Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'?†

[T]o trust is to depend—and to become dependent, or at least vulnerable.[1]

The reader is probably familiar with pictures that can be observed from two completely different viewpoints, such as the Necker Cube and the Old Woman–Young Woman. Such phenomena are in part based on an optical illusion or a trick of the mind. But they serve also to remind us that interpretation is dependent upon experience.[2] Psychologists know this phenomenon as 'Gestalt shift', and the philosophical significance of it is that we cannot always take the straightforward perception of certain observable phenomena to be 'given'.[3]

Lawyers sometimes fall victim to Gestalt shifts: subtle vacillations in the perception of the same legal doctrine or closely related legal doctrines. We often do not know, or cannot agree upon, which side of the same coin we are or should be looking at. One example comes from the law of undue influence. Sometimes this area of law is viewed as an experience of our concern with an 'excessively impaired consent'.[4] This is a distinctly plaintiff/consent-based orientation, and it is highlighted most starkly when undue influence is compared with its equitable sibling, unconscionable dealings:

> Undue influence ... looks to the quality of the consent or assent of the weaker party. ... Unconscionable dealings looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity and good conscience that he should do so.[5]

† I should like to thank Peter Watts and Grant Huscroft for their useful comments. Parts of the paper were delivered at the Sixth Annual Journal of Contract Law Conference ('The Changing Law of Contract'), Auckland, 14 and 15 August 1995. The usual caveats apply.

[1] K. D. Kaegle, 'Friendship and Acquaintances: An Exploration of Some Social Distinctions' (1958) 28 *Harvard Educational Review* 232 at 243.

[2] For example, entrenched predilection or prior knowledge (history/'perception learning').

[3] See S. Blackburn, *The Oxford Dictionary of Philosophy*, 1994, 157: 'Gestalt'.

[4] For this distinction see P. Birks and N. Y. Chin, 'On the Nature of Undue Influence', in J. Beatson and D. Friedmann (eds), *Good Faith and Fault in Contract Law*, 1995, ch 3.

[5] *Per* Deane J. in *Commercial Bank of Australia* v *Amadio* (1983) 151 CLR 447 at 474. It is easy to multiply quotations to the same effect. Compare, for example, Mason J. in the same case, id, at 461; Toohey J. in *James* v *Australia and New Zealand Banking Group Ltd* (1986) 64 ALR 337 at 389; *Dipros* v *Louis* (1992) 110 ALR 1, especially the judgment of Brennan J. Sir Anthony Mason perhaps contradicts this stance when he later seeks, extra curially, to draw a distinction between the common law and equity's approaches to defeasible transactions:

> '[T]he common law looks to "the reality of the assent of the person resisting enforcement of the contract" whereas equity "look[s] at the matter from the point of view of the person seeking to enforce the contract and ... inquire[s] whether, having regard to all the circumstances, it [is] consistent with equity and good conscience that he should be allowed to enforce it"'.

On other occasions, however, undue influence, like unconscionable dealings, is perceived as a species of 'wicked exploitation'.[6] This is clearly defendant/conduct-oriented at its core. Such a perception is perhaps understandable given the common ancestry of the doctrines.[7] The conceptual thread that is said to link them is 'abuse by the stronger party ... of a perceived position of special advantage'.[8]

Doubtless, it is important to understand the proper conceptual dimensions of undue influence, as this understanding will naturally have implications for all that follows, such as the approach we are to take in respect of dealings with financier third parties.[9] In this short essay I seek to demonstrate that the law of relational undue influence is defendant/conduct-based in its concerns and orientation. I acknowledge that this is at variance with the view expounded recently in an article by Peter Birks and Chin Nyuk Yin, titled 'On the Nature of Undue Influence'.[10] The view expressed in that article is that 'the doctrine of undue influence is about impaired consent, not about wicked exploitation'.[11] However, I maintain that any distinction one can draw between 'impaired consent' and 'wicked exploitation' is a distinction which is superficial at best. In this context the concepts of impaired consent and exploitation are inextricably linked. This is clearly demonstrated by the interrelationship of such ideas as 'power', 'consent', 'voluntariness', and 'exploitation' in our law relating to the formation of contracts.

See the Hon Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238 at 249, quoting Fullagar J. in *Blomley* v *Ryan* (1956) 99 CLR 362 at 401–2. With respect, few today would suggest that the common law doctrines of duress or deceit, for example, were not concerned primarily with defendant misconduct (rather than simply with the plaintiff's defective consent). Duress clearly requires pressure to be wrongful or 'unconscionable', and the 'overborne will' theory has been discredited: see *Crescendo Management Pty Ltd* v *Westpac Banking Corporation* (1988) 19 NSWLR 40, esp at 45–6 per McHugh JA. The focus in deceit is firmly on the state of mind of the defendant in making the statement that subjects the plaintiff to an improper motive for action: *Derry* v *Peek* (1889) 14 App Cas 337 at 374 *per* Lord Herschell.

[6] Birks and Chin, above, n 4 at 58

[7] In particular, in Lord Hardwicke's third category of equitable fraud in *Earl of Chesterfield* v *Janssen* (1751) 2 Ves Sen 125; 28 ER 82: '... taking surreptitious advantage of the weakness and necessity of another: which knowingly to do is equally as against good conscience as to take advantage of his ignorance: a person is equally unable to judge for himself in one as in the other': id, 155–6. Cf also McTiernan J in *Blomley* v *Ryan* (1956) 99 CLR 362 at 392.

[8] I. J. Hardingham, 'Unconscionable Dealing', in Finn (ed) *Essays in Equity*, 1985, ch 1 at 18.

[9] This is the context in which questions of undue influence have arisen most frequently in recent times. See, for example, *Barclays Bank plc* v *O'Brien* [1994] 1 AC 180; *CIBC Mortgages plc* v *Pitt* [1994] 1 AC 200; *Akins* v *National Australia Bank* (1994) 34 NSWLR 155; *Hartick* v *ASB Bank Ltd* [1995] 5 NZBLC 103,675; *Massey* v *Midland Bank plc* [1995] 1 All ER 929; *Banco Exterior Internacional* v *Mann* [1995] 1 All ER 936; *TSB Bank plc* v *Camfield* [1995] 1 All ER 951. Although beyond the scope of this article, I consider that a financier who is aware that a surety acts on account of motivations wrongfully produced by a third party is itself guilty of exploiting, passively, the known vulnerabilities resulting from that wrongdoing. The wrongdoing may be misrepresentation, pressure, or undue influence; it does not matter which. The victim of the wrongdoing is as unable in one as he is in the other to preserve his own best interests in a sequel transaction between himself and a third party financier. The difficulties arise when the financier has less than actual knowledge of the relevant vulnerability. Here it becomes a question of *what* that financier must know about the surety's circumstances which will tend to raise the possibility of prior wrongdoing, be it actual or presumed, in the mind of a person acting reasonably in the financier's position. This requires that we understand, first and foremost, the gravamen ('conceptual dimensions') of each of the particular species of wrongdoing which may have produced the vulnerability and which may attract a particular legal or equitable doctrine, such as duress, undue influence, or unconscionable dealings.

[10] Above, n 4.

[11] Id at 58.

1 *Power, Consent and Voluntariness in Contract Formation*

A *Consent*

Binding contract is most significantly grounded in *consent*, and in particular, in the consensual assumption (not imposition) of legal contractual obligation.[12] This in turn emphasizes the more fundamental values of freedom[13] and autonomy.[14] Indeed, at the heart of contract is a deep respect for the individual's liberty;[15] and if respect for liberty requires that one be permitted to enter into binding agreements, it also demands that binding agreements reflect one's voluntary choices. As Hart pointed out, it is for the very reason that the law exists to render our preferences effective that it also includes 'invalidating conditions' such as mistake, fraud and duress—the sorts of conditions implied by the voluntariness principle itself.[16] 'To enforce agreements made by fraud or coercion would nullify the point of allowing binding agreements in the first place'.[17] Suffice it to say that just, and therefore indefeasible, distributions of private resources depend at least on voluntary behaviour, or consensual transfer.

With this, the plaintiff/consent-based proponents of undue influence would not disagree.

B *Voluntariness*

To act 'voluntarily', I maintain, is at least to be *responsible* for the manifestation of one's contractual assent.[18] Although determining the existence of consent objectively, in judging the actual *quality* of one's manifested contractual assent, and hence one's responsibility, the law will look at the *motivation* which produced the assent.[19] This rests on the implicitly normative view that some motivations

[12] Cf R. Barnett, 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269. For an historical account of the operation of consent in contract law and theory generally, see J. Gordley, *The Philosophical Origins of Modern Contract Doctrine*, 1991.

[13] Ie, not to be interfered with by others.

[14] Ie, to be able to plan and control one's own life, for good or for ill. Generally, see C. Johnson, 'The Idea of Autonomy and the Foundations of Contractual Liability' (1983) 2 *Law and Philosophy* 271.

[15] This in itself provides the basis for guaranteeing some measure of contractual 'justice': cf M. Mautner, 'A Justice Perspective of Contract Law: How Contract Law Allocates Entitlements' (1990) 10 *Tel Aviv University Studies in Law* 239 at 246–8.

[16] H. L. A. Hart, 'Legal Responsibility and Excuses', in *Punishment and Responsibility: Essays in the Philosophy of Law*, 1968, 29. Compare also the same author in 'The Ascription of Responsibility and Rights', in A. Flew (ed) *Logic and Language*, 1952, 148.

[17] A. Wertheimer, *Coercion*, 1987, 21.

[18] Depending on context, 'responsibility' can be read either as referring to 'blame' responsibility or to 'task' responsibility. Blame responsibility has to do with fixing credit or, more commonly, blame for certain actions or states of affairs. Task responsibility has to do with assigning duties, jobs or general tasks. Cf. R. Goodin, 'Apportioning Responsibilities' (1987) 6 *Law and Philosophy* 167 at 167–8. On the relationship between 'consent' and 'responsibility', see J. Kleinig, 'The Ethics of Consent' (1982) *Canadian Journal of Philosophy, Supplementary Volume* 8, 91 at 93 and 107. For a somewhat different view of the voluntary-responsibility relationship, albeit in the tort and criminal contexts, see M. Dan-Cohen, 'Reponsibility and the Boundaries of the Self' (1992) 105 *Harvard Law Review* 959.

[19] Cf *Restatement (Second) of Contracts*, § 19, Comment (c). In law, the distinction between expressing and merely signifying consent is sometimes marked by a distinction between 'consent' and 'assent' respectively.

are consistent with voluntary action while others are not.[20] Subject to some necessary elaboration and qualification,[21] it is generally understood that in order to be 'voluntary' the motivation which produced a party's assent must have originated in the will (or volition) of that party, and not in the will of another,[22] and it should also have been a product of that party's cognitive, deliberative, or judgmental capabilities, as opposed to fundamental ineptitude, error, or ignorance.[23] Again, the plaintiff/consent-based theorists would not disagree with this proposition; indeed they propound it.

But identifying the conditions for effective consent in law is no easy task.[24] This is largely because each of the legal and equitable doctrines which are traditionally understood to 'police' the genuineness or quality of contractual assent—duress, misrepresentation, undue influence, mistake, unconscionable dealings, and the like—often requires substantial normative refinement in its application. Yet 'consent' does serve as an expedient rhetorical device in our law; for in relation to contract law in particular, it is at least synonymous with the notion of 'responsibility'.[25]

C *Power*

Contract bargaining is a paradigmatic instance of strategic interpersonal activity. As such, it gives rise to controversial questions of whether, and to what extent, power or position should be permitted to impinge on consent-building outcomes.[26] By 'power', one usually means the capacity to influence another—'the ability of one party to cause another to change behaviour in an intended direction'.[27] Accordingly, a *successful* use of power always depends on the effects it produces on the actions or motivations of the recipient of its use.

But power, however great, is inert in itself. Its possession is unavoidable in our natural world of unequals, and to possess power is not necessarily to use it. To have power in contract bargaining, then, is to have an 'advantage'—and an advantage of a distinctively *strategic* or *relative* kind. It may allow one, if one

[20] Cf Cohen, 'The Basis of Contract' (1933) 46 *Harvard Law Review* 553 at 578. See also D. F. Gustafson, 'Voluntary and Involuntary' (1964) 24 *Philosophy and Phenomenological Research* 493.

[21] An investigation into these elaborations and qualifications is beyond the scope of this paper. However, the relevant qualifications do not affect the general points I wish to make.

[22] A person acts freely, says Nozick, when 'no other's motives and intentions are as closely connected to ... [his] ... act' as his own, regardless of the pressures under which that person acts: R. Nozick, *Philosophical Explanations*, 1981, 49.

[23] Aristotle, for example, identified ignorance and constraint as the two circumstances that render human action involuntary: Aristotle, *Nichomachean Ethics*, Book III, M. Ostwald (tr) 1962, 1109b–11b.

[24] For an excellent philosophical attempt, see Kleinig, above, n 18.

[25] Hart is again instructive in this context. I refer to his 'Responsibility Principle':–

'What is crucial is that those whom we [hold legally responsible] should have had, when they acted, the normal capacities, physical and mental, ... and a fair opportunity to exercise these capacities'.

Hart, above, n 16, 152 (see also id at 181, 218 and 227).

[26] Cf R. Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities*, 1985, 36. Indeed, negotiation has been conceived of as a 'power struggle' with the final result determined by the relative strengths of the parties: P. H. Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective*, 1979, 187.

[27] Zartman, 'The Political Analysis of Negotiations' (1974) 26 *World Politics* 385, as quoted by Gulliver, id, 188.

chooses, to manipulate the contractual choices and actions of one's bargaining opponent.

However, the law accepts, as it must, that manipulative capacity is to be tolerated for the most part in contractual dealings. The law could never hope to correct all the inequalities that will inevitably affect contracting parties according to their circumstances. The ability to manipulate, moreover, unquestionably produces desirable results: people enter into bargains, and this produces flow on effects for the benefit of society as a whole.[28] But the law becomes more vigilant when the disparities in relative contracting power are extreme. At some point it becomes unrealistic to suppose that a person can be so much in another's power as to keep his or her interactions free from even the gentlest influences which result from that power.[29] I shall return to this point below; although suffice it to say here that there may be moral significance in the existence of a strongly manipulative capacity *per se*.[30]

2 *From Involuntariness to Exploitation*

> *Exploitation* . . . Taking unjust advantage of another for one's own advantage or benefit.[31]

In general, arguments which defeat voluntariness fall into two categories. First, the defects may be inherent in the promisor himself (ie, unconnected with the improper actions of the promisee): ignorance, mistake, incapacity, drunkenness, need, and the like are examples in this regard. Second, the defects in the promisor may be wrongfully introduced or engineered by the promisee, such as through fraud or by force. But these categories can be further unified, because there is something that *all* involuntary agreements seem to have in common. All, or practically all,[32] involuntary agreements prima facie involve objectionable forms of advantage-taking, or *exploitation*.[33] This is to say, the problem of locating the necessary and sufficient conditions for 'involuntariness' is equivalent to determining

[28] As Isaacs J. pointed out in *Watkins* v *Combes* (1922) 30 CLR 180 at 193–4, 'influence may be used wisely, judiciously and helpfully', and generally it is to the benefit or advantage of the person receiving the advice or subject to the influence. Kekewich J, in the trial court in *Allcard* v *Skinner* (1887) 36 Ch D 145 at 157–8, also makes this point particularly well:–

'The law does not exclude influence. Nay, it recognises influence as natural and right. Few, if any, men are gifted with characters enabling them to act, or even think, with complete independence of others, which could not largely exist without destroying the foundations of society. But the law requires that influence, however natural and right, shall not be unduly exercised . . .'

[29] Cf J. R. S. Wilson, 'In One Another's Power' (1977) 88 *Ethics* 299 at 308.

[30] 'The objection is not [merely] that people in a vulnerable position are exploitable—not necessarily that they are exploited. It is, *ceteris paribus*, immoral to tolerate a serious risk of immoral outcomes (e.g., exploitation) even if that risk never actually becomes reality . . .': Goodin, above, n. 26, at 114.

[31] *Black's Law Dictionary* (6th ed) 1990.

[32] Some forms of mistake have little or nothing to do with exploitation (eg, common mistake, innocent misrepresentation). However, even these species of 'invalidating condition' can, in a rather strained way, be viewed as a form of exploitation. For example, see Sir George Jessel MR's alternative explanations of the doctrinal basis for equitable intervention in respect of innocent misrepresentation: *Redgrave* v *Hurd* (1881) 20 Ch D 1 at 12–13.

[33] Cf A. Kronman, 'Contract Law and Distributive Justice' (1980) 89 *Yale Law Journal* 473.

> which of the many forms of advantage-taking possible in exchange relationships are compatible with the libertarian [and liberal] conceptions of individual freedom [voluntariness].[34]

For in each of the cases in which a promisor claims that his or her promise is not voluntarily given,

> the promisee enjoys an advantage of some sort which he has attempted to exploit for his own benefit. The advantage may consist in his superior information, intellect, or judgment, in the monopoly he enjoys with regard to a particular resource, or in his possession of a powerful instrument of violence or a gift for deception. In each of these cases, the fundamental question is whether the promisee should be permitted to exploit his advantage to the detriment of the other party, or whether permitting him to do so will deprive that other party of the freedom that is necessary, from a libertarian point of view, to make his promise truly voluntary and therefore binding.[35]

Thus, in all cases in which one party seeks to be relieved of the normal moral or legal consequences of a manifested contractual assent on the ground that such assent was produced by motivations incompatible with voluntary action, the other party also has an advantage. Essentially this advantage transmits into a form of relative contracting *power*, which that other party either (1) consciously and affirmatively employs to secure the contractual assent of the disadvantaged party—a decidedly *active* process (of exploitation); or (2) knowingly, or with reason to know, desists from taking such positive steps for the benefit of the disadvantaged party as would have been necessary to correct the power imbalance existing between them—a comparatively *passive* process (of exploitation).[36]

It should be obvious, therefore, that the focus of the law must be on misconduct by the stronger party, and its consequences, rather than on the mere existence of the power imbalance itself, or on the mere existence of subjective 'involuntariness' on the part of the assent-rendering party; for as noted above, the existence of power is generally inert. In the absence of the stronger party itself introducing the unfair bargaining advantages into the particular negotiations, there is usually no way for that party to divest itself of the advantage, and it would not be to the putative advantage of the weaker party, or perhaps a class to which he or she belongs, to prohibit contracts between the parties altogether.[37] The only plausible solution to extant natural inequalities, therefore, is an indirect one. Given the human propensity toward self-interested behaviour, the best society can do is to control the *use* of unfair circumstances, or more particularly, the use, *in wrongful ways*, of the power advantages that those circumstances give

[34] Kronman, id, 480. The insertions are Lucy's. See Lucy, 'Contract as a Mechanism of Distributive Justice' (1989) 9 *OJLS* 132 at 133.

[35] Kronman, ibid.

[36] For more on the distinction between active and passive exploitation, see Wilson, above, n 29 at 300–1; *Hart v O'Connor* [1985] 1 AC 1000 at 1024.

[37] To take the most extreme example—that of the contracting fiduciary—the law does not operate to bar the fiduciary from ever contracting with his beneficiary; but should he choose to do so he is bound to show that the advantage he received was the product of dealing at arm's length, or was authorized by law. This is reflected in the reversal of the onus of proof, which follows the presumption of wrongdoing.

to one social member and not to another. Defences to the enforcement of contractual obligations, therefore, must be dependent on the stronger party taking unfair advantage of its position. This prevents the concept of genuine consent from collapsing into voluntariness alone.

Accordingly, the focus is on the *conduct* of the advantaged party; the law does not ask whether the disadvantaged party's assent to the transaction was simply 'genuine' in terms of the voluntariness principle. So, for example, relief for fraud and duress is given not only because the victim contracted in ignorance or under pressure, but because the ignorance was wrongfully induced, or the pressure wrongfully brought to bear, by the other party. If ignorance or pressure were sufficient to vitiate consent, then it should not matter whether they were caused wrongfully by that other party. Hence the availability of relief turns on the legitimacy of the conduct which produced the contractual assent, rather than on the mere state of mind of the victim who manifested it. The corollary of this reasoning is that the emphasis of the legal and equitable doctrines commonly relied upon in transaction avoidance cases should reside less in notions of 'freedom' or 'voluntariness' *simpliciter*, than in notions of 'wrongful conduct' or 'unfairness'.

3 *Undue Influence as 'Wicked Exploitation', Not 'Impaired Consent'*

The doctrine of undue influence may seem strongly plaintiff/conduct-based because of its peculiar focus on the contracting parties' special relationship and, in particular, the plaintiff's strongly dependent position within that relationship. It is by virtue of this 'excessive dependence' (on the defendant) that the plaintiff is said to 'lack[. . .] the capacity for self-management which the law attributes to the generality of adults'.[38] This is true. But recall that all acts of exploitation begin with a plaintiff's peculiar vulnerability.[39] What is objectionable about exploitation is that a defendant chooses, freely and knowingly, to benefit from the relative position of power resulting from such vulnerability, and that the defendant's gain—in this context, the right to a contract—results from the exercise of that power.[40] So, in the context of a law 'designed to protect the vulnerable',[41] the exploiter is guilty not merely of 'neglecting' his or her protective responsibilities, but of *negating* them.[42] Characteristically, an exploiter plays for advantage in the face of a strong moral-cum-legal duty actually to protect—to assist, or at least to have due regard for the interests of—a bargaining opponent whose interests can be strongly affected by the exploiter's own choices and

[38] Birks and Chin, above, n 4 at 67

[39] In this context, all disabilities relied upon will be such that the vulnerable party is seriously unable to preserve her own best interests in the transaction in question.

[40] Wilson, above, n 29 at 310. Cf *Blomley* v *Ryan* (1956) 99 CLR 362 at 385 per McTiernan J.

[41] Per Lord Browne-Wilkinson in *Barclays Bank plc* v *O'Brien* [1994] 1 AC 180 at 188.

[42] R. Goodin, 'Exploiting a Situation and Exploiting a Person', in A. Reeve (ed) *Modern Theories of Exploitation*, 1987, 166 at 188.

actions. To be sure, the exploiter is guilty of disregarding the weaker party's interests primarily as a means to pursuing his or her own.

One should also bear in mind that undue influence is concerned with a unique kind of vulnerability. While most legally-recognized bargaining vulnerabilities do not preclude pursuit of self-interest (the courts merely ensure that sufficient regard be had for the other party's special disabilities),[43] what is characteristically 'vulnerable' about victims of undue influence is that they are all parties who have in some way 'let down their guard':[44] they have 'renounced playing for advantage themselves'.[45] They are, accordingly, justified in believing that the other party is acting, or will act, exclusively in their interests. What follows, on the part of the ascendant party, is a peculiar power to effect adversely the interests of the other party who has entrusted the former with his or her own welfare. It is for this reason, moreover, that such vulnerable persons are excused from that level of 'individual responsibility' ordinarily expected and required of the generality of contracting parties.[46]

Thus, the relationship of influence from which a presumption of undue influence arises is a relationship in which fiduciary characteristics may be seen.[47] It is on account of this relationship, moreover, that we quickly proscribe any *possible* use of the power and opportunities the ascendant party's position has given him to act inconsistently with the special responsibility of acting only in the interests of the reliant or dependent party.[48] Given the strongly prophylactic stance, a mere dishonest or disloyal tendency in a dealing between the ascendant party and his or her 'beneficiary' is generally considered to be enough to justify both a presumption of wrongdoing and a shift of the burden of proof to the ascendant party to demonstrate the fairness of the transaction as a whole.[49] Certainly as the law has developed in Australia, a dishonest or disloyal tendency, or the suspicion of such,[50] arises not because the transaction is materially disadvantageous overall,[51] but because 'the character of the relation is never enough to explain *the transaction* and to account for it without suspicion of confidence abused'.[52] In this context, any dealing which 'wears the appearance

[43] This may, for example, require the advantaged party to explain the purport and effects of the proposed transaction; to recommend or to ensure that the other party seeks or receives independent competent advice; or, simply, to ensure that the transaction entered into was a fair, just and reasonable one. In other words, he or she must do what is necessary to render the parties functional equivalents in the transaction in question.

[44] Usually through the concession of an unusual degree of trust and reliance.

[45] Goodin, above, n 42 at 185.

[46] Cf Dixon J. in *Johnson* v *Buttress* (1936) 56 CLR 113 at 135; and Gillard J. in *Union Fidelity* v *Gibson* [1971] VR 573 at 577.

[47] Per Dixon J. in *Johnson* v *Buttress* (1936) 56 CLR 113 at 135.

[48] Generally see Finn, 'The Fiduciary Principle', in Youdan (ed) *Equity, Fiduciaries and Trusts*, 1989, ch 1.

[49] This presumption can only be rebutted by showing that the ascendant party's position was not abused, but that the transaction received was 'the independent and well-understood act of the [subservient party]', who was 'in a position to exercise a free judgment based on information as full as the [ascendant party's own]': per Dixon J. in *Johnson* v *Buttress* (1936) 56 CLR 113 at 134.

[50] The raising of the presumption in cases of relational undue influence is based upon 'a recognition, and a necessary distrust, of the infirmities of human nature': per Lord Herschell in *Bray* v *Ford* [1896] AC 44 at 51.

[51] In the case of gift transactions, to which the rules also apply, this will invariably be so.

[52] Per Dixon J. in *Yerkey* v *Jones* (1939) 63 CLR 649 at 675. Emphasis is added to highlight the fact that it is the transaction within the relation that raises the suspicion and not simply the relation itself.

of a business transaction'[53] between the parties is generally considered to be sufficient grounds for suspicion because the motivations which inform a contract are assumed to be inherently non-altruistic. Contractual dealings simply imply ulterior motives of a sort that are incompatible with the type of relationship which attracts the law of undue influence.

Some have expressed concern over the instability of the epithet 'undue' in the 'undue influence' formulation.[54] Although in daily use as the 'mildest form of an epithet',[55] the use of this word suggests that undue influence essentially involves a wrongful, or at least an unacceptable, exercise of influence (power) by one contracting party over the other.[56] For the foundation of the equitable jurisdiction to set aside transactions procured by undue influence has long been expressed to lie precisely in the prevention of exploitative practices.[57]

Yet this anti-exploitation theme is easily obscured, largely by reason of the rebuttal presumption of wrongdoing which operates in this context: a presumption that influence existed and was unduly exercised. To be specific, this presumption, when it arises, does not purport to identify or define any *particular* form of opprobious conduct. Logically its operation does not require any detailed enquiry into the precise nature and manner of the exercise of the influence existing between the parties. Since equity presumes that certain relationships are ripe for abuse, a specific illegitimate use of influence need not be shown; advantage can be taken of trust and confidence in the most subtle and insidious modes of persuasion.

Be that as it may, in each case of undue influence we are essentially concerned with a superior party who wrongfully provides an ordinarily free and rational person with what appears to be reason for doing what the influencer desires. Yet as with duress,[58] the will of the victim of undue influence is not 'overborne'.[59] There may have been misplaced trust or reliance, but the victim still acts 'intentionally', perhaps even acceding to the transaction euphorically. Whether by threats, nondisclosure, argument, entreaty, intercession, importunity, or persuasion, what the ascendant party does in the undue influence context (like the coercer in the duress 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.[60] As Fingarette remarks:[61]

[53] Per Dixon J. in *Johnson* v *Buttress* (1936) 56 CLR 113 at 135–6.

[54] See Birks and Chin, above, n 4 at 57–8, 85–7.

[55] W. King, 'Undue Influence in Wills in Illinois' (1935) 2 *University of Chicago Law Review* 457 at 460.

[56] Compare, for example, the definition given by Hodges J in *Union Bank of Australia Ltd* v *Whitelaw* [1906] VLR 711 at 720.

[57] Cf Dixon J. in *Johnson* v *Buttress* (1936) 56 CLR 113 at 134.

[58] See *Crescent Mining and Dry Ltd* v *Westpac Banking Corporation* (1988) 19 NSWLR 40.

[59] In many cases of undue influence the exploiter or victimizer works his will not merely on or against the will of the victim but specifically *through* it. Cf H. Fingarette, 'Victimization: Analogies of Coercion, Deception, Undue Influence, and Excusable Prison Escape' (1985) 42 *Washington and Lee Law Review* 65 at 105, 111. Cf also *Tufton* v *Sperni* [1952] 2 TLR 516 at 530, 532; *Bank of Credit and Commerce International SA* v *Aboody* [1989] 2 WLR 759 at 784: plaintiff's mind described as 'a mere channel through which the will of [the victimizer] operated'.

[60] Cf Fingarette, id, 113.

[61] Id, 114.

> It is not a matter of mental power, forcefulness, or weakness that is at issue, or mere forcefulness versus weakness of mind. It is the use of wrongful means to persuade in a situation where, absent such means, [the victim would have been free to act independently of the other's will].

Thus, the rationale of the doctrine lies not merely in the actions, circumstances, or condition of the subservient party herself. This is a plaintiff/consent-based orientation or focus. Rather, undue influence operates to police the conduct or 'conscience' of the recipient of a beneficial transaction, whether it be contract or gift.[62] So like 'unconscionable' in the 'unconscionable dealings' formulation, or 'illegitimate' in the 'illegitimate pressure' formulation of the classic duress test,[63] all that 'undue' in the 'undue influence' formulation seems to represent is a legal condemnatory conclusion about the exercise of a particular manipulative or exploitative capacity. One might therefore seek to describe the myriad circumstances in which the jurisdiction has been applied in order to provide a contextual identification of undue influence;[64] however, I seriously doubt whether it is possible to supply a verbal or definitional identification.[65]

In describing the defendant/conduct-based conception of undue influence, Birks and Chin employ the language of 'wicked exploitation'.[66] In this context, however, resort to such language is pleonastic.[67] While it may provide a somewhat caricatured counter-notion against which a plaintiff/consent-based theory of undue influence may be set, the use of such strongly pejorative language tends to mask the possibility that exploitation may be active or passive.[68] When it is passive, it looks less 'wicked', but it is no less wrong and no less 'exploitation'. The real complaint in any given instance of relational undue influence is twofold: first, that the fiduciary-like expectation held by or ascribed to the dependent party has been breached; and second, that on account of such a breach, the transaction entered into lacked the quality of 'independence' on the part of the beneficiary—that independence being considered the hallmark of genuine personal consent—which has been eroded by the fiduciary's influence.[69] This need not necessarily mean that the ascendant party has 'bullied', 'dominated', or 'flagrantly deceived' the subservient party, although this may have in fact been

[62] The jurisdiction, and hence many of the principles arising therefrom, apply equally to both: cf *National Westminster Bank plc* v *Morgan* [1985] 1 AC 686 at 707, 708 per Lord Scarman.

[63] Per Lord Scarman in *Universe Tankships Inc of Monrovia* v *International Transport Workers Federation* [1983] AC 366 at 400.

[64] Compare Mahoney J's sentiments in *Antonovic* v *Volker* (1986) 7 NSWLR 151 at 165: suggesting that, as a principle of equity, unconscionability was 'better described than defined'.

[65] Compare Lord Scarman's warning in *National Westminster Bank* v *Morgan* [1985] 1 AC 686 at 709. However, one cannot also ignore the possibility of a deliberate, strategic circumvention of a definitional approach. Lord Chelmsford LC, in *Tate* v *Williamson* (1866) LR 2 Ch App 55, when speaking of the jurisdiction exercised by equity over the dealings of those persons standing in certain fiduciary relations, said '... the Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise' (at 61).

[66] Birks and Chin, above, n 4.

[67] There are, of course, degrees of 'badness' in relation to proven acts of exploitation, and this may call for some doctrinal refinement (in particular as these refinements are linked to an appropriate range of remedies and defences potentially available in such cases). However, in my view, the scales of badness are not analytically relevant to the question of determining a party's initial liability for an act of exploitation.

[68] See above, n 36 and accompanying text.

[69] Cf J. C. Shepherd, *The Law of Fiduciaries*, 1981, 200.

the case.[70] Rather, all the proper inference of fact need be in such cases is that the ascendant party simply 'failed to ensure that the plaintiff was emancipated from the dependence or excessive reliance in him'.[71] This may be a decidedly passive form of exploitation.

In exploring the conceptual dimensions of undue influence, I should like finally to applaud the gradual diminution, in recent times, of the 'manifest disadvantage' criterion in undue influence cases.[72] Such a requirement has of course been strongly eschewed in the context of unconscionable dealings (and indeed in undue influence cases) in Australia, at least as a substantive precondition to equitable relief.[73] While it is true that exploitative acts ordinarily redound to the benefit of those who perform them (doubtless this is what motivates such acts in the first place), the connection between exploitation and benefit (or 'material advantage') is contingent rather than analytic.[74] What one seizes upon in an act of exploitation is an advantage or benefit of one type: *a strategic* or *relative* advantage—peculiarly superior bargaining power—in order to obtain yet another, different kind of advantage or benefit: a *substantive* or *material* advantage or benefit. Exploitation is only a means to an end. In this context, the substantive or material advantage or benefit obtained is the *right to* the contract itself; and this, in my view, is to be viewed in isolation of the objective merits of the bargain actually struck. What happens in an act of exploitation, simply, is that the stronger party 'transforms bargaining power into promissory claims' and thereby 'legitimizes' his superiority over the weaker party.[75]

Exploitation, on this analysis, is purely a matter of process: not a matter of *where* a party ends up but rather of *how* he or she got there. An apparent equality on the face of an exchange does not guarantee that the integrity of the special relation existing between the parties has not been jeopardized.[76] At best, the proper evidentiary role of substantive disadvantages is that they speak merely to the extent of the presumption of the exercise of undue influence, and hence to the strength of the evidence required to rebut it.[77]

[70] See, for example, *Farmers' Co-operative Executors & Trustees Ltd* v *Perks* (1989) 52 SASR 399; *In re Craig, decd* [1971] Ch 95; *Bank of Credit and Commerce International SA* v *Aboody* [1989] 2 WLR 759; and *CIBC Mortgages plc* v *Pitt* [1994] 1 AC 200.

[71] P. Birks, *An Introduction to the Law of Restitution*, 1985, 184. Cf also per Lord Hatherley LC in *Turner* v *Collins* (1871) LR 7 Ch App 329 at 340:–

'When we talk of parental influence we do not think of terror in connection with it — that is not the primary idea — it is not terror and coercion, but kindness and affection, which may bias the child's mind, and induce the child to do that which may be highly imprudent, and which, if the child were properly protected, he would never do.'

[72] *CIBC Mortgages plc* v *Pitt* [1994] 1 AC 200.

[73] *Blomley* v *Ryan* (1956) 99 CLR 362 at 405 per Fullagar J; *Commercial Bank of Australia* v *Amadio* (1983) 151 CLR 447 at 475 per Deane J; *Johnson* v *Buttress* (1936) 56 CLR 113 at 134; *Baburin* v *Baburin* [1990] 2 QD R 101, aff'd [1991] QLR 143. But cf *Farmers' Co-operative Executors & Trustees Ltd* v *Perks* (1989) 52 SASR 399; and *James* v *ANZ Bank* (1986) 64 ALR 347 at 390 per Toohey J.

[74] Cf Goodin, above, n 42 at 168: 'Taking an advantage is not the same thing as taking [the] good itself'.

[75] Goodin, above, n 26 at 38.

[76] Cf per Slade LJ in the Court of Appeal in *National Westminster Bank* v *Morgan* [1983] 3 All ER 85 at 92.

[77] Cf Latham CJ in *Johnson* v *Buttress* (1936) 56 CLR 113 at 120.

4 *Conclusion*

In seeking to tame undue influence's Gestalt shift, I do not advocate a conceptual merger between undue influence and unconscionable dealings. Although I maintain that both doctrines are conceptually linked by an expansive anti-exploitation theme, I view each as occupying a distinct position within a broader scheme of doctrines concerned essentially with varying manifestations of the same evil. Although 'inspired by the same source', each doctrine assumes a life force of its own. Each has its own 'formula'; each channels judicial enquiry into slightly different issues or 'factors' pertaining to the wider order or scheme. Yet there remains good reason to observe a distinction between undue influence and unconscionable dealings, if only to keep the law within 'manageable proportions'.[78]

Conceptually, both undue influence and unconscionable dealings concern a form of 'exploitation', although the source of the plaintiff's vulnerability—the 'exploitable circumstances'—is quite different in each. The vulnerability in unconscionable dealings is not characteristically brought about through a special relation existing between the parties; typically, it is on account of some social or transactional disabling condition unassociated (at least initially) with the defendant. In relational undue influence cases, however, the plaintiff is vulnerable precisely on account of a special antecedent relational condition (misplaced trust or reliance) relative to the defendant. And because this vulnerability is, or is presumed to be, so extreme in such cases, and the relation so worthy of society's protection, affirmative proof of 'exploitation' is not required in the same way as it is in unconscionable dealings cases.[79] Instead, the law raises a presumption of wrongdoing whenever a commercial transaction, such as a contract, takes place between the parties.

Accordingly, unconscionable dealings and undue influence are distinct less on account of the *kind* of disabling condition (all vulnerabilities will be sufficiently extreme as to displace 'individual responsibility' on the part of the disadvantaged party), than on account of their *source*. The different legal techniques (presumptions of wrongdoing, reversal of proof, etc) and policies applicable to each equitable doctrine further attest to a definitional, though not a conceptual, distinction between the two classes of case. If one were to draw a conceptual distinction between undue influence and unconscionable dealings, it might reside in undue influence's distinct concern with volitions that have been wrongfully deflected in ways other than by the use of 'threats'. Although there is no logical

[78] Cf Finn, above, n 48, 55.

[79] It is true that the modern formulation of unconscionable dealings is still framed in terms of a rebuttable presumption: see for example, *Commercial Bank of Australia* v *Amadio* (1983) 151 CLR 447 at 474 per Deane J. Historically, the presumption in this context circumvented the issue of conscious exploitation, as the early cases were rooted in a strongly protectionist jurisdiction (catching bargains with expectant heirs): *O'Rorke* v *Bolingbroke* (1877) 2 App Cas 814. However, it is clear that the doctrine has been fundamentally reorientated into something which is now concerned with wrongful conduct (*Hart* v *O'Connor* [1985] 1 AC 1000; *Nichols* v *Jessup* [1986] 1 NZLR 226 at 235 per Somers J), and hence any shifting of the burden of proof in this context should be discarded today as an anachronism, or at least as a redundancy.

reason why unconscionable dealings could not also accommodate deflected-volition cases—the jurisdiction is in its definition sufficiently broad to include undue influence and duress—deficiencies in judgmental or 'rational' capacity seem more its staple.

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