved, because the law presumes irrebuttably that there was influence. “This distinction appears to resemble the substance (though not the nomenclature) of the distinction between class 2A and class 2B cases”<sup>496</sup> and therefore it is thought that Lord Nicholls supports the retention of class 2A and 2B. The question is raised, as to how this should be reconciled with the judgments of Lords Hobhouse, Scott and Clyde, who all doubted the continued survival of “class 2B”.

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<sup>491</sup> P Ridge, ‘Uncertainties Surrounding Undue Influence: Its Formulation, Application, and Relationship to Other Doctrines’ [2003] NZ Law Review 329.

<sup>492</sup> Ibid, p 331-3. Ridge argues that the two different approaches will give different results. She writes that the *Etridge* formulation is more difficult to satisfy because it is directed solely at proof of wrongdoing. However, in the pre-*Etridge* formulation, reliance can be made on fiduciary principles, which is more likely to favour the weaker party.

<sup>493</sup> J D McCamus, *Essentials of Canadian Law The Law of Contracts* (2005), p 383.

<sup>494</sup> Ibid.

<sup>495</sup> See A Craig, ‘Evidential Presumptions’ [2002] NLJ, (cited Lexis.com at 10 February 2006); F R Burns, ‘Elders and Testamentary Undue Influence in Australia’ (2005) 28(1) UNSWL 145.

<sup>496</sup> G H Treitel, *The Law of Contract* (11<sup>th</sup> ed 2003), p 415.

Treitel argues that you can reconcile this by looking at the context of *Etridge* as a husband/wife guarantee case. In the situation of a husband/wife guarantee, the “class 2B presumption” is inappropriate because there is an explanation for the transaction other than the fact that it was procured by undue influence. Therefore, Treitel concludes “that the distinction between the two classes of presumptions survives, but with significant modifications: first, that the class 2A presumption is no longer that undue influence is taken to have been *exercised*; and secondly, that the class 2B presumption will not normally (*i.e.* “in the ordinary course”) apply between spouses or parties in closely analogous relationships.”<sup>497</sup>

With respect, it is submitted that Treitel’s interpretation of *Etridge* is too narrow. A better way to reconcile the judgments is that implicit in Lord Nicholls judgment is a rejection of the old “presumption” of undue influence and hence the class 2B presumption. While Lord Nicholls does not specifically discuss the classes 2A and 2B in his judgment, he does talk about relationships that give rise to a measure of influence (class 2A). He then goes on to discuss the fact that relationships are infinitely various, and in some cases “the question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type”<sup>498</sup> (class 2B). Lord Nicholls was at pains to make a clear distinction between the “presumption” of *undue* influence, and the evidential presumption of undue influence, which is a forensic exercise. Therefore the distinction between class 2A and class 2B are not needed, as they are simply two different ways to prove the relationship of trust and confidence. It is conceded that 2A is easier to prove than 2B; however, the relationships encompassed in 2A have been recognised as special. It was intended to protect certain relationships that the law regards as worthy of extra protection.<sup>499</sup>

In *Li Sau Ying v Bank of China (Hong Kong) Ltd*<sup>500</sup> Lord Scott, sitting in the Court of Final Appeal in Hong Kong, reiterated the comments made by the Lords in *Etridge*, in particular the use of the expression “presumed undue influence”, and, deprecated its use in connection with Class 2B cases.<sup>501</sup>

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<sup>497</sup> G H Treitel, *The Law of Contract* (11<sup>th</sup> ed 2003), p 417.

<sup>498</sup> *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, per Lord Nicholls, p 458.

<sup>499</sup> *Ibid*, per Lord Nicholls, p 460. Lord Nicholls discusses the attitude of the courts in this area. There are certain relationships that the law takes a sternly protective attitude towards. The relationships are typically one where one party acquires influence over another who is dependent and vulnerable. In addition, substantial gifts from persons in the vulnerable position are not normally expected.

<sup>500</sup> [2005] 1 HKLRD 106 (Court of Final Appeal, Hong Kong). *Re Choi Siu Lui, Ex P Bank of China (Hong Kong) Ltd* [2005] HKEC 1475, 2005 WL 1997437 cited *Li Sau Ying v Bank of China (Hong Kong) Ltd* with approval, but did not apply the new principles extracted from *Etridge*.

<sup>501</sup> [2005] 1 HKLRD 106, per Lord Scott, p 119.

Use of the old “presumptions” detracted from the real issue of deciding whether the evidence justified finding that the impugned transaction was procured by undue influence.

Despite the apparent divergence in the individual judgements by the Law Lords, in practice, this has not caused any great difficulty amongst judges (unlike the academics). The majority of the cases post-*Etridge* have treated Lord Nicholls’ judgment as commanding the unqualified support of the House, and thus have proceeded to extract the *ratio decidendi* from Lord Nicholls’ judgment, without attempting to reconcile the debate as to whether or not class 2B has survived *Etridge*.<sup>502</sup>

## REPLACEMENT TRANSACTIONS

One issue that did not arise in *Etridge* was the situation where a transaction replaces a previous transaction. In some cases the undue influence was exerted from the outset, at the initial transaction, but not at the time of the replacement transaction. The issue that is raised is, whether the undue influence continues to taint the second transaction.<sup>503</sup> Alternatively, the original transaction may be unaffected by undue influence, but the replacement transaction is. The issue becomes, whether the first transaction ‘immunises’ the second?

In *Yorkshire Bank v Tinsley*,<sup>504</sup> mortgages were executed by Mrs Tinsley to secure Mr Tinsley’s business debts. The initial mortgages were executed while Mr Tinsley exercised undue influence over his wife. The bank had constructive notice of the undue influence, and took no steps to ensure that Mrs Tinsley entered into those mortgages freely. The mortgages were, therefore, voidable as against the bank. Those mortgages were later replaced by another mortgage on a different property, as part of divorce proceedings to secure Mr Tinsley’s current and future liabilities. The question before the Court of Appeal was whether the undue influence exercised on the earlier mortgages could be “transferred” to the replacement mortgage. It was held that it could:

It would be natural to expect that if, without more, an obligation incurred between two or three parties is legally ineffective in any way, any new obligation arising out of the release of such earlier obligation would be legally ineffective in a similar way. It may not be easy to find authority for such a broad proposition but, in principle ‘nothing will come of nothing’ as King Lear observed. As far as void contracts are concerned there can be little question that that must be the law ... and, if it is a condition of the rescission or release of the original void or voidable bargain that the parties enter into a new bargain, that new bargain must be as open to attack as the old one.<sup>505</sup>

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<sup>502</sup> *McGregor v Michael Taylor & Co* [2002] 2 Lloyd’s Rep 468; *Padgham v Rochelle & Searle* 2002 WL 31413932 (cited Westlaw at 31 July 2006); *GMAC Commercial Credit Development Limited v Sandhu* [2004] EWHC 716; *Vale v Armstrong* [2004] EWHC 1160; *Wadlow v Samuel (p.k.a. Seal)* [2006] EWHC 1492; *Dailey v Dailey* 2003 WL 22187642, [2003] UKPC 65; *Leeder v Stevens* [2005] EWCA Civ 50; *White v State Bank of New South Wales* [2002] NSWCA 241.

<sup>503</sup> See discussion by G Andrews, and R Millett, *Law of Guarantees* (4<sup>th</sup> ed 2005), p 190.

<sup>504</sup> [2004] 3 All ER 463. Longmore LJ at p 468 acknowledged that this case was the first of its kind.

<sup>505</sup> *Ibid*, per Longmore LJ, p 468-9.

The factual context of the new contract must be materially similar to that of the old contract. In effect the second contract must be a true substitute for the first. Therefore on the facts of the case, the two mortgages were inseparably connected, and the replacement mortgage was also affected with undue influence.<sup>506</sup>

In *Wadlow v Samuel (p.k.a. Seal)*<sup>507</sup> the case concerned the recording artist Seal and his former manager Mr Wadlow. Mr Wadlow claimed that he was owed commission under an agreement between the parties. The agreement had replaced an earlier agreement which had been signed under undue influence. It was held that the replacement agreement not only replaced the agreement tainted by undue influence, but also another untainted agreement. The replacement agreement (under which Mr Wadlow claimed the right to be paid a commission) was not signed under undue influence, and the validity had never been questioned. Therefore it was held that *Tinsley* could be distinguished because the factual context of the replacement agreement and the original agreements were fundamentally different, and the replacement agreement could not be construed as a replacement for the agreement tainted with undue influence.<sup>508</sup>

In *Rutherford v Bank of New Zealand*<sup>509</sup> similar issues were examined. The case concerned the execution of replacement mortgages on a property. The wife alleged that undue influence was exerted when the replacement mortgage was signed. The bank attempted to argue that since there were no allegations of undue influence with respect to the original mortgage, “executing a new mortgage ought not mean that the plaintiff has a cause of action she would otherwise not have had.”<sup>510</sup> This was rejected by Gendall J. It was held that with each new security, the obligations on the parties are the same. In this case, there was an obligation on the bank to ensure that the plaintiff received adequate advice. This was not given, so there was a finding of undue influence that tainted a replacement transaction, even though the original transaction was untainted.

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<sup>506</sup> It was also held that if the bank had notice of the exercise of undue influence in the original contract, then that notice continues to the second contract. This was not considered to be an extension of the doctrine of constructive notice. However, if the second contract is made with a different lender, then the new lender cannot be deemed to be aware of matters that the first lender is aware of.

<sup>507</sup> [2006] EWHC 1492.

<sup>508</sup> See also *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd: The Atlantic Baron* [1978] 3 All ER 1170, where Mocatta J held that if a threat that constitutes duress taints a contract, and the contract led to a further contract which was made for good consideration, then the new contract would be voidable by reason of economic duress.

<sup>509</sup> HC Wellington, Civ-2006-485-1345, [5 February 2007].

<sup>510</sup> *Ibid*, per Associate Judge Gendall, para 53.

## TRANSACTION THAT CALLS FOR EXPLANATION

Reconciling Lord Scott's judgment with that of Lord Nicholls as to the requirement for a transaction that calls for explanation has provided debate among the Lords themselves. Lord Nicholls held that the evidential presumption is raised by a relationship of trust and confidence, coupled with a transaction that calls for explanation. This can be contrasted with Lord Scott's comments. He held that the presumption arises with proof of the relationship "coupled with whatever evidence is for the time being available"<sup>511</sup>, and later, he held that the presumption "arises if the nature of the relationship between two parties coupled with the nature of the transaction between them"<sup>512</sup> justifies the finding of undue influence. It could be interpreted that Lord Scott suggests that something other than a transaction that calls for explanation may suffice to raise the evidential presumption. The conclusion one must draw at this point is that Lord Nicholls' judgment received the unqualified support of the House. Therefore, one must prove a transaction that calls for explanation. Further, the requirement of a transaction that calls for explanation can be construed to encompass the factors raised by Lord Scott.

The issue was further considered in *Attorney-General for England and Wales v R.*<sup>513</sup> Lord Scott dissented on the question of undue influence. He again reiterated that the factors required to raise the evidential presumption was "the relationship between the parties to a contract coupled with the nature of the contract and, sometimes, the circumstances in which consent"<sup>514</sup> was obtained. His Lordship held that it was the relationship between the appellant and his senior officers and the circumstances in which the contract came to be signed that "produced a classic "relationship" case in which undue influence should be presumed."<sup>515</sup> The circumstances surrounding the signing of the confidentiality agreement, namely the absence of any independent legal advice was sufficient to raise the evidential presumption. Lord Scott was alone in his dissent. The argument that something other than a transaction that calls for explanation was sufficient was rejected by the majority in the case.

Difficulty has also arisen with the application of the test of a transaction that calls for explanation. It may be recalled that the test of a transaction that calls for explanation extracted from *Etridge* means "that the transaction is not readily explicable by the relationship of the parties."<sup>516</sup> The test of a transaction that calls for explanation is comprised of two facets: the relative advantages and

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<sup>511</sup> *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, per Lord Scott, p 503.

<sup>512</sup> *Ibid*, p 513.

<sup>513</sup> [2003] 2 NZLR 577.

<sup>514</sup> *Ibid*, per Lord Scott, p 587.

<sup>515</sup> *Ibid*, p 589.

<sup>516</sup> *Above n 511*, per Lord Nicholls, p 460.

disadvantages; and an inexplicable transaction based on the relationship between the two parties. The problem with post-*Etridge* cases applying the test of a transaction that calls for explanation is that some have focused on only one of those facets,<sup>517</sup> and have succumbed to reverting back to the concept of manifest disadvantage.

The cases that have applied the relative advantage and disadvantage facet have in effect reverted back to applying the test of manifest disadvantage, for example, *National Commercial Bank (Jamaica) Limited v Hew*,<sup>518</sup> *Humphreys v Humphreys*,<sup>519</sup> and *Dailey v Dailey*.<sup>520</sup> In *Macklin v Dowsett*<sup>521</sup> it was held that the judge in the trial case was incorrect when he applied the test of manifest disadvantage to the second limb of the *Etridge* test. Auld LJ described the practice of using the description “manifest disadvantage” as a form of shorthand for the inexplicability of the transaction as “dangerous.”<sup>522</sup> However, Auld LJ in effect weighed up the respective advantages and disadvantages. In any event it was held that the transaction was to the manifest disadvantage of the influenced party, and it was also inexplicable.<sup>523</sup>

The weighing up of the factors necessary to establish undue influence means that in some cases, certain elements may have a more substantial role to play than in other cases. It is submitted that if this process is coupled with consideration of the parties’ relationship, then the test is properly applied. In *Bowkett v Action Finance Ltd*<sup>524</sup> Tipping J discussed this approach in respect of unconscionability:

For example, the inadequacy of consideration may be so startling as to justify a presumption of procedural impropriety and the more startling the inadequacy the less substantial the disability may need to be. By contrast if the disability is grave then a lesser inadequacy of consideration may suffice. In the end all the material considerations must be weighed ...”<sup>525</sup>

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<sup>517</sup> See also K N Scott, ‘Evolving Equity and the Presumption of Undue Influence’ (2002) 18 JCL 15, 2002 JCL LEXIS 15 (cited Lexis.com at 10 February 2006) where the author focused on only one aspect of the test.

<sup>518</sup> [2003] UKPC 51.

<sup>519</sup> [2004] EWHC 2201. Rimer J used the terminology from *Etridge* however in effect, he applied the test of a manifest disadvantage.

<sup>520</sup> 2003 WL 22187642, [2003] UKPC 65. Lord Hope held that in transactions for full value actual undue influence must be proved. This is again applying the old concept of a monetary value of manifest disadvantage. A transaction may be for full value yet still call for an explanation.

<sup>521</sup> [2004] EWCA Civ 904.

<sup>522</sup> *Ibid*, per Auld LJ, para 17.

<sup>523</sup> In *Popowski v Popowski* [2004] EWHC 668 the advantages and disadvantages of the transaction were weighed up. Similarly N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 11-012-13 writes that the size of the disadvantage is relevant. If it is large, it is more likely that it is a transaction that calls for explanation. If it is not substantial, then it is unlikely that it will call for an explanation.

<sup>524</sup> [1992] 1 NZLR 449.

<sup>525</sup> *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449, per Tipping J, p 461.

*Vale v Armstrong*<sup>526</sup> is illustrative of the reversion back to manifest disadvantage. *Vale* was a case concerned with the transfer of a house from an elderly man to his great nephew, and since not a “difficult case,” (that is the difficulty in determining whether a guarantee is to manifest disadvantage to the wife in the husband/wife guarantee situations) Evans-Lombe J used the phrase manifest disadvantage as shorthand for a transaction that calls for explanation. It was held that the disadvantages to Mr Vale were threefold. Firstly, his continued occupation of the property was not secure. Secondly, the house was Mr Vale’s only asset. If, due to illness or incapacity, he may have needed to move, he would have no finances to make such a move. Thirdly, the success of the transaction was dependent on cooperation between Mr Vale and Mr Armstrong. The absence of any written agreement to record the arrangement was relevant on this point. It was held that it would have been possible to effect the transaction without a “manifest disadvantage” to Mr Vale. However, this was not done. Therefore, the evidential presumption was raised, and the burden shifted to the defendant to prove otherwise.

The practice of reverting to a test of manifest disadvantage, or even using it as a label for the second limb of *Etridge* is unhelpful and may cause confusion. To do so, means that *Etridge* has failed to make a meaningful change in the law. In *National Westminster Bank Plc v Waite*<sup>527</sup> Havelock-Allan J clearly points out that “manifest disadvantage is not the test. A transaction may have caused manifest disadvantage but nevertheless be explicable by the nature of the relationship between the parties and therefore call for no explanation or not appear untoward when the nature of that relationship is properly taken into account.”<sup>528</sup>

## CONCLUSION

From the discussion in the previous chapter, it can be seen that the House of Lords in *Etridge* has succeeded in making a meaningful clarification to the law on undue influence. The only source of continuing confusion is how judges (typically in the lower courts) and academics view and apply the principles from the case.

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<sup>526</sup> [2004] EWHC 1160. See discussion above p 53 and 68.

<sup>527</sup> [2006] EWHC 1287.

<sup>528</sup> *Ibid*, per Havelock-Allan J, para 37.



## **CHAPTER 6**

# **DURESS**

## INTRODUCTION

Duress is a doctrine that is closely related to actual undue influence. Duress allows an agreement to be set aside “where the consent of the complainant has been procured by illegitimate pressure”.<sup>529</sup> Originally, the doctrine of duress was limited to threats of physical violence to the person,<sup>530</sup> or to someone close to that person.<sup>531</sup> Developments in the common law have resulted in expansion of the concept of duress to allow other forms of duress that do not involve physical violence, such as economic duress, and hence there is overlap between duress and undue influence.<sup>532</sup> The continued survival of the two doctrines depends on there being differences between duress and undue influence. Later discussion will show that there is also an overlap with duress and unconscionability.

The difficulty with a concept such as duress is that many contracts are entered into as a result of some pressure. Pressure is a natural part of the bargaining process.<sup>533</sup> The law must make a distinction between pressure that is acceptable, and pressure which is unacceptable. In *Universe Tankships Inc of Monrovia v International Transport Workers Federation*<sup>534</sup> Lord Scarman held that that there are “two elements in the wrong of duress: (1) pressure amounting to compulsion of the will of the victim; and (2) the illegitimacy of the pressure exerted. There must be pressure the practical effect of which is compulsion or the absence of choice.”<sup>535</sup> In effect, there are two independent tests for duress, and both must be satisfied before relief is granted. However, this is not to say that the tests are unrelated. The two elements are linked.<sup>536</sup> “Illegitimate pressure may amount to duress even if there is a practical choice, but the absence of practical choice may suggest the pressure is illegitimate.”<sup>537</sup> The requirement that both the tests be satisfied before a claim of duress can succeed, discredits<sup>538</sup> Birks and Chin’s

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<sup>529</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 2-001.

<sup>530</sup> G H Treitel, *The Law of Contract* (11<sup>th</sup> ed 2003), p 408.

<sup>531</sup> *Engle v Carswell* 1995 ACWSJ LEXIS 46937, 1995 ACWSJ 632249, 53 ACWS (3d) 1282, (cited Lexis.com at 20 October 2006), per Miller J, para \*\*70.

<sup>532</sup> *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, per Lord Nicholls, p 457.

<sup>533</sup> See discussion by Tipping J in *Attorney-General for England and Wales v R* [2002] 2 NZLR 91, para 62.

<sup>534</sup> [1983] 1 AC 366.

<sup>535</sup> *Ibid*, per Lord Scarman, p 400.

A Wertheimer, *Coercion* (1987), conceptualises the elements of duress into a two pronged theory, the Choice Prong, (that the plaintiff had no choice but to do what the defendant proposed), and the Proposal Prong, (the defendant’s proposal was wrongful). Both of the prongs must be satisfied in order to establish duress.

<sup>536</sup> S Todd, Burrows, Finn and Todd, *Law of Contract in New Zealand* (3<sup>rd</sup> ed 2007), p 348.

<sup>537</sup> *Attorney-General for England and Wales v R* [2002] 2 NZLR 91, per Tipping J, para 62.

<sup>538</sup> Enonchong, above n 529, para 2-002. See also P S Atiyah and S A Smith, *Atiyah’s Introduction of the Law of Contract* (6<sup>th</sup> ed 2005), p 272-8. The rule that threats made by a third party must be known by the person seeking to enforce the contract also discredits the impaired consent theory of duress.

theory that (in addition to undue influence) duress is based on the defective consent of the plaintiff alone,<sup>539</sup> and not also the illegitimacy of the defendant's conduct.

The Court of Appeal endorsed the approach in *Universe Tankships in Pharmacy Care Systems Ltd v Attorney General*.<sup>540</sup> Hammond J summarised the elements of the law of duress in New Zealand:

First, there must be a threat or pressure. Secondly, that threat or pressure must be improper. Thirdly, the victim's will must have been overborne by the improper pressure so that his or her free will and judgment have been displaced. Fourthly, the threat or pressure must actually induce the victim's manifestation of assent. Fifthly, the threat or pressure must be sufficiently grave to justify the assent from the victim, in the sense that it left the victim no reasonable alternative. Sixthly, duress renders the resulting agreement voidable at the instance of the victim. This may be addressed either by raising duress as a defence to an action, or affirmatively, by applying timeously to a Court for avoidance of the agreement. Seventhly, the victim may be precluded from avoiding the agreement by affirmation.<sup>541</sup>

More recently in *Gemmell v Harlow*<sup>542</sup> Keane J confirmed that the law on duress in New Zealand and England were "nearly, if not completely identical."<sup>543</sup>

## ILLEGITIMATE PRESSURE

The traditional concept of duress involved physical threats to the person. The process of determining whether there was illegitimate pressure was clear. In the case of a threat to commit an unlawful act such as a crime or a tort, the threat was usually sufficient to constitute illegitimate pressure.<sup>544</sup>

However, not all threats of unlawful action may amount to duress. There are difficulties surrounding the definition and boundary of what "unlawful" means.<sup>545</sup>

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<sup>539</sup> P Birks, and N Y Chin, 'On the Nature of Undue Influence' in J Beatson and D Friedmann (ed), *Good Faith and Fault in Commercial Law* (1995), p 88, 95.

<sup>540</sup> (2004) 2 NZCCLR 187, [2004] BCL 835.

<sup>541</sup> *Ibid*, per Hammond J, para 98. Hammond J's judgment has been scathingly criticised for confusing the law of duress in New Zealand by its repetition of some elements of duress and for including features which are not elements of duress; see R Bigwood 'When Exegesis Becomes Excess: The Newborn Problematics of Contractual Duress Law in New Zealand', JCL 21(3) Nov 2005, 208. It is respectfully submitted that while some of the criticism of *Pharmacy Care Systems Ltd* are well argued, it is unlikely that the Court of Appeal intended to revise and restate the law on duress in New Zealand. There was very limited discussion of the leading cases in *Pharmacy Care*. If Hammond J intended to depart from the law which New Zealand has followed for over a decade, then there would be more extensive consideration and discussion of the existing law and the reasons for departure. Instead, *Pharmacy Care* should be read in conjunction with existing authorities. Its summary of the seven elements should be construed as a summary of the law relating to duress.

<sup>542</sup> HC AK CIV 2005-404-002993 [4 July 2006].

<sup>543</sup> *Ibid*, per Keane J, para 48.

<sup>544</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 3-001; A Wertheimer, *Coercion* (1987), p 39; and R Bigwood, 'Coercion in Contract: The Theoretical Constructs of Duress' 46 U Toronto LJ 201, p 214.

<sup>545</sup> Whether conduct amounts to "unlawful means" is not always clear cut. Economic duress was identified at one of the emerging areas of "unlawfulness". See M Bedggood and J Hughes, 'Interference with Business Relations: The Common Law' in S Todd (ed), *The Law of Torts in New Zealand* (4<sup>th</sup> ed 2005). See also N Seddon, 'Compulsion In Commercial Dealings' in P D Finn (ed), *Essays on Restitution* (1990), p 150, where Seddon writes that "a threat to commit a tort or to break a contract is not of itself unacceptable."

To determine whether the type of pressure being exerted is illegitimate, a two stage inquiry can be employed. The first question is to look at the nature of the pressure,<sup>546</sup> and the second question “is to look at the nature of the demand which the pressure is applied to support.”<sup>547</sup> This mirrors the comments made in *Pharmacy Care Systems Ltd v The Attorney General* where it was held that “the particular threat will be illegitimate because what is threatened is in and of itself a legal wrong, or because the threat is wrongful, or because it is contrary to public policy”,<sup>548</sup> and *Haines v Carter*, where it was held that “the illegitimacy of the pressure may lie in the illegality of the actions threatened or, alternatively, may be associated with the illegitimacy of the particular threats in the context in which they were made.”<sup>549</sup>

## 1. Threats of Unlawful Conduct

The difficulty distinguishing a lawful threat from an unlawful threat is evident in the context of commercial dealings. In all aspects of business dealings there is normally an element of pressure, and it is more likely than not that one party will be in a stronger bargaining position than another. The threat not to do future business with another party does not constitute duress because parties are entitled to choose who they do business and contract with.<sup>550</sup> Similarly, the threat to break a contract is a difficult question. While non-performance of a contract is *per se* unlawful, there is always a right to break a contract, especially to cut ones losses. Therefore, the focus should be on the nature of the demand that the pressure was applied to support.<sup>551</sup>

To determine whether illegitimate pressure has been exerted, a number of factors may be taken into account:

These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract. These are all relevant factors. Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining.<sup>552</sup>

Cases have recognised that a threat to break a contract can constitute an illegitimate threat sufficient to amount to economic duress in a purely commercial context. This has produced inconsistent results.

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<sup>546</sup> *Universe Tankships Inc. of Monrovia v International Transport Workers Federation* [1983] 1 AC 366, per Lord Scarman, p 401, held that in many cases this inquiry will be decisive.

<sup>547</sup> *Ibid.*

<sup>548</sup> (2004) 2 NZCCLR 187, [2004] BCL 835, per Hammond J, para 91.

<sup>549</sup> [2001] 2 NZLR 167, per Young J, p 189.

<sup>550</sup> *Smith v William Charlick Limited* (1924) 34 CLR 38.

<sup>551</sup> Bigwood, ‘Coercion in Contract: The Theoretical Constructs of Duress’ 46 U Toronto LJ 201, p 243-5.

<sup>552</sup> *DSND Subsea Limited v Petroleum Geo Services ASA* 2000 WL 1741490, [2000] BLR 530, per Dyson J, para 131.

In *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd: The Atlantic Baron*<sup>553</sup> there was a contract to build a ship with the price to be paid in five instalments. After the first instalment was paid, the US dollar suffered a sharp devaluation, and the defendant shipbuilders demanded a 10 per cent increase for the remaining four instalments. They threatened to terminate the contract if payment was not made. The ship's owner (the plaintiff) was aware that there was no legal basis for the demand. Subsequent to the demand, the plaintiff reached an advantageous agreement with a client to charter the ship, and was motivated to pay the increase. Payment was made. Subsequently, the plaintiff sought repayment of the increased amounts. It was held by Mocatta J that a threat to break a contract was sufficient pressure to constitute economic duress. If the threat led to a further contract which was made for good consideration, then the new contract would be voidable by reason of economic duress. It was held that the pressure in this case constituted economic duress; however, due to the delay of 8 months before the commencement of arbitration, the plaintiff had affirmed the contract.

The threat to break a contract and a lack of practical alternatives<sup>554</sup> available to the defendant in *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd*<sup>555</sup> established duress. The plaintiff misquoted the rate by which they would carry the defendant's goods. A contract was entered into reflecting that rate. The plaintiff refused to carry the defendant's load unless a higher charge was paid. The defendant had no choice but to agree to the higher charge: they were a small company who needed to deliver a large order, which was crucial to their commercial survival. It would have been difficult, if not impossible to organise an alternative carrier. All of this was known by the plaintiff. Tucker J held that the new agreement was signed unwillingly and under compulsion. The pressure was illegitimate, and vitiated the defendant's consent to the agreement.

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<sup>553</sup> [1978] 3 All ER 1170.

<sup>554</sup> See also *TA Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Pty Ltd* (1956) 56 SR (NSW) 323 there was a contract for the supply of galvanized iron of French origin. Due to the intervention of the French Government, the price of the iron increased. The supplier demanded the increase from the buyer. The buyer urgently required the iron to carry out its own commitments, and if the increase was not agreed to, no iron would have been delivered. It was held that the actions of the supplier amounted to a level of compulsion sufficient to establish duress.

*Newfoundland and Labrador Drilling Ltd v Miller* 31 ACWS (3d) 393 (cited 1992 ACWSJ LEXIS 29732, Lexis.com at 9 October 2007) (Newfoundland Supreme Court) additional payments paid to return stranded equipment was held to be paid under economic duress. The plaintiffs were anxious not to have their equipment stranded for the winter, and were unable to secure services of another barge to transport their equipment.

*Modular Windows of Canada v Command Construction* 27 ACWS (2d) 439, (cited 1984 ACWSJ LEXIS 31546 Lexis.com at 9 October 2007) (Ontario High Court of Justice) there was additional payments made under a contract to supply windows. There was no additional performance under the contract to justify the extra payment. The defendant felt that he was effectively "over the barrel" with regard to the need to obtain the windows. It was held that there were no practical alternatives open to the defendant. If the project was incomplete, the defendant would have been liable to a greater magnitude than the additional amount demanded by the plaintiff. It was held that the defence of economic duress had been established. An appeal to the Ontario Court of Appeal was dismissed at 37 ACWS (2d) 431 (cited 1986 ACWSJ LEXIS 36484, Lexis.com at 9 October 2007).

<sup>555</sup> [1989] 1 All ER 641.

There has been difficulty reconciling cases that recognise that a threat to breach a contract constitutes an unlawful threat with *Williams v Roffey Bros and Nicholls (Contractors) Ltd.*<sup>556</sup> The case concerned a contract to refurbish a block of flats. The defendant subcontracted work to the plaintiff. After the contract was signed, and work began, the plaintiff found he was in financial difficulties because the price of the subcontract was too low, and the workmen had been insufficiently supervised. A meeting was called, and the defendants agreed to pay the plaintiff an additional amount, because they did not want to incur penalties under the main contract. It was recognised that there were incentives for both parties to ensure that the subcontract was completed on time.

It was held by Glidewell LJ that:

(i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time and (iv) as a result of giving his promise B obtains in practice a benefit, or obviates a disbenefit, and (v) *B's promise is not given as a result of economic duress or fraud on the part of A*, then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.<sup>557</sup> (emphasis added)

It was held that this was not a case of economic duress. Therefore, the agreement was binding.

However, exactly why the demand for the extra money did not constitute duress was not elaborated upon.<sup>558</sup>

The approach in *Williams v Roffey Bros* is similar to that in *DSND Subsea Limited v Petroleum Geo Services ASA*.<sup>559</sup> The pressure in *DSND* did not amount to illegitimate pressure because it was held to be reasonable behaviour by a contractor acting bona fide in a difficult situation. The contract did not contain a provision for the situation that occurred in the case, and the contractor was justified to refuse to go offshore (resulting in a breach of contract) until it was assured that insurance was in place to cover the risks. However, if the contractor had said that they would not resume work until the compensation issue was resolved, then this would have amounted to illegitimate pressure. In deciding whether duress was exerted, Dyson J looked at specific facts of the case: there was an amicable atmosphere between the parties, they went out for dinner together; and there was no hint or any reference to duress in any of the documents, written correspondence, internal memoranda, or diary entries.

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<sup>556</sup> [1990] 1 All ER 512.

<sup>557</sup> *Williams v Roffey Bros and Nicholls (Contractors) Ltd* [1990] 1 All ER 512, per Glidewell LJ, p 521-522.

<sup>558</sup> There are cases with similar fact scenarios to *Williams v Roffey Bros*, that is, a contract for work to be performed, demand by one party for additional payment, there are external pressures on the other party to complete the contract to ensure other contractual commitments are met, and business is not disrupted. That fact scenario amounted to duress in a number of cases, see *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419; and *Vantage Navigation Corporation v Suhail and Saud Bahwan Building Materials LLC, (The "Alev")* [1989] 1 Lloyd's Rep 138.

<sup>559</sup> 2000 WL 1741490, [2000] BLR 530.

The decision of *Williams v Roffey Bros* creates an interesting issue of how it can be reconciled with cases before it. Indeed, in *Williams* itself, Glidewill J did not elaborate on what specific elements of the case that lead him to conclude that economic duress had not been established. Todd argues that this creates an unclear and difficult distinction in the law: “a contracting party who fears he or she may be unable to carry out a contract and who seeks to renegotiate the terms should be careful not to threaten to break it. The other party must voluntarily agree to a variation rather than give way to unlawful pressure.”<sup>560</sup> Similarly, Seddon and Ellinghaus suggest that a “shrewd contractor should be attentive to how he or she makes the suggestion that more money is needed to finish the job.”<sup>561</sup>

Smith<sup>562</sup> writes that the justification of the cases lies in the distinction between a warning and a threat: “[a] threat is a proposal to bring about an unwelcome event that is made so as to induce the recipient of the proposal to do a requested act (e.g., enter into a contract). A warning ... is a mere prediction that an unwelcome event will happen. In typical cases, warnings can be distinguished from threats by the speaker’s lack of control over the unwelcome consequence.”<sup>563</sup> Therefore, in the case of a subcontractor who requires more money to complete the contract, or risk bankruptcy, this is a warning. However, if the subcontractor is able to complete the contract yet is simply demanding more money, this is a threat.<sup>564</sup>

Another way to reconcile the cases is to identify a “classic hold-up situation:” where there is no change in the commercial environment that could justify the defendant’s demands and the threatened breach of contract is calculated to take advantage of the other party’s vulnerability. Therefore, in the case of market fluctuations or discovery of a negotiation error, the defendant is effectively trying to renegotiate the contract, or reallocate the risks under the contract. This will amount to illegitimate pressure.<sup>565</sup>

Todd takes a similar view on deliberate under-quoting in order to secure a contract, and then negotiating the price upwards. While he concedes that the problem may be more theoretical than real,

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<sup>560</sup> S Todd, Burrows, Finn and Todd, *Law of Contract in New Zealand* (3<sup>rd</sup> ed 2007), p 345.

<sup>561</sup> N C Seddon, and M P Ellinghaus, *Cheshire and Fifoot’s Law of Contract* (8<sup>th</sup> Australian ed, 2002), p 661.

<sup>562</sup> S Smith, *Contract Theory* (2005).

<sup>563</sup> *Ibid*, p 318.

<sup>564</sup> See also P S Atiyah and S A Smith, *Atiyah’s Introduction of the Law of Contract* (6<sup>th</sup> ed 2005), p 270. A threat to break a contract is illegitimate, whereas a warning that a party may be unable to perform the contract unless more money is received is not. Atiyah and Smith argue that if both parties are willing to compromise and pay more, then this is enforceable because this is the only way that performance can be induced. Any issues of deliberate underbidding should be dealt with by regulation, for example licensing standards and mandatory insurance.

<sup>565</sup> R Bigwood, ‘Coercion in Contract: The Theoretical Constructs of Duress’ 46 U Toronto LJ 201, p 247-8.

Bigwood interprets *Williams v Roffey Bros* as exceptions to the general rule; see R Bigwood, *Exploitative Contracts* (2003), p 336, at footnote 310. This approach also explains *DSND Subsea Ltd* because the contract did not contain a provision to cover the situation that eventuated.

“evidence of earlier deliberate underbidding could help in showing bad faith, which is an alternative basis for a finding of illegitimate pressure.”<sup>566</sup>

Enonchong discusses the issue of whether a threatened breach of contract constitutes illegitimate pressure at some length. He argues that there is no simple comprehensive test to determine the issue. Instead, a number of factors need to be considered: “whether the demand is made because circumstances have changed, whether the demand is reasonable in the circumstances and whether the demand is made in good faith.”<sup>567</sup>

The situation could quite simply be that *Williams v Roffey Bros* is wrongly decided. The fact that one party has asked nicely to renegotiate the terms of a contract means that the party is highly likely to break that contract if the other party does not agree to its variation. It may not have been an express threat, but it certainly is an implied threat.<sup>568</sup> Whether threats are express or implied, the threat still places the party in a situation of making an unfair choice, and is thereby compelled to undertake what the “threatening” party proposes.<sup>569</sup> However, this ignores the fact that both parties received a benefit from the completion of the contract,<sup>570</sup> and that parties should be free to voluntarily vary a contract. There was an element of fairness and reasonableness to the whole process of negotiation in *Williams v Roffey Bros*. If the subcontractor had demanded three times the appropriate rate to complete the work, it would have been likely that the agreement would not be enforced.<sup>571</sup>

Another approach may be to decide these cases under undue influence. The general nature of influence is more flexible than the pressure required by duress, and it is unnecessary to distinguish between legitimate and illegitimate pressure. However, in the event that the evidential presumption is relied on, there needs to be established a relationship of trust and confidence, and this may be difficult in a business situation. The very nature of a business relationship means that each party is entitled to put his or her interests first, and the fiduciary nature of the evidential presumption does not sit well with a business relationship. This can be overcome by relying on the exertion of pressure under actual undue

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<sup>566</sup> S Todd, Burrows, Finn and Todd, *Law of Contract in New Zealand* (3<sup>rd</sup> ed 2007), p 345.

<sup>567</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 3-004.

<sup>568</sup> See also *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419, where there was no overt demand to break the contract if the extra payment was not made, however it was implicit in the negotiations and the conduct of the party exerting the pressure that if the payment was not made, the contract would not be completed.

<sup>569</sup> R Bigwood, ‘Coercion in Contract: The Theoretical Constructs of Duress’ 46 *U Toronto LJ* 201, p 210-11.

<sup>570</sup> R Bigwood, *Exploitative Contracts* (2003), p 342. Any benefit received by the parties to the renegotiated contract must also be considered.

<sup>571</sup> P S Atiyah and S A Smith, *Atiyah’s Introduction of the Law of Contract* (6<sup>th</sup> ed 2005), p 281.



influence. Alternatively, unconscionability may be used in this area quite effectively, and the development of a defence of duress by necessity shows that the doctrines are very similar.<sup>572</sup>

## 2. Threats of Lawful Conduct

Threats of lawful action are considered generally to be insufficient to constitute duress.<sup>573</sup> However, this is subject to exceptions,<sup>574</sup> and the question of when a lawful threat (where one threatens to do what one is legally entitled to do), constitute illegitimate pressure needs to be answered. The issue has been expressed as “whether it is unconscionable for the party who issued the threat to take the benefit of the contract.”<sup>575</sup> In the situation of a “lawful act duress” in a purely commercial context, it was held in *CTN Cash and Carry Ltd v Gallagher Ltd*<sup>576</sup> that it would be “relatively rare”<sup>577</sup> to establish duress. The reason being, that it would produce uncertainty in the commercial bargaining process, and enable settled accounts to be reopened.

When does the threat of a lawful action become illegitimate? It was held in *Crescendo Management Pty Ltd v Westpac Banking Corporation*<sup>578</sup> that “[e]ven overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress.”<sup>579</sup> In many cases, the person making the lawful threat has a legal right to take such action, even a moral obligation, such as reporting a crime or tax evasion.<sup>580</sup> Having said that, the mere fact that there is the legal right to take such action does not make the demand supported by the threat lawful. In effect, “a demand which is backed by a threat of lawful action may bear little or no relationship to the purpose of the right to do the action threatened.”<sup>581</sup> It is this lack of correlation that makes the threat unlawful (in other words, blackmail). Bigwood writes that a person is permitted to exercise an independent legal right, insofar as the exercise of that right is not for a purpose that is regarded by the law as improper, “or to extract a benefit which is otherwise ‘unconscionable,’ that is ‘exploitative,’ in the

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<sup>572</sup> See discussion below p 128-130.

<sup>573</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 3-001; A Wertheimer, *Coercion* (1987), p 39; and R Bigwood, ‘Coercion in Contract: The Theoretical Constructs of Duress’ 46 U Toronto LJ 201, p 214.

<sup>574</sup> Examples of this include the threat to prosecute, or to bring industrial action. See N C Seddon, and M P Ellinghaus, *Cheshire and Fifoot’s Law of Contract* (8<sup>th</sup> Australian ed, 2002), p 659-60.

<sup>575</sup> N C Seddon, and M P Ellinghaus, *Cheshire and Fifoot’s Law of Contract* (8<sup>th</sup> Australian ed, 2002), p 658.

<sup>576</sup> [1994] 4 All ER 714.

<sup>577</sup> *Ibid*, per Steyn LJ, p 719.

<sup>578</sup> (1988) 19 NSWLR 40.

<sup>579</sup> *Ibid*, per McHugh JA, p 46.

<sup>580</sup> *Thorne v Motor Trade Association* [1937] AC 797; and *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366.

<sup>581</sup> Enonchong, above n 573 para 3-017. See also *Pharmacy Care Systems Ltd v The Attorney General* (2004) 2 NZCCLR 187, [2004] BCL 835, per Hammond J, para 93.

circumstances.”<sup>582</sup> Therefore, threats to engage the legal process, although lawful, may become unlawful if the threat was made in bad faith.

This is illustrated in *Haines v Carter*.<sup>583</sup> The case concerned an agreement to divide assets of the parties on the breakdown of their relationship. Mr Haines wished to avoid the contract on the grounds of duress. He alleged Ms Carter threatened that if he did not enter into the agreement, she would make things difficult with the bank that provided banking facilities to the business, and would sabotage existing banking arrangements. She also threatened to make things difficult for Mr Haines at the Inland Revenue Department. It was held by Young J that the threats amounted to blackmail and were therefore illegitimate.<sup>584</sup> In the situation of blackmail, the blackmailer is usually entitled to do what he or she is threatening to do. However, what the blackmailer must justify is “not the threat, but the demand of money.”<sup>585</sup>

Good faith also has a role to play. *Moyes & Groves Ltd v Radiation New Zealand Ltd*<sup>586</sup> illustrates that a demand made in good faith, does not usually constitute duress. In the case, the buyer and seller contracted for the supply of goods that were made to the buyer’s specifications. Both parties subsequently forgot about the contract, and the goods arrived two years late, and at a substantial increase to the original contract price. The buyers still wanted the goods, and the sellers were willing to supply the goods, but at the increased price. If the buyers were unwilling to pay the new price, the sellers would have returned the goods to the manufacturers. The buyers agreed to pay the new price “under protest”, but once they received the goods, they paid the original contract price. The sellers sued for the balance. Cooke J held that “in New Zealand law economic duress can be a ground for avoiding liability under a contract. But it is certainly something which should not be found lightly.”<sup>587</sup> There was a genuine commercial dispute between the parties. The demand for increased payment by the sellers was justified, as they were entitled to treat the original contract as abandoned. There was no coercion of the buyer’s will. It was “a prudent and sensible compromise.”<sup>588</sup>

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<sup>582</sup> Bigwood, ‘Coercion in Contract: The Theoretical Constructs of Duress’ 46 U Toronto LJ 201, p 217.

<sup>583</sup> [2001] 2 NZLR 167. The case was appealed to the Privy Council on the interpretation of a clause in the Relationship Property Agreement.

<sup>584</sup> Despite the illegitimacy of the threats, the threats did not amount to duress. The negotiation process was conducted via mediation, and it was unlikely that duress was applied; the pressure was not particularly coercive; and the agreement had been affirmed.

<sup>585</sup> *Thorne v Motor Trade Association* [1937] AC 797, per Lord Atkin, p 806.

<sup>586</sup> [1982] 1 NZLR 368.

<sup>587</sup> *Ibid*, per Cooke J, p 372.

<sup>588</sup> *Ibid*.

Todd<sup>589</sup> writes that the genuine belief by the defendants of their entitlement to demand payment was crucial to defeating the plaintiff's claim of duress. He acknowledged, that a lawful threat, made in good faith could possibly constitute duress, although this is "not easy to envisage."<sup>590</sup>

Reliance on the bona fide belief of a party to place pressure on another party is by no means a straight forward test to determine whether conduct constitutes duress. Bigwood argues that the motives and beliefs of the party exerting the pressure should not be determinative of any issues of duress. Such an approach also transforms duress cases into "difficult, highly fact-dependent, 'exploitation' analysis",<sup>591</sup> requiring yet another test to determine when legitimate conduct becomes illegitimate.<sup>592</sup> Therefore, the presence of bad faith can be viewed as an important factor in deciding whether a threatened lawful act constitutes illegitimate pressure. However, the absence of bad faith should not be considered a determinative factor,<sup>593</sup> but given the nature of duress, the presence of some kind of improper conduct will be needed.

In *Pharmacy Care Systems Ltd v The Attorney General*<sup>594</sup> Hammond J drew the distinction between the threat of criminal prosecution or to engage civil process. In the case of a threat to instigate a criminal prosecution, this is generally regarded as improper pressure. The resulting agreement is against public policy. However, in the case of a threat to resort to civil process, the threat would only be considered improper if the demand was exorbitant, or the threatened action was not a reasonable alternative. If threats to resort to civil process is categorised as illegitimate from the outset, this poses problems with regard to access to justice.<sup>595</sup>

## COERCION

In addition to an illegitimate threat, that threat must also coerce a person into entering into the contract. The test of whether a threat has had a causative effect has been expressed in several different ways. In *Pao On v Lau Yiu Long*<sup>596</sup> the test was expressed to be "a coercion of the will so as to vitiate consent." To determine whether the will was coerced, additional factors to consider are whether or not: the

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<sup>589</sup> S Todd, Burrows, Finn and Todd, *Law of Contract in New Zealand* (3<sup>rd</sup> ed 2007), p 346.

<sup>590</sup> Ibid p 347. See also M H Ogilvie, 'Economic Duress in Contract: Departure, Detour or Dead End?' (2001) 34 Can Bus LJ 194.

<sup>591</sup> R Bigwood, *Exploitative Contracts* (2003), p 340.

<sup>592</sup> Ogilvie, above n 590 p 210-20

<sup>593</sup> N C Seddon, and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract* (8<sup>th</sup> Australian ed, 2002), p 659.

<sup>594</sup> (2004) 2 NZCCLR 187, [2004] BCL 835.

<sup>595</sup> Ibid, per Hammond J, paras 94-5.

<sup>596</sup> [1979] 3 All ER 65, per Lord Scarman, p 78.

person protested; had alternative courses available such as a legal remedy; had independent advice; and after entering the contract, took steps to avoid it.<sup>597</sup>

This was developed further in *Universe Tankships Inc of Monrovia v International Transport Workers Federation*.<sup>598</sup> Lord Scarman acknowledged that in many cases, consent of the victim is not entirely absent. His Lordship expressed the test as “not the lack of will to submit but the victim’s intentional submission arising from the realisation that there is no other practical choice open to him.”<sup>599</sup>

Therefore, the victim is aware of his actions, but the choices available to him are not viable. The example given by many commentators in this area involve a victim who has a gun held to his head. The options available to him are to hand over his money, or be shot in the head. Being shot is always an option, but not a particularly viable one.

What may be the crucial point to justify the decision in *Williams v Roffey Bros* (but was not discussed in the judgment) was that there were practical and reasonable alternatives open to the contractor at the time the additional payments were agreed to.<sup>600</sup> Reasonable alternatives include legal redress, or employing other subcontractors. While the alternatives may have been inconvenient, it was still a possibility. As the alternatives were not pursued, there was a benefit gained in agreeing to the extra payments. The benefit gained in agreeing to the additional payments is relevant to the question of duress as well as consideration. In relation to duress, the benefit is relevant to determine whether there has been a coercion of the will. In terms of consideration, a sufficient level of benefit received will suffice. McKendrick writes that historically, duress cases were decided under the doctrine of consideration. However, given the rule that consideration must be sufficient, but need not be adequate, McKendrick argues that consideration is ill-equipped to deal with duress cases.<sup>601</sup> Instead “the modern courts will be more willing to find the presence of consideration in the renegotiation of a contract and leave it to duress to regulate the fairness of the renegotiation.”<sup>602</sup>

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<sup>597</sup> See also discussion by M H Ogilvie, ‘Economic Duress in Contract: Departure, Detour or Dead End?’ (2001) 34 Can Bus LJ 194, p 215.

<sup>598</sup> [1983] 1 AC 366.

<sup>599</sup> Ibid, per Lord Scarman, p 400. See discussion by Kerr LJ, *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419, at p 428, where his Honour suggests that Lord Scarman’s passage contains a typographical error. Instead of the “lack of will to submit” it should be a “lack of will to resist”.

<sup>600</sup> See discussion in *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419, per Kerr LJ, p 428; R Bigwood, *Exploitative Contracts* (2003), p 342; and N Seddon, ‘Compulsion in Commercial Dealings’ in P D Finn (ed) *Essays on Restitution* (1990), p 152.

<sup>601</sup> E McKendrick, *Contract Law*, (5<sup>th</sup> ed 2003).

<sup>602</sup> Ibid, p 362.

The courts take a strict view on reasonable alternatives. An alternative course of action can be construed as reasonable even if it is unpalatable. In *Hennessy v Craigmyle & Co Ltd*<sup>603</sup>, an employee was faced with the choice of signing an agreement giving up his rights to bring proceedings before an industrial tribunal, and then being made redundant (thereby becoming entitled to redundancy payment), or to be summarily dismissed. The employee took legal advice and signed the agreement, which he later sought to avoid on the grounds of duress. It was held that the conduct of the employer did not amount to duress because there were real, albeit unattractive alternatives open to the employee. He could have complained to an industrial tribunal, or drawn a social security benefit.

Similarly in *Engle v Carswell*<sup>604</sup> the court considered pressure exercised<sup>604</sup> by the husband over the wife, inducing her to sign a prenuptial agreement. The wife had a law degree and was familiar with the relevant legislation. The husband threatened on their wedding day that if she did not sign the prenuptial, then he would not go through with the marriage ceremony. The couple were already cohabiting and had three children together. She maintained that she had no choice but to sign, and did so. It was not until the husband commenced divorce proceedings that the wife sought legal advice as to her position and the legal status of the prenuptial agreement. It was held that there was an alternative available to her. She could have refused to sign the prenuptial agreement, and taken the risk that the husband would back out of the ceremony. The claim of duress failed.

Subsequent cases have moved away from the overborne theory and focused on how much of a “cause” the pressure operated on the party. In *Dimskal Shipping Co SA v International Transport Workers Federation*<sup>605</sup> Lord Goff held the economic pressure that is sufficient for the purposes of duress “may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the relevant contract.”<sup>606</sup> Similarly in *Haines v Carter*,<sup>607</sup> Young J held that the party affected by duress need not “have been psychologically crippled by reason of pressure before relief can be available.”<sup>608</sup> In effect, the pressure must have been a cause,<sup>609</sup> or “an appreciable factor in

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<sup>603</sup> [1986] ICR 461.

<sup>604</sup> 1995 ACWSJ LEXIS 46937, 1995 ACWSJ 632249, 53 ACWS (3d) 1282 (cited Lexis.com at 20 October 2006).

<sup>605</sup> [1992] 2 AC 152.

<sup>606</sup> Ibid, per Lord Goff, p 165.

<sup>607</sup> [2001] 2 NZLR 167. The case was appealed to the Privy Council on the interpretation of a clause in the Relationship Property Agreement.

<sup>608</sup> Ibid, per Young J, p 190.

<sup>609</sup> R Bigwood, ‘Economic Duress By (Threatened) Breach of Contract’ (2001) 117 LQR, 376, p 380. N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 4-005-6 writes that there is difficulty in determining the precise degree of causal connection required by the law. Despite some suggestion by authorities that the test of causation may differ depending on the type of duress alleged, Enonchong argues that two different tests for causation would be a step backwards as the law has advanced from the notion that only duress to the person can constitute duress.

influencing”<sup>610</sup> the plaintiff to enter into the transaction where there was no other practical choice or alternative open to the plaintiff.<sup>611</sup> In *Crescendo Management Pty Ltd v Westpac Banking Corporation*<sup>612</sup> McHugh JA held that the correct approach “is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether the pressure went beyond what the law is prepared to countenance as legitimate?”<sup>613</sup>

Arguments discrediting the overborne theory of duress are supported by the legal effect of duress. Duress renders a contract voidable. If the true nature of duress is the overbearing of one’s will, then a contract entered into under duress should be void not voidable.

The New Zealand Court of Appeal *Attorney-General for England and Wales v R*<sup>614</sup> adopted the but for test: that is, “the existence of pressure causing the party under that pressure to enter into a contract which, but for the existence of the pressure, would not have been entered into.”<sup>615</sup> Similar comments were made in *Huyton SA v Peter Cremer GmbH & Co.*<sup>616</sup> It was held that the party asserting duress must show “that the illegitimate pressure was a least a significant cause inducing it to enter the

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<sup>610</sup> *Haines v Carter* [2001] 2 NZLR 167, per Young J, p 190.

<sup>611</sup> *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87.

Wertheimer proposes the baseline test to distinguish between offers and threats. Offers do not coerce, threats do. A threat makes the threatened party worse off relative to that person’s baseline, whereas an offer makes the offeree better off in relation to that person’s baseline. A person’s baseline consists of that person’s rights and entitlements. The baseline includes moral and non-moral (statistical) aspects, and can change according to a person’s current level of expectation. Therefore the baseline will differ for each person, and what will be a threat for one person may not constitute a threat for another. To determine a person’s baseline is not a straightforward exercise. The tests suggested by Wertheimer largely focus on subjective elements pertinent to the “offeree”. However, the determination of whether there is an offer or a threat depends also on the relative importance attached to the moral or the non-moral aspect of a person’s baseline. To illustrate the moral test, Wertheimer gives an example of a private/public physician. If a patient approached a private physician to treat his illness, and the doctor replied that he would only treat the patient if he was paid \$100, which was a fair price, this constitutes an offer. The doctor is not obliged to treat the patient for free. However, if the doctor was a public physician, employed by the public health system, and was legally obliged to treat patients without cost, the demand for \$100 becomes a threat. The doctor has an obligation to treat patients free of charge. It is submitted that the use of the baseline theory requires a detailed, subjective analysis of a person’s expectations, and unduly complicates the legal analysis. A Wertheimer, *Coercion* (1987), p 204-8. R Bigwood, ‘Coercion in Contract: The Theoretical Constructs of Duress’ 46 U Toronto LJ 201, p 212.

<sup>612</sup> (1988) 19 NSWLR 40.

<sup>613</sup> *Ibid*, per McHugh JA, p 45-6. See also P S Atiyah, ‘Economic Duress and the “Overborne Will” (1982) 98 LQR 197, p 201.

<sup>614</sup> [2002] 2 NZLR 91.

<sup>615</sup> *Ibid*, per Tipping J, para 61. See also N Seddon, ‘Compulsion In Commercial Dealings’ in P D Finn (ed), *Essays on Restitution* (1990); and N C Seddon, and M P Ellinghaus, *Cheshire and Fifoot’s Law of Contract* (8<sup>th</sup> Australian ed, 2002), p 667 suggested a but for test: “is it more probable than not that, but for the threat, the party would not have entered into the transaction in question?”

Smith writes that another way to conceptualise the issue is to adopt the NESS test. See S Smith, *Contract Theory* (2005), p 321. “According to the NESS test, an action causes a result if ‘it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the result.’”

<sup>616</sup> [1999] 1 Lloyd’s Rep 620.

contract.”<sup>617</sup> “The illegitimate pressure must have been such as actually caused the making of the agreement ... In that sense, the pressure must have been decisive or clinching.”<sup>618</sup> Mance J also expressed the issue in terms of deflection of the will.

In *Barton v Armstrong*<sup>619</sup> it was held that the threats only had to be *a* reason, not *the* reason.<sup>620</sup> This was cited with approval in *Haines v Carter* and by the New Zealand Court of Appeal in *Pharmacy Care Systems Ltd v The Attorney General*.<sup>621</sup> In *Pharmacy Care*, it was held that “[i]t is not necessary to show that duress was the sole cause inducing the agreement. It is enough if it was “an” inducement of the requisite character.”<sup>622</sup> Hammond J acknowledged the debate regarding the overborne theory, and it was held that the “victim’s will must be overborne by the improper pressure so that his or her free will and judgment have been displaced ... the threat or pressure must actually induce the victim’s manifestation of assent ... [and] the threat or pressure must be sufficiently grave to justify the assent from the victim, in the sense that it left the victim with no reasonable alternative.”<sup>623</sup>

Todd writes that “[i]t is unfortunate that the “overbearing of the will” theory has emerged again.”<sup>624</sup> Similar views on the overborne theory of duress were expressed by Atiyah.<sup>625</sup> Atiyah argues that following the decision of the House of Lords in *Lynch v DPP of Northern Ireland*<sup>626</sup> the overborne theory of duress has been discredited. Instead, the will should be thought of in terms of being deflected, as opposed to being destroyed.<sup>627</sup> In terms of the decision in *Pharmacy Care* it is not apparent from the judgment that Hammond J intended to resurrect the overborne theory. The passage cited from the judgment contains a smorgasbord of elements of duress. His use of the term “overborne” may simply have been used to denote the circumstances whereby the victim has succumbed to pressure.<sup>628</sup>

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<sup>617</sup> *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd’s Rep 620, per Mance J, p 630.

<sup>618</sup> *Ibid* p 636.

<sup>619</sup> [1976] AC 104.

<sup>620</sup> Many commentators have justified the decision in *Barton v Armstrong* on the basis that the threats in the case were so unacceptable that a low threshold of causation was accepted. See N Seddon, ‘Compulsion In Commercial Dealings’ in P D Finn (ed), *Essays on Restitution* (1990), p 156; and R Bigwood, *Exploitative Contracts* (2003), p 336.

<sup>621</sup> (2004) 2 NZCCLR 187, [2004] BCL 835.

<sup>622</sup> *Ibid*, per Hammond J, para 90.

<sup>623</sup> *Ibid*, per Hammond J, para 98.

<sup>624</sup> S Todd, Burrows, Finn and Todd, *Law of Contract in New Zealand* (3<sup>rd</sup> ed 2007), p 348.

<sup>625</sup> See P S Atiyah, ‘Economic Duress and the “Overborne Will”’ (1982) 98 LQR 197, and P S Atiyah, ‘Duress and the Overborne Will Again’ (1983) 99 LQR 353. See also M H Ogilvie, ‘Economic Duress in Contract: Departure, Detour or Dead End?’ (2001) 34 Can Bus LJ 194; and J D McCamus *Essentials of Canadian Law The Law of Contracts* (2005), at p 373. If the overborne theory was strictly applied, the defence of economic duress would rarely be available.

<sup>626</sup> [1975] AC 653. In *Lynch v DPP of Northern Ireland* the appellant contended that he had aided and abetted a murder under duress, and should be acquitted. Lord Morris held that in cases of duress the will of the victim is not overborne. The actions undertaken may have been done unwillingly; however, it would have been done intentionally.

<sup>627</sup> *Ibid*, per Lord Simon, p 685.

<sup>628</sup> See also D Tiplady in response to Professor Atiyah’s article (1982) 98 LQR 197: D Tiplady, ‘Concepts of Duress’ (1983) 99 LQR 188. Tiplady argues that use of the term “overborne” is useful shorthand to describe the victim falling under

Duress requires that the plaintiff was under pressure. The question as to how much pressure has ranged from an objective assessment<sup>629</sup> “that the threat [must] be sufficient to overcome the will of “a person of ordinary firmness””;<sup>630</sup> to a subjective standard “under which the threat need only have deprived the particular victim of his free will.”<sup>631</sup> This has led to the modern formulation, a hybrid, where the court takes into account whether there were reasonable alternatives open to the plaintiff.<sup>632</sup> Subjective elements are also considered “such as the complainant’s age, health, financial circumstances or receipt of legal advice”<sup>633</sup>, and also the complainant’s background and relationship with the other party.<sup>634</sup> Whether the plaintiff took steps to avoid the contract when freed from the pressure is relevant,<sup>635</sup> as is the victim’s response. Persons who are weak, cowardly or timid will need more protection than more courageous persons.<sup>636</sup> Similarly, if a particular weakness or sensitivity is exploited, this may make what seems a trivial threat into something much more intolerable.<sup>637</sup> Whether the plaintiff protested or not, is a relevant, albeit weak factor.<sup>638</sup>

## DURESS AND UNDUE INFLUENCE

There has been much written on the overlap between duress and actual undue influence.<sup>639</sup> In the past, undue influence was considered a doctrine that would operate where there was no other remedy at law,

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pressure. The notion of the overborne theory is no obstacle to identifying the forms of pressure that the law regards as legitimate or illegitimate. He argues that the notion of overborne will “can be safely left, like other chameleon phrases, to take its colour from its context”, at p 194.

<sup>629</sup> E A Farnsworth, *Farnsworth on Contracts* (Vol I 2<sup>nd</sup> ed, 1998), p 487. N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 4-002.

<sup>630</sup> *Pharmacy Care Systems Ltd v The Attorney General* (2004) 2 NZCCLR 187, [2004] BCL 835, per Hammond J, para 96.

<sup>631</sup> *Ibid.*

<sup>632</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 4-002.

<sup>633</sup> *Ibid.*

<sup>634</sup> E A Farnsworth, *Farnsworth on Contracts* (Vol I 2<sup>nd</sup> ed, 1998), p 489-90.

<sup>635</sup> *Pao On v Lau Yiu Long* [1979] 3 All ER 65; and *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87.

<sup>636</sup> Farnsworth, above n 534 p 489-90.

<sup>637</sup> N C Seddon, and M P Ellinghaus, *Cheshire and Fifoot’s Law of Contract* (8<sup>th</sup> Australian ed, 2002), p 665.

<sup>638</sup> Seddon, and Ellinghaus, *Ibid.*, p 665; *Pao On v Lau Yiu Long* [1979] 3 All ER 65; and *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87. In terms of undue influence in a commercial transaction, such as a guarantee, the reluctance of the surety may show that “she has yielded to the external exigencies of the situation.” Instead of showing the presence of pressure, reluctance on the part of the surety may show that she is executing the guarantee because she knew that it was the right thing to do. *Royal Bank of Scotland v Etridge (No2)* [1998] 4 All ER 705 Court of Appeal, per Stuart-Smith LJ, para 18.

<sup>639</sup> *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, per Lord Nicholls, p 457; M D J Conaglen, ‘Duress, Undue Influence, and Unconscionable Bargains – The Theoretical Mesh’ (1999) 18(4) NZULR 509; R B Grantham, and C E F Rickett, *Enrichment & Restitution in New Zealand* (2000); R McKeand, ‘Economic Duress – Wearing the Clothes of Unconscionable Conduct’ 2001 JCL LEXIS 6 (cited Lexis.com at 3 July 2007); M Cope, *Duress, Undue Influence and Unconscionable Bargains* (1985), p 64; P D Finn, ‘The Fiduciary Principle’ in T G Youden (ed), *Equity, Fiduciaries and Trusts* (1989); P Birks, and N Y Chin, ‘On the Nature of Undue Influence’ in J Beatson and D Friedmann (ed), *Good Faith and Fault in Commercial Law* (1995), p 76; Bigwood, R, *Exploitative Contracts* (2003), p 384; and P Vout, (ed and Current Updating Author), *Unconscionable Conduct The Laws of Australia* (2006), para 35.7:2.



developed to cover “what would otherwise be a gap in the law,”<sup>640</sup> and to embrace “those forms of illegitimate pressure which were not recognised at common law.”<sup>641</sup> As the concept of duress has expanded, essentially to encompass lawful acts and economic duress, this has resulted in the blurring of the distinction between duress, undue influence and unconscionability.<sup>642</sup> Both duress and actual undue influence are concerned primarily with procedural impropriety.<sup>643</sup> The two doctrines focus more on the punishment of the “illegitimate use of power” as opposed to “the protection of a tender relationship against abuse.”<sup>644</sup>

A key difference between duress and actual undue influence is that under the former, the complainant is unwillingly forced into the contract, whereas under the latter, the party influenced may have been only too willing to enter into the contract.<sup>645</sup> However, this distinction has been eroded over time with the overborne theory of duress being discredited.<sup>646</sup> The result in terms of relief for undue influence and duress are the same, the contract is voidable.<sup>647</sup>

In essence, the distinction between undue influence and duress is the level of pressure required to constitute a sufficient wrong, to warrant the intervention of the law.<sup>648</sup> Pressure, or the illegitimate

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<sup>640</sup> *Bank of Credit & Commerce International SA v Aboody* [1992] 4 All ER 955, per Slade LJ p 970; and *National Westminster Bank plc v Morgan* [1985] 1 All ER 821, per Lord Scarman, p 831. E A Farnsworth, *Farnsworth on Contracts* (Vol I 2<sup>nd</sup> ed, 1998), p 496-7.

<sup>641</sup> P Vout, (ed and Current Updating Author), *Unconscionable Conduct The Laws of Australia* (2006), para 35.7:2.

<sup>642</sup> Bigwood, R, *Exploitative Contracts* (2003), p 362-3; A Phang, ‘Economic Duress: Recent Difficulties and Possible Alternatives’ (1997) 5 RLR 53; and I J Hardingham, ‘Unconscionable Dealing’ in P D Finn (ed), *Essays in Equity* (1985), p 21.

See *NA v MA* [2006] EWCH 2900 at paras 122-3, where Baron J used the terms “acting under undue pressure”, undue influence, “that the Wife’s free will was overborne” and “manifestly [acting] to her disadvantage whilst under duress” to describe the pressure the wife was under to sign a post nuptial agreement.

<sup>643</sup> M D J Conaglen, ‘Duress, Undue Influence, and Unconscionable Bargains – The Theoretical Mesh’ (1999) 18(4) NZULR 509, p 527.

<sup>644</sup> *Ibid* p 537.

<sup>645</sup> N C Seddon, and M P Ellinghaus, *Cheshire and Fifoot’s Law of Contract* (8<sup>th</sup> Australian ed, 2002), p 657; Vout, above n 641 para 35.7:2; and R W Clarke, *Inequality of Bargaining Power* (1987), p 235. See also M Chen-Wishart, ‘The O’Brien Principle and Substantive Unfairness’ Cambridge LJ 56(1), March 1997, 60, p 66. Chen-Wishart argues that a finding of actual undue influence without substantive unfairness is an example of a case of clear pressure, which is more appropriately dealt with under duress. However, it is respectfully submitted that this is incorrect, because, in a case of actual undue influence, fairness, or disadvantage in the contract is not an issue, see *Pitt*.

<sup>646</sup> In terms of economic duress, the overborne theory is no longer applicable. The victim of duress normally knows what he or she is doing, but chooses to submit to the pressure. See P S Atiyah, ‘Economic Duress and the “Overborne Will”’ (1982) 98 LQR 197; and Clarke, above n 645 p 235.

<sup>647</sup> Vout, above n 641 para 35.7:2; Atiyah, above n 646; Clarke, above n 645 p 235; E A Farnsworth, *Farnsworth on Contracts* (Vol I 2<sup>nd</sup> ed, 1998), p 490; and Seddon, and Ellinghaus, above n 645 p 657.

<sup>648</sup> A Burrows, ‘We Do This At Common Law But That In Equity’ 22 Oxford J Legal Stud 1, p 5. Burrows argues that the doctrines of undue influence and duress falls into the category where common law and equity co-exist, but “there is nothing to be gained by adherence to those historical labels.” The difference is simply between the different types of threats or pressure involved.

threat is not a prerequisite for actual undue influence,<sup>649</sup> although typically it is present. “Undue influence involves the use of psychological pressure while economic duress involves the use of economic pressure.”<sup>650</sup> Undue influence can also exist in cases of extreme submissiveness, where there is no evidence of any pressure exerted, because no pressure is required.<sup>651</sup>

The difference in pressure required by duress as opposed to undue influence is illustrated in *Mutual Finance Ltd v John Wetton & Sons Ltd*.<sup>652</sup> The case centred on the issue of whether a guarantee could be avoided on the basis of duress or undue influence. One of the sons in the family business forged a guarantee. Mutual Finance Ltd was aware that the family, and in particular, another brother would be unwilling to permit a prosecution, as it might cause the death of their ill father. A new guarantee was signed. There were no threats of prosecution, and there was no promise not to prosecute if the new guarantee was signed. However, it was acknowledged that both parties knew that the impetus for signing the guarantee was the fear of prosecution. It was held that the case failed to establish duress at common law. Porter J recognised that the issue of whether undue influence had superseded duress was raised as early as 1927 by Salmond. Undue influence was wider than duress by the fact that “it is not necessary that there should be any direct threat.”<sup>653</sup> It was enough for undue influence that an undertaking was given out of a desire to prevent prosecution, and that desire was known by the person to whom the undertaking was given.<sup>654</sup> The case books are littered with actual undue influence cases with little or no pressure, certainly not enough pressure to constitute duress.

Given the similarities that undue influence and duress share in common, it raises the question: can the differences be overcome in order for the doctrines to be merged? This will be examined in chapter 8.

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<sup>649</sup> *Bank of Credit and Commerce International SA v Aboody* [1992] 4 All ER 955; *Bank of Montreal v Stuart* [1911] AC 120; *Dunbar Bank v Nadeem* [1998] 3 All ER 876; G H Treitel, *The Law of Contract* (11<sup>th</sup> ed. 2003), p 409; and N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 4-003.

<sup>650</sup> M H Ogilvie, ‘Economic Duress in Contract: Departure, Detour or Dead End?’ (2001) 34 Can Bus LJ 194, p 227.

<sup>651</sup> See discussion above p 45.

<sup>652</sup> [1937] 2 KB 389.

<sup>653</sup> *Ibid*, per Porter J, p 395.

<sup>654</sup> *Ibid*, per Porter J, p 395.

**CHAPTER 7**

**UNCONSCIONABILITY**

## INTRODUCTION

One final doctrine that will be discussed in this thesis is the doctrine of unconscionability. This doctrine is related in nature to the doctrines of undue influence<sup>655</sup> and duress. Unconscionability is an equitable doctrine that allows a court of equity to set aside a bargain of an improvident character. The early unconscionability cases concerned the expectant heir who was just of age, and made an improvident bargain with respect to the inheritance yet to be received.<sup>656</sup> The doctrine has now been extended to bargains “made by a poor or ignorant person acting without independent advice which cannot be shown to be a fair or reasonable transaction.”<sup>657</sup> The rationale for the intervention of equity in cases of unconscionable bargains “is not the relief of the foolish from their foolishness but rather the relief of the weak in appropriate cases from bargains entered into as a result of their weakness.”<sup>658</sup>

The doctrine of unconscionability has been utilised to differing degrees in New Zealand, England and Australia. In Australia unconscionable bargains has developed into a much wider doctrine as compared with the English cases. This has led Glover to conclude that “‘unconscientious dealing’ is the doctrinal paradigm in Australia” whereas “‘undue influence’ is the paradigm in the United Kingdom.”<sup>659</sup> However, this is not to say that the unconscionability doctrine in England is completely barren. In *Credit Lyonnais Bank Nederland NV v Burch*<sup>660</sup> Nourse LJ held that equity’s jurisdiction to relieve against such transactions utilising unconscionable bargains is rarely exercised in modern times. However, he recognised that the doctrine “is at least as venerable as its jurisdiction to relieve against those procured by undue influence.”<sup>661</sup>

As far as the divergence in the English and Australian jurisdictions on unconscionability are concerned, New Zealand can be seen to fall somewhere in between. As to which jurisdiction it is more analogous to, this is open to debate. Mason noted, “[s]o far, Australia’s enthusiasm for unconscionable conduct as a ground for relief has not been reciprocated elsewhere except in New Zealand.”<sup>662</sup> Tipping J held in *Attorney-General for England and Wales v R*<sup>663</sup> that “the English approach to unconscionable bargains

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<sup>655</sup> See discussion in *Louth v Diprose* (1992) 110 ALR 1, p 4-5 where Brennan J held that a similar jurisdiction exists to set aside gifts procured by undue influence.

<sup>656</sup> *Fry v Lane* (1889) 40 ChD 312, per Kay J, p 321.

<sup>657</sup> *O’Conner v Hart* [1985] 1 NZLR 159, per Lord Brightman, p 171.

<sup>658</sup> *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449, per Tipping J, p 460.

<sup>659</sup> J Glover, *Equity, Restitution & Fraud* (2004), p 281.

<sup>660</sup> [1997] 1 All ER 144.

<sup>661</sup> *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, per Nourse LJ, p 151.

<sup>662</sup> A Mason, ‘Contract, Good Faith and Equitable Standards in Fair Dealing’, (2000) 116 LQR 66, p 89.

<sup>663</sup> [2002] 2 NZLR 91, per Tipping J, p 117

may not have developed to the same extent or in exactly the same way as its New Zealand and Australian counterparts.” Despite the recognition of the differences, Tipping J later concedes that “the English and New Zealand manifestations of an unconscionable bargain are not markedly different.”<sup>664</sup>

## ELEMENTS

The principles derived from the leading cases on unconscionable bargains were summarised by the Court of Appeal in *Gustav & Co Limited v Macfield Limited*.<sup>665</sup> The principles stated were not intended to be exhaustive.<sup>666</sup>

1. Equity will intervene to relieve a party from the rigours of the common law in respect of an unconscionable bargain.
2. This equitable jurisdiction is not intended to relieve parties from “hard” bargains or to save the foolish from their foolishness. Rather, the jurisdiction operates to protect those who enter into bargains when they are under a significant disability or disadvantage from exploitation.
3. A qualifying disability or disadvantage does not arise simply from an inequality of bargaining power. Rather, it is a condition or characteristic which significantly diminishes a party’s ability to assess his or her best interests. It is an open-ended concept. Characteristics that are likely to constitute a qualifying disability or disadvantage are ignorance, lack of education, illness, age, mental or physical infirmity, stress or anxiety, but other characteristics may also qualify depending on the circumstances of the case.
4. If one party is under a qualifying disability or disadvantage (the weaker party), the focus shifts to the conduct of the other party (the stronger party). The essential question is whether in the particular circumstances it is unconscionable to permit the stronger party to take the benefit of the bargain.
5. Before a finding of unconscionability will be made, the stronger party must know of the weaker party’s disability or disadvantage and must “take advantage of” that disability or disadvantage.
6. The requisite knowledge may be that of the principal or an agent, and may be actual or constructive. Factors associated with the substance of a transaction (for example, a marked imbalance in consideration) or the way in which a transaction was concluded (for example, the failure of one party to receive independent advice in relation to a significant transaction) may lead to a finding that the stronger party had constructive knowledge. So, in the particular circumstances the stronger party may be put on enquiry, and in the absence of such enquiry, may be treated as if he or she knew of the disability or disadvantage.
7. “Taking advantage of” (or victimisation) in this context encompasses both the active extraction and the passive acceptance of a benefit. Accordingly, as Tipping J said in *Bowkett* at 457, an unconscionable victimisation will occur where there are:  
... circumstances which are either known or which ought to be known to the stronger party in which he has an obligation in equity to say to the weaker party: no, I cannot in all good conscience accept the benefit of this transaction in these circumstances either at all or unless you have full independent advice.
8. If these conditions are met, the burden falls on the stronger party to show that the transaction was a fair and reasonable one and should therefore be upheld.

On proof of the points three to seven it has been expressed that a “presumption of fraud”<sup>667</sup> is raised which places the onus on the stronger party to prove that the “purchase was “fair, just, and

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<sup>664</sup> *Attorney-General for England and Wales v R* [2002] 2 NZLR 91, per Tipping J, p 119.

<sup>665</sup> CA 168/05 [2007] NZCA 205, per Arnold J, para 30.

<sup>666</sup> The elements were also discussed by Tipping J in *Attorney-General for England and Wales v R* above n 664, p 118-9; and in an earlier case of *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449, p 460.

See also discussion by M Pawlowski and J Brown, *Undue Influence and the Family Home* (2002), p 193; P Vout, (ed and Current Updating Author), *Unconscionable Conduct The Laws of Australia* (2006) para 35.9:10; R P Meagher, J D Heydon, and M J Leeming, *Meagher, Gummow and Lehane’s Equity Doctrines and Remedies* (4<sup>th</sup> ed 2002), para 16-010; P D Maddaugh, J D McCamus, *The Law of Restitution* (1990), p 624-5; and N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 15-004.

reasonable.”<sup>668</sup> If this is not shown, a court of equity will set aside the transaction. The jurisdiction is based on the twin concepts of “inequality and improvidence.”<sup>669</sup> Alternatively, there may be proof of actual fraud.<sup>670</sup>

The elements of unconscionability illustrate that there is much in common between the evidential presumption of undue influence and the presumption of fraud. Text writers further highlight the similarities between undue influence and unconscionability. Enonchong’s chapter on unconscionability is a comprehensive summary of the law. It illustrates that elements of unconscionability is raised in much the same way as undue influence. Proof of impropriety to support a claim of unconscionable bargain can be established by showing actual impropriety, or presumed impropriety (where it is inferred from “either the relationship of the parties or the nature of the transaction”<sup>671</sup> or from transactional imbalance). In terms of transactional imbalance, a modern way of expressing the requirement is “where the contractual imbalance is so large as to call for an explanation.”<sup>672</sup> This is an identical formulation to that expressed in *Etridge* in terms of undue influence. This gives rise to a rebuttable presumption. The presumption of impropriety in unconscionability can be rebutted in much the same way as the presumption of undue influence.<sup>673</sup> Enonchong concludes by observing that the “presumption of unconscionable dealing is similar to the presumption of undue influence”<sup>674</sup> that is, it is evidential in nature.

In *Turner v Windever*,<sup>675</sup> Austin J held that an important feature of both the doctrine of undue influence and unconscionability is that “they both employ equitable presumptions. In the case of undue influence, a presumption arises out of the anterior relationship of the parties. The In (*sic*) the case of unconscionable dealings, the presumption that unconscionable advantage is being taken of a disability

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<sup>667</sup> *Morrison v Coast Finance Ltd* 55 DLR (2d) 710, per Davey JA, p 713. The elements were expressed as firstly, proof of inequality of the parties’ positions arising out of ignorance, need or distress of the weaker, leaving her at the mercy of the stronger party; and secondly proof of substantial unfairness of the bargain.

See also discussion in *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484, per Lord Selborne LC, p 490-1; *Chesterfield (Earl of) v Janssen* (1751) 2 Ves. Sen 125 [28 ER 82], per Lord Hardwicke, p 101; and *Blomley v Ryan* [1954-56] 99 CLR 362, per McTiernan J, p 385.

See also M Pawlowski and J Brown, *Undue Influence and the Family Home* (2002), p 196.

<sup>668</sup> *Fry v Lane* (1889) 40 ChD 312, per Kay J, p 322.

<sup>669</sup> B E Crawford, ‘Restitution – Unconscionable Transaction – Undue Advantage Taken of Inequality Between Parties’ (1966) 44 Can Bar Rev 142, p 143.

<sup>670</sup> *Chesterfield (Earl of) v Janssen* (1751) 2 Ves. Sen 125 [28 ER 82], per Lord Hardwicke, p 101.

<sup>671</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 17-022.

<sup>672</sup> *Ibid* para 17-027.

<sup>673</sup> *Ibid* para 17-030.

<sup>674</sup> *Ibid* para 18-007. Enonchong goes on to write that a significant difference is that in terms of unconscionability, transactional imbalance is enough to raise the presumption, but in a case of undue influence, transactional imbalance (that is a transaction that calls for explanation) is not enough to raise the evidential presumption.

<sup>675</sup> [2003] NSWSC 1147, per Austin J, para 130.

arises out of the position of the parties at the time of the transaction and the nature of the benefits passing under it.”<sup>676</sup>

## SPECIAL DISADVANTAGE

The first element is that one party must be at a disadvantage or disability *vis-à-vis* the stronger party. In *Fry v Lane*<sup>677</sup> the disadvantage that one must suffer in relation to another was held to be “poor and ignorant.”<sup>678</sup> *Cresswell v Potter*<sup>679</sup> held that in modern times, “the word “poor” to be replaced by “member of the lower income group”, and the word “ignorant” by “less highly educated.””<sup>680</sup> In *Portman Building Society v Dusangh*<sup>681</sup> the modern equivalent of poor and ignorant was held to be elderly, illiterate and on a very low income. The categories of disadvantage has been held to include “poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary.”<sup>682</sup> Unfamiliarity with or imperfect English can also be a disadvantage.<sup>683</sup> It has been acknowledged that it is “neither desirable nor indeed possible to attempt exhaustively to define or catalogue the circumstances which may amount to a material disability or disadvantage.”<sup>684</sup>

To establish a special disadvantage within a relationship there is no need to show a fiduciary relationship.<sup>685</sup> However, the level of disability or disadvantage required for equity to intervene needs to be determined. There needs to be an unequal relationship, and the relevant disadvantage needs to be assessed relative to the parties concerned, not as a disability in general. Therefore, if both the parties suffer from a disability, then this would not constitute a sufficient disadvantage.<sup>686</sup>

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<sup>676</sup> This was cited with approval in *Janson v Janson* [2007] NSWSC 1344.

An appeal of the decision in *Turner v Windever* was rejected in *Turner v Windever* [2005] NSWCA 73.

<sup>677</sup> (1889) 40 ChD 312.

<sup>678</sup> *Fry v Lane* (1889) 40 ChD 312, per Kay J, p 322.

<sup>679</sup> *Cresswell v Potter* [1978] 1 WLR 255.

<sup>680</sup> *Ibid*, per Megarry J, p 257. See also discussion in *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, per Nourse LJ at p 151, where he considers that recognition of the change in the categories “demonstrates that the jurisdiction is in good heart and capable of adaptation to different transactions entered into in changing circumstances.

<sup>681</sup> (2000) 80 P & CR D20, (cited 2000 WL 491447, Westlaw at 17 November 2007, Transcript).

<sup>682</sup> *Blomley v Ryan* [1954-56] 99 CLR 362, per Fullagar J, p 405. In *Nichols v Jessup* [1986] 1 NZLR 226, at p 233,

McMullin J held that the factors to be regarded are: poverty, ignorance, lack of independent advice, illness, age, inequality of bargaining power and inadequacy of consideration.

<sup>683</sup> R P Meagher, J D Heydon, and M J Leeming, *Meagher, Gummow and Lehane’s Equity Doctrines and Remedies* (4<sup>th</sup> ed 2002), para 16-010.

<sup>684</sup> *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449, per Tipping J, p 458.

<sup>685</sup> J P F Bogden, ‘On the “Agreement Most Foul”: A Reconsideration of the Doctrine of Unconscionability’ *Manitoba Law Journal*, Vol 25 No 1 187, p 193.

<sup>686</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 16-003-4.

Further, the disadvantage between the parties must be serious or special. The fact that one of the parties is in a stronger bargaining position is insufficient.<sup>687</sup> In *Commercial Bank of Australia v Amadio*<sup>688</sup> Mason J qualified the word “disadvantage” by adding the adjective “special” “in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasize that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests.”<sup>689</sup> The stronger party must know or ought to know of that disability.<sup>690</sup>

In terms of the special disadvantage “the Australian courts have gone so far as to recognise that this could be inferred from the improvidence of the transaction, the modern English judges have hardly ventured out of the traditional categories such as “poor and ignorant”.”<sup>691</sup> In *Bridgewater v Leahy*<sup>692</sup> an elderly uncle transferred to his nephew his interest in land, and forgave most of the purchase price. In his will, he gave his nephew an option to purchase further land. It was established in evidence that there was a close relationship between the uncle and nephew, and the uncle regarded his nephew as the son he never had. It was held that the relationship between the parties was such that, an unequal relationship was created when the nephew raised the question of acquiring the land. The nephew took advantage of his stronger position to obtain a benefit through a grossly improvident transaction at the expense of the uncle. *Bridgewater v Leahy* has been regarded as relaxing the requirement of special disadvantage to the extent that the case can “be interpreted as not requiring special disability, or at least widening the ambit of what can constitute special disability.”<sup>693</sup>

In *Elia v Commercial & Mortgage Nominees Ltd*<sup>694</sup> the plaintiff claimed that he was under a special disadvantage due to his ignorance and inexperience of legal and financial matters, unfamiliarity with written English, and his race.<sup>695</sup> He also claimed there was a lack of assistance or explanation provided to him. Mr Elia invested in a rest home business from which he derived no benefit. It was held that the finance transactions were complex and any ordinary borrower would have found them difficult to follow. However, for Mr Elia, given his disadvantage, it would have been beyond him. It was held that

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<sup>687</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 16-005.

<sup>688</sup> (1983) 151 CLR 447.

<sup>689</sup> *Ibid*, per Mason J, p 462.

<sup>690</sup> *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449, per Tipping J, p 460.

<sup>691</sup> Enonchong, above n 687 para 20-018. See also R McKeand, ‘Economic Duress – Wearing the Clothes of Unconscionable Conduct’ 2001 JCL LEXIS 6 (cited Lexis.com at 3 July 2007).

<sup>692</sup> [1998] HCA 66.

<sup>693</sup> McKeand, above n 691 [\*25].

<sup>694</sup> (1988) 2 NZBLC 103,296.

<sup>695</sup> *Elia v Commercial & Mortgage Nominees Ltd* (1988) 2 NZBLC 103,296, per Gault J, p 103,304.



the defendants took advantage of Mr Elia's "inability separately to make an informed judgment as to the transactions he became committed to."<sup>696</sup> It did not matter that Mr Elia did not protest or indicate his unwillingness. His disadvantages should have been apparent, and inquiries should have been made as to his level of comprehension. Therefore, there was a combination of the impaired ability of Mr Elia combined with the unconscionable conduct of the defendants that resulted in the finding of unconscionable conduct.

Further, a distinction has been drawn between a disadvantage which is constitutional, and a disadvantage which is situational. Constitutional disadvantage derives from factors inherent in the weaker party, such as those discussed above, age, illness, poverty, inexperience or lack of education.<sup>697</sup> Situational disadvantage arises "from particular features of a relationship between actors in the transaction such as the emotional dependence of one on the other."<sup>698</sup> While drawing a distinction between the two types of disadvantage may be useful, it is important that "such descriptions do not take on a life of their own, in substitution for ... the content of the law to which it refers. There is a risk that categories, adopted as a convenient method of exposition of an underlying principle, might be misunderstood, and come to supplant the principle."<sup>699</sup>

The issue of commercial (situational) disadvantage was considered in *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd*.<sup>700</sup> It was held that in the case of an experienced business person, something more than mere commercial vulnerability (however extreme) is needed to elevate disadvantage into special disadvantage. It was held that the disadvantage suffered in this case was a combination of poor commercial judgment (the decision to borrow heavily to purchase the business), and oversight in neglecting to exercise the option to renew the lease in good time. This did not amount to a special disadvantage.

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<sup>696</sup> *Elia v Commercial & Mortgage Nominees Ltd* (1988) 2 NZBLC 103,296, per Gault J, p 103,311.

<sup>697</sup> *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* 189 ALR 76, per Gray, French and Stone JJ, p 92.

<sup>698</sup> *Ibid.* See also discussion by J P F Bogden, 'On the "Agreement Most Foul": A Reconsideration of the Doctrine of Unconscionability' *Manitoba Law Journal* Vol 25 No 1 187, p 193.

<sup>699</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 197 ALR 153, per Gleeson CJ, p 156-7.

<sup>700</sup> 189 ALR 76.

*Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd*<sup>701</sup> concerned the inequality of bargaining power between the lessees of business premises and the lessors, (the owners of the mall). The lessees were in a difficult bargaining position because they wanted to renew their lease, but had no option to do so. They needed to renew in order to proceed with the sale of their business. The lessors took opportunity of their bargaining position and required the lessees to discontinue any legal proceedings they were pursuing against the lessors. It was held that taking advantage of a superior bargaining position is not the same as unconscientious exploitation of another's inability, or diminished ability to preserve one's own interest.<sup>702</sup> It was held in this case the lessees were not labouring under a special disadvantage: "many, perhaps even most, contracts are made between parties in unequal bargaining power."<sup>703</sup> It was also held that there was no unconscientious conduct on the part of the lessors, because "good conscience does not require parties to contractual negotiations to forfeit their advantages, or neglect their own interests."<sup>704</sup>

## EXPLOITATION

The second element to establish an unconscionable bargain is the exploitation of the special disadvantage by the stronger party in circumstances that amount to actual or equitable fraud. Related to this element is some procedural impropriety on the part of the stronger party which can be established or presumed.<sup>705</sup> The element of procedural impropriety is not mandatory but will often be a feature in cases.<sup>706</sup> The interaction of procedural and substantive unfairness was discussed in *O'Connor v Hart*:<sup>707</sup>

If a contract is stigmatised as "unfair", it may be unfair in one of two ways. It may be unfair by reason of the unfair manner in which it was brought into existence ... It will be convenient to call this "procedural unfairness". It may also, in some contexts, be described (accurately or inaccurately) as "unfair" by reason of the fact that the terms of the contract are more favourable to one party than to the other ... it will be convenient to call it "contractual imbalance". The two concepts may overlap. Contractual imbalance may be so extreme as to raise a presumption of procedural unfairness such as undue influence or some other form of victimisation. Equity will relieve a party from a contract which he has been induced to make as a result of victimisation. Equity will not relieve a party from a contract on the ground only that there is a contractual imbalance not amounting to unconscionable dealing.<sup>708</sup>

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<sup>701</sup> (2003) 197 ALR 153. The decision was based on a provision of the Australian statute, the Trade Practices Act 1974. However, it still has general significance in the law of unconscionability. See the discussion by S Todd, Burrows Finn & Todd, *Law of Contract in New Zealand* (3<sup>rd</sup> ed 2007), p 371.

<sup>702</sup> (2003) 197 ALR 153, per Gleeson CJ, p 157.

<sup>703</sup> Ibid.

<sup>704</sup> Ibid.

<sup>705</sup> *Attorney-General for England and Wales v R* [2002] 2 NZLR 91, per Tipping J, p 118-9.

<sup>706</sup> *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449, per Tipping J, p 460; and *O'Connor v Hart* [1985] 1 NZLR 159.

See also *Australian Competition & Consumer Comm v CG Berbatis Holdings Pty Ltd* (2003) 197 ALR 153 where the court made the distinction between constitutional and situational disadvantage.

See also discussion by N C Seddon and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract* (8<sup>th</sup> Australian ed, 2002), para 15.4; and S Worthington, *Equity* (2003), p 200.

<sup>707</sup> [1985] 1 NZLR 159.

<sup>708</sup> Ibid, per Lord Brightman, p 166. See also discussion in *Rosen v Rosen* 3 RFL (4<sup>th</sup>) 267 Ont CA, per Grange JA, p 273-4. An appeal brought by the husband against an order setting aside a separation agreement on the ground of unconscionability. The appeal was allowed. In terms of unconscionability it was held the doctrine of unconscionability does not seek to make equal, the bargaining strengths of the parties. In terms of grossly inadequate consideration, this is not a ground to set aside a

In *Boustany v Pigott*<sup>709</sup> Lord Templeton held that the fact that a bargain is hard, unreasonable or foolish is insufficient to establish unconscionability. The stronger party must have “imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience.”<sup>710</sup> This has alternatively been expressed as conduct by the stronger party “that can be characterised by some moral culpability or impropriety,” in that it is “not right that the strong should be allowed to push the weak to the wall.”<sup>711</sup>

The doctrine of unconscionability by its nature looks at the conduct of the stronger party. There must be some impropriety on the part of the defendant.<sup>712</sup> However, the issue as to how much moral wrongdoing the stronger party must demonstrate, has been an issue in unconscionability cases, as it has featured in undue influence cases. It must be shown that the defendant knew of the disadvantage and took advantage of it. The test is constructive, not actual knowledge. “That is, if the stronger party had *reason to know* of the other’s disadvantage, that is enough,”<sup>713</sup> or alternatively, “when a reasonable man would have adverted to the possibility of its existence.”<sup>714</sup> The unconscionable conduct, or victimisation by the stronger party, has been held to “consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances.”<sup>715</sup> The result of the unconscionable conduct has been expressed as affecting the conscience of the stronger party to the extent that the stronger party “cannot in all good conscience enforce or take advantage of this bargain.”<sup>716</sup>

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contract that has been freely entered into. “It is the taking advantage of that ability to prey upon the other party that produces the unconscionability.”

See also *Nichols v Jessup* [1986] 1 NZLR 226, McMullin J p 233.

<sup>709</sup> (1995) 69 P & CR 298.

<sup>710</sup> *Ibid*, per Lord Templeman, p 303.

<sup>711</sup> *Ibid*.

<sup>712</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 17-002-17-003. Enonchong writes that the reason for impropriety is because without it, the doctrine of unconscionability would be too wide. “The second reason for the requirement of impropriety is that since the ground for relief is the unconscientious conduct of the defendant, it would be strange if relief were available where there was nothing unconscientious in the defendant’s conduct.”

<sup>713</sup> N C Seddon and M P Ellinghaus *Cheshire and Fifoot’s Law of Contract* (8<sup>th</sup> Australian ed, 2002), para 15.9. See also R P Meagher, J D Heydon, and M J Leeming, *Meagher, Gummow and Lehane’s Equity Doctrines and Remedies* (4<sup>th</sup> ed 2002), para 16-010.

<sup>714</sup> *Nichols v Jessup* [1986] 1 NZLR 226, per Somers J, p 235.

<sup>715</sup> *O’Connor v Hart* [1985] 1 NZLR 159, per Lord Brightman, p 171. See also *Nichols v Jessup* [1986] 1 NZLR 226 p 232-4; and *Bridgewater v Leahy* (1998) 194 CLR 457 at [75].

<sup>716</sup> *Attorney-General for England and Wales v R* [2002] 2 NZLR 91, per Tipping J, p 119; and *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449, per Tipping J, p 457. In terms of surety cases, “it is necessary to show that the conscience of the party who seeks to uphold the transaction was affected by notice, actual or constructive, of the impropriety by which it was obtained by the intermediary”, *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, per Millett LJ, p 153.

The difficulty in cases arises when there appears to be no unconscionable conduct on the part of the stronger party. In *O’Conner v Hart*<sup>717</sup> Mr O’Conner did not have sufficient mental capacity to enter into the agreement but this was not known to Mr Hart. On his death, the trustees of Mr O’Conner’s trust estate sought to have it set aside on the grounds of unfairness and unconscionability. It was held that Mr Hart’s conduct was above reproach and he had done nothing wrong. It was held that the doctrine of unconscionability would not assist a claimant “where there was no victimisation, no taking advantage of another’s weakness, and the sole allegation was contractual imbalance with no undertones of constructive fraud.”<sup>718</sup> There must be an element of unfairness that amounts to equitable fraud.<sup>719</sup> The contract was upheld and not set aside on the ground of unconscionable bargain because Mr Hart was not guilty of any unconscionable conduct. He had acted with complete innocence throughout, and was unaware of the unsoundness of mind.

The Court of Appeal was faced with a similar issue in *Nichols v Jessup*.<sup>720</sup> The Court of Appeal criticised the Privy Council in *O’Conner v Hart* because no arguments were heard as to whether the agreement was fair or not, because disparity of consideration is a factor when deciding whether a case of unconscionable bargains has been proved. With regard to the conduct of the stronger party, it was held that it is not necessary to provide:

... proof of an active extortion of a benefit, an abuse of confidence, a lack of good faith by the party seeking to hold the bargain. Accepting the benefit of an improvident bargain by an ignorant person acting without independent advice which cannot be shown to be fair, may be unconscionable. Such a transaction may affect the conscience of the party who benefits from it.<sup>721</sup>

However, that statement was not intended to negate the importance of objective considerations and the requirement to establish overreaching behaviour.<sup>722</sup>

Cooke P held that the plaintiff did not set out to intentionally exploit the defendant. However, given the disparity in contractual values, the plaintiff must have at some stage realised the imbalance in the arrangement. The plaintiff should have done more to ensure the defendant received adequate independent legal advice. Further, the plaintiff “must have been well aware of the defendant’s characteristics and must have known or suspected that she was no judge of her own interests.”<sup>723</sup> (The trial judge found that the defendant was ignorant about property rights, unintelligent and muddleheaded and her judgment in business matters were swayed by irrelevant considerations.)

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<sup>717</sup> [1985] 1 NZLR 159.

<sup>718</sup> Ibid, per Lord Brightman, p 171.

<sup>719</sup> Ibid, per Lord Brightman, p 174.

<sup>720</sup> [1986] 1 NZLR 226.

<sup>721</sup> Ibid, per McMullin J, p 234.

<sup>722</sup> Ibid, per McMullin J, p 234.

<sup>723</sup> Ibid, per Cooke P, p 231.

In a recent Court of Appeal case *Gustav & Co Limited v Macfield Limited*,<sup>724</sup> the sole director of the appellant company was diagnosed with terminal cancer. He entered into a transaction to purchase commercial property at a premium shortly before his death. It was held that due to the cancer and the associated medical treatment, he was under a qualifying disability or disadvantage. However, despite the fact that the purchaser “looked terminal,” he had days where he was lucid, mentally acute, and business-like. He gave the impression that he knew what he was doing. It was held that the vendor did not have the requisite knowledge of the disadvantage. It was the purchaser who initiated the offer to buy, and it was subject to a full due diligence process. Further, it was held that despite knowing that the purchaser had terminal cancer, and that there was no joint venture or funding arrangements in place, there was no duty on the vendors to make further enquiries.

Therefore, while it is generally accepted that the basis of unconscionable bargains is the conduct of the stronger party, the issues regarding the level of moral culpability arise in the context of unconscionability as well as undue influence.<sup>725</sup> Later discussion will illustrate that rebutting the presumption of fraud, and the role of independent advice, serves different purposes under the doctrine of undue influence as compared with unconscionability.

## **SUBSTANTIAL INADEQUACY OF CONSIDERATION**

In order to successfully challenge a contract on the basis of unconscionability, substantive unfairness is an element to be considered. A large component of this is inadequacy of consideration, “and the stronger party either knows or ought to know that to be so.”<sup>726</sup> Inadequacy of consideration alone is insufficient to establish unconscionability.<sup>727</sup> However, it is a powerful evidential tool.<sup>728</sup> “It may be important in either or both of two ways – firstly as supporting the inference that a position of disadvantage existed, and secondly as tending to show that an unfair use was made of the occasion.”<sup>729</sup>

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<sup>724</sup> CA 168/05 [2007] NZCA 205.

<sup>725</sup> See also the discussion by D Capper, ‘Undue Influence and Unconscionability: A Rationalisation’ (1998) 114 LQR 479, p 485. Capper lists recklessness and improvidence as one of the categories of disadvantage. He notes that the cases that support this category are remarkable as equity does not relieve people from the consequences of their own folly. However, he notes that the cases that he cites included an element of wrongdoing on the part of the defendant because the plaintiff was unaware of the value of property and was deceived into selling it at a much lower price.

<sup>726</sup> *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449, per Tipping J, p 460.

<sup>727</sup> *Blomley v Ryan* [1954-56] 99 CLR 362, per Fullgar J, p 405.

<sup>728</sup> D Capper, ‘Undue Influence and Unconscionability: A Rationalisation’ (1998) 114 LQR 479, p 486.

<sup>729</sup> Above n 727, per Fullgar J, p 405.

See also N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 18-001. Enonchong writes that in some cases the transactional imbalance may be so great that the court is left “with no option but to draw an inference that the disadvantaged party must have been under some special disability or that the stronger party must have taken advantage of the disability of the weaker party or both.” He describes this inference “as a presumption of unconscionable dealing.”

While transactional imbalance is a strong evidential factor, it is recognised that there may be some cases where a transaction may be unconscionable even if the values of the exchange are relatively equal.<sup>730</sup>

The level of transactional imbalance required to establish unconscionability has varied within different jurisdictions.<sup>731</sup> In English law a high degree of transactional imbalance must be shown. “The complainant must show that the terms of the transaction were “harsh or oppressive” or “overreaching and oppressive.””<sup>732</sup> The phrase employed in *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd*<sup>733</sup> is that it “shocks the conscience of the court.”<sup>734</sup>

The difficulty in establishing a case on the ground of unconscionable bargain in England is illustrated in *Portman Building Society v Dusangh*.<sup>735</sup> A 25 year mortgage was granted by Mr Dusangh when he was 72 and retired. Mr Dusangh had come to live in England from India. His understanding of spoken English was poor, and he was illiterate. Part of the loan was used to pay off the existing mortgage, and the remainder of the money was paid to his son for use in the son’s business. The business failed. In defence of mortgage proceedings, Mr Dusangh relied on *inter alia* unconscionable bargains. It was held that the transaction was an improvident one. The ability of his son to make repayments depended on the

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<sup>730</sup> See *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449, per Tipping J, p 460; where it was held that “inadequacy of consideration is not mandatory but will almost always be present.”

See also S M Waddams, ‘Unconscionability In Contracts’ (1976) 39 Mod L Rev 369, p 392; and J D McCamus, *Essentials of Canadian Law The Law of Contracts* (2005), p 407.

*Lindsay v Lindsay* 21 RFL (3d) 34, (cited 1989 CarswellMan 44, Westlaw), per Kroft J, para 42 held that “the fact that an agreement is unwise or one-sided is not tantamount to unconscionability. No court should relieve a person from responsibility for a contract entered into willingly and knowingly, even where the contract is an act of folly.”

<sup>731</sup> A Mason, ‘Contract, Good Faith and Equitable Standards in Fair Dealing’, (2000) 116 LQR 66; and A Mason, ‘The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: An Australian Perspective’ in D W M Waters (ed), *Equity, Fiduciaries and Trusts* (1993) writes that in Australia, (as compared with England); unconscionability has relegated undue influence to a position of relative unimportance. Whereas in England, unconscionability as an independent ground for relief does not loom large.

L McMurtry, ‘Unconscionability and Undue Influence: an Interaction’ Conv 2000 Nov/Dec 573 (cited Westlaw at 13 August 2006), where McMurtry argues that the requirement of affirmative proof of unconscionable conduct, or inferring the conduct from an inexplicable transaction, has limited development of the doctrine of unconscionability in England.

N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 18-004-5. Enonchong goes on to assert that it is because there is no need to show transactional imbalance in Australia that it has enabled Australia to use the doctrine of unconscionability in the context of tripartite transactions.

See also R P Meagher, J D Heydon, and M J Leeming, *Meagher, Gummow and Lehane’s Equity Doctrines and Remedies* (4<sup>th</sup> ed 2002), para 16-005; and S Worthington, *Equity* (2003), p 200.

<sup>732</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 18-004.

<sup>733</sup> [1983] 1 WLR 87.

<sup>734</sup> *Ibid*, per Peter Millett QC, p 95. See *Humphreys v Humphreys* [2004] EWHC 2201, where the claim for undue influence succeeded, but unconscionable bargains did not because it was not sufficiently disadvantageous for the purposes of unconscionable bargains. *Portman Building Society v Dusangh* (2000) 80 P & CR D20, (cited 2000 WL 491447, Westlaw at 17 November 2007, Transcript), per Ward LJ, p 11, where the case lacked “moral outrage” and “the moral conscience of the court [was not] shocked.” See also discussion by K N Scott, ‘Evolving Equity and the Presumption of Undue Influence’ (2002) 18 JCL 15, 2002 JCL LEXIS 15, (cited Lexis.com at 10 February 2006), [\*16]-[\*17].

<sup>735</sup> (2000) 80 P & CR D20, (cited 2000 WL 491447, Westlaw at 17 November 2007 Transcript).

success of a risky supermarket venture, and the father did not receive any benefit from the transaction. However, the transaction was held to be not overreaching and oppressive. It was held by Ward LJ that the son had not exploited the father in a way that would affect his conscience. There was a lack of moral outrage in the case and the moral conscience of the court was not shocked.

In New Zealand and Australia a striking transactional imbalance is not essential.<sup>736</sup> In *Gustav & Co Limited v Macfield Limited*<sup>737</sup> Arnold J held that a marked imbalance in consideration is usually present in unconscionability cases, but it is not a prerequisite for relief. “However, if there is no significant imbalance in consideration or if the weaker party received full independent advice it is unlikely that any issue of unconscionability will arise.”<sup>738</sup> Similarly in *Contractors Bonding Ltd v Snee*<sup>739</sup> it was held that the focus must be on the conduct of the stronger party. Transactional imbalance “is a factor for consideration it is not the touchstone.”<sup>740</sup> All the circumstances of the case must be assessed, the special disadvantage, independent advice, the terms of the contract, and whether the disability was known, or should have been known by the stronger party. Equity will intervene if one party has “obtained benefits or have accepted benefits in unconscionable circumstances.”<sup>741</sup> In *Commercial Bank of Australia v Amadio*<sup>742</sup> Deane J held that in most cases of unconscionable dealing, inadequacy of consideration will be present. However, a transaction may be unconscionable (unfair, unreasonable and unjust) even if adequate consideration has moved from the stronger party to the weaker.<sup>743</sup>

*Dusangh* can be contrasted with *Bowkett v Action Finance Ltd*.<sup>744</sup> Both cases share similar facts: elderly parents who wanted to financially help their child in a business venture. In *Bowkett* the New Zealand Court of Appeal held that there was a dramatic inadequacy of consideration as the parents received nothing apart from the benefit of assisting their son. The circumstances of the case did shock the conscience of the court, and relief was granted. Similarly in *Nichols v Jessup*<sup>745</sup> the consideration to

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<sup>736</sup> See *Blomley v Ryan* [1954-56] 99 CLR 362; *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447; *Louth v Diprose* (1992) 110 ALR 1; and *Nichols v Jessup* [1986] 1 NZLR 226. N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 18-005. Enonchong writes that transaction imbalance is not required in Australia. He considers that “[i]n Australia there appears to be only two requirements for relief on the ground of unconscionable dealing (special disability and unconscientious conduct of the defendant) and transactional imbalance is not one of them.” Similar conclusions were drawn by N C Seddon and M P Ellinghaus, *Cheshire and Fifoot’s Law of Contract* (8<sup>th</sup> Australian ed, 2002), para 15.7.

<sup>737</sup> CA 168/05 [2007] NZCA 205.

<sup>738</sup> *Ibid*, per Arnold J, para 31.

<sup>739</sup> [1992] 2 NZLR 157.

<sup>740</sup> *Ibid*, per Richardson J, p 174.

<sup>741</sup> *Ibid*, per Richardson J, p 174.

<sup>742</sup> (1983) 151 CLR 447.

<sup>743</sup> *Ibid*, per Deane J, p 475.

<sup>744</sup> [1992] 1 NZLR 449.

<sup>745</sup> [1986] 1 NZLR 226.

be received by the defendant was grossly inadequate. However, in addition to that, the defendant was at a disadvantage, and she received no independent legal advice. The contract was set aside. Therefore, in New Zealand and Australia, transactional imbalance is an important evidential factor, but it has not been elevated to the same level as required in England.<sup>746</sup>

A significant point of differentiation between the English and Australian jurisdiction is whether or not the doctrine of unconscionability applies to gifts. English authorities have held that unconscionable bargains do not apply to gifts.<sup>747</sup> The nature of a gift is that it is a one sided transaction without the element of a bargain. An example is *Langton v Langton*.<sup>748</sup> In *Langton*, the plaintiff transferred his property to his son and his daughter-in-law after he had been released from jail for murdering his wife. The plaintiff had undergone a serious of operations, and was dependent upon his son and daughter-in-law for his daily care. He gifted his house to them. When the relationship between the plaintiff and the defendants soured, they asked him to leave the house. He sought to have the gift set aside on the grounds of actual and presumed undue influence and unconscionability.

He succeeded on the ground of undue influence. It was held that it is better to deal with gifts under the doctrine of undue influence. Despite considerable similarities between the doctrines of presumed undue influence and unconscionability, the crucial difference is that the doctrine of unconscionable bargains does not apply to gifts. If gifts were included into unconscionable bargains it would encroach onto the jurisdiction of undue influence. Further, if unconscionable bargains applied to gifts, then all gifts from poor and ignorant persons without independent advice will always shift the burden to the donee to prove that the gift was fair and reasonable.

*Langton* has been criticised, and academic writers are in support of the Australian stance, that unconscionability applies to gifts as well as to bargains.<sup>749</sup> *Louth v Diprose*<sup>750</sup> held that “gifts can also potentially be classified as having been unconscionably extracted, even though no consideration passes

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<sup>746</sup> See also *Stuart v Wain & Naysmith* [2001] DCR 61. In the case there was an agreement that the plaintiff would be paid \$100,000 in return for six months of companionship to the defendant. The defendant was lonely, elderly, and of ill health. It was held that this may have been excessive and disproportionate, but it did not render the contract unconscionable.

<sup>747</sup> M Pawlowski and J Brown, *Undue Influence and the Family Home* (2002), p 195.

<sup>748</sup> [1995] 2 FLR 890.

<sup>749</sup> D Capper, ‘Undue Influence and Unconscionability: A Rationalisation’ (1998) 114 LQR 479, p 482, argues that the term relational inequality, not inequality of bargaining power, should be utilised so that it does not imply that unconscionable bargains does not apply to gifts.

See also M Pawlowski and J Brown, *Undue Influence and the Family Home* (2002), p 195; and N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 20-003.

<sup>750</sup> (1992) 110 ALR 1, per Brennan J, p 5.



at all.”<sup>751</sup> There is no New Zealand authority that discusses the doctrine of unconscionability in relation to gifts. However, Lord Brightman’s statement in *O’Conner v Hart*<sup>752</sup> where he held that “an unconscionable bargain [is] a bargain of an improvident character made by a poor or ignorant person acting without independent advice which cannot be shown to be a fair and reasonable transaction” has been regarded as reflecting the view that the doctrine of unconscionability does not apply to gifts.<sup>753</sup> However, given that in New Zealand and Australia, substantial inadequacy of consideration is simply a factor to be considered, and not elevated to the standard required by English cases, it is arguable that in New Zealand the doctrine applies to gifts as it does in Australia.

## UNDUE INFLUENCE AND UNCONSCIONABILITY

Much has been written on the similarities between undue influence and unconscionability. To many the distinctions between the doctrines are becoming blurred,<sup>754</sup> and therefore there have been calls to merge the two doctrines. In some judgments it is often difficult to distinguish between the two.<sup>755</sup> *Bridgewater v Leahy*<sup>756</sup> held “[e]ach doctrine may be seen as a species of that genus of equitable intervention to refuse enforcement of or to set aside transactions which if allowed to stand, would offend equity and good conscience.”<sup>757</sup>

### 1. Similarities

The doctrines of undue influence and unconscionability share much in common.<sup>758</sup> The first is that procedural impropriety underlies both of the doctrines.<sup>759</sup> Both doctrines are anti-exploitation devices,<sup>760</sup> “designed to mitigate the risk of abuse by the stronger party of his position of special advantage.”<sup>761</sup> Both doctrines require that the stronger party be aware of their influence, or the other party’s disadvantage, and an obligation on the stronger party to ensure that the weaker party has made

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<sup>751</sup> M D J Conaglen, ‘Duress, Undue Influence, and Unconscionable Bargains – The Theoretical Mesh’ (1999) 18(4) NZULR 509, p 523.

<sup>752</sup> [1985] 1 NZLR 159, p 171.

<sup>753</sup> Conaglen, above n 751 p 523.

<sup>754</sup> *Barclay’s Bank plc v Goff* [2001] EWCA Civ 635. P Vout, (ed and Current Updating Author), *Unconscionable Conduct The Laws of Australia* (2006), para 35.9:33.

<sup>755</sup> N C Seddon, and M P Ellinghaus, *Cheshire and Fifoot’s Law of Contract* (8<sup>th</sup> Australian ed, 2002) para 14.1.

<sup>756</sup> [1998] HCA 66.

<sup>757</sup> *Ibid*, per Gaudron, Gummow and Kirby JJ, para 73.

<sup>758</sup> S Todd, Burrows Finn & Todd, *Law of Contract in New Zealand* (3<sup>rd</sup> ed 2007), p 369. See also discussion by Millett LJ in *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, p 153.

<sup>759</sup> M Chen-Wishart, ‘The O’Brien Principle and Substantive Unfairness’ Cambridge LJ 56(1), March 1997, 60, p 64.

Clarke, R W, *Inequality of Bargaining Power* (1987), p 251. Clarke argues that Lord Scarman’s perspective in *Morgan* that undue influence involves the victimisation of the weak by the strong emphasizes the unitary nature of undue influence and unconscionability.

<sup>760</sup> R Bigwood, *Exploitative Contracts* (2003), p 398-9.

<sup>761</sup> I J Hardingham, ‘Unconscionable Dealing’ in P D Finn (ed), *Essays in Equity* (1985), p 18.

an independent and informed decision.<sup>762</sup> Transactional imbalance is a potent evidential factor in both. As discussed earlier, the evidential presumption of fraud in an unconscionability case is raised in much the same way as the evidential presumption of undue influence.

More importantly however, both doctrines can be utilised to the same effect.<sup>763</sup> There are some cases that could easily be decided on either ground of undue influence or unconscionability. For instance, *Lloyds Bank Ltd v Bundy* could have been either a case on undue influence, unconscionability, or both.<sup>764</sup> While *Barclays Bank plc v O'Brien* was a case on misrepresentation and undue influence, it has been considered an application of unconscionability.<sup>765</sup>

*Louth v Diprose*<sup>766</sup> is an example of how the two doctrines can be utilised to give the same result. The relationship between the parties was one of immense love, devotion and infatuation on the part of Mr Diprose, which was not reciprocated by Ms Louth. Mr Diprose was under an immense degree of emotional dependence on Ms Louth. It was held that he was extremely susceptible to Ms Louth's influence. She exploited his infatuation by engineering a situation of crisis, for which he purchased a house in her name. It was held that Mr Diprose was under a special disability that arose from his infatuation. This led to a situation of extraordinary vulnerability to Ms Louth's actions.<sup>767</sup> As a result, Mr Diprose was able to retain the house he purchased for Ms Louth. However, the manipulation of Mr Diprose's infatuation to Ms Louth's advantage could quite easily fit under the jurisdiction of undue influence.

*Canadian Imperial Bank of Commerce v Ohlson*<sup>768</sup> was also such a case. The appellant was an 82 year old woman who borrowed money and secured it to her house for the benefit of her son. At the time she signed the documents the funds had already been advanced to the son. The bank structured the transaction as a loan as opposed to a guarantee, and it deprived Mrs Ohlson of independent advice. It was held that in substance, the transaction was a guarantee, and it was unconscionable to Mrs Ohlson. The doctrines of undue influence and unconscionability were described as twins, and amorphous in nature.<sup>769</sup>

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<sup>762</sup> I J Hardingham, 'Unconscionable Dealing' in P D Finn (ed), *Essays in Equity* (1985), p 18.

<sup>763</sup> M Pawlowski and J Brown, *Undue Influence and the Family Home* (2002), p 192.

<sup>764</sup> J D McCamus, *Essentials of Canadian Law The Law of Contracts* (2005), p 365.

<sup>765</sup> Pawlowski and Brown, above n 763 p 191; and M Chen-Wishart, 'The *O'Brien* Principle and Substantive Unfairness' *Cambridge LJ* 56(1), March 1997, 60, p 62.

<sup>766</sup> (1992) 110 ALR 1.

<sup>767</sup> *Ibid*, per Deane J, p 14.

<sup>768</sup> 154 DLR (4<sup>th</sup>) 33, (cited 1997 *CarswellAlta* 1050, Westlaw).

<sup>769</sup> *Ibid*, per Conrad JA, para 19.

*Alirezai v Australian and New Zealand Banking Group Limited*<sup>770</sup> and *Credit Lyonnais Bank Nederland NV v Burch*<sup>771</sup> both applied the concepts of unconscionable bargains and undue influence on the facts. In *Alirezai* McMurdo P held that unconscionability exists “when the inequality of a relationship between two people gives one a measure of influence or ascendancy over the other of which the dominant person takes unfair advantage and abuses that influence.”<sup>772</sup> He cited *Garcia v National Australia Bank Ltd*<sup>773</sup> in support of this. However, he also cited *Etridge* because in his view “an unequal relationship existed between the borrower, (the husband), and the surety, (the wife, who mortgaged the matrimonial home), giving the borrower a measure of influence or ascendancy over the surety.”<sup>774</sup> Similarly in *Burch* it was held that the unconscionability of the transaction was directly material to the case based on undue influence.<sup>775</sup> Therefore the two doctrines can be applied in the same doctrinal manner to the same facts.<sup>776</sup>

## 2. A Unique New Zealand Perspective

A distinct New Zealand development has come in the area of disability *vis-à-vis* undue influence. In England a complainant’s disability may not constitute undue influence.<sup>777</sup> This was illustrated in *Irvani v Irvani*<sup>778</sup> where it was held that the relationship of undue influence could not arise out of a condition of chronic intoxication.<sup>779</sup> The relationship may arise if the dominant party assumes a role of guardian or adviser to the inebriate. Buxton LJ regarded the New Zealand case of *Brusewitz v Brown*<sup>780</sup> as incorrect.

In *Brusewitz*, Mr Brusewitz was 66 years old, separated from his wife and family and living by himself in a hotel. He suffered from poor health as a result of chronic alcoholism. Four months before his death

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<sup>770</sup> [2004] QCA 6, [2004] Q ConvR 54-601, (cited 2004 WL 227507, Westlaw at 10 February 2006).

<sup>771</sup> [1997] 1 All ER 144. See also the approach of the Privy Council in *Attorney-General for England and Wales v R* [2004] 2 NZLR 577; and *Mahoney v Purnell* [1996] 3 All ER 61, per May J, p 81-2. Further discussion below p 133 on *Mahoney v Purnell*.

<sup>772</sup> Above n 770, per McMurdo P, para 39.

<sup>773</sup> 155 ALR 614.

<sup>774</sup> *Ibid.*

<sup>775</sup> [1997] 1 All ER 144, per Nourse LJ, p 151.

<sup>776</sup> L Ho, ‘Undue Influence: When and How it Matters to Banks and Solicitors’ [2002] *Singapore Journal of Legal Studies* 617, p 624. Ho also draws similarities with the doctrinal approach of unconscionability, and the undue influence approach in *Etridge*. The two concepts of undue influence and unconscionable bargains were also merged in arguments in *White v State Bank of New South Wales* [2002] NSWCA 241.

<sup>777</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 10-031.

<sup>778</sup> [2000] 1 Lloyd’s Rep 412.

<sup>779</sup> A more recent English case of *Macklin v Dowsett* [2004] EWCA Civ 904 also appears contrary to *Irvani*. In considering whether there was a relationship of trust and confidence, the financial disparity of the parties was considered. This was couched in similar terms to unconscionable bargains.

<sup>780</sup> [1923] NZLR 1106. See also discussion above p 68.

he transferred to the defendant, Mr Brown a mortgage for £1,000 for an annuity of £108, payable by monthly instalments. The mortgage was effectively Mr Brusewitz's only asset and therefore a grossly improvident transaction. The relationship between Mr Brusewitz and Mr Brown was not just one of a friend and trusted companion, but also a trusted agent. Mr Brown collected money for Mr Brusewitz and cashed cheques on his behalf. Salmond J found that far from trying to protect Mr Brusewitz from his drinking problem, it became Mr Brown's daily habit to drink with Mr Brusewitz in the hotels of Nelson. It was held that the combination of the factors of alcoholism, isolation from his family, ill health, and his relationship with Mr Brown raised the presumption of undue influence. It is important to note that it was not the alcoholism alone which raised the presumption; it was a combination of factors. Cases that have cited *Brusewitz* have cited it as a case concerned with unconscionability.<sup>781</sup>

*Richardson v Harris*<sup>782</sup> illustrates that certain fact scenarios can constitute both undue influence and unconscionability. However, the importance of the case is that the Supreme Court considered that a relationship of unequal power created a relationship of influence. In the case, Mr Harris was "a farm labourer of weak character and possessing an intelligence which is not of a high order."<sup>783</sup> Mr Harris had creditors who were pressing him to borrow money on his life interest to settle debts. Mr Richardson was a money-lender who was described as shrewd and experienced. He had had previous dealings with Mr Harris. He knew of Mr Harris' financial difficulties, and impoverished circumstances, and inexperience in matters of finance. Mr Harris sold to Mr Richardson his life interest in a sum of £7,250 for £1,750 and the placing of adequate life insurance by Mr Richardson.

The Supreme Court held that this was a case of undue influence. It was held that the relationship between a "bankrupt and dullard" versus a "shrewd experienced money-lender"<sup>784</sup> created a relationship of influence. This relationship of influence was not based on any established presumptions; it arose from the "conduct of the parties and the circumstances of the particular case."<sup>785</sup> This relationship of influence was not rebutted by Mr Richardson, and the transaction was set aside. On appeal, the Court of Appeal held that a person in the position of Mr Harris is normally protected as an expectant heir, under unconscionable bargains. Mr Richardson failed to discharge the burden placed on

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<sup>781</sup> *In the Marriage of JW and AM Gebert* (1990) 14 Fam LR 62. It was also cited in *Krambousanos v Jedda Investments Pty Ltd* (1996) 142 ALR 604 in relation to the issue of a solicitor's retainer which does not involve a duty to give advice regarding the propriety of a transaction.

<sup>782</sup> [1930] NZLR 890 (SC).

<sup>783</sup> *Ibid*, per Herdman J, p 891.

<sup>784</sup> *Ibid*, per Herdman J, p 899.

<sup>785</sup> *Ibid*, per Herdman J, p 900.

him to prove that the transaction was fair, just and reasonable. It was held that this was an unconscionable bargain.

A further example is *Westpac Banking Corporation v Chang*.<sup>786</sup> The case involved a claim by Mrs Chang of undue influence and unconscionable bargains on the part of her husband for a mortgage executed in favour of Westpac Banking Corporation. Mrs Chang argued that she could not speak or write English, she had never had a paid job, and she had been a housewife all her married life. It was held that Mrs Chang was induced to sign the mortgage based on the undue influence of her husband. It was held that the influence was very clear, because Mrs Chang did not speak English and did not understand what she was signing. Given that she was totally dependant on her husband, undue influence was established.<sup>787</sup>

In *Milsom v Mazey and Ritz Hair Fashions*<sup>788</sup> Heron J cites *Brusewitz v Brown* as an authority where a disability is considered a weakness under the undue influence doctrine. In *Milsom v Mazey and Ritz Hair Fashions*, the relationship that developed between Miss Milsom and Mr Mazey arose out of her marriage break up. She had lost custody of her children and was clearly unwell from drinking and drug taking. She was also admitted to a mental hospital. She was clearly dominated by Mr Mazey, and unduly influenced to enter into purchasing his hairdressing business, a transaction that was unfavourable to her, and the contract was set aside.

### 3. Which Doctrine is “Wider”?

If the argument is made to merge undue influence and unconscionability, authorities and academics have considered the question as to which doctrine is wider than the other. The basis of this discussion is to determine which one should be subsumed by the other. The majority of the academic and text writers consider that unconscionability is wider than undue influence.<sup>789</sup> Undue influence can be

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<sup>786</sup> HC CH CP 120/98 [1 December 1998].

<sup>787</sup> However, in terms of unconscionable conduct it was held that Mrs Chang’s disability arose from her inability to understand English. As there was no evidence to suggest that the Bank knew of this disability, Mrs Chang failed on the ground of unconscionable bargains. Because the Bank had no notice of the disability, Master Venning did not discuss whether Mr Chang’s conduct to his wife was unconscionable.

<sup>788</sup> HC CH A159/84 [May 30 1985].

<sup>789</sup> S M Waddams, ‘Unconscionability In Contracts’ (1976) 39 Mod L Rev 369, p 387; D Capper, ‘Undue Influence and Unconscionability: A Rationalisation’ (1998) 114 LQR 479, p 498; J P F Bogden, ‘On the “Agreement Most Foul”: A Reconsideration of the Doctrine of Unconscionability’ Manitoba Law Journal Vol 25 No 1 187, p 190-1; and A Mason, ‘The Place of Equity and Equitable Remedies in the Contemporary Common Law World’ (1994) 110 LQR 238, p 249. Chen-Wishart, M, *Unconscionable Bargains* (1989), p 42. Chen-Wishart argues that unconscionability is more expansive than undue influence because unconscionability can extend to “those who act, not through their own influence but through the influence or advantage of others.” (She was writing here about third party rights). However, it is submitted that this is not correct as third parties can be held accountable under undue influence pursuant to the doctrine of constructive notice.

conceptualised as a species of unconscionable conduct<sup>790</sup> for a number of reasons. Undue influence requires some personal relationship between the parties (whether there is an actual relationship or one presumed by the law). The need to prove a relationship of trust and confidence limits undue influence.<sup>791</sup> Further, unconscionability can be considered to be wider than undue influence because, in theory, an agreement that is brought about because of undue influence is highly likely to be unconscionable, or alternatively, an unconscionable bargain can exist without undue influence.<sup>792</sup>

However, the arguments that undue influence is wider than unconscionability are also as strong and compelling. “*Snell’s Principles of Equity* treats undue influence as the dominant category of constructive fraud, followed by abuse of confidence and, finally, unconscionable bargains. This is a familiar pattern in all modern textbooks.”<sup>793</sup> Further, the limited nature of unconscionability in the English jurisdiction is an example that undue influence is wider. Unconscionable bargains have been considered an “offshoot”<sup>794</sup> of undue influence.

*Langton v Langton*<sup>795</sup> discussed the issue. It was held that the underlying basis to the doctrine of unconscionability was to protect persons who were persuaded to enter into an unfair or unconscionable bargain. Equity imposed an onus to prove that the transaction was fair, just and reasonable, and to protect a weaker party from those in a position to take advantage of them. It was held that an unconscionable bargain fits within the rationale behind the class 2B presumption<sup>796</sup> arising from *O’Brien*: that is the nature of the relationship between the vendor and purchaser which arises because of the nature of the transaction concluded, coupled with the dominating characteristic of the vendor. It was held that unconscionable bargain cases with poor and ignorant people could, and should be treated as undue influence cases.<sup>797</sup> It is unclear from the judgment whether the judge was treating all categories of special disability as falling within undue influence, or purely poor and ignorant people.

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<sup>790</sup> S Todd, Burrows Finn & Todd, *Law of Contract in New Zealand* (3<sup>rd</sup> ed 2007), p 369.

<sup>791</sup> D Capper, ‘Undue Influence and Unconscionability: A Rationalisation’ (1998) 114 LQR 479, p 498.

<sup>792</sup> J P F Bogden, ‘On the “Agreement Most Foul”: A Reconsideration of the Doctrine of Unconscionability’ *Manitoba Law Journal* Vol 25 No 1 187, p 190-1. Bogden concedes that in practice the distinction between the doctrines is not as acute. Enonchong also agrees. He writes that conduct can fall short of undue influence, yet may still amount to impropriety for the purposes of unconscionability. N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 17-012. See also *Zabolotney v Szyjak* 5 Man R (2d) 107, (cited 1980 CarswellMan 249, Westlaw).

<sup>793</sup> M Halliwell, *Equity & Good Conscience in a Contemporary Context* (1997), p 44.

<sup>794</sup> Fridman, G H L, *The Law of Contract in Canada* (5<sup>th</sup> ed, 2006), p 321.

<sup>795</sup> [1995] 2 FLR 890.

<sup>796</sup> There is also a close correlation between class 2B, actual undue influence and duress.

<sup>797</sup> Wilson argues that class 2B “bears the strongest comparison with the Australian unconscionability cases.” P Wilson, ‘Unconscionability and fairness in Australian equitable jurisprudence’ 2004 APLJ LEXIS 19 (cited Lexis.com at 10 February 2006), [\*72]-[\*73].

However, His Honour did appear to use the phrase “poor and ignorant” as a short hand for special disability.

Despite the volume of debate as to which doctrine is wider than the other, it is submitted that this debate is unnecessary. Ultimately, the basis for any subsumption of one doctrine into another depends on whether one doctrine can encapsulate the other in terms of proof, and outcome in cases. Any merger also depends on the doctrines sharing enough doctrinal elements. The discussion below as to the differences between the doctrines of undue influence and unconscionability will show that neither doctrine share the same exact characteristics.

#### 4. Differences

To some, the doctrines of undue influence and unconscionability are distinct and separate.<sup>798</sup> The special disadvantage or disability is more difficult to establish than a relationship of trust and confidence. Further, undue influence has a level of “subtlety which unconscientious dealing lacks.”<sup>799</sup> Glover gives an example of a man who threatens to shoot himself unless his wife signs a contract. For unconscionable bargains, she would not be under a special disability, nor would her cognitive faculties have been impaired. The situation would be “objectionable because of the way in which motives were produced antecedent to consent.”<sup>800</sup> She would therefore, succeed under undue influence.<sup>801</sup>

In *Wilkinson v ASB Bank Ltd*<sup>802</sup> Blanchard J approached the issue of the interaction between undue influence and unconscionable bargains as if they were two separate doctrines in their own right. There were no attempts to reconcile the two doctrines, even though cases that seem to blur the distinction were cited, such as *Credit Lyonnais Bank Nederland NV v Burch*. Similarly in *Humphreys v Humphreys*<sup>803</sup> Rimer J considered undue influence and unconscionability as two separate doctrines. Rimer J held that the trust deed was executed by a mother under the influence of her son. The Judge reached this conclusion using the evidential presumption established in *Etridge*. However, in terms of unconscionability, it was held that the son did not act with sufficient moral culpability to enable a finding on unconscionable bargains.

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<sup>798</sup> B E Crawford, ‘Restitution – Unconscionable Transaction – Undue Advantage Taken of Inequality Between Parties’ (1966) 44 Can Bar Rev 142, p 143.

<sup>799</sup> J Glover, *Equity, Restitution & Fraud* (2004), p 282.

<sup>800</sup> Ibid.

<sup>801</sup> Glover was discussing this issue in his comparison of undue influence and unconscionability. However, given the fact scenario he has outlined, the wife could also succeed under duress.

<sup>802</sup> [1998] 1 NZLR 674.

<sup>803</sup> [2004] EWHC 2201.

*Irvani v Irvani*<sup>804</sup> is a recent case that considered the difference between undue influence and unconscionable bargains. Buxton LJ treated undue influence and unconscionability as distinct. It was held that undue influence was concerned with prior relationships between the contracting parties, and the motivations for entering into the contract. On the other hand, unconscionability was “concerned with the nature and circumstances of the bargain itself, and can arise without there being any relationship, outside that of the immediate contract, between the parties.”<sup>805</sup> His Honour felt it was important to keep the distinctions clear. If not, there will be a tendency to import undue influence elements into an unconscionability case, and vice versa. This, he argues will attract “relief on a vaguer basis of general equity.”<sup>806</sup> The importance of retaining the distinction was also important in cases of contracting with parties suffering from mental incapacity, or addiction to drugs or alcohol. Buxton LJ held that it is unlikely that those circumstances can give rise to a claim of undue influence.<sup>807</sup>

More recently Austin J in *Turner v Windever*<sup>808</sup> held that:

The similarities in the operation of the two doctrines can engender false assumptions about similarity of scope. It is essential for a judge at first instance to bear in mind the different evidentiary foundations of cases invoking the doctrines, the one focusing on evidence of the prior relationship and the domination and dependence said to have been engendered, and the other focusing on the position of special disadvantage of one party and the other party’s knowledge of it at the point of transaction. Thus, if a plaintiff is permitted to shift from reliance on one doctrine to reliance on the other at the trial, the defendant’s evidentiary preparation for the hearing could be undermined. On the other hand, if a plaintiff has prepared its case with a view to invoking one doctrine, the evidence is unlikely to be sufficient to warrant relief under the other.

### **(a) Plaintiff-Defendant Basis**

The distinction between undue influence and unconscionability need not be as subtle as described by Glover. It is commonly thought that the prime focus in unconscionability is on the conduct of the party applying the pressure,<sup>809</sup> whereas undue influence focuses on the consent of the weaker party. This was discussed extensively in chapter 2. The distinction between the two doctrines is not without criticism. It has been written that the difference is “more of emphasis than substance”<sup>810</sup> and that “such a basis of distinction is untenable”<sup>811</sup> as both doctrines require to some extent both impaired consent and wicked

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<sup>804</sup> [2000] 1 Lloyd’s Rep 412.

<sup>805</sup> Ibid, per Buxton LJ, p 424.

<sup>806</sup> Ibid.

<sup>807</sup> Ibid. Contrast to the New Zealand case of *Brusewitz v Brown* above p 117.

<sup>808</sup> [2003] NSWSC 1147, per Austin J, para 131. This was cited with approval in *Janson v Janson* [2007] NSWSC 1344.

<sup>809</sup> R McKeand, ‘Economic Duress – Wearing the Clothes of Unconscionable Conduct’ 2001 JCL LEXIS 6 (cited Lexis.com at 3 July 2007), [\*7].

<sup>810</sup> P Parkinson, (ed) *The Principles of Equity* (2<sup>nd</sup> ed 2003), p 129.

<sup>811</sup> M Chen-Wishart, *Unconscionable Bargains* (1989), p 91.



exploitation.<sup>812</sup> The differentiation has also been described as “unconvincing,”<sup>813</sup> “strained,”<sup>814</sup> “illusory,”<sup>815</sup> and incorrect in theory.<sup>816</sup>

As it was established in chapter 2, the argument that undue influence is a purely plaintiff based doctrine or defendant based doctrine is unsupported by precedent and theoretically incorrect. Inherent in undue influence is an element of both. Accordingly, conceptualising undue influence and unconscionability as purely defendant based, does not afford the basis to merge the two doctrines. On the other hand, unconscionability is largely a doctrine centred on the wrongful conduct of the stronger party. Finn writes that the focus of unconscionability has undergone a basic reorientation:

Historically it has focused upon protecting a person because of his own weakness. Today the pressure would seem to be to protect a person because of another’s strength – to curb an overweening and self-interested power rather than to aid an inept and incompetent interest.<sup>817</sup>

It is conceded that there are some unconscionability cases where it is difficult to ascertain wrongful conduct on the part of the stronger party. However, those cases can be construed as a passive acceptance of a benefit.

It is submitted that the crucial distinction between undue influence and unconscionability is the focus of rebutting the evidential presumption of undue influence as opposed to the presumption of fraud. If the elements of unconscionability are established, and a presumption of fraud is raised, the onus shifts to the stronger party to show that the transaction was fair, just and reasonable. “It is here that the difference between undue influence and unconscionability can be most clearly seen. In the former, the stronger party has to show that the weaker acted independently. In the latter, the burden is to show that the transaction was fair.”<sup>818</sup> Independent advice serves a different role in the two doctrines. In *Credit Lyonnais Bank Nederland NV v Burch*<sup>819</sup> Millett LJ held that the role of the independent adviser in an undue influence case as opposed to a case on unconscionability is not identical but is not dissimilar.<sup>820</sup> However, His Honour did not elaborate how it differs. It is submitted that in an unconscionability case, independent advice helps to “redress the relational imbalance which would otherwise exist by reason of

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<sup>812</sup> M Chen-Wishart, *Unconscionable Bargains* (1989), p 91; and N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 20-013.

<sup>813</sup> P Parkinson, (ed) *The Principles of Equity* (2<sup>nd</sup> ed 2003), p 432.

<sup>814</sup> *Ibid.*

<sup>815</sup> K N Scott, ‘Evolving Equity and the Presumption of Undue Influence’ (2002) 18 JCL 15, 2002 JCL LEXIS 15 (cited Lexis.com at 10 February 2006), [\*15]-[\*16]. See also M Pawlowski and J Brown, *Undue Influence and the Family Home* (2002), p 200; and A Phang, ‘Undue Influence Methodology, Sources and Linkages’ [1995] JBL 552, p 567-8.

<sup>816</sup> R W Clarke, *Inequality of Bargaining Power* (1987), p 251, writing in the context of *Morrison v Coast Finance Ltd* 55 DLR (2d) 710.

<sup>817</sup> P D Finn, ‘The Fiduciary Principle’ in T G Youden (ed), *Equity, Fiduciaries and Trusts* (1989), p 7.

<sup>818</sup> N C Seddon, and M P Ellinghaus, *Cheshire and Fifoot’s Law of Contract* (8<sup>th</sup> Australian ed, 2002), para 15.10.

<sup>819</sup> [1997] 1 All ER 144.

<sup>820</sup> *Ibid.*, per Millett LJ, p 156.

the special disability of the weaker party.”<sup>821</sup> It helps to establish that the stronger party did not abuse the position he or she held over the weaker party. In effect, the role of independent advice is to clear the conscience of the stronger party.<sup>822</sup> In a case of undue influence, the role of independent advice is not only to free the weaker party from the influence of another, (the wrong doing aspect) but also to ensure that free will was exercised (the plaintiff based aspect).

### **(b) Fiduciary Elements**

The distinction between undue influence and unconscionability has also been drawn along the lines of the fiduciary element. The nature of the emphasis on the relationship of influence has some convinced that the difference is that undue influence has a fiduciary element<sup>823</sup> to it, whereas unconscionability does not. According to Finn, one of the hallmarks of a fiduciary relationship is that “one party reposes trust and confidence in the other.”<sup>824</sup> Fiduciary exploitation must be guarded more jealously because it in effect is an “attack from within”<sup>825</sup>, and involves a “greater wrong.”<sup>826</sup> Unconscionable bargains are considered to be concerned with maintaining the parties’ freedom, whereas undue influence is concerned with subordinating freedom, that is the stronger party must put his or her interest behind that of the weaker party.<sup>827</sup> It is considered that any merger of unconscionability with undue influence would obscure any fiduciary characteristics of undue influence.<sup>828</sup>

However, others argue that there is a fiduciary element to unconscionability. It is an extension of the “morality aspect of the fiduciary relationship”.<sup>829</sup> La Forest J in *Hodgkinson v Simms*<sup>830</sup> held that:

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<sup>821</sup> N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 19-001.

In *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449, per Tipping J, p 460-1 held that “absence of independent advice is a frequent feature of unconscionable bargain cases and it would be hard to find a bargain unconscionable if the weaker party had received adequate independent advice.

However, in *Toronto-Dominion Bank v Wong* 65 BCLR 243, (cited 1985 ACWSJ LEXIS 20146, Lexis.com at 20 March 2006, cited 1985 CarswellBC 240, Westlaw at 13 October 2006) the lack of independent advice did not affect the finding that there was no unconscionable transaction. The weaker party was caught up with her son’s enthusiasm and optimism about the project, and she would have entered into the transaction regardless of any advice.

<sup>822</sup> *Nichols v Jessup* [1986] 1 NZLR 226, per McMullin J, p 234. In *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449, per Tipping J, p 119, his Honour held that “there must be circumstances which are either known or which ought to be known to the stronger party in which he has an obligation in equity to say to the weaker party: no, I cannot in all good conscience accept the benefit of this transaction in these circumstances either at all or unless you have full independent advice.”

<sup>823</sup> P Parkinson, (ed) *The Principles of Equity* (2<sup>nd</sup> ed 2003), p 428; Bigwood, R, *Exploitative Contracts* (2003), p 399-400.

<sup>824</sup> P D Finn, ‘The Fiduciary Principle’ in T G Youden (ed), *Equity, Fiduciaries and Trusts* (1989), p 33.

<sup>825</sup> Bigwood, above n 823 p 400.

<sup>826</sup> R Bigwood, ‘Undue Influence in the House of Lords: Principles and Proof’ (2002) 65 (3) MLR 435, p 438.

<sup>827</sup> Bigwood, above n 823 p 399-400.

<sup>828</sup> Parkinson, above n 823 p 433.

<sup>829</sup> J Dixon, ‘The Remedial Constructive Trust Based on Unconscionability in the New Zealand Commercial Environment’ (1992) 7 AULR 147, p 163.

<sup>830</sup> 117 DLR (4<sup>th</sup>) 161, [1994] 3 SCR 377, (cited 1994 CarswellBC 438, Westlaw at 11 October 2006) Supreme Court of Canada.

Vulnerability is common to many relationships in which the law will intervene to protect one of the parties. It is, in fact, the “golden thread” that unites such related causes of action as breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation.<sup>831</sup>

Finn lists, in ascending order of intensity of fiduciary standard: ““the unconscionability standard,” “the good faith standard,” and the “fiduciary standard.””<sup>832</sup> What differentiates the level of fiduciary obligation is the extent that one party must defer his or her own interest in favour of another. ““Unconscionability” accepts that one party is entitled as of course to act self-interestedly in his actions towards the other,”<sup>833</sup> unless one party is unable to look after his or her own interests and is vulnerable to the exploitation or manipulation of the other party. The standard progresses to the fiduciary standard which “enjoins one party to act in the interests of the other – to act selflessly with undivided loyalty. There is, in other words, a progression from the first to the third: from selfish behaviour to selfless behaviour.”<sup>834</sup>

With a similar concept, Conaglen argues that duress, undue influence and unconscionable bargains are all examples of duties of good faith. Conaglen suggests that to understand the interrelationship between the doctrines they should be placed on a continuum of human relationships, ranging from equal bargaining power, to the imposition of fiduciary duties. Conaglen draws similarities with presumed undue influence, unconscionable bargains and the doctrine governing fiduciary relationships. The similarities between presumed undue influence and unconscionability is that a weaker party may be excessively dependent on another so that he is prone to being influenced to enter into a transaction which is not in his best interests, or unable to determine what is in his best interests.<sup>835</sup> In other words, the law is concerned with protecting the weaker party in both doctrines. However, the doctrines fall at different points along the continuum. There is a fiduciary element in each, but to differing amounts. Conaglen concedes that his arguments for a continuum may be criticised for being uncertain. However, it does not rely solely on the courts determining what is fair.

Despite the doctrine of unconscionability exhibiting some fiduciary characteristics, it is submitted that this is not enough to conceptualise it as analogous with undue influence. There are a range of

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<sup>831</sup> *Hodgkinson v Simms* 65 BCLR 243, (cited 1985 ACWSJ LEXIS 20146, Lexis.com at 20 March 2006, cited 1985 CarswellBC 240, Westlaw at 13 October 2006), per La Forest J, para 27.

<sup>832</sup> P D Finn, ‘The Fiduciary Principle’ in T G Youden (ed), *Equity, Fiduciaries and Trusts* (1989), p 3.

<sup>833</sup> *Ibid* p 4.

<sup>834</sup> *Ibid*.

<sup>835</sup> M D J Conaglen, ‘Duress, Undue Influence, and Unconscionable Bargains – The Theoretical Mesh’ (1999) 18(4) NZULR 509, p 536.

relationships which may have fiduciary responsibilities imposed on it. This was discussed by Fletcher Moulton LJ in *Coomber v Coomber*.<sup>836</sup> His Honour held that:

Fiduciary relations are of many types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him.

Similarly, Flannigan gives the example of “a mechanic who uses a customer’s vehicle for personal or business purposes would also be in breach of fiduciary obligation.”<sup>837</sup> The fiduciary element present in an undue influence case differs from an unconscionability case:

undue influence often has a subtle operation and may be understood or unprovable as a result. Accordingly, because of the detection and evidentiary difficulties, the law presumes undue influence if a ‘special’ relationship exists. This special relationship corresponds to the relationship where a person reposes a deferential trust in another.<sup>838</sup>

While there may be a fiduciary element in unconscionability, the doctrine still recognises the ability of one party to put his or her own interests before another. The doctrine is aimed not at subordinating one’s interest, but to ensure that a person who suffers from a special disability is not taken advantage of.

### (c) Miscellaneous Distinctions

Parkinson has drawn the distinction between unconscionability and undue influence based on the focus on procedural or substantive unfairness. It was contended that both procedural unfairness and substantive unfairness are elements in unconscionability,<sup>839</sup> whereas undue influence only focuses on procedural unfairness.<sup>840</sup> It is respectfully submitted that both procedural unfairness and substantive unfairness are relevant in undue influence cases. In *Etridge* it was held that in order to raise the evidential presumption, a relationship of trust and confidence, *and* a transaction that calls for explanation is required.

There are different remedies for undue influence and unconscionable bargains.<sup>841</sup> It is considered that there are a wider range of remedies available for a claim in undue influence.<sup>842</sup> Remedies such as constructive trust, account of profits and compensation may be available pursuant to undue influence, because it can involve a breach of a fiduciary obligation. In both undue influence and unconscionability cases, the transaction can be set aside.<sup>843</sup>

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<sup>836</sup> [1911] 1 Ch 723 per Fletcher Moulton LJ, p 728.

<sup>837</sup> R Flannigan, ‘Commercial Fiduciary Obligation’ 36(4) Alberta LR 905, p 909.

<sup>838</sup> R Flannigan, ‘The Fiduciary Obligation’ (1989) 9 OJLS 285, p 293.

<sup>839</sup> P Parkinson, (ed) *The Principles of Equity* (2<sup>nd</sup> ed 2003), p 130.

<sup>840</sup> *Ibid*, p 396.

<sup>841</sup> P Vout, (ed and Current Updating Author), *Unconscionable Conduct The Laws of Australia* (2006), para 35.8:19.

<sup>842</sup> Bigwood, R, *Exploitative Contracts* (2003), p 399-400.

<sup>843</sup> Vout, above n 841.

Others have drawn the distinction based on the focus of the doctrines. Undue influence seeks to monitor the relationship of influence built up over time. Further, undue influence has the benefit of recognised relationships which give rise to a presumption of influence.<sup>844</sup> A claimant in undue influence need not suffer from any particular disability.<sup>845</sup> On the other hand, unconscionability does not require a relationship,<sup>846</sup> and there are no established presumptions of unconscionability. “Attention is not paid to the history of the relationship so much as to the particular transaction.”<sup>847</sup> In other words, “undue influence is concerned with the exploitation of relationships of influence, the main concern of unconscientious dealing is with ad hoc exploitation.”<sup>848</sup> However, this argument ignores the fact that actual undue influence can be utilised to encompass relationships that are of a more one-off, ad hoc nature. The nature of the abuse of the relationship in an actual undue influence case is similar to exploitation of a special disability which one party is or should have been aware of.

## DURESS AND UNCONSCIONABILITY

While there has been much discussion on the common elements of undue influence and unconscionability, there is some element of overlap between unconscionability and duress. In *Westpac Banking Corporation v Cockerill*<sup>849</sup> it was held that since unlawful conduct and threatened or actual physical violence can constitute unconscionable conduct in equity, it is arguable that common law duress has been subsumed by the equitable ground for relief.<sup>850</sup>

There is also much correlation between unconscionability and *economic* duress. “A common thread centres on the element of domination of the will of the innocent party,”<sup>851</sup> or on “the defendant unconscientiously exploiting a superior negotiating position”.<sup>852</sup> Lawful act duress is considered to be almost indistinguishable from unconscionability.<sup>853</sup> In *Equiticorp Finance Ltd (In Liq) v Bank of New Zealand*,<sup>854</sup> Kirby P in his dissent criticised the economic expertise of judges. He argued that the doctrine of economic duress would be better dealt with under either the doctrines of undue influence or

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<sup>844</sup> P Vout, (ed and Current Updating Author), *Unconscionable Conduct The Laws of Australia* (2006) para 35.9:33; and Bigwood, R, *Exploitative Contracts* (2003), p 399-400.

<sup>845</sup> K N Scott, ‘Evolving Equity and the Presumption of Undue Influence’ (2002) 18 JCL 15, 2002 JCL LEXIS 15 (cited Lexis.com at 10 February 2006), [\*17].

<sup>846</sup> *Louth v Diprose* (1992) 110 ALR 1, per Brennan J, p 5.

<sup>847</sup> N C Seddon, and M P Ellinghaus, *Cheshire and Fifoot’s Law of Contract* (8<sup>th</sup> Australian ed, 2002), para 15.3.

<sup>848</sup> P Parkinson, (ed) *The Principles of Equity* (2<sup>nd</sup> ed 2003), p 128. See also M D J Conaglen, ‘Duress, Undue Influence, and Unconscionable Bargains – The Theoretical Mesh’ (1999) 18(4) NZULR 509, p 532.

<sup>849</sup> (1998) 152 ALR 267.

<sup>850</sup> Vout, above n 844, para 35.7:3.

<sup>851</sup> A Phang, ‘Undue Influence Methodology, Sources and Linkages’ [1995] JBL 552, p 570. Bigwood, above n 844, p 283

<sup>852</sup> R W Clarke, *Inequality of Bargaining Power* (1987), p 232.

<sup>853</sup> Bigwood, above n 844 p 365.

<sup>854</sup> (1993) 32 NSWLR 50, p 107.

unconscionability. This would enable a more consistent and principled development of the law rather than the law being distorted by judges who lack economic expertise.<sup>855</sup>

The recent development of a defence of duress by necessity has seen the two doctrines move closer together.<sup>856</sup> This defence operates within duress where a stronger party takes advantage of another's necessity. In certain cases, the defence of duress by necessity will operate "like a partial doctrine of unconscionability".<sup>857</sup> Smith concedes that there is little academic or judicial support for a defence of necessity in contract law.<sup>858</sup>

*W H Violette Ltd v Ford Motor Co of Canada*<sup>859</sup> "illustrates a movement towards viewing economic duress as an unconscionability doctrine."<sup>860</sup> If there is unconscionable behaviour, then the contract may be unenforceable regardless of the wrongfulness of the behaviour. In the case there was a binding agreement between the plaintiff and the defendant where the plaintiffs could pick up the vehicles directly from the defendant's factory (at their own cost). This was an arrangement that was not available to other dealers. Over time, a five dollar charge per vehicle was imposed. Later, the charge was arbitrarily increased in line with charges with all other distributors. The increases in charges were paid to the defendant under a power of attorney which it held. The plaintiff continually protested the increase in charges, and action was taken for recovery. It was held that it was clear that the payments made by the plaintiff were not made with the intention of closing the matter. The relationship between the plaintiffs and the defendant was franchiser and franchisee. This was a complex, continuing business relationship. The Ford Company was held to be a corporation with vast resources and economic power which placed it in a superior position to its dealers. It was this relationship which established that the plaintiffs acted under practical compulsion, because there was no alternative manner to deal with the demand for payment. The moneys paid were recoverable.<sup>861</sup>

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<sup>855</sup> See also S Todd, Burrows, Finn and Todd, *Law of Contract in New Zealand* (3<sup>rd</sup> ed 2007), p 347.

<sup>856</sup> P Jaffey, *The Nature and Scope of Restitution* (2000); S A Smith, 'Contracting Under Pressure: A Theory of Duress' [1997] *Cambridge Law Journal* 343; and R Bigwood, *Exploitative Contracts* (2003), p 364.

An analogy can also be drawn with unfair maritime salvage agreements, where a distressed ship is saved in return for a fee; see M D J Conaglen, 'Duress, Undue Influence, and Unconscionable Bargains – The Theoretical Mesh' (1999) 18(4) *NZULR* 509, p 524.

<sup>857</sup> Smith, above n 856 p 367. Bigwood, above n 856 p 364.

<sup>858</sup> Bigwood, above n 856 p 367. Bigwood argues that these cases are better dealt with under unconscionability.

<sup>859</sup> 31 NBR (2d) 394, 75 APR 394, (cited 1980 *CarswellNB* 271, *Westlaw*).

<sup>860</sup> R W Clarke, *Inequality of Bargaining Power* (1987), p 244.

<sup>861</sup> 31 NBR (2d) 394, 75 APR 394, (cited 1980 *CarswellNB* 271, *Westlaw*), per Leger J, para 49. An appeal by the Ford Motor Company was rejected in *W H Violette Ltd v Ford Motor Co of Canada* 34 NBR (2d) 238, 85 APR 238, (cited 1981 *CarswellNB* 146, *Westlaw*).

In *Dusik v Newton*<sup>862</sup> the stronger party, the board of the company exploited the weaker party's ignorance of the value of his shares. Dusik was a minority shareholder in a company. An offer was made to purchase all the shares of the company, and the offer was communicated to the defendant and not the plaintiff. Pressure was placed on Dusik to sell his shares at considerable undervalue, or the shares would be purchased from the bank. The bank held a pledge of the shares to secure borrowings and purchasing the shares from the bank would have caused Dusik to suffer severe tax consequences. The defendant did not want to pay the plaintiff the market value of the shares because it did not want to give him the finances to enable the plaintiff to set up in competition with the company. The plaintiff sold his shares at the under value, and discovered the next day that the majority of the shares were sold at a premium. He sued for the balance. It was held that "the conduct of the board was markedly divergent from the community standards of commercial morality normally observed by reputable businessmen."<sup>863</sup> The conduct could not amount to tortious intimidation because the threats were not illegitimate. However, it was held that there was an inequality of bargaining power, and advantage was taken of the plaintiff's financial circumstances, and ignorance of the take over offer. The conduct in making the threats was unconscionable, and amounted to unconscionable dealing.

*Osorio v Cardona*<sup>864</sup> has been cited as "the most graphic authority of the overlap between the doctrine of unconscionability and duress."<sup>865</sup> The plaintiffs and the defendant entered into an agreement where they agreed that each would share in each other's winnings if either of them won a series of horse races. If the plaintiffs' ticket won, they agreed to pay the defendant 30% of winnings. If the defendant's ticket won, he agreed to pay the plaintiffs 20% of the winnings (the plaintiffs' ticket contained fewer possibilities for a win than the defendant's.) The defendant's ticket won and paid \$735,000. He refused to pay 20% to the plaintiffs. Instead he offered to pay the plaintiffs \$60,000 in full satisfaction of their claim. The plaintiffs accepted payment of \$60,000 because they were anxious that the defendant might leave the country without any payment. The plaintiffs maintained that the \$60,000 was not in full settlement and they sought to recover the full \$147,000.

It was held that the balance had to be paid not only on the ground for want of consideration, but also on the ground of unconscionability. "This is so where the debtor has exercised undue pressure by threatening to pay nothing unless the creditor, who has little option to accept what he can get, agrees to

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<sup>862</sup> (1985) 62 BCLR 1.

<sup>863</sup> Ibid, per Carrothers, Macdonald and Anderson JJA, p 46.

<sup>864</sup> 59 BCLR 29, 15 DLR (4<sup>th</sup>) 619, (cited 1984 CarswellBC 419, Westlaw).

<sup>865</sup> R W Clarke, *Inequality of Bargaining Power* (1987), p 245.

settlement.”<sup>866</sup> The plaintiffs were poor people, with no legal knowledge, and no money to hire a lawyer (the legal advice they had received was free). The defendant was single, with no family or property ties, and able to leave the country easily. He let this fact be known to the plaintiffs, and left them in a “state of uncertainty and emotional turmoil”<sup>867</sup> in the days leading up to the payment. This constituted an inequality of bargaining power, leaving the weak at the mercy of the strong. It resulted in the plaintiffs accepting the smaller amount, so it could be used to hire a lawyer to fight for the rest. It was held that “[t]he resultant agreement was ... procured by undue pressure and intimidation,”<sup>868</sup> and the agreement was set aside.

Most discussion regarding the similarities between duress and unconscionability is centred on economic duress,<sup>869</sup> especially “if the victim of the economic pressure is seen as being at a special disadvantage vis-à-vis the other party, in making a decision about the transaction.”<sup>870</sup> The argument is made that economic duress should be subsumed into unconscionability.<sup>871</sup> However, in order for a successful merger, duress *in general* must have sufficient overlap with unconscionability, and it is submitted that it does not.

The most striking difference between unconscionability and duress, is that in a duress case, the party coerced is aware of the situation, and consents to the transaction as the “least unpalatable of a series of unattractive options.”<sup>872</sup> The person coerced is in a sense, traumatised into consent. However, in an unconscionability case “power is abused generally by keeping the victim in the dark; the victim is lulled into a false sense of security.”<sup>873</sup>

It is submitted that the similarities drawn between duress and unconscionability centre on the abuse of the stronger bargaining position. However, this ignores the other elements to establish unconscionability. The unequal power and abuse of that power is one aspect of unconscionability. As discussed earlier, there are some cases where the moral culpability may be difficult to establish. This factor alone will not defeat a claim of unconscionability, but will defeat a claim based on duress.

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<sup>866</sup> *Osorio v Cardona* 59 BCLR 29, 15 DLR (4<sup>th</sup>) 619, (cited 1984 CarswellBC 419, Westlaw), per McLachlin J, para 46.

<sup>867</sup> *Ibid*, per McLachlin J, para 48.

<sup>868</sup> *Ibid*.

<sup>869</sup> A Phang, ‘Economic Duress: Recent Difficulties and Possible Alternatives’ (1997) 5 RLR 53, p 63.

<sup>870</sup> R McKeand, ‘Economic Duress – Wearing the Clothes of Unconscionable Conduct’ 2001 JCL LEXIS 6 (cited Lexis.com at 3 July 2007), [\*28]-[\*29].

<sup>871</sup> A Phang, ‘Economic Duress: Recent Difficulties and Possible Alternatives’ (1997) 5 RLR 53, p 63.

<sup>872</sup> R W Clarke, *Inequality of Bargaining Power* (1987), p 249.

<sup>873</sup> *Ibid*.



## THE INTERACTION OF ALL THREE DOCTRINES

It has been established that there is much in common between the doctrines of undue influence, unconscionability and duress. The common elements that the three doctrines share have in some cases been highlighted to the extent that it is conceivable that if these cases are considered in isolation, it would seem that the process of merger has already been undertaken. The most prominent example in New Zealand law that fails to draw the relevant distinction between the three doctrines is *Attorney-General for England and Wales v R*.<sup>874</sup> In the case, the Privy Council had the opportunity to consider the doctrines of duress, undue influence and unconscionable bargains in the New Zealand context. Lord Hoffmann delivered the judgment for the majority.<sup>875</sup> In terms of duress, it was held that the threat made in the case was lawful. (It may be recalled that the threat was: if the soldier failed to sign the confidentiality agreement, it would result in the soldier returning to unit). Further, the demand (signing the confidentiality agreement), supported by the threat was lawful. Therefore, the contract was not obtained by duress.<sup>876</sup>

However, when Lord Hoffman went on to discuss undue influence he effectively merged the two doctrines. It was held that the army as an institution and the commanding officer were able to exercise an influence over the soldier because of the nature of the military hierarchy, strong regimental pride, and admiration for the commanding officer. This however, did not give rise to an inference that the confidentiality agreement was signed pursuant to unfair exploitation of that relationship. It was acknowledged that R signed the agreement because he wanted to remain a member of the SAS. It was held that:

If facing him with such a choice was not illegitimate for the purposes of duress, Their (*sic*) Lordships do not think that it could have been an unfair exploitation of a relationship which consisted in his being a member of the SAS. There seems to Their (*sic*) Lordships to be some degree of contradiction between R's claim, in the context of duress, that he signed only because he was threatened with return to his unit and his claim, for the purposes of undue influence, that he signed because of the trust and confidence which he reposed in the army or his commanding officer.<sup>877</sup>

In terms of unconscionability, this was dealt with in a way that inextricably linked it to the two previous doctrines:

If the transaction was not such as to give rise to an inference that it had been unfairly obtained by a party in a position to influence the other, it must follow that the transaction cannot be independently attacked as unconscionable.<sup>878</sup>

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<sup>874</sup> [2004] 2 NZLR 577.

<sup>875</sup> Lord Scott dissented on the issue of undue influence, but he did not discuss the interaction of the three doctrines.

<sup>876</sup> Above n 874, per Lord Hoffmann, p 584.

<sup>877</sup> *Ibid*, per Lord Hoffmann, p 584-5.

<sup>878</sup> *Ibid*, per Lord Hoffmann, p 585.

Ridge has criticised *AG v R*<sup>879</sup> on the basis that it made little reference to previous authorities; adopted *Etridge* uncritically;<sup>880</sup> and there was no logical structure to Lord Hoffmann's application of the law. Lord Hoffmann's judgment was criticised on the basis that it dealt with duress, undue influence and unconscionable bargains "as if they were entirely overlapping, so that if one failed, all would fail."<sup>881</sup> Ridge argues that Lord Hoffmann could be taken to be assimilating undue influence into the doctrine of duress. However, if he considered that there was no illegitimate pressure in the context of duress, he should have made a separate consideration of whether there was illegitimate pressure in the context of undue influence. Ridge further criticises Lord Hoffmann's judgment in terms of unconscionable dealing, that Lord Hoffmann's approach in effect renders the doctrine of unconscionability redundant. "Clearly, Lord Hoffmann's conclusion is either wrong, or else supported by reasoning that is not adequately spelt out."<sup>882</sup>

The views in *AG v R* are not unique to New Zealand. Thompson argues that given the rationale behind unconscionability, to protect ignorant or poor people from entering into unfair bargains, "it is difficult to see the scope for such a doctrine to operate when an argument based upon undue influence has failed; particularly given the inherently uncertain nature of the concepts of poverty and ignorance."<sup>883</sup>

*Campbell v Campbell*<sup>884</sup> also failed to make the distinction between the doctrines. The case concerned the validity of a marriage contract. The wife contended that she signed the contract as a result of pressure from her husband, and to save her marriage (the husband threatened divorce action if she did not sign). She relied on the grounds of duress, undue influence, unconscionability, and inequality of bargaining power. On the issue of the improvidence of the transaction, it was held that the doctrines of undue influence, unconscionability or inequality of bargaining power require that the contract results in an unfair division of property.<sup>885</sup> It was held that the wife failed to establish enough fear of emotional or psychic violence as to constitute duress. For undue influence, Barry J held that it incorporates the same necessary element of pressure as that for duress. It was held that the wife was not in an acute mental and emotional state of anxiety and stress. There were no threats by the husband. She was not prevented from exercising independent judgment. While there were two incidents of abuse, a history of

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<sup>879</sup> P Ridge, 'Uncertainties Surrounding Undue Influence: Its Formulation, Application, and Relationship to Other Doctrines' [2003] NZ Law Review 329, p 343-51.

<sup>880</sup> Ridge criticises *AG v R* for not using the terms "actual" and "presumed" undue influence. It is submitted that *Etridge* warned against and discouraged the use of the labels which could be unhelpful and confusing.

<sup>881</sup> Ridge, above n 879 p 352.

<sup>882</sup> *Ibid*, p 354-5.

<sup>883</sup> M P Thompson, 'New Wine from Old Bottles' [1994] Conv 233, p 236.

<sup>884</sup> (1990) 83 Nfld & PIER 340.

<sup>885</sup> *Ibid*, per Barry J, para 45.

vindictiveness, and the plaintiff's claim that she was of such an emotional and psychological state that she could not survive outside the marriage (thus signing the agreement), this did not amount to pressure so that an unfair advantage was taken of the plaintiff.<sup>886</sup> In terms of unconscionability, it was held that there was substantial unfairness in the marriage contract, but there was not such inequality of the parties so that the wife was left in the power of the husband. The wife took the contract to her solicitor, and he negotiated some changes. Therefore, it could not be construed that the husband preyed on the wife in a way that justified a finding of unconscionability.<sup>887</sup>

In *Mahoney v Purnell*<sup>888</sup> the transaction concerned the sale of shares in a hotel business from Mr Mahoney to his son in law Mr Purnell. Both men were 50/50 partners in the business. A year later Mr Purnell sold the hotel at price, which on reflection meant Mr Mahoney sold his shares to Mr Purnell at undervalue. Mr Mahoney claimed undue influence and in the alternative, unconscionable bargains. It was agreed between the parties that the success on the basis of unconscionable bargain presupposes success on the basis of undue influence, "and that no additional remedy would accrue from a finding of unconscionable bargain."<sup>889</sup> Following this, it was found that the transaction was tainted by undue influence. However, no further discussion on unconscionability was given.

The approach taken in *AG v R* can be contrasted with Hardie Boys J in *Walmsley v Christchurch City Council*.<sup>890</sup> His Honour maintained that the doctrines of undue influence and unconscionability were "different concepts, although both are founded on fraud, in the sense of an unconscionable use of power". It was held that this was not a case of undue influence or unconscionability, however, "[t]hese conclusions are not necessarily an answer to the allegation of economic duress."<sup>891</sup> It was held that conduct in the case did constitute economic duress. The limitations of the case are that it did not discuss how the doctrines interact, and Hardie Boys J does not really elaborate on what the operative distinctions are.<sup>892</sup> A similar approach was taken in *Rooney v Conway*.<sup>893</sup> In *Engle v Carswell*<sup>894</sup> it was held that "[t]he finding here against undue influence does not conclude the question whether the appellant is entitled to relief against an unconscionable transaction."<sup>895</sup>

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<sup>886</sup> *Campbell v Campbell* (1990) 83 Nfld & PIER 340, per Barry J, para 86.

<sup>887</sup> The wife's claim also failed on the ground of inequality of bargaining power.

<sup>888</sup> [1996] 3 All ER 61.

<sup>889</sup> *Ibid*, per May J, p 81.

<sup>890</sup> [1990] 1 NZLR 199.

<sup>891</sup> *Walmsley v Christchurch City Council* [1990] 1 NZLR 199, per Hardie Boys J, p 207.

<sup>892</sup> A Phang, 'Undue Influence Methodology, Sources and Linkages' [1995] JBL 552, p 568.

<sup>893</sup> [1982] 5 NIJB (Transcript) (cited LexisNexis at 6 February 2008).

<sup>894</sup> 1995 ACWSJ LEXIS 46937, 1995 ACWSJ 632249, 53 ACWS (3d) 1282, per Miller J, para \*\*69.

<sup>895</sup> *Ibid*, per Miller J, para \*\*101.

## **CONCLUSION**

There is a level of similarity between the three doctrines of undue influence, unconscionability and duress. It is no coincidence that they are pleaded in the alternative in most cases involving a relationship that stems from unequal power, and in most textbooks, are discussed in the same chapter. However, do the similarities allow the merger of one or all of the doctrines, or are the distinctions between the doctrines so divergent that any notions of merger are not practical or workable? As the previous discussion has shown, some cases have unintentionally merged the three doctrines. These issues will be explored in the next chapter.

## **CHAPTER 8**

# **CONCLUSION: ATTEMPTING FUSION**

## INTRODUCTION

In *Lloyds Bank Ltd v Bundy*,<sup>896</sup> Lord Denning MR held that the single thread that runs throughout the doctrines of duress of goods, unconscionable transactions, undue influence, undue pressure, and salvage agreements, is that, they all rest on the inequality of bargaining power. Although Lord Denning's exposition has been discredited, there has been a huge amount written about the overlap that exists between the doctrines of duress, undue influence and unconscionability. It has been recognised that all three doctrines are converging.<sup>897</sup> "Lines of demarcation are not now as clearly defined as they may have been in the past."<sup>898</sup> Worthington argues that there are parallels between all of the approaches classified under the head of procedural unfairness:

All are concerned with claimants whose consent, or actual intent to commit to a deal and its consequential risks and rewards, is impaired by various informational shortcomings or physical, economic, or social circumstances. In misrepresentation, duress and undue influence cases, the defendant either knows of the impairment or is unwittingly responsible for it. In unconscionable bargain cases, the defendant actually knows of the impairment or his knowledge is inferred because of the way the bargain is 'snatched'.<sup>899</sup>

There has been extensive debate over whether these doctrines can or should be merged into one or several doctrines. It has almost become trite to suggest that actual undue influence should be merged with duress, and that unconscionability and undue influence should also be merged. However, despite what may seem to be a large degree of overlap between the three doctrines, it may have more to do with "the richness of the fact scenarios that may attract the doctrines than about the intertranslatability of the doctrines themselves."<sup>900</sup> Any new doctrine will "need to be sharp in its focus, conceptually sound and explicit in its policy and underpinnings, and operational in terms of both the process of judicial inquiry it envisages and the remedial instruments available to a court to abate objectionable phenomena."<sup>901</sup>

## DURESS AND UNDUE INFLUENCE

At this point, it is helpful to consider how duress interacts with the outdated concept of the presumption of undue influence, and the *Etridge* formulation of the evidential presumption of undue influence. In pre-*Etridge* terms, there has always been a familial likeness drawn between class 2B presumed undue

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<sup>896</sup> [1975] QB 326.

<sup>897</sup> P D Finn, 'The Fiduciary Principle' in T G Youden (ed), *Equity, Fiduciaries and Trusts* (1989), p 43; I J Hardingham, 'Unconscionable Dealing' in P D Finn (ed), *Essays in Equity* (1985), p 19; and N C Seddon, and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract* (8<sup>th</sup> Australian ed, 2002), p 655.

<sup>898</sup> Hardingham, above n 897 p 2.

<sup>899</sup> S Worthington, *Equity* (2003), p 201-2.

<sup>900</sup> Bigwood, R, *Exploitative Contracts* (2003), p 230.

<sup>901</sup> M J Trebilcock, 'The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords' (1976) 26 U Toronto LJ 359, p 385.

influence, and actual undue influence,<sup>902</sup> and hence duress.<sup>903</sup> The main hurdle against any merger was the existence of class 2A, the classes of the relationships, and the fiduciary element in that class that is not present in actual undue influence and duress.<sup>904</sup> Birks and Chin acknowledged that one of the advantages of litigating under the head of undue influence was the ability to rely on one of the established presumptions. The authors do concede that “every case of presumed undue influence can be turned into a case of actual undue influence by a claimant who is able and willing to renounce the help of the presumption.”<sup>905</sup>

In post-*Etridge* terms it seems that the doctrines have moved even closer together. In *Etridge* it was held that the evidential presumption is merely another way of proving actual undue influence. It was conceptualised as the equitable counterpart of *res ipsa loquitur*. As Lord Clyde held, “whatever the relationship of the parties and however the influence was exerted, there will be found to have been an actual case of undue influence.”<sup>906</sup> Therefore, in light of *Etridge* the reasons for merging undue influence and duress appear to be even more compelling.<sup>907</sup> The fact that one lies in equity and the other at common law does not pose a problem. “It is time that in this field we overcame the old jurisdictional duality.”<sup>908</sup> In *Elia v Commercial & Mortgage Nominees Ltd*<sup>909</sup> Gault regarded the antipodeans statement that:

a party may be regarded as unconscientious not only when he knew at the time the bargain was entered into that the other suffered from a material disability or disadvantage and of its effect on that other, but also when he ought to have known of that circumstance; when a reasonable man would have adverted to the possibility of its existence. This is, practically, to import the archetype of the common law.<sup>910</sup>

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<sup>902</sup> See *Bank of Credit and Commerce International SA v Aboody* [1992] 4 All ER 955, per Slade LJ.

<sup>903</sup> M D J Conaglen, ‘Duress, Undue Influence, and Unconscionable Bargains – The Theoretical Mesh’ (1999) 18(4) NZULR 509, p 528-9. However, Conaglen goes on to argue that the difference between presumed undue influence and duress is that presumed undue influence “involves a mixed concern for both the procedure which led to the impugned transaction and the substantive result of that transaction.”

<sup>904</sup> P Ridge, ‘Uncertainties Surrounding Undue Influence: Its Formulation, Application, and Relationship to Other Doctrines’ [2003] NZ Law Review 329, p 333. M Pawlowski and J Brown, *Undue Influence and the Family Home* (2002), p 13 noted that “there may be undue influence in the absence of a fiduciary relationship and, conversely, not in every fiduciary relationship will undue influence be presumed.” See also J Cartwright, *Unequal Bargaining* (1991), p 180.

<sup>905</sup> P Birks, and N Y Chin, ‘On the Nature of Undue Influence’ in J Beatson and D Friedmann (ed), *Good Faith and Fault in Commercial Law* (1995), p 76.

<sup>906</sup> *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, per Lord Clyde p 477-478.

<sup>907</sup> This view has support from Ridge, who writes that “potentially much more of undue influence doctrine can be assimilated with duress; that is, undue influence is regarded as a form of illegitimate pressure for the purposes of that doctrine.” Ridge, above n 904 p 343.

<sup>908</sup> Birks, and Chin, above n 905 p 63; and N C Seddon, and M P Ellinghaus, *Cheshire and Fifoot’s Law of Contract* (8<sup>th</sup> Australian ed, 2002), p 657.

<sup>909</sup> (1988) 2 NZBLC 103,296.

<sup>910</sup> *Ibid*, per Gault J, p 103,309.

Arguments that duress should be merged into undue influence<sup>911</sup> have been raised from both judges and academics. In *Dimskal Shipping Co SA v International Transport Workers Federation*<sup>912</sup> Lord Goff regarded undue influence as an extended form of duress. Similarly in *Farmers Co-operative Executors & Trustees Ltd v Perks*<sup>913</sup> Duggan J held that duress is simply an extreme example of actual undue influence, and therefore, duress should be subsumed under actual undue influence.<sup>914</sup> Duggan J's judgment was an approval of Cope's views.<sup>915</sup> Ogilvie writes that because undue influence and economic duress involve the victimisation of one party by another, economic duress is a misnomer, and should more accurately be described as "economic undue influence". Economic duress should be conceptualised as a species of undue influence.<sup>916</sup>

However, others believe that the merger should proceed by subsuming actual undue influence into duress.<sup>917</sup> Atiyah and Smith argue that actual undue influence can be conceptualised as a species of duress.<sup>918</sup> Birks and Chin argue that the modern, expanded notion of duress is wide enough to encompass actual undue influence cases. Pressure, or duress is an easy to understand notion, and pressure has already dominated this area of the law, and has concealed the nature of relational undue influence.<sup>919</sup>

Despite the arguments for merging actual undue influence into duress, it is submitted that any merger must be undertaken by merging duress into undue influence. One must consider the driving force behind the creation of undue influence. Equity saw the need to provide relief in cases where there had been an exercise of pressure which equity considered illegitimate, or "undue",<sup>920</sup> yet it did not amount to the coercion or force inherent in a threat needed to constitute common law duress.<sup>921</sup> Equity was

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<sup>911</sup> N C Seddon, and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract* (8<sup>th</sup> Australian ed, 2002), p 657.

<sup>912</sup> [1992] 2 AC 152, per Lord Goff, p 169.

<sup>913</sup> (1989) 52 SASR 399.

<sup>914</sup> *Ibid*, per Duggan J, p 405.

<sup>915</sup> M Cope, *Duress, Undue Influence and Unconscientious Bargains* (1985), para 125.

<sup>916</sup> M H Ogilvie, 'Economic Duress in Contract: Departure, Detour or Dead End?' (2001) 34 Can Bus LJ 194, p 227.

<sup>917</sup> P Birks, and N Y Chin, 'On the Nature of Undue Influence' in J Beatson and D Friedmann (ed), *Good Faith and Fault in Commercial Law* (1995), p 63. See also E A Farnsworth, *Farnsworth on Contracts* (2<sup>nd</sup> ed, 1998), p 496-7, where Farnsworth argues that the expanded scope of duress has undercut the importance of undue influence. R Bigwood, *Exploitative Contracts* (2003), p 384.

<sup>918</sup> P S Atiyah and S A Smith, *Atiyah's Introduction of the Law of Contract* (6<sup>th</sup> ed 2005), p 285.

<sup>919</sup> Birks and Chin's last argument in support of their proposal was that the future requirement of manifest disadvantage was uncertain. *Etridge* has dispensed with the requirement.

<sup>920</sup> *O'Connor v Hart* [1985] 1 NZLR 159, per Lord Brightman, p 171; Halsbury Laws of Australia, [www.lexisnexis.com](http://www.lexisnexis.com), (sighted on LexisNexis.com at 9 February 2006), para 110-5010.

<sup>921</sup> *Barton v Armstrong* [1975] 2 All ER 465, per Lord Cross, p 474; and P Vout, (ed and Current Updating Author), *Unconscionable Conduct The Laws of Australia* (2006), para 35.7:2.

In *Nocton v Lord Ashburton* [1914] AC 932, Viscount Haldane LC explained that the "Courts of Chancery and of Common Law exercised a concurrent jurisdiction from the earliest of times."



seen as supplementing the common law. “Equity extended the reach of the law to other unacceptable forms of persuasion.”<sup>922</sup> This is why undue influence is fundamentally a wider doctrine. Secondly, following *Etridge* it has re-established that there is one doctrine of undue influence, but two ways of proving it. There is only one route to establish duress. If undue influence is merged into duress, then this destroys a crucial route to establishing the defence.

Therefore, if any attempts to merge are made, it is submitted that duress should be subsumed under undue influence. This is because undue influence is a wider doctrine and encompasses a wider range of conduct. Cases of direct pressure are clearly included, and undue influence can encompass different and more subtle types of pressure than duress. This will help clarify the law especially in the cases of lawful act duress. The only difficulty in subsuming duress into undue influence is the fiduciary elements that are present when utilising the evidential presumption of undue influence. This does not integrate well with the opportunistic nature of business transactions. It is submitted that if actual undue influence is unable to encompass the factual situation, then unconscionability can also be utilised. Unconscionability can also be used to deal with cases of lawful threats in a business context, without the need to find a relationship of trust and confidence.

## **MERGER OF THREE DOCTRINES**

Having examined all three doctrines, and identified the points of contact between the three, it would be helpful to now consider the various arguments in favour of a merger. Much of the discussion on issues of merger centre on the theme that unconscionability is the doctrine of choice, which duress and undue influence should fall under.

Phang argues that the coercive effect of actual undue influence and duress are similar, and that those two doctrines can be assimilated.<sup>923</sup> However, Phang goes further and suggests that unconscionability is a “more concrete as well as substantive manifestation of the underlying spirit”<sup>924</sup> of “equity centring on fairness.”<sup>925</sup> Therefore, unconscionability “ought to be the “umbrella doctrine” which unites all other doctrines.”<sup>926</sup>

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<sup>922</sup> *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, per Lord Nicholls, para 7.

<sup>923</sup> A Phang, ‘Undue Influence Methodology, Sources and Linkages’ [1995] JBL 552, p 566.

<sup>924</sup> *Ibid* p 568-9.

<sup>925</sup> *Ibid* p 568.

<sup>926</sup> *Ibid* p 569.

It is respectfully submitted that Phang's proposal can only come to fruition if an expanded notion of unconscionability exists, as in Australia<sup>927</sup> and New Zealand. The doctrine of unconscionability is underutilised in England. The question then arises; can the doctrines of duress and undue influence be subsumed under the English version of the doctrine of unconscionability? The answer to that is not clear cut. From the previous chapter on unconscionability, it can be seen that the doctrinal elements in England and New Zealand are the same. If that is so, then a merger can be undertaken. However, on an operational level the courts in England apply differing standards to the doctrinal elements. Transactional imbalance must be more substantial and the categories of special disability are more limited. If the doctrine of unconscionability is utilised to a different standard than to undue influence, then a merger in English law cannot be sustained.

The view that unconscionability should be the umbrella doctrine that undue influence and duress should be subsumed under has much support.<sup>928</sup> Discussing the assimilation of undue influence and unconscionability in *Louth v Diprose*, Pawlowski and Brown argue that there is no reason why duress should not also be included because it also “embodies notions of relational inequality and unconscionable conduct associated with the doctrine of undue influence and unconscionable dealing.”<sup>929</sup>

Capper proposes to go further than to simply assimilate actual undue influence with duress. He argues that undue influence and unconscionability can be merged into one doctrine. Capper would prefer to subsume both actual and presumed undue influence under the doctrine of unconscionability. This is because relational inequality is present in both, and transactional imbalance would serve as an evidentiary function. Capper argues that to maintain the distinction between undue influence and unconscionability on the basis that there are certain presumptions available to the plaintiff in an undue influence case (even though those relationships are difficult to define) “is to overwork that presumption.”<sup>930</sup>

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<sup>927</sup> K N Scott, ‘Evolving Equity and the Presumption of Undue Influence’ (2002) 18 JCL 15, 2002 JCL LEXIS 15 (cited Lexis.com at 10 February 2006), [\*17]; and N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006), para 20-016.

<sup>928</sup> S Todd, Burrows Finn & Todd, *Law of Contract in New Zealand* (3<sup>rd</sup> ed 2007), p 350; M Pawlowski and J Brown, *Undue Influence and the Family Home* (2002), p 187; N C Seddon, and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract* (8<sup>th</sup> Australian ed, 2002), p 670; and J R F Lehane, ‘Undue Influence, Misrepresentation and Third Parties’ (1994) 110 LQR 167, p 173.

<sup>929</sup> M Pawlowski and J Brown, *Undue Influence and the Family Home* (2002), p 211.

<sup>930</sup> D Capper, ‘Undue Influence and Unconscionability: A Rationalisation’ (1998) 114 LQR 479, p 493.

Capper goes further and argues that there is no reason to limit the merged doctrine from also subsuming duress. The exercise of duress is usually associated with relational inequality. The exercise of duress is a form of unconscionable conduct. Transactional imbalance is compelling evidence that duress has been exercised. Therefore, undue influence and duress can be subsumed into unconscionability.<sup>931</sup> Capper proposes that his new doctrine would work in the following manner:

the court would have to weigh up the three elements of relational inequality, transactional imbalance, and unconscionable conduct, and come to an overall judgment as to whether a particular transaction can stand ... Transactional imbalance would serve an evidentiary function ... The principal grounds for relief would thus be relational inequality and unconscionable conduct ... Where the parties to a transaction are on very unequal terms and the transaction is weighted strongly in favour of one party, unconscionable conduct can be inferred. Where the parties are on fairly equal terms and the defendant has clearly behaved unconscionably, the court could infer that the defendant's conduct has induced an unfair transaction if the transaction appears unbalanced.<sup>932</sup>

Capper's new doctrine would be neither plaintiff or defendant-sided in nature, however, it would be more concerned with procedural rather than substantive unfairness. The substantive unfairness element would not be an independent ground for invalidity. It would serve to "provide evidence from which grounds of invalidity can be deduced."<sup>933</sup>

Conaglen argues that Capper's new doctrine is unworkable because a unified doctrine would obscure "the policy reasons for the differences between the doctrines."<sup>934</sup> A combined doctrine would ignore the "fact that the doctrines are concerned with different relational problems arising in transactional contexts."<sup>935</sup>

A "unified" doctrine, such as one Capper proposes would suggest that the courts are prepared to look at pretty much any transaction and overturn it where they do not consider it fair. That is not the current state of the law and it is not a direction in which the law should sensibly be pushed.<sup>936</sup>

Parkinson argues that actual undue influence should be merged with unconscionability, and "presumed undue influence" with fiduciary law. The reason behind this is if undue influence as a whole is submerged under fiduciary law, this would not account for cases of actual undue influence, or use of actual pressure. On the other hand, subsuming undue influence under unconscionability will fail to account for the fiduciary aspects of undue influence.<sup>937</sup> Parkinson sees no problem that some of the relationships in undue influence are fiduciary and some not. The "function of fiduciary law is to act as

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<sup>931</sup> D Capper, 'Undue Influence and Unconscionability: A Rationalisation' (1998) 114 LQR 479, p 504.

<sup>932</sup> Ibid p 500.

<sup>933</sup> Ibid p 501.

<sup>934</sup> M D J Conaglen, 'Duress, Undue Influence, and Unconscionable Bargains – The Theoretical Mesh' (1999) 18(4) NZULR 509, p 544.

<sup>935</sup> Ibid.

<sup>936</sup> Ibid.

<sup>937</sup> P Parkinson, (ed) *The Principles of Equity* (2<sup>nd</sup> ed 2003), p 428.

a deterrent against cheating in cases where explicit contractual controls are foreclosed.”<sup>938</sup> Therefore, all instances where presumed undue influence arises will attract fiduciary law, that is, the need to limit self-interested behaviour. He considers that in the United States, presumed undue influence and fiduciary law have already merged.

Despite the “fiduciary element” Birks and Chin argue that undue influence should be kept separate from the law of fiduciary duties.<sup>939</sup> “[U]ndue influence and breach of fiduciary duty are different grounds for relief, with different consequences. It is again a matter of alternative analyses.”<sup>940</sup> Further, defaulting fiduciaries are subject to a different range of remedies, personal and proprietary, which is not available for an undue influence scenario.<sup>941</sup>

Despite the support to merge the three doctrines in various permutations, there is just as much objection to any attempts to merge. In 1975 Sealy welcomed Lord Denning’s inequality of bargaining power to the extent that it emphasises that “courts ought not to continue to perpetuate the fine distinctions made in the old cases,”<sup>942</sup> as a stimulus for thought, and as an inducement for courts to depart from “unwarranted technicality.”<sup>943</sup> However as a general discussion on any merger he doubted:

whether there is any advantage to be gained in mixing together a number of features which are to be found in some – but in no case all – of the old-established categories in which relief may be given, and to put them forward as an all-embracing statement of principle to replace those categories.<sup>944</sup>

He argued that inequality of bargaining power would be bound to prove a most unruly horse.<sup>945</sup>

For some, the most cogent reason for opposing the merger between undue influence and unconscionability is that if the doctrines are conceptualised as differing in their “operational,”<sup>946</sup> and “abstract conceptual level,”<sup>947</sup> then merger is not possible. Further, although each doctrine is concerned with anti-exploitation, each doctrine has assumed “a life force of its own.”<sup>948</sup> The differences that Bigwood refers to are that the vulnerability required by unconscionability is not normally brought about because of some special relation. Parkinson describes this as “ad hoc exploitation of a position of

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<sup>938</sup> P Parkinson, (ed) *The Principles of Equity* (2<sup>nd</sup> ed 2003), p 429.

<sup>939</sup> P Birks, and N Y Chin, ‘On the Nature of Undue Influence’ in J Beatson and D Friedmann (ed), *Good Faith and Fault in Commercial Law* (1995), p 91.

<sup>940</sup> *Ibid* p 92.

<sup>941</sup> J R F Lehane, ‘Undue Influence, Misrepresentation and Third Parties’ (1994) 110 LQR 167, p 173.

<sup>942</sup> L S Sealy, ‘Undue Influence and Inequality of Bargaining Power’ [1975] Camb LJ 21, p 23.

<sup>943</sup> *Ibid* p 24.

<sup>944</sup> *Ibid* p 23.

<sup>945</sup> *Ibid* p 24.

<sup>946</sup> R Bigwood, ‘Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation’?’ (1996) 16 Oxford J Legal Stud 503, p 514.

<sup>947</sup> R Bigwood, ‘Undue Influence in the House of Lords: Principles and Proof’ (2002) 65 (3) MLR 435, p 435.

<sup>948</sup> Bigwood, above n 946 p 514.

advantage.”<sup>949</sup> In an undue influence case, the special relation is precisely how the relationship of influence arises.<sup>950</sup> Bigwood argues that the relationship of influence is so extreme in some cases it makes this relationship “so worthy of society’s protection, affirmative proof of ‘exploitation’ is not required in the same way as it is in unconscionable dealing cases.”<sup>951</sup>

Different burdens of proof, use of presumptions, and different remedies,<sup>952</sup> all indicate that the doctrines cannot be merged. Further, unconscionability is concerned with maintaining the freedom of both parties in assessing an arms length transaction. However, in an undue influence case, the defendant’s freedom is not an issue. In most cases the defendant is required to put the plaintiff’s interest before his own.<sup>953</sup> All these issues “militate strongly against merger of the two doctrines into a single doctrine.”<sup>954</sup> A further reason given by Bigwood against any merger is to “keep the law within ‘manageable proportions’.”<sup>955</sup>

A further argument against any process of merger is that it “would introduce excessive uncertainty in the judicial process.”<sup>956</sup> However, other academic writers assert that this objection should not be overstated.<sup>957</sup> Waddams argues “that certainty, though an important value in contract law, is not an absolute one.”<sup>958</sup> Fridman argues that “certainty in contract law is a myth. Hence, to found any contractual doctrine, or to dismiss any new doctrine, on the basis of the criterion of certainty is invalid and inaccurate.”<sup>959</sup> Capper argues that a merged doctrine may provide more legal certainty:

because it would not obscure the underlying policy considerations, which tend to get buried when differences are maintained between what is essentially the same. Cases might be better argued because litigants and their advisors would better understand what issues around which evidence and argument had to be organised. Parties with abundant resources would not be able to prolong litigation to the prejudice of less well resourced parties by taking obscure and unmeritorious points. And in the longer term courts might find it easier to develop clear and rational criteria for the resolution of these disputes.<sup>960</sup>

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<sup>949</sup> P Parkinson, (ed) *The Principles of Equity* (2<sup>nd</sup> ed 2003), p 433.

<sup>950</sup> See also J D McCamus, *Essentials of Canadian Law The Law of Contracts* (2005), p 425.

<sup>951</sup> R Bigwood, ‘Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation’?’ (1996) 16 Oxford J Legal Stud 503, p 514.

<sup>952</sup> Bigwood argues that there are more remedies available for a case of undue influence. Phang writes that under duress a plaintiff has a positive right of rescission, as opposed to a mere right to approach the court of a remedy in undue influence and unconscionability. This is premised on the distinction between common law and equity. Further, Phang writes that *restitutio in integrum* would only apply to undue influence and unconscionability cases, and not to duress. However, he does not think that these two issues should be any impediment to merger. See A Phang, ‘Undue Influence Methodology, Sources and Linkages’ [1995] JBL 552, p 572.

<sup>953</sup> R Bigwood, *Exploitative Contracts* (2003), p 399-400.

<sup>954</sup> Ibid p 399. R Bigwood, ‘Undue Influence in the House of Lords: Principles and Proof’ (2002) 65 (3) MLR 435, p 438.

<sup>955</sup> Bigwood, above n 951 p 514.

<sup>956</sup> A Phang, ‘Undue Influence Methodology, Sources and Linkages’ [1995] JBL 552, p 570.

<sup>957</sup> M Pawlowski and J Brown, *Undue Influence and the Family Home* (2002), p 211; and S M Waddams, ‘Unconscionability In Contracts’ (1976) 39 Mod L Rev 369, p 391.

<sup>958</sup> S M Waddams, ‘Unconscionability In Contracts’ (1976) 39 Mod L Rev 369, p 391.

<sup>959</sup> G H L Fridman, *The Law of Contract in Canada* (5<sup>th</sup> ed, 2006), p 331.

<sup>960</sup> D Capper, ‘Undue Influence and Unconscionability: A Rationalisation’ (1998) 114 LQR 479, p 503.

Pawlowski and Brown agree with Capper. If there is a broader notion of unconscionability, this would lead to the laying down of more specific rules regarding its application, and a more systematic approach to the development of the doctrine. This would avoid the current confusion arising from the overlap from several related, but distinct doctrines,<sup>961</sup> “and courts could set about the task of focusing their attention on bringing the new doctrine to legal maturity.”<sup>962</sup> Phang writes that an argument against merger based on uncertainty in the law, expresses “a lack of confidence in the ability of judges to arrive at decisions after a fair and logical exercise of their powers of analysis and judgment.”<sup>963</sup> It is highly probable that new criteria would be laid down, and it is not likely that it would provide any less guidance than is currently experienced.

On the other hand, Birks and Chin argue that the law cannot take short cuts:

If there are two doctrines, there are two doctrines; and the fact that one might do perhaps ninety-five per cent of the work is no reason for pretending that the other does not exist. The correct approach will be to treat both undue influence and duress as plaintiff-sided factors which ground relief on a degree of impairment of the plaintiff's capacity to make decisions.<sup>964</sup>

However, Capper argues that the Birks and Chin claim overplays the risk of injustice. Capper argues that “[w]here there is a risk of a plaintiff with a meritorious case falling between two stools the court might well manipulate the notion of undue influence or that of unconscionability so as to avoid this.”<sup>965</sup>

## CONCLUSION

In order to successfully merge any or all three of the doctrines discussed in this thesis, one would have to be confident that the doctrines share enough doctrinal elements. In addition to this, one must also ensure that the new doctrine will be equipped to handle the range of cases that are currently served by the three separate doctrines.

It is submitted that duress can and should be merged with actual undue influence. The range of pressure which duress has expanded to include has resulted in an extensive overlap between the two doctrines. Undue influence should subsume duress because it is a wider doctrine and better equipped to deal with lawful pressure situations. Any factual situations that cannot be dealt with using undue influence can be

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<sup>961</sup> M Pawlowski and J Brown, *Undue Influence and the Family Home* (2002), p 211. A Phang, ‘Undue Influence Methodology, Sources and Linkages’ [1995] JBL 552, p 571.

<sup>962</sup> A Phang, ‘Undue Influence Methodology, Sources and Linkages’ [1995] JBL 552, p 571.

<sup>963</sup> Ibid.

<sup>964</sup> P Birks, and N Y Chin, ‘On the Nature of Undue Influence’ in J Beatson and D Friedmann (ed), *Good Faith and Fault in Commercial Law* (1995), p 95.

<sup>965</sup> D Capper, ‘Undue Influence and Unconscionability: A Rationalisation’ (1998) 114 LQR 479, p 498.

dealt with utilising unconscionability. Therefore, given the recent developments of the three doctrines, it is duress that is the superfluous doctrine.

However, it is submitted that undue influence and unconscionability (and hence a three way merger) cannot be achieved. While there is a substantial overlap between undue influence and unconscionability the substance, that is, the doctrinal elements of the two doctrines differ. Conaglen provides a helpful summary:

[Undue influence] is concerned primarily with the close relationship between the two parties and is determined to prevent any abuse of that relationship. The doctrine of unconscionable bargains, on the other hand, is concerned more with improper advantage being taken of a situation which has arisen as a result of cognitive defects in the weaker party. Such defects give rise to a significant power imbalance between the parties, but there need not be any special relationship between them aside from the fact that they have come together to negotiate a transaction and one is aware that the other is labouring under a special disadvantage. That in and of itself is not sufficient to create the relationship which is so carefully protected by the doctrine of presumed undue influence, but it will suffice under the doctrine of unconscionable bargains.<sup>966</sup>

However, there is a body of case law in New Zealand that, in effect recognises that a disability can give rise to a relationship of influence.<sup>967</sup> Given this development, it is submitted that merger still cannot be undertaken. This is because of the doctrinal focus of undue influence and unconscionability. It has been shown that unconscionability can exhibit some plaintiff-based characteristics. However, it is largely a defendant based doctrine. On the other hand, undue influence exhibits both plaintiff and defendant based elements. Further, the focus of any independent advice in an unconscionability case is to establish that the conscience of the stronger party is not tainted: that abuse of the stronger position did not occur. In an undue influence case, it is to show that the influenced party acted with free and informed consent. If the doctrines are merged, (especially if undue influence was to be merged into unconscionability), then this factor will be obscured.

This element cannot be ignored. Indeed Capper conceded that he had to accept this distinction.<sup>968</sup> What Capper proposes is a doctrine that is neither defendant based, or plaintiff based. However, it is submitted that this is not enough. Merging undue influence into unconscionability would also obscure the much larger fiduciary element present in undue influence. That fiduciary standard holds the influencing party to a higher standard not required of the stronger party in an unconscionability case. Further, utilisation of the evidential presumption will be lost. Capper contends that this argument overemphasises the value of the presumptions. It is respectfully submitted that this is not so. The

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<sup>966</sup> M D J Conaglen, 'Duress, Undue Influence, and Unconscionable Bargains – The Theoretical Mesh' (1999) 18(4) NZULR 509, p 531-2.

<sup>967</sup> *Milsom v Mazey and Ritz Hair Fashions* HC CH A159/84 [May 30 1985]; *Westpac Banking Corporation v Chang* HC CH CP 120/98 [1 December 1998]; *Richardson v Harris* [1930] NZLR 890; and *Brusewitz v Brown* [1923] NZLR 1106.

<sup>968</sup> D Capper, 'Undue Influence and Unconscionability: A Rationalisation' (1998) 114 LQR 479, p 493.

presumptions were established because it was recognised that in undue influence cases, the use of pressure to induce a transaction may be so subtle that it is impossible to prove.<sup>969</sup> The presumption was designed to assist the influenced party in certain special relationships that were justified in warranting special protection. It would be an unhelpful development in the law if such presumptions were abandoned.

Ultimately Capper concedes that for his new doctrine to work “a few rough edges relating to presumptions and independent advice can be shaved off with ease.”<sup>970</sup> Whether this can be done is questionable. Certainly, the focus and effect of independent advice can be altered without much effect, but it is respectfully submitted that use of the presumptions cannot be abandoned so easily.

At the beginning of my research on this topic, I sought to establish that there was a case for a three way merger. However, in conclusion to this thesis, it is submitted that such a development in the law cannot be sustained. It is submitted that if clarification and simplification of the law is sought, it would not be achieved by merging all three doctrines. Duress can be successfully merged into undue influence. However, undue influence and unconscionability cannot be merged.

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<sup>969</sup> *Allcard v Skinner* (1885) 36 Ch D 145.

<sup>970</sup> D Capper, ‘Undue Influence and Unconscionability: A Rationalisation’ (1998) 114 LQR 479, p 500.



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