Sze-Beng Tang[*]

A NEOCLASSICAL ANALYSIS OF THE EQUITABLE DOCTRINE OF UNCONSCIONABLE DEALING

I INTRODUCTION

This article is an exegesis which closely examines the legal reasoning and result of *Bridgewater v Leahy*,[1] a case described as 'puzzling'[2] by no less an authority than *Cheshire and Fifoot*. This article will argue that *Bridgewater* has been subject to implicit judicial disregard in subsequent cases in the lower courts[3] — not only to illustrate the most problematic elements of the doctrine of unconscionable dealing, but to provide the springboard for an enquiry into the jurisprudential foundations of the doctrine and a normative discussion of how it ought to be formulated.

The three problematic elements of the doctrine which will be examined by this article are: (1) whether 'substantive unfairness'[4] is a legal or a mere evidentiary factor; (2) the test of impaired judgement to determine whether a disability is of the 'special' kind required by the doctrine; and (3) the validity of emotional dependence as a 'disability'.

---

* Final year (2007) combined BCom/LLB student at The University of Melbourne; Editor 2007 *Melbourne University Law Review*. The author would like to thank Associate Professor M P Ellinghaus for his invaluable advice, assistance and encouragement and Ms Emily Zhang for her tireless and diligent proofreading. This article is based on a research essay completed in 2005 as part of the undergraduate law subject 730-222 Contracts II at The University of Melbourne. Any errors or omissions remain, of course, my own.

1 (1998) 194 CLR 457 ('*Bridgewater*').

2 N C Seddon and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract* (8th ed, 2002) [15.7].

3 See, eg, *Xu v Lin* (2005) 12 BPR 23 131 ('*Xu*'): see below Part III; *Turner v Windever* [2005] ANZ ConvR 214, 214–15 (Giles JA) ('*Turner*'): unlike the majority in *Bridgewater*, the Court displays no hesitation in utilising the well-established legal test of impaired judgement to determine whether a disability is of the 'special' nature required by the doctrine of unconscionable dealing; *Smith v Smith* (2004) 12 BPR 23 051, 23 053–5, 23 069–70 (Barrett J): absence of unequivocal support for the permissive approach towards 'emotional dependence' as a valid type of 'disability' adopted by *Bridgewater*, since unlike *Bridgewater*, the factual evidence presented in this case was both weighty and highly persuasive.

4 This term refers to a contract's unjust effect: see, eg, Arthur Leff, 'Unconscionability and the Code – The Emperor's New Clause' (1967) 115 *University of Pennsylvania Law Review* 485, 487; Mark Sneddon, 'Unconscionability in Australian Law: Development and Policy Issues' (1992) 14 *Loyola of Los Angeles International and Comparative Law Journal* 545, 548.

This article is structured so that each section starts with a theoretical normative critique of each problematic element before moving to an examination of the most recent supporting empirical evidence. The survey of the relevant cases will be restricted to cases from 2003–05 as Burns has already conducted a review of cases from 1999–2003 with similar results, albeit with a radically different conclusion based on the author's dichotomous theoretical lens.[5]

The theoretical lens adopted by this article can be termed 'neoclassicism'.[6] It advocates an approach to the doctrine of unconscionable dealing which provides greater protection for individual autonomy and freedom of contract. Particular attention will be paid to addressing the severe criticisms of neoclassicism made by P S Atiyah as this article engages in a defence of neoclassical notions of individual liberty and *pacta sunt servanda*.

However, it must be emphasised that this article is not arguing for the complete abolition of the doctrine of unconscionable dealing as it recognises the need for some standard of conduct in commercial transactions. But it argues that any standard must be restricted to the bargaining process (how a contract was made) and cannot extend to the 'effect' or outcome of a contract.

II THE BASIC FACTS IN *BRIDGEWATER*

On 22 April 1989, Bill York, a grazier with substantial land holdings died aged 85.[7] Bill was survived by his wife and four married daughters.[8] Over the course of a half-century Bill had, in partnership with his younger brother Sam, successfully 'carried on a cattle grazing and wheat growing business'[9] on several properties. Bill's nephew Neil had worked on his uncle's land for many years and eventually became a fully-fledged partner in,[10] and the day-to-day manager of,[11] the primary

5 Fiona Burns, 'The Equitable Doctrine of Unconscionable Dealing and the Elderly in Australia' (2003) 29 *Monash University Law Review* 336.

6 This is a broad term used to refer to a school of legal, economic and political thought which arose in the 19th century. It is variously referred to as 'liberal' political philosophy, 'neoclassical' economics and 'classical' contract theory: see generally P S Atiyah, *The Rise and Fall of Freedom of Contract* (1979); Grant Gilmore, *The Death of Contract* (1974); Michael J Trebilcock, *The Limits of Freedom of Contract* (1993). For our present purposes, there is no real difference among the multiplicity of nomenclatures used to refer to what I have broadly described as neoclassicism. Whilst many legal and political philosophers could and would point to subtle yet important differences between the various 'isms', the salient point for the purposes of the present enquiry is the primacy accorded to the values of individual freedom, autonomy and rationality.

7 *Bridgewater* (1998) 194 CLR 457, 474 (Gaudron, Gummow and Kirby JJ).

8 Ibid 463 (Gleeson CJ and Callinan J).

9 Ibid 482 (Gaudron, Gummow and Kirby JJ).

10 Ibid 483 (Gaudron, Gummow and Kirby JJ).

11 Ibid.

production business. 'In late 1987 or early 1988 … Neil proposed to Bill that he acquire Bill's interests in [certain grazing lands] for a price of $150 000.'[12] According to an independent valuation, the lands were worth a cumulative total of $696 811.[13] 'On 19 July 1988, Bill and Sam executed a contract of sale'[14] for the disposition of those lands to Neil and his wife Beryl for the total consideration of $696 811. However, on the same day, a deed of forgiveness was entered into for $546 811 of that price, meaning that effectively, Neil and Beryl paid only $150 000 for the lands worth $696 811.[15]

In addition, clause 4 of Bill's will (made in 1985) conferred upon Neil the option to purchase the residue of his estate, including those lands which were the subject of the 1988 transaction, for the price of $200 000 — failure to exercise the option would see the residue of Bill's estate pass to his four daughters in equal shares. 'On 24 May 1989, a little more than a month after Bill's death, Neil exercised the option conferred by cl 4 of the will',[16] which meant that each of Bill's four daughters received $50 000 under the will. Further, '[c]lause 3 [of Bill's will] gave to his wife the matrimonial home … together with any motor vehicle owned by Bill at the time of his death and all moneys [about $150 000] invested in his name in any bank or building society.'[17]

In the Supreme Court of Queensland, Bill's wife and four daughters sued Neil and Beryl and the executor of Bill's will (his son-in-law Kevin Leahy who took no active part in the proceedings), seeking a declaration that both the option conferred by clause 4 of Bill's will and the 1988 land transfers or deed of forgiveness were of no effect because they were induced by undue influence and/or unconscionable conduct. At trial, the plaintiff's claims were dismissed by de Jersey J and their appeal to the Court of Appeal was dismissed by Macrossan CJ and Davies JA, with Fitzgerald P dissenting. The plaintiffs appealed to the High Court and were successful in part as the majority of Gaudron, Gummow and Kirby JJ set aside the deed of forgiveness, subject to an allowance in favour of Neil and Beryl, but did not set aside the contracts of sale and transfers. Gleeson CJ and Callinan J delivered a strong dissent.

---

12 Ibid 484 (Gaudron, Gummow and Kirby JJ).

13 Ibid 465 (Gleeson CJ and Callinan J), 484 (Gaudron, Gummow and Kirby JJ); *Bridgewater v Leahy* (Unreported, Supreme Court of Queensland, de Jersey J, 23 August 1995) 3.

14 *Bridgewater* (1998) 194 CLR 457, 486 (Gaudron, Gummow and Kirby JJ).

15 Ibid 465–6 (Gleeson CJ and Callinan J), 487 (Gaudron, Gummow and Kirby JJ); *Bridgewater v Leahy* (Unreported, Supreme Court of Queensland, de Jersey J, 23 August 1995) 3.

16 *Bridgewater* (1998) 194 CLR 457, 487 (Gaudron, Gummow and Kirby JJ).

17 Ibid 481 (Gaudron, Gummow and Kirby JJ).

III THE NORMATIVE DISTINCTION BETWEEN PROCEDURAL AND SUBSTANTIVE UNFAIRNESS[18]

This article adopts the uncontroversial interpretation that the finding of legal 'unfairness' in *Bridgewater* was heavily reliant on 'substantive unfairness'.[19] The finding is objectionable on both positive and normative grounds. At a positive level, it contradicts both previous authority and judicial practice since *Bridgewater*. At the normative level, it is inconsonant with the most basic principles of neoclassicism which underpin a functioning market economy.

Neoclassicism has no problem with 'procedural unfairness'[20] forming part of the doctrine of unconscionable dealing[21] since by policing the bargaining process and preventing the use of unfair tactics it ensures that any agreement is the product of a genuine exercise of free will on the part of the individual transacting agents.

By focusing on the bargaining process, procedural unfairness examines how the contract was made, whereas substantive unfairness is concerned with the 'effect'[22] of the contract. Thus, the focus of 'substantive unfairness' is on the equality of the distribution of the 'final settlement',[23] with courts often referring to the 'improvidence'[24] of the result, the 'undervalue'[25] represented by the disputed transaction, or the 'inadequacy'[26] of the consideration.

---

18 Leff, above n 4, 486: historically, the distinction originated in the United States in the seminal article by Professor Arthur Leff and was subsequently embodied in § 2-302 of the Uniform Commercial Code ('UCC').

19 See, eg, Seddon and Ellinghaus, above n 2, [15.7].

20 Broadly, this term refers to unfairness in the process of negotiating a contract and is often evidenced by unfair tactics: Sneddon, above n 4, 548; Leff, above n 4, 487.

21 See below Part V(D).

22 Sneddon, above n 4, 548.

23 This famous term describing the outcome of the bargaining process between rational individual agents in a competitive market economy was originally coined by the barrister turned economist Francis Ysidro Edgeworth in his seminal work: *Mathematical Psychics: An Essay on the Application of Mathematics to the Moral Sciences* (1881).

24 *Bridgewater* (1998) 194 CLR 457, 493 (Gaudron, Gummow and Kirby JJ); *Louth v Diprose* (1992) 175 CLR 621, 626 (Mason CJ), 638 (Deane J), 639 (Dawson, Gaudron and McHugh JJ); *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 466 (Mason J) ('*Amadio*'); *Blomley v Ryan* (1956) 99 CLR 362, 426 (Kitto J). Cf *Brusewitz v Brown* [1923] NZLR 1106, 1109 (Salmond J).

25 *Blomley v Ryan* (1956) 99 CLR 362, 406 (Fullagar J); *Amadio* (1983) 151 CLR 447, 460 (Gibbs CJ), citing *Fry v Lane* (1888) 40 Ch D 312, 322; *Bridgewater* (1998) 194 CLR 457, 463, 469 (Gleeson CJ and Callinan J).

26 *Bridgewater* (1998) 194 CLR 457, 484 (Gaudron, Gummow and Kirby JJ); *Amadio* (1983) 151 CLR 447, 475 (Deane J); *Blomley v Ryan* (1956) 99 CLR 362, 385 (McTiernan J), 404–5 (Fullagar J).

Prior to *Bridgewater*, only procedural unfairness was a formal element of the doctrine, although substantive unfairness was relevant insofar as it was an evidentiary factor which could be used to show 'procedural unfairness'.[27] *Bridgewater* appeared to eliminate that distinction as it applied a legal definition of 'unfairness' which (wrongly) raised 'substantive unfairness' to the level of a formal element sufficient, in and of itself, to prove 'unfairness' in law.[28] It will be argued that such an approach is unwarranted as there are strong justifications for the maintenance of the distinction in neoclassical theory.

Furthermore, a doctrinal focus on procedural unfairness is entirely consistent with the High Court's emphasis that it is 'the conduct of the stronger party [which] is central to a determination on whether there has been unconscionable dealing',[29] since such an approach would involve an examination of the tactics used by the stronger party in the bargaining process.

A *The Enforcement of 'Substantive Unfairness' by the Courts through Equitable Doctrines is Incompatible with Neoclassicism*

The strict application of 'substantive unfairness' leads to the exogenous disturbance of the 'final settlement' freely reached between the parties to a market trade on the nebulous moral grounds that a court of law finds the distribution of the said settlement to be inequitable and hence morally objectionable.

This effectively entails the inappropriate application of the egalitarian ideal to private commercial relationships among individual economic agents in the marketplace. Thus, the inclusion of 'substantive unfairness' as a formal element of the doctrine leads to the absurd implication that a deal negotiated by an individual economic agent which earns him or her relatively more benefits than the other party to the trade cannot be allowed to stand, even where he or she has not used unfair tactics. The majority in *Bridgewater* seem to be implicitly imposing an onerous requirement that every agent receive the fair value or at least, the market value, in a commercial transaction.

Such nebulous concepts of personal morality would invariably wreak havoc in a competitive market economy which is premised on the relatively simple idea that the rational, autonomous, self-interested agent who is actually engaging in the trade

---

27 The law before and after *Bridgewater* is that the element of 'unfairness' in the doctrine of unconscionable dealing is defined primarily by reference to procedural rather than substantive unfairness: see, eg, Anthony J Duggan, 'Unconscientious Dealing' in Patrick Parkinson (ed), *The Principles of Equity* (2nd ed, 2003) [503]; Sneddon, above n 4, 548 ('[t]he equitable doctrine concerns only the procedural aspect of unconscionability'); *Blomley v Ryan* (1956) 99 CLR 362, 405 (Fullagar J).

28 *Bridgewater* (1998) 194 CLR 457, 460 fn 18, 484.

29 Burns, above n 5, 343, citing *Blomley v Ryan* (1956) 99 CLR 362; *Louth v Diprose* (1992) 175 CLR 621; *Wilton v Farnworth* (1948) 76 CLR 646.

is in the best position to decide whether a particular transaction makes them better or worse off.

Neoclassical exchange theory does not say that each party to a trade gains equally, just that someone can be made better off, without making anyone else worse off. Pareto Optimality[30] is premised on a mutually, not an equally advantageous trade[31] — the parties to the transaction do not have to each be better off to the exact same degree. In theory, it is not even necessary that both parties be better off for a Pareto Optimal[32] trade to occur in a market economy — it is only necessary that no-one be worse off.

In a liberal democracy, the unelected judiciary cannot be permitted to impose an ethic of perfect equality on commercial outcomes for the very notion is inimical to a modern market economy which functions on the basis of individual freedom, autonomy and rationality.

Bridgewater is particularly objectionable because an extraneous third party who was deliberately excluded by the parties to the trade successfully litigated to secure a portion of the trade's benefits. By ruling in favour of the third party litigant, the majority in *Bridgewater* was in effect overruling an individual's free exercise of his economic right to choose with whom to trade and to determine the quantities traded, on the nebulous moral ground that the distribution of the final settlement between the two trading parties was unequal.

It must be observed that the third party was not any worse off from the disputed transaction since they did not lose anything other than a mere expected gain. Therefore, even for the third party, the trade could still be regarded as Pareto Optimal and hence entirely unobjectionable from the viewpoint of efficiency in a competitive market economy. If, on the other hand, an actual party to the transaction was worse off and hence the trade was not Pareto Optimal, then there

---

30 Although this article acknowledges that Pareto Optimality rather than being a pure efficiency criterion, is itself a value judgement, it argues that it is one which is justifiably relevant in a liberal-democratic society which has voluntarily embraced a market economy.

31 Gino Dal Pont, 'The Varying Shades of "Unconscionable" Conduct – Same Term, Different Meaning' (2000) 19 *Australian Bar Review* 135, 145–6, appears to recognise this when he labels the majority's finding that 'sowing the seed in the mind of another person as to what he or she could do with his or her property can of itself amount to exploitation even though the course which the transferor chooses to adopt *also serves his or her ends* – a remarkable conclusion' (emphasis added).

32 A Pareto Optimal deal is defined as one which is mutually advantageous to both parties. Note it is not necessary for both parties to be *better off* since it is entirely possible to have a Pareto Optimal trade where only one party is better off and the other party is merely *not* any *worse off*: see generally Vilfredo Pareto, *Manual of Political Economy* (1906).

may be some neoclassical grounds for the courts to intervene — but this was not the case in *Bridgewater*.

Finally, even if we were to accept 'substantive unfairness' as a formal element of the doctrine, courts should at minimum, still have to apply a conjunctive requirement for both procedural *and* substantive unfairness. *Bridgewater* would still be problematic because it is premised on substantive unfairness only. It is difficult to argue that any procedural unfairness actually existed in *Bridgewater*. The majority asserts that Neil actively took the initiative, but then expressly endorses 'passive acceptance of benefit' as an alternative argument, implying that the 'active initiation' argument was relatively weak.[33] Moreover, even if Neil did take the initiative, one could very well argue that instead of being unfair, this was economically reasonable — the product of an understandable desire to be rewarded for years of hard work and a wish to preserve the commercial viability of the enterprise. In the words of the learned trial judge, 'the granting of the option had a *rational justification*, in light of Bill's gratitude for Neil's past assistance and his probable wish to keep all of the properties together under the control of someone he considered reliable and experienced in managing them'.[34]

This article is in substantial agreement with Sneddon that the doctrine is 'limited enough in scope'[35] provided that in terms of its formal legal elements, it is restricted to procedural, rather than substantive unfairness. As long as substantive unfairness is restricted to being at most an evidentiary factor which goes to proving the presence of procedural unfairness, then the doctrine will be kept within acceptable bounds which preclude the proliferation of excessive discretion and personal value judgements in judicial decision-making on this matter. Therefore, this article argues for the unequivocal elimination of 'substantive unfairness' as a formal element of the doctrine of unconscionable dealing.

B *Substantive Unfairness is Properly the Responsibility of Elected Parliaments not the Courts*

This article accepts the need to redistribute income and wealth for reasons of social equity, justice and public ethics. However, such a redistribution of the 'final settlement' reached by a competitive market economy, if it is to be conducted at all, must be the role of the legislature and its elected representatives who are endowed with the legitimacy which can only be conferred by a democratic mandate and

---

33 *Bridgewater* (1998) 194 CLR 457, 493 (Gaudron, Gummow and Kirby JJ). Cf the learned trial judge unequivocally rejected this argument: *Bridgewater v Leahy* (Unreported, Supreme Court of Queensland, de Jersey J, 23 August 1995) 14: 'in no sense did Neil "procure" the granting of the option in the will to himself … Neil played no part in securing the option — it was Bill's own initiative'.

34 *Bridgewater v Leahy* (Unreported, Supreme Court of Queensland, de Jersey J, 23 August 1995) 15 (emphasis added).

35 Sneddon, above n 4, 564.

hence possess the requisite authority to advance broad social values such as equality. Such a normative exercise in value judgements is not for an unelected judiciary. Parliaments are better equipped with the temporal, human and fiscal resources required to identify broad social values such as egalitarianism and ensure that they are adequately reflected in the law.[36]

C *Substantive Unfairness is Inconsistent with the Doctrine of Consideration*

'Substantive unfairness' is inconsistent with the doctrine of consideration because whilst the latter says quite unequivocally that consideration need not be commercially adequate, just legally sufficient,[37] the former facilitates judicial intervention in freely agreed transactions on the very basis of 'inadequacy'[38] of consideration. This is problematic because the doctrine of consideration, despite being subject to fierce criticism over the years, remains the cornerstone of contract law. Even Atiyah admits that it is 'unlikely'[39] to be replaced and shows no signs of withering away.[40]

D *Value Judgements and the Separation of Law and Morality*

Another objection which could be raised is that in addition to the imposition of social morality (egalitarianism), the application of 'substantive unfairness' often leads to the imposition of nebulous concepts of personal morality. The importance of the separation between law and morality, and the undesirability of excessive

---

36 The salient issue of which branch of government is the appropriate site for the redistribution of income and wealth is itself a vexed question which has occupied scholars of both legal and political theory. Beyond acknowledging its importance to this article's thesis, and unequivocally stating the side embraced by this article, the author will exercise his discretion not to enter into this heated debate as any useful contribution would necessitate a separate article in itself. There is an abundance of literature on this fascinating and important theoretical question: see, eg, Simon Evans, 'Constitutional Property Rights in Australia: Reconciling Individual Rights and the Common Good' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (2006) 213–14, highlights the limitations of courts as a site for moral deliberation and argues that the 'greater deliberative capacity' and 'epistemic advantages' enjoyed by Parliament means that it is better equipped to address the moral dimensions of property — 'courts cannot discern whether the prevailing distribution of property rights is unjust and that [a] … law attempts to redistribute those rights more justly'; Margaret Jane Radin, *Reinterpreting Property* (1993) 35, 65: 'Courts can perceive whether or not an object has been taken, but cannot in the same way discern whether "too much" wealth has been taken'.

37 See, eg, Seddon and Ellinghaus, above n 2, [4.10]–[4.12].

38 See, eg, *Bridgewater* (1998) 194 CLR 457, 484 (Gaudron, Gummow and Kirby JJ).

39 P S Atiyah, *Essays on Contract* (1986) 128.

40 Ibid.

discretion and personal value judgements in judicial decision-making was eloquently expressed by Rehnquist J in a justifiably famous article:

> Beyond the *Constitution* and the laws [enacted by the Legislature] in our society, there simply is no basis other than the individual conscience of the citizen that may serve as a platform for the launching of moral judgments. There is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgments of your conscience, and vice versa. Many of us necessarily feel strongly and deeply about our own moral judgments, but they remain only personal moral judgments until in some way given the sanction of law [by the Legislature].[41]

In *Bridgewater*, the 'substantive unfairness' arguments are intimately tied up with subjective value judgements based on personal morality — the unequal and commercially-oriented (as opposed to family-oriented) way in which Bill redistributes his assets not only leads to the finding of substantive unfairness, but the implicit conclusion that Bill neglected both his parental and husbandly duties by bequeathing his primary business assets to a nephew equipped with both business acumen and experience, rather than his daughters who possessed neither.

The extent to which *Bridgewater* is based on this lack of respect for the separation between law and morality is particularly evident in the fact that it is difficult to find any discussion of *Bridgewater*, even by the most learned commentators, which does not include some kind of moral disapprobation for Bill with descriptions ranging from 'unattractive'[42] to sexist[43] — an indication of just how much the case was founded on nebulous concepts of personal morality and subjective value

---

41 William H Rehnquist, 'The Notion of a Living Constitution' (1976) 54 *Texas Law Review* 693, 704.

42 Even Wilson in an otherwise excellent article which disapproves of the reduction of the general concept of 'unconsionability' to nothing more than nebulous notions of personal morality, makes a Freudian slip when he describes Bill York as 'fairly unattractive': Peter Wilson, 'Unconscionability and Fairness in Australian Equitable Jurisprudence' (2004) 11 *Australian Property Law Journal* 1, 16.

43 Mooney cannot resist giving an airing to Bill's outdated views on gender equality — that the correct place for his wife and four daughters was 'in the home, not on the land or engaged in business affairs': Ralph James Mooney, 'Hands Across the Water: The Continuing Convergence of American and Australian Contract Law' (2000) 23 *University of New South Wales Law Journal* 1, 35. Whilst there can be no doubt that Bill's *personal* attitudes towards the opposite gender are to put it politely, not consonant with community values, this should have been of no relevance to the legal reasoning and outcome of a commercial case situated in the law of contract. It would be deeply unsettling if legal judgments, particularly in a commercial context, were influenced in any way by the judiciary's subjective value judgement of a commercial party's personal and privately-held, political-moral beliefs on matters such as gender equity — no matter how repugnant or distasteful the judiciary finds them to be on a personal level.

judgements, rather than the proper, rigorous application of well-established legal principles and tests.

It is certainly arguable that *Bridgewater* was influenced by family values.[44] However, the promulgation of such personal moral values is properly the function of society through vehicles such as religion, education and family — not legal doctrine enforceable through the courts. In any event, as a matter of policy, if the promulgation of such values is to be contemplated by the law then their influence should be nakedly and openly acknowledged, not hidden behind the convenient facade of legal respectability and objectivity provided by the doctrine of unconscionable dealing. Indeed, it would be wise to keep in mind the observation of the learned trial judge, de Jersey J, 'that this is not a "testator's family maintenance" application',[45] and although '[t]here is no doubt … that in view of the size of his estate, Bill could have treated Stella and his daughters more generously. That he did not do so is consistent, however, with the fairly ungenerous way he treated them throughout his life.'[46]

The majority in *Bridgewater*, and some academic commentators, seem to find Bill's supposed failure to make adequate provision for his wife and daughters morally distasteful.[47] Apart from being an entirely illegitimate and inappropriate ground on which to base a decision in law, there is (somewhat ironically given the majority's implicit disapproval of other aspects of such notions in their judgment) more than a hint of old school chauvinistic chivalry about the decision, as the majority impliedly approves of some rather old fashioned notions of a gentleman's patriarchal duties to wife and child.

---

44 Tina Cockburn, 'The Boundaries of Unconscionability and Equitable Intervention: *Bridgewater v Leahy* in the High Court' (2000) 8 *Australian Property Law Journal* 143, 144 fn 4, '[t]he majority noted at [82] that it may have been a more prudent course to have stood over the *family* provision application until the status of the will, transfers and deed had been determined. Similarly Gleeson CJ and Callinan J noted at [24] that they "did not know why the applications under the Succession Act were not diligently pursued"' (emphasis added); Burns, above n 5, 355–6: see discussion of the archetypal case of elders transferring property to relatives working in the 'family business'.

45 *Bridgewater v Leahy* (Unreported, Supreme Court of Queensland, de Jersey J, 23 August 1995) 12.

46 Ibid.

47 Wilson, above n 42, 16; Mooney, above n 43, 35. There is a tone of implicit disapproval in the majority's narrative of Bill's relationship with his daughters and in particular the emphasis on certain disparaging remarks made in relation to their choice of husband and occupation as well as their business ability and work ethic: *Bridgewater* (1998) 194 CLR 457, 489. This tone of disapproval is even more evident in the majority's choice of quotation from the primary judge to describe Bill's treatment of his wife and daughters and in particular his (unwarranted) frugality and outdated chauvinistic attitudes: *Bridgewater* (1998) 194 CLR 457, 492.

IV THE MOST RECENT EMPIRICAL EVIDENCE ON THE DISTINCTION BETWEEN SUBSTANTIVE AND PROCEDURAL UNFAIRNESS

Unlike the High Court in *Bridgewater*, the Supreme Court of New South Wales in *Xu v Lin*[48] does not appear to regard 'substantive unfairness' as being even a persuasive evidentiary factor in proving 'procedural unfairness', much less a formal element of the doctrine which is sufficient, in and of itself, to determine that legally 'unfair' advantage was taken. Despite reproducing[49] the quote from *Bridgewater* that 'seriously inadequate consideration'[50] is a factor in unconscionability, Barrett J does not accord much, if any, importance to the presence of even blatant 'substantive unfairness' on the facts, and holds that inadequacy of consideration, no matter how serious, is not a sound basis for intervention under the equitable doctrine.[51]

If anything, the degree of the 'substantive unfairness' in *Xu* was far greater than that in *Bridgewater*. In *Xu* the putative victim-client transferred his main financial asset[52] and place of residence,[53] to a prostitute he frequented at substantial undervalue,[54] in return for nothing more than the vague hope of future matrimonial bliss[55] in a transaction which was entirely bereft of any 'commercial purpose'.[56] Whereas in *Bridgewater*, although the disputed business (as opposed to purely personal) assets[57] were also transferred at 'substantial undervalue',[58] there could be no doubt that there was a clear commercial purpose to the transaction,[59] as there

48 *Xu* (2005) 12 BPR 23 131.

49 Ibid 23 139 (Barrett J).

50 *Bridgewater* (1998) 194 CLR 457, 484 (Gaudron, Gummow and Kirby JJ).

51 *Xu* (2005) 12 BPR 23 131, 23 139 (Barrett J).

52 Ibid 23 133 (Barrett J).

53 Ibid.

54 At between $145 000–$200 000 undervalue: ibid 23 135 (Barrett J). The client-plaintiff even paid the deposit for the prostitute-defendant *and* paid her rent when he continued to reside there: at 23 133, 23 135 (Barrett J).

55 Ibid 23 132 (Barrett J).

56 UCC § 2-302 (2001).

57 Ownership of the firm and pastoral land: *Bridgewater* (1998) 194 CLR 457, 463 (Gleeson CJ and Callinan J).

58 Ibid.

59 Maintenance of the firm as an integrated farming enterprise: *Bridgewater* (1998) 194 CLR 457, 492 (Gaudron, Gummow and Kirby JJ). This is crucial from the perspective of neoclassical economics as it enables the firm to reap the benefits of economies of scale which are vital to the profitability of a modern commercial farming enterprise: see, eg, Australian Government, Rural Industries Research & Development Corporation, *RIRDC Short Report No 7: Financial Performance of Broadacre Agriculture* (1997) <http://www.rirdc.gov.au/pub/shortreps/sr7.html>; National Competition Council Community Information, *Securing the Future of Australian Agriculture: An Overview* (2000) <http://www.ncc.gov.au/pdf/CIComAg-001.pdf>; Warren Truss, Federal Minister for Agriculture, Fisheries and Forestry, 'Address to Members of the International Federation of Agricultural Journalists'

was a commercial benefit accruing to the transferor[60] and the transferee had contributed substantially to the value and profitability of the firm.[61]

It is certainly arguable then that the 'outcome' of the disputed transaction in *Xu* was more 'grossly improvident'[62] than that in *Bridgewater*, yet it was the latter, and not the former which was overturned on the grounds of 'substantive unfairness'. Such an inconsistent result suggests that one of the two cases has interpreted or formulated the law incorrectly, and this article respectfully submits that it was *Bridgewater* which erred by applying a legal definition of 'unconscionability' which incorrectly raised 'substantive unfairness' to the level of a formal element of the doctrine, sufficient in and of itself to prove 'unfairness' in law.

Xu on the other hand correctly recognised that procedural, not substantive, unfairness lies at the core of the legal meaning of 'unfairness' for the purposes of the doctrine of unconscionable dealing.[63] The prostitute-defendant receiving the house was not guilty of any procedural unfairness — no unfair tactics of any description[64] were used by her in the bargaining process as she made no threats of any kind.[65] In fact, the entire transaction was 'engineered' by the putative victim-client with a view to winning the affections of the prostitute.[66]

Thus, although the disputed transaction in *Xu* was more 'grossly improvident' than that in *Bridgewater*, the Supreme Court of New South Wales opted quite rightly not to intervene on the grounds that mere substantive unfairness on its own is not sufficient to show 'unfairness' for the purposes of the doctrine.

(Speech delivered at the The Great Hall, Parliament House, Canberra, Monday 11 September 2000).

60 Ibid: the continued commercial viability and profitability of the farming business he had spent a lifetime building.

61 *Bridgewater* (1998) 194 CLR 457, 463, 483 (Gaudron, Gummow and Kirby JJ): Neil was a partner in the business and a vital employee who had not only worked for the business since he left school but was the 'day to day manag[er]' and responsible for 'preparing the books'.

62 *Bridgewater* (1998) 194 CLR 457, 493 (Gaudron, Gummow and Kirby JJ).

63 Above n 27.

64 *Xu* (2005) 12 BPR 23 131, 23 134–6, 23 138–9, 23 140 (Barrett J) (although this last pinpoint reference deals specifically with the *Contracts Review Act 1980* (NSW), it is clear that the Court reaches the same conclusion with regards to the equitable doctrine).

65 Ibid 23 136 (Barrett J).

66 Ibid 23 139 (Barrett J).

A *The Doctrine of Consideration and Neoclassical Freedom of Contract*

The absence of procedural unfairness in *Xu* meant that the transfer was the product of a genuinely 'free'[67] and 'deliberate'[68] decision of the putative victim.

Xu, by correctly requiring the mere presence of some 'valuable consideration'[69] rather than examining the adequacy of that consideration, adheres to the fundamental axiom of the doctrine of consideration so blithely ignored by *Bridgewater* — that consideration need only be of some value, not equal value.[70]

Neoclassical ideals appear to lie at the heart of *Xu*'s emphasis on the 'deliberate nature'[71] of the putative victim's decision and his 'ent[rance] into the transaction of his free will'.[72] *Xu* appeared to accord great importance to the neoclassical axioms advocated by this article — individual autonomy, rationality, liberty and the freedom and sanctity of contract. Evidence of this can be found in the approving quotation[73] of Salmond J's justifiably famous passage in *Brusewitz v Brown*[74] — one of the classic statements of the neoclassical ideal of freedom of contract in the common law:

> The law in general leaves every man at liberty to make such bargains as he pleases, and to dispose of his own property as he chooses. However improvident, unreasonable, or unjust such bargains or dispositions may be, they are binding on every party to them unless he can prove affirmatively the existence of one of the recognised invalidating circumstances.[75]

As the review of post-*Bridgewater* unconscionable dealing decisions conducted above in Part III and below in Parts V(D) and VI(B) show, Australian courts, like their American counterparts,[76] are moving back towards a neoclassical approach to the general law of contract. To paraphrase the title of Atiyah's famous book, one could characterise the empirical trend documented in this article as one of the rise, fall and redemption of freedom of contract — at least in the context of the general law.

---

67 Ibid 23 138 (Barrett J).
68 Ibid 23 136 (Barrett J).
69 Ibid 23 138 (Barrett J).
70 See, eg, *Ipex Software Services Pty Ltd v Hosking* [2000] VSCA 239 (Unreported, Callaway, Batt JJA and Eames AJA, 15 December 2000); *Beaton v McDivitt* (1987) 13 NSWLR 162.
71 *Xu* (2005) 12 BPR 23 131, 23 136 (Barrett J).
72 Ibid 23 138 (Barrett J).
73 Ibid 23 139 (Barrett J).
74 [1923] NZLR 1106.
75 Ibid 1109.
76 See generally Mooney, above n 43, 35.

B *A Brief Overview of Empirical Trends in Statutory Unconscionability*

The empirical trend in the statutory context is less clear as the courts have adopted a different interpretation of 'unconscionability' for each of the three unconscionability provisions of the *Trade Practices Act 1974* (Cth) ('*TPA*') which apply in the context of 'in trade or commerce'.

The most relevant of these three provisions is s 51AC which is directed towards small business transactions as it applies only to supply and acquisition 'for the purpose of trade or commerce'[77] and does not cover supply or acquisition at a price in excess of $3 000 000.[78] It performs two broad protective functions in preventing 'small business suppliers' from acting unconscionably towards persons and protecting 'business consumers' from unconscionable conduct by persons. It is the only *TPA* unconscionability provision which extends to cover financial services.[79] The definition of 'unconscionability' adopted by *TPA* s 51AC(3)–(4) is wider than equity and in interpreting those sub-sections, the courts have adopted the dictionary meaning[80] in emphasising that s 51AC unconscionability is:

> not limited to the cases of equitable or unwritten law unconscionability the subject of s 51AA. The principal pointer to an enlarged notion of unconscionability in s 51AC lies in the factors to which subs (3) permits the Court to have regard. Some of them describe conduct that goes beyond what would constitute unconscionability in equity.[81]

This broad interpretation is made particularly clear by Sundberg J's remark that '[w]hether conduct is unconscionable for the purpose of s 51AC is *at large*'.[82]

---

77 *TPA* s 51AC(7)–(9).

78 *TPA* s 51AC(10).

79 Because *TPA* ss 51AA and 51AB do not apply to 'financial services' by virtue of *TPA* s 51AAB.

80 '[T]he term ["unconscionable"] carries the meaning given by the *Shorter Oxford English Dictionary*, namely, actions showing no regard for conscience, or that are irreconcilable with what is right or reasonable': *Hurley v McDonald's Australia Ltd* [1999] FCA 1728 (Unreported, Heerey, Drummond and Emmett JJ, 17 December 1999) [22] (Heerey, Drummond and Emmett JJ), citing *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246, 262 (Davies J). This well-known quote was recently approved in *Boral Formwork & Scaffolding Pty Ltd v Action Makers Ltd* [2003] NSWSC 713 (Unreported, Austin J, 6 August 2003) [88]. See also *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] FCA 903 (Unreported, Finkelstein J, 2 July 1999) [46]: 'I take as the measure of unconscionability, conduct that might be described as unfair'.

81 *Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* (2000) 104 FCR 253, 265 (Sundberg J).

82 Ibid 267 (Sundberg J) (emphasis added).

Section 51AB is directed towards consumer goods type transactions because it only applies to goods or services 'of a kind *ordinarily* acquired for personal, domestic or household use or consumption'[83] and does not apply to goods for use in trade or commerce.[84] Further, the goods must be acquired *for consumption* because 'the supply or possible supply of goods for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce' is excluded from the operation of s 51AB.[85]

The impugned transaction must occur 'in trade or commerce',[86] although 'financial services' are specifically excluded.[87] Similarly to s 51AC, the definition of 'unconscionability' adopted by s 51AB(2) is wider than equity and in interpreting those sub-sections, the courts have adopted the ordinary *Shorter Oxford English Dictionary* meaning of 'showing no regard for conscience; irreconcilable with what is right or reasonable'[88] in emphasising that s 51AB 'unconscionability' is 'not a term of art'[89] and its meaning 'is not limited to traditional equitable or common law notions of unconscionability'.[90]

Section 51AA is a 'mop-up' section as it 'does not apply to conduct that is prohibited by section 51AB or 51AC'.[91] In practice it is applied to 'big business' type transactions where for example, publicly listed companies are involved and the transaction is priced at greater than $3 000 000. Similarly to s 51AB, it 'does not apply to conduct engaged in in relation to financial services'.[92] Since it only prohibits 'conduct that is unconscionable within the meaning of the *unwritten law*, from time to time, of the States and Territories',[93] the definition of 'unconscionability' adopted is not wider than equity.

---

83 *TPA* s 51AB(5) (emphasis added).

84 *TPA* s 51AB(6).

85 *TPA* s 51AB(6).

86 *TPA* s 51AB(1).

87 *TPA* s 51AAB(2). Note, however, *Australian Securities and Investments Commission Act 2001* (Cth) s 12CB.

88 *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* (2002) 117 FCR 301, 316 (Gray, French and Stone JJ) ('*Samton*'), quoted approvingly in *Australian Competition and Consumer Commission v Lux Pty Ltd* [2004] FCA 926 (Unreported, R D Nicholson J, 16 July 2004) [98].

89 *Samton* (2002) 117 FCR 301, 316 (Gray, French and Stone JJ); *Australian Competition and Consumer Commission v Lux Pty Ltd* [2004] FCA 926 (Unreported, R D Nicholson J, 16 July 2004) [98].

90 *Australian Competition and Consumer Commission v Lux Pty Ltd* [2004] FCA 926 (Unreported, R D Nicholson J, 16 July 2004) [98], citing *Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* (2000) 104 FCR 253, 265 (Sundberg J).

91 *TPA* s 51AA(2).

92 *TPA* s 51AAB(1).

93 *TPA* s 51AA(1).

In contrast to the judicial definitions of 'unconscionability' for ss 51AB and 51AC, the broad, 'at large' dictionary meaning of unconscionability was rejected for s 51AA as the Federal Court in *Samton* made it clear that a specific equitable doctrine needed to be satisfied.[94] Indeed, the only legal ambiguity was whether s 51AA was limited to just the equitable doctrine of unconscionable dealing or extended to *any* specific equitable doctrine.[95] The Court decided in favour of the latter interpretation.[96]

However, it may be argued that the later Supreme Court of New South Wales decision of *Boral Formwork & Scaffolding Pty Ltd v Action Makers Ltd* [97] casts some doubt on this approach as Austin J made no attempt to place the case into any specific equitable doctrine of unconscionability in holding that the mere making of a call on a letter of credit for an amount greater than that actually due, was unconscionable. In other words, it was unconscionable for the defendant to claim money which they knew they had no entitlement to. In adopting this seemingly broad approach, Austin J relied heavily on the Victorian case of *Olex Focas Pty Ltd v Skodaexport Co Ltd*.[98]

It is argued that both these cases are distinguishable and do not represent the correct legal interpretation of 'unconscionability' for the purposes of s 51AA. First, anything said in *Boral* about the meaning of s 51AA 'unconscionability' must be regarded as dicta because the case was decided on the basis of s 51AC unconscionability,[99] and moreover, ss 51AA and 51AC are mutually exclusive as *TPA* s 51AA(2) makes it clear that s 51AA 'does not apply to conduct that is prohibited by section 51AB or 51AC'. Secondly, *Olex*, a decision of a single judge in the Supreme Court of Victoria was cited dismissively by three judges of the Federal Court in *Sampton*.[100] Thirdly, the unanimous decision of the Full Court of the High Court in *Tanwar Enterprises Pty Ltd v Cauchi*[101] (although admittedly in a very different legal and factual context) suggests that the current High Court prefers a specific mediating doctrine rather than an 'at large' meaning of unconscionability.[102]

---

94 *Samton* (2002) 117 FCR 301, 318 (Gray, French and Stone JJ), provides a non-exhaustive list of specific equitable doctrines which may be utilised 'under the rubric of unconscionable conduct'.

95 Ibid 318–19 (Gray, French and Stone JJ).

96 Ibid.

97 [2003] NSWSC 713 (Unreported, Austin J, 6 August 2003) ('*Boral*').

98 [1998] 3 VR 380 ('*Olex*').

99 *Boral* [2003] NSWSC 713 (Unreported, Austin J, 6 August 2003).

100 *Samton* (2002) 117 FCR 301, 319 (Gray, French and Stone JJ).

101 (2003) 217 CLR 315.

102 See also *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 245 (Gummow and Hayne JJ): 'the notion of unconscionable behaviour does not operate wholly at large'.

In conclusion, it is clear that in contrast to the general law, the overall tenor of *TPA* unconscionability decisions favours a broad approach towards unconscionability which may run counter to neoclassical freedom of contract. When faced with an interpretative choice the courts have systematically favoured the broader approach on offer. In the context of ss 51AB and 51AC, the courts opted for an 'at large', ordinary dictionary meaning of 'unconscionability' which is wider than equity, rather than a narrow interpretation limited to equitable doctrines incorporating unconscionability. In the context of s 51AA, the courts opted for a relatively broad definition of 'unconscionability' which included all equitable doctrines incorporating unconscionability, rather than a narrow interpretation limited to only the equitable doctrine of unconscionable dealing.

V A RESPONSE TO ATIYAH

Atiyah makes two arguments to justify the presence of 'substantive unfairness' as an element in unconscionability and it will be necessary to respond to each of these in turn.

A *Atiyah's Normative Argument*

First, Atiyah mounts a normative argument that it is acceptable for 'contract law to attempt some modest element of redistribution',[103] meaning that substantive unfairness could be considered a valid element of the doctrine of unconscionable dealing.

Atiyah's argument starts from the premise that everyone agrees that there exist 'neutral and objective principles of fairness'.[104] He then reasons that by definition such principles are equally ascertainable by all. Hence, there can be no reason for distinguishing between the judiciary and the legislature as the appropriate site for the redistributive function since both must be equally capable of ascertaining these objective principles. Atiyah's argument is aimed at the 'democratic mandate' argument often employed by neoclassicists to argue that any redistribution of the allocation of income and wealth, if it is to take place at all, ought to be undertaken by an elected legislature.[105] However, Atiyah's argument never addresses the substance of the original neoclassical 'democratic mandate' argument.

If one rejects its premise, the entire argument falls. We turn then to the premise of Atiyah's argument. First, it can be argued that the premise is inextricably linked to the English socio-political context in which it was made and is not necessarily applicable to this jurisdiction. Secondly, if one accords any weight at all to the basic

---

103 Atiyah, *Essays on Contract*, above n 39, 132.

104 Ibid 136.

105 See above Part III(B).

postmodernist critique[106] that decision-makers are not impartial, and principles, rather than being 'neutral and objective' are 'partial and subjective', then surely Parliament is the lesser of two evils and the preferred forum. The reason for this is that any redistributive policy formulated by subjective decision-makers would at least be exposed to extensive technical and professional analysis, not to mention vigorous debate and ideological criticism, both inside and outside Parliament.[107] This would tend to minimise the inherent 'subjectivity' of any principles devised, as they would at least be a compromise between competing interests and beliefs. Such a parliamentary process would be eminently preferable to a redistributive function left entirely to the discretion of the judiciary, who are clearly subject to less external constraints on their decision-making, thus broadening the scope for the proliferation of irrational and 'subjective' principles of 'fairness'.

Therefore, Atiyah's argument really stands and falls on the premise, namely the universal consensus as to the existence of 'objective' principles. In Australia, it is doubtful whether such a premise would be accepted at all, much less with the near unanimity apparently required by Atiyah's argument, given the prevalence of postmodernist critiques in this area of the law.[108] As a matter of formal logic, whilst Atiyah's argument may well still be *valid*, it is certainly not *sound* in the Australian socio-political context because there are many who would contest the truth of its premise.[109] In summary then, Atiyah reasons from an unsubstantiated premise to an unwarranted conclusion.

For this article's argument to succeed, a neoclassicist does not have to embrace postmodernist critiques regarding the existence of 'neutral and objective principles of fairness' as valid, and this article does not express any opinion either way in this 'hotly disputed question of political theory'.[110] It merely uses the existence and influential status of such critiques as empirical evidence for the proposition that there are *some* who reject the argument that there is a way to identify 'neutral and objective principles of fairness' — that is all that is required to falsify the premise of Atiyah's argument that in general *everyone* would agree that there are some 'neutral and objective principles of fairness'.[111] Even a moderate degree of disagreement is all that is required to demonstrate that Atiyah's absolute proposition is false.

---

106 See, eg, Lisa Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*' (1994) 19 *Melbourne University Law Review* 701.

107 Evans, above n 36, 215–17.

108 See, eg, Sarmas, above n 106; Justice Peter Heerey, 'Truth, Lies and Stereotype: Stories of Mary and Louis' (1996) 3 *Newcastle Law Review* 1.

109 On the distinction between soundness and validity in formal logic: see generally A C Grayling, *An Introduction to Philosophical Logic* (1997); Richard Mark Sainsbury, *Logical Forms: An Introduction to Philosophical Logic* (2001).

110 Atiyah, *Essays on Contract*, above n 39, 136.

111 Ibid.

Atiyah's argument — that if you believe in the possibility of 'neutral and objective' principles, then it must be the case that such principles could be just as impartially applied by the courts as by Parliament — attempts to use the neoclassicist's faith in 'objective' legal principles against them. My response is that the correct comparison is relative, not absolute.[112] For the neoclassicist's faith to be justified, legal principles and precedent do not have to be *perfectly* objective — just more objective than the alternative, which is an unfettered judicial discretion. Thus, the neoclassical belief that legal principle and reasoning is *more* objective than unfettered judicial discretion does not necessarily imply that there is such a thing as a perfectly 'neutral' or objectively fair 'public interest' which courts can easily ascertain and impartially apply.

B *Atiyah's Positive Argument*

Atiyah makes the positive argument that by overriding freedom of contract, the doctrine of unconscionability is already redistributive anyhow[113] and hence adding the redistributive element of 'substantive unfairness' would make no appreciable difference.[114]

This argument is based on the existence and enforceability of executory contracts. Atiyah argues that such contracts endow the promisee with a 'property-like entitlement … to the benefit of the promisee'[115] which is an 'additional advantage'[116] not justifiable by mere reference to Lockean natural law.[117]

The neoclassical response to Atiyah's argument is simple: the legal entitlement is the upshot of an antecedent voluntary decision to trade. Atiyah would of course then say that first choices are not determinative and '[p]eople can and do change their minds'.[118] However, this is a somewhat puzzling argument because a contract requires as elements of its formation both the intention to create legal relations and certainty of essential terms. These requirements are surely an indication that the voluntary decision to trade manifested in the legally binding contract is the product of sound deliberation and careful calculation — that is precisely why contract law does not allow parties to subsequently change their minds once they have entered into a contract.

---

112 This relative comparator also applies to the earlier argument: just as legal principle is eminently preferable to unfettered judicial discretion, Parliament is preferred to the courts as the site where redistributive decisions ought to be made because it is *relatively* more objective.

113 Atiyah, *Essays on Contract*, above n 39, 132–3.

114 Ibid.

115 Ibid 133.

116 Ibid 134.

117 Ibid.

118 Ibid 133.

Moreover, it is unclear what exactly Atiyah is attempting to argue when he emphasises time and time again that '[p]eople can and do change their minds'.[119] The confusion stems from the choice of time at which the law draws the line and says that an agent's rational calculation of self-interest and consequent decision to enter into a contract is thereafter legally binding and enforceable. Atiyah seems to be saying that trading parties should be allowed to recalculate their self-interest continually, until presumably the contract is actually performed, thus rendering the contract executed rather than executory. However if that be the case, then radical changes would have to be made to the law of formation of contracts as we know it. As the law currently stands, the relevant time for the agent's calculation of self-interest is at the time the executory contract was made (as opposed to when it is due to be performed). In the absence of the provision of any compelling reason by Atiyah for such a radical change, it is difficult to see why it should be adopted, particularly when one considers that the operation of global financial markets is based on the legal enforceability of such executory contracts.[120]

C *Atiyah and the Distinction between Procedural and Substantive Unfairness*

Atiyah attacks the distinction between procedural and substantive unfairness on the grounds that unfair tactics (procedural unfairness) usually produce unfair outcomes (substantive unfairness).[121] The neoclassical response is that the converse is not necessarily true. The existence of a one-sided contract does not always mean that unfair tactics were used to obtain that outcome — this justifies the retention of 'procedural unfairness' as an element of the doctrine.

However, presuming for the moment, that we accept Atiyah's assumption that unfair tactics produce unfair outcomes, it is hard to understand why we then need to be worried about 'substantive unfairness' at all, since by his own admission, in the vast majority of contracts, unfair tactics mean that there was also an unfair result (substantive unfairness).[122] Therefore, by simply targeting procedural unfairness, we can catch most, if not all, instances of substantive unfairness with the same net, thereby eliminating any need for substantive unfairness to form an element of the doctrine.[123]

Now, this article is not for one moment accepting Atiyah's argument that substantive unfairness ought to be a relevant consideration, it is merely pointing out

---

119 Ibid.

120 For example, short-selling, options, derivatives, forward contracting and innumerable other transactions which underpin financial markets depend on executory contracts.

121 Atiyah, *Essays on Contract*, above n 39, 333.

122 Ibid.

123 On the other hand, it could be argued that substantive unfairness is needed for the admittedly very few cases in which there is no procedural unfairness: M P Ellinghaus, 'In Defense of Unconscionability' (1969) 78 *Yale Law Journal* 757, 778.

that logically, as a consequence of his own bold statement that procedural unfairness nearly always implies substantive unfairness,[124] then if one does wish to intervene in cases of substantive unfairness, it is not actually necessary to have a doctrine which intervenes on the basis of substantive unfairness. To use a somewhat crude fishing metaphor: regardless of which size net is used, we will still catch the set of fish we are aiming for. Therefore Atiyah's bold assertion, if accepted as true, actually forms the basis for an argument that substantive unfairness should not be a formal element of the doctrine of unconscionable dealing.

D *The Neoclassical Justification for the Retention of Procedural Unfairness*

Procedural unfairness, by regulating the bargaining process through which agreements are made, actually protects freedom of contract by 'ensur[ing] that an apparent agreement is the product of a genuine exercise of freedom'.[125] Thus, if unfair tactics are practised by one party to the transaction, then the other party is not genuinely free to trade and freedom of contract is violated. Further, if procedural unfairness exists, then the fundamental presumption underpinning neoclassicism, that the market trader is a free and autonomous individual, is conclusively rebutted. Therefore, the enforcement of procedural unfairness is not only entirely consistent with, but essential to, a neoclassical approach to the law of contracts. This provides a strong normative justification for its retention as an element of the doctrine of unconscionable dealing.

The enforcement of 'substantive unfairness' on the other hand, has a deleterious effect on freedom of contract because it restricts the legitimate exercise of an individual's freedom to enter into agreements as he or she chooses, on the nebulous moral grounds of distributional inequality. Thus, neoclassicists argue that it should not be an element of the doctrine.

VI THE ELEMENT OF SPECIAL DISABILITY IN THE DOCTRINE OF UNCONSCIONABLE DEALING AND THE TEST OF IMPAIRED JUDGEMENT

A *The Failure to Apply the Test of Impaired Judgement in* Bridgewater

Proponents of *Bridgewater* tend to emphasise the emotional elements of the Bill-Neil relationship to the exclusion of the perfectly valid commercial dimension[126] as

---

124 Ibid.

125 Malcolm Cope, *Duress, Undue Influence and Unconscientious Bargains* (1985) [320], citing Christopher Carr, 'Notes of Cases: Inequality of Bargaining Power' (1975) 38 *Modern Law Review* 463, 466.

126 See, eg, Mooney, above n 43, 35: notice how Mooney only informs us that Neil was the son Bill had always wanted, but never had, whilst omitting to mention Neil's commercial role and importance to the enterprise. By doing so, Mooney avoids mention of any legitimate commercial motive and purpose to the transaction, because

even a cursory examination of the latter would require the acknowledgment of the existence of a legitimate commercial purpose to the transaction, making it unlikely that the impaired judgement test would be satisfied. As a matter of common sense, if a transaction was de facto in each party's commercial interests, then it would not be unreasonable to infer that each party was capable of judging whether the transaction was in their own best interests.[127] Indeed, the learned trial judge explained that 'the will did reflect, in a *rational* way, Bill's wish to achieve the goal, probably very important to him, of retaining the properties as an integrated farming enterprise'[128] and emphasised the 'rational' nature of the impugned transaction (from Bill's point of view), no less than five times in his judgment.

It will be rare indeed that an alleged victim of unconscionable dealing was both perfectly competent and fully informed, and yet unable to make any judgement as to what is in his or her best interests. The consequent absurdity of the erroneous majority decision to that effect in *Bridgewater*, where Bill was not only of 'sound mind'[129] and fully informed, but an experienced farmer who was an enthusiastic participant in the commercial transaction which accorded with his express personal and business desires,[130] is best conveyed by Cockburn's remark that '[a]ccording to the majority in *Bridgewater* … the fact that a person is perfectly competent to make informed dispositions of his or her property, does not prevent a court from finding … a special disability'.[131]

The mere fact that as a businessperson, Bill remained entirely capable of ascertaining, and actually pursued the most commercially sound course of action available to him, would seem to merit the inference that his judgement was not impaired as he was not only perfectly capable of making *a* judgement as to what was in his own best commercial interests, but actually pursued that course. Even supporters of *Bridgewater* explicitly acknowledge that the disputed transaction voluntarily entered into by Bill was the only way to maintain the 'economic viability'[132] of the private enterprise. Therefore, it could be argued that if he had *not* entered into the disputed transaction there would have been grounds to infer that his judgement was impaired**,** as the selection of a course of action which could not lead

---

to do so would make it prima facie unlikely that the impaired judgement test for 'special disability' is satisfied.

127 Unsurprisingly, when the minority, citing the well-established authority provided by Mason and Deane JJ in *Amadio* (1983) 151 CLR 447, properly apply the legal test of impaired judgement they reach the conclusion that there was no 'special disability': *Bridgewater* (1998) 194 CLR 457, 470 fn 37 (Gleeson CJ and Callinan J).

128 *Bridgewater v Leahy* (Unreported, Supreme Court of Queensland, de Jersey J, 23 August 1995) 12 (emphasis added).

129 *Bridgewater* (1998) 194 CLR 457, 465 (Gleeson CJ and Callinan J).

130 Above n 59; see below fn 135–46.

131 Cockburn, above n 44, 146–7.

132 Burns, above n 5, 341.

to an economically viable outcome would seem to indicate that an individual agent is incapable of making a judgement as to what is in his own best interests.

In fact, Bill's decision was clearly in his own, and the firm's, best commercial interests as it effectively secured the future commercial viability and profitability of the firm as an integrated farming enterprise able to reap the benefits of economies of scale.[133] The relevant question in law (according to the test of impaired judgement) and, incidentally, the appropriate question in economic theory, is whether the individual agent is capable of making a judgement whether the transaction is in his own best (commercial) interests, not the (moral) interests of third party family members.

Needless to say, this article argues that if the well-established and well-defined test of impaired judgement had actually been utilised in *Bridgewater* as it should have been, then there would have been no finding of 'special disability' because it could not be plausibly argued that Bill was rendered incapable of making a judgement as to what was in his own best interests. This is a view apparently shared by the learned trial judge who, after a thorough examination of the evidence before him, had no difficulty in quickly disposing of the unconscionable dealing claim with the remark that 'I do not regard Bill as having been in a position of "special disability" vis-à-vis Neil, in July, 1988, and so that doctrine does not apply.'[134]

Even if one accepts the argument that the father-son type relationship made Bill emotionally dependent upon Neil, it could hardly be argued that Bill was rendered incapable of making a judgement as to what was in his own best interests as it was not disputed that he 'was of sound mind and capable of making decisions about his personal affairs'[135] and moreover, was even able to articulate a coherent commercial purpose to the disputed transaction consistent with sound economic principles.[136]

Further, where it is possible to identify a clear commercial purpose to the transaction for both parties, then courts ought to be more willing to find that each party was capable of making a judgement as to what was in their own best interests. In *Bridgewater*, an economic analysis could enumerate a number of legitimate commercial purposes to the transaction, including but not limited to: Lockean labour theory,[137] information economics[138] and economies of scale.[139]

---

133 Above n 59.

134 *Bridgewater v Leahy* (Unreported, Supreme Court of Queensland, de Jersey J, 23 August 1995) 25.

135 *Bridgewater* (1998) 194 CLR 457, 465 (Gleeson CJ and Callinan J).

136 Ibid 492 (Gaudron, Gummow and Kirby JJ): 'retaining the properties as an integrated farming enterprise under reliable and experienced management.'

137 Bill himself appears to employ the classic Lockean rationale for bequeathing the primary business assets to Neil. Basically, this amounts to the argument that Neil is entitled to the fruits of his labours: see ibid 489 (Gaudron, Gummow and Kirby JJ):

At the most basic level of common sense, it is hard to see how an individual businessperson's rational desire to see ownership of the firm and key business assets (pastoral land together with interests in livestock and machinery)[140] transferred to competent, reliable and experienced management, could be characterised as anything other than a legitimate commercial purpose.

The minority in *Bridgewater* correctly apply the test of impaired judgement and reach the same conclusion — that there was no special disability because Bill retained his 'independence of mind'[141] and 'capacity to exercise judgment'[142] and in entering into the transaction which he himself 'initiated',[143] he 'knew and understood what he was doing and … the transaction gave effect to his long standing and firmly held wishes'.[144] Unlike the majority, the minority correctly emphasised the primacy of the well-established legal test, noting that the 'nature of the relevant disadvantage concerns the ability of the weaker, or victimised, party, to make an informed judgment as to his or her best interests',[145] and described the impaired judgement test as the 'essence of the supposed disability'.[146]

B *The Neoclassical Justification for the Test of Impaired Judgement*

Neoclassicism is based on the premise that rational, self-interested economic agents are best placed to, and most capable of, judging what is in their own best interests. Therefore, it is only when they are rendered incapable of doing so that there is a role for the general law to intervene. The proper application of the test of impaired judgement is entirely consistent with neoclassical economic theory.

In this instance, the formal composition of the doctrine of unconscionable dealing in *Bridgewater* was not the source of the problem — it was the majority's abject

---

'Dealing with the reasons why Neil had been given the land, Bill said that Neil "has worked hard", that Neil had stuck with him "through thick and thin" and that he thought Neil was "entitled to it".'

138 In the presence of moral hazard (hidden action) employers need to provide incentives to induce workers to exert high effort and reward those who do so. It was not disputed that Neil was a loyal and productive worker — he had worked for the firm since leaving school and in addition to being a partner, he prepared the books and was the day-to-day manager. Therefore, not providing a commensurate reward such as ownership of the firm would act as a disincentive to high effort for employees leading to lower labour productivity.

139 Above n 59.

140 *Bridgewater* (1998) 194 CLR 457, 488 (Gaudron, Gummow and Kirby JJ).

141 Ibid 469 (Gleeson CJ and Callinan J).

142 Ibid.

143 Ibid 464 (Gleeson CJ and Callinan J).

144 Ibid 469 (Gleeson CJ and Callinan J).

145 Ibid 470 (Gleeson CJ and Callinan J).

146 Ibid 471 (Gleeson CJ and Callinan J).

failure to even consider, much less apply a well-established legal test which was a formal element of the doctrine.[147]

The majority's unwarranted ambivalence towards a legal test which was, and is, incontrovertibly an essential part of the doctrine of unconscionable dealing, is evident in their emphasis that the relevant question is not whether the putative victim knew what he or she was doing, but how the intention was produced.[148] This approach betrays a degree of misunderstanding of the largely discrete nature of two separate constitutional elements of the doctrine — whilst the latter proposition relates to 'unfairness', the former relates to 'special disability' and more specifically, impaired judgement.

Duggan has wryly observed that 'the [majority] judgment [in *Bridgewater*] could be read as inferring A's disadvantage from the "grossly improvident" nature of the transaction. If so, the case is an unusual one. Courts are generally reluctant to draw such inferences in the absence of additional supporting evidence.'[149] By the term 'grossly improvident', Duggan is referring to what this article has labelled 'substantive unfairness', that is, inequality in the final distribution of the proceeds of the transaction. One might add, *Bridgewater* is not just 'unusual' but confused, because the two-steps of a two-step analysis are collapsed into one — substantive unfairness is used to show special disability even though 'unfairness' and 'special disability' are two discrete elements of the doctrine of unconscionable dealing. The relationship between the two main elements of the doctrine, 'special disability' and 'knowingly taking unfair advantage' becomes a classic case of which comes first, the chicken or the egg?

Now it must be noted that (provided it is properly categorised under 'procedural unfairness') this article wholly approves of the proposition that the relevant question is *how* the intention was produced — the problem is that the majority in *Bridgewater* paid scant regard to their own proposition.[150] Instead of basing their decision on an examination of how the intention to transact was produced (ie procedural unfairness), the majority appeared more influenced by the distributional consequences which flowed from that intention (ie substantive unfairness).[151]

This article does, however, object to the validity of the majority's implicit proposition that the question whether the victim actually knew what she or he was

147 *Bridgewater* (1998) 194 CLR 457, 470 fn 37 (Gleeson CJ and Callinan J), citing *Amadio* (1983) 151 CLR 447, 462 (Mason J), 476–7 (Deane J). See also *Blomley v Ryan* (1956) 99 CLR 362, 392 (McTiernan J).

148 *Bridgewater* (1998) 194 CLR 457, 491 (Gaudron, Gummow and Kirby JJ).

149 Duggan, above n 27, [505] (emphasis added).

150 *Bridgewater* (1998) 194 CLR 457, 491 (Gaudron, Gummow and Kirby JJ).

151 See, eg, the majority's repeated references to the 'improviden[ce]' of the transaction: ibid 490, 492–3, and the 'very low consideration': at 485.

doing is entirely irrelevant to the doctrine of unconscionable dealing.[152] Whilst it is correct to say that the question is wholly irrelevant to the issue of 'unfairness', it is entirely relevant to the question whether the disability under which the putative victim laboured was of the 'special' kind necessary to invoke the doctrine — indeed it is the crux of the legal test of 'impaired judgement' used to determine whether the disability is 'special'. If the victim did not even know what they were doing then it is evident that they were rendered incapable of making any judgement as to what was in their own best interests and hence the test of 'impaired judgement' would be satisfied. A court would be justified in concluding that the disability is indeed of a 'special' nature which allows for the intervention of the equitable doctrine of unconscionable dealing in a commercial transaction since that transaction can no longer be properly described as 'freely agreed' or 'voluntarily negotiated'.

Finally, it is interesting to note that whether the knowledge required of the party taking unfair advantage is actual or constructive is an unresolved question of law which has already been the subject of extensive judicial and academic enquiry.[153] There are two broad arguments:

1. The leading majority judgment in *Amadio* unequivocally approves an objective test based on constructive knowledge.[154] Therefore, the weaker party must show that for a reasonable person in the stronger party's position, there was at least a possibility that the weaker party's entry into the transaction was compromised by their disadvantage, resulting in an inability to make a judgement in his or her own best interests.

2. Several cases indicate that in practice, a subjective test of actual knowledge seems to be favoured by intermediate appellate courts. Two cases which readily spring to mind are *Koh v Chan*[155] and *Australian Competition and Consumer Commission v Radio Rentals*.[156] Whilst in the latter, more recent case, Finn J admits to being bound by the majority in *Amadio*, his Honour still cites his own extra-curial writing advocating a subjective test of actual knowledge.[157]

---

152 *Bridgewater* (1998) 194 CLR 457, 490–1 (Gaudron, Gummow and Kirby JJ): the majority do not dispute that Bill was of sound mind and acted with a full understanding of what he was doing in bequeathing his primary business assets to his nephew, business partner, book-keeper and day-to-day manager, but nonetheless the majority finds in favour of Bill's widow and four daughters.

153 Burns, above n 5, 366–74; *Koh v Chan* (1997) 139 FLR 410, 456 (Murray J); *Australian Competition and Consumer Commission v Radio Rentals* [2005] FCA 1133 (Unreported, Finn J, 24 August 2005) [18]–[22].

154 (1983) 151 CLR 447, 467 (Mason J).

155 (1997) 139 FLR 410, 456 (Murray J).

156 [2005] FCA 1133 (Unreported, Finn J, 24 August 2005) [18]–[22] (Finn J).

157 P D Finn (ed), *Essays on Contract* (1987) 140–2.

This aspect of the doctrine of unconscionable dealing is beyond the scope of this article. However, it is relevant to the extent that if one fails to meet this threshold knowledge requirement (whether it be an objective or subjective test), then there is no need to consider the question of 'unfair advantage' at all. Thus, how high the knowledge threshold is set will affect the relevance and practical applicability of this article's doctrinal discussion of the element of 'unfair advantage' — the court may not even get to that stage if the knowledge threshold is set at a very high level. However, it is salient to note that Finn J's extra-curial support for a subjective test of actual knowledge and Burns' empirical observation that such a test is what is applied in practice by the lower courts may be construed as evidence of an increasingly greater reluctance to intrude in commercial transactions in a market economy. Actual knowledge creates a higher threshold, thereby making it more difficult for the law to interfere with commercial transactions.

C *Policy Considerations: Keeping Family Tragedies Out of Courts*

It is likely that a proper, consistent application of the test of impaired judgement will tend to lead to decisions which deny relief under the doctrine of unconscionable dealing. As a matter of policy, this would have the desirable effect of discouraging the kind of 'unfortunate'[158] and deleterious intra-family litigations so often pursued via the doctrine of unconscionable dealing and exemplified in recent cases such as *Bridgewater*, *Smith v Smith*[159] and *Turner v Windever*.[160] As Bryson JA observed in *Turner*, such cases are nothing short of 'family traged[ies]'.[161]

Clearly it is preferable that such disputes are settled by 'agreement'[162] and 'compromise',[163] rather than litigation. Naturally, the doctrinal arguments advanced — the utilisation of a well-defined legal test rather than resort to nebulous concepts of personal morality, and a more restrictive conception and interpretation of the doctrine in general[164] — may tend to facilitate the achievement of this public policy goal by reducing the probability of success in litigation and thereby encouraging the use of alternative means of dispute resolution such as negotiated settlement.

---

158 *Turner* [2005] ANZ ConvR 214, 218–19 (Giles JA).

159 (2004) 12 BPR 23 051.

160 *Turner* [2005] ANZ ConvR 214.

161 Ibid 222 (Bryson JA). Bryson JA laments that in such disputes, 'closely related persons litigate at length over family property and incur costs which are not well proportioned to the value of the property in dispute, so that there can be little for the winner to enjoy and disaster for the loser: the parties cannot afford their conflict and the prize is not worth the expense, or the injury to family relationships': at 222.

162 Ibid.

163 Ibid.

164 At minimum restoring 'substantive unfairness' to the level of a mere evidentiary rather than a legal factor and hence defining 'unfairness' in the doctrine of unconscionable dealing principally by reference to 'procedural unfairness'.

Ideally, the law should aim to channel such tragic disputes which 'sees families destroy their economic positions and well-being'[165] away from the courts into less adversarial and less costly means of dispute resolution. This article argues that the proposed doctrinal changes which reduce the probability of success in litigation would facilitate the attainment of this policy goal.

D *Empirical Review of Recent Cases Addressing the Test of Impaired Judgement*

1 *Pre-2003 Cases Canvassed in Burns'*[166] *Empirical Review*

Courts have continued to apply the test of impaired judgement in recent cases decided after *Bridgewater*, with the result that *Bridgewater* now stands out as an anomalous case which is inconsistent with the law as it is currently applied in practice.

Where there is evidence of 'mental capacity'[167] and 'intention to enter into the transaction',[168] it is unlikely that the test of impaired judgement will be satisfied. This prompted Burns to observe that '[i]t appears that the courts have assumed that evidence of mental capacity and an intention to enter into the transaction is an answer to a claim based on unconscionable dealing, whereas the majority of the High Court in *Bridgewater* has made it clear that it is not'.[169] If this test had been properly applied in *Bridgewater*, then the conclusion would have been that there was no 'special disability', and hence no equitable intervention in a freely and voluntarily agreed commercial transaction between autonomous, rational individual agents would have been warranted.[170]

Burns' observation, in relation to the determination of special disability in more recent cases, that '[c]ourts have not considered that persons who were very elderly, frail and suffering from some kind of illness or bereavement were necessarily suffering from a special disadvantage, if the elderly person demonstrated a clear intention to enter into the transaction',[171] highlights the anomalous character of *Bridgewater*. Bill was not suffering from illness or bereavement,[172] he demonstrated a clear intention to enter into the transaction,[173] and although Neil may have initiated it, Bill was an 'enthusias[tic]'[174] participant as the disputed transaction

165 *Turner* [2005] ANZ ConvR 214, 222 (Bryson JA).
166 Burns, above n 5.
167 Ibid 358.
168 Ibid.
169 Ibid.
170 This was exactly the approach taken, and the outcome reached by the minority in *Bridgewater* (1998) 194 CLR 457, 470–4 (Gleeson CJ and Callinan J).
171 Burns, above n 5, 358.
172 *Bridgewater* (1998) 194 CLR 457, 491 (Gaudron, Gummow and Kirby JJ).
173 Ibid 491–2 (Gaudron, Gummow and Kirby JJ).
174 Ibid 491 (Gaudron, Gummow and Kirby JJ).

gave effect to his 'long standing and firmly held wishes'[175] to keep the business as an integrated farming enterprise under reliable and experienced management.

Burns laments that in determining 'special disability', the lower courts have effectively ignored[176] the permissive approach to special disability adopted by the majority in *Bridgewater*, preferring to rely on the classic *Amadio* statement[177] of the test of impaired judgement[178] and to follow the rigorous application of that test demonstrated by the minority in *Bridgewater*.[179] But Burns, like the majority in *Bridgewater*, fails to even attempt to provide any coherent reason why such a permissive approach is warranted.

A telling indication of how little *Bridgewater*'s laissez-faire approach towards 'special disability' has been followed is that the only unequivocal support for it is to be found in a lone dissenting judgment,[180] as the lower courts have recognised that they cannot contemplate the abolition of a well-established legal test in the absence of any cogent justification.

2. *Post-2003 Cases*

Subsequent cases have continued to utilise this well-established legal test to determine whether a 'disability' is of the 'special' nature required by the doctrine of unconscionable dealing.

For example, in *Turner* the question was whether '[m]ere unawareness of a matter material to the interests of a party to a transaction'[181] (that the mortgage was not binding in its terms as to compound interest and repayment) caused by bad advice could constitute a 'special disability'.[182] Unlike the majority in *Bridgewater*, the majority in *Turner* solved this legal problem through straightforward recourse to the accepted legal test of impaired judgement.[183] Hence, the question was answered in the negative because mere unawareness, even if caused by bad advice, does not

175 Ibid 469 (Gleeson CJ and Callinan J).
176 Burns, above n 5, 356–60.
177 *Amadio* (1983) 151 CLR, (citation omitted) 447, 462 (Mason J), 476–7 (Deane J).
178 Burns, above n 5, 359:

> Indeed, it appears that courts have not considered that the decision in *Bridgewater* has in any way significantly affected the importance or rigour of the criterion … Some judges have assumed that the decisions of the majority of the High Court in *Bridgewater* and *Amadio* are consistent, while others have not discussed the case, relying on the statement of principles in *Amadio* instead.

179 Burns, above n 5, 373.
180 Beazley JA in *Archer v Archer* [2000] NSWCA 314 (Unreported, Handley, Beazley and Fitzgerald JJA, 7 November 2000).
181 *Turner* [2005] ANZ ConvR 214, 215 (Giles JA).
182 Ibid 214–16 (Giles JA).
183 Ibid 215–16 (Giles JA).

render the party incapable of making a judgement as to his or her own best interests.[184]

The salient point to note here is that the majority in *Turner* has no hesitation in adopting and applying the established legal test which the majority in *Bridgewater* all but ignored. The decision continues the dominant trend identified by this article post-*Bridgewater* of lower courts: (a) opting not to follow the law as conceived by the majority in *Bridgewater*; and (b) interpreting and applying the law as it existed pre-*Bridgewater*, in effect behaving as if *Bridgewater* never existed in law.

VII EMOTIONAL DEPENDENCE

A *A Valid Type of Disability?*

The implication of *Bridgewater*[185] seems to be that the only legitimate commercial motive (not open to being overturned by the doctrine of unconscionable dealing) in a commercial transaction is one entirely divorced from any kind of emotional attachment or considerations.

Effectively then, what the Court is doing is imposing a false dichotomy between the emotional (non-commercial) and the commercial. Such a dichotomy does not exist for the two are not mutually exclusive. To ascribe such a discrete separation is to ignore the reality and complexity of social, personal and economic interactions between individuals. Plainly, some commercial transactions, especially dealings with small-to-medium enterprises (SMEs) in the form of family businesses, are at least partially influenced by a modicum of non-commercial considerations.[186]

Even the majority in *Bridgewater* seems to concede that the two were intertwined — part of the reason Bill had fond emotions for Neil was *because* he was a

---

184 Ibid:
> Notwithstanding the bad advice, the party may have the capacity to make a judgment as to his best interests. It may be a flawed judgment because the capacity is exercised upon incomplete knowledge or bad advice, but there is an important difference between a person under a condition or circumstance disabling him from making a sound judgment and a person who is able to make a judgment but fails to make a sound one.

185 *Bridgewater* (1998) 194 CLR 457, 493 (Gaudron, Gummow and Kirby JJ).

186 See, eg, Lord Browne-Wilkinson's leading judgment in *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 188 where his Honour expressly canvasses as a policy consideration in a husband-wife surety case, 'the need to ensure that the wealth currently tied up in the matrimonial home does not become economically sterile' and to maintain 'the flow of loan capital to business enterprises.' This underlines the economic importance of allowing family-owned SMEs to be conducted as businesses despite the inevitable emotional entanglements which will arise.

productive worker.[187] This is surely a reasonable response in a commercial environment. Employers like hardworking employees and in family businesses this may translate into increased affection for those family members who exert higher effort and are more productive. Applying a cause and effect analysis, Neil's diligence and hard-working nature was the antecedent cause of Bill's positive emotional attitude towards Neil — thus the root cause was economic, although the effect was emotional. As the learned trial judge remarked, 'Bill was extremely fond of Neil, certainly, but I do not conclude that that degenerated into utter, questioning reliance or dependence.'[188]

Therefore, it is argued that *Bridgewater* should not have been a case of 'emotional dependence', which is by nature irrational,[189] since any emotion was based on solid, rational economic foundations. Ultimately, the disputed transaction was largely a commercially motivated one — to transfer ownership to the hard-working partner,[190] day-to-day manager[191] and chief book keeper.[192] The transaction in *Bridgewater* was more the product of commercial rather than emotional considerations.

In finding that despite the absence of compelling evidence, 'emotional dependence' could be used as a valid type of 'disability',[193] the majority embraced a permissive approach to 'emotional dependence' with a low evidentiary threshold. More recent cases have adopted a much more stringent evidentiary threshold. For example, in *Xu*[194] the putative victim-client had no discernible commercial reasons whatsoever for transferring his primary financial asset[195] and place of residence[196] at substantial undervalue[197] to a prostitute he frequented — yet, the Supreme Court of New South Wales found that no special disability of emotional dependence existed and opted not to intervene to overturn the transaction under the doctrine of unconscionable dealing.

---

187 *Bridgewater* (1998) 194 CLR 457, 493 (Gaudron, Gummow and Kirby JJ): 'Bill's goal to preserve his rural interests intact and his perception that Neil was the candidate to provide reliable and experienced management thereof were significant elements in his emotional attachment to and dependency upon Neil.'

188 *Bridgewater v Leahy* (Unreported, Supreme Court of Queensland, de Jersey J, 23 August 1995) 24.

189 See, eg, *Louth v Diprose* (1992) 175 CLR 621.

190 *Bridgewater* (1998) 194 CLR 457, 483 (Gaudron, Gummow and Kirby JJ).

191 Ibid.

192 Ibid.

193 Ibid 490, 493 (Gaudron, Gummow and Kirby JJ).

194 (2005) 12 BPR 23 131.

195 Ibid 23 133 (Barrett J).

196 Ibid.

197 At between $145 000–$200 000 undervalue: ibid [17]. The client-plaintiff even paid the deposit for the prostitute-defendant *and* paid her rent when he continued to reside there: at [9], [18].

Hypothetically, even if a discrete separation between the emotional and the commercial existed, it was arguably satisfied in *Bridgewater* because Bill had legitimate commercial reasons for the transfer which were unrelated to emotional dependence.[198] Arguably, the fact that Bill considered Neil to be the only person able to provide reliable and experienced management, had nothing to do with emotional attachment, and everything to do with the nature of the enterprise in which they were engaged — it is not uncommon, even in today's labour market, for there to be only one appropriate choice for a high-ranking position in a business enterprise,[199] particularly when the firm itself and the industry in which it operates require a high degree of first-hand knowledge and experience. When one adds up all the skills and abilities Bill required in a successor[200] to secure the long-term economic viability of the firm, the conclusion that there was only one suitable candidate in Neil is not an unreasonable one.

B *Empirical Evidence on 'Emotional Dependence'*

The empirical evidence indicates that recent cases diverge from *Bridgewater* by embracing a high, rather than a low, evidentiary threshold for 'emotional dependence' as a valid form of 'disability' recognised by law.

In *Smith v Smith*,[201] a daughter took advantage of her dying father's illness to appropriate property from her mother. The Supreme Court of New South Wales held that the putative victim-mother 'had the same kind of emotional dependence on the defendant as was found in *Bridgewater*'.[202] However, this cannot be interpreted as unequivocal support for the permissive approach towards 'emotional dependence' adopted by *Bridgewater* for the simple reason that the factual evidence presented in *Smith*, far from being scant, was both weighty and highly persuasive.

First, the degree of the victim's reliance on the other transacting party was far greater in *Smith*. The evidence disclosed that the victim-mother was almost entirely reliant in all respects on her dying husband. She 'looked to her husband for support

198 Cf *Xu* (2005) 12 BPR 23 131 where the putative victim-client had no discernible commercial reason whatsoever for transferring his primary financial asset and place of residence to a prostitute he frequented at substantial undervalue, and yet the Supreme Court of New South Wales opted not to intervene to overturn the transaction under the doctrine of unconscionable dealing.

199 Indeed this is a refrain heard often in the business pages of any daily broadsheet whenever a company announces the appointment of a new CEO, CFO, Managing Director, Head Coach etc, after a long search and filtering process.

200 From the case itself we could easily infer the following requirements: a degree of proficiency in accounting; experience in the agricultural sector; hands-on experience in the particular firm, and a willingness to keep the firm an integrated farming enterprise.

201 (2004) 12 BPR 23 051.

202 Ibid 23 069–70 (Barrett J).

in communication, he … ke[pt] her informed of matters of which she needed to know'[203] and he 'looked after all business and financial affairs'.[204] Therefore, when her dying husband told her that their daughter would 'look after her'[205] in his absence, the victim-wife became almost entirely emotionally dependent on the daughter. Further, there was an additional salient physiological 'weakness' which exacerbated the victim's emotional dependence on her defendant-daughter — namely her profound deafness[206] and her '[entire] relian[ce] upon others to relay to her the content of oral statements made by persons whose manner of speaking did not allow her to lip-read.'[207]

These facts can be contrasted with *Bridgewater* where Bill not only retained his 'independence of mind'[208] but still took an active interest in his own business affairs[209] and was concerned enough to take steps to secure the long-term commercial viability of his own firm.[210] These are not the characteristics and actions of a man who could ever be described as entirely reliant on anyone but himself in his business dealings. The alleged 'emotional dependence' was minimal at best as it was based on two tendentious propositions derived from the evidence. The first is that Bill 'always' did what Neil told him.[211] The majority bases this broad conclusion on rather flimsy evidence — a single excerpt from Neil's oral testimony under cross-examination to the effect that the only thing he had ever been denied was a tractor some years ago.[212] Further, the only additional piece of supporting evidence which can be found in the trial judgment is that 'Bill … asked Neil what he should give to "his girls" … nominat[ing] $100,000. Neil responded that Bill should give them "twice that much", provoking Bill's comment: "I told mum you would be bloody fair."'[213] However, the trial judge, de Jersey J, rejected the contention of the plaintiff's counsel that this 'illustrated Neil's influence, in that Bill adopted the precise figure suggested by Neil' because his Honour found that 'Bill simply told Neil what he had done … [and] did not raise the matter for Neil's

203 Ibid 23 054 (Barrett J).
204 Ibid.
205 Ibid 23 055 (Barrett J).
206 Ibid 23 069–70 (Barrett J).
207 Ibid.
208 *Bridgewater* (1998) 194 CLR 457, 468–9 (Gleeson CJ and Callinan J).
209 Ibid 492 (Gaudron, Gummow and Kirby JJ), citing the primary judge: 'Bill's life revolved substantially about his interest in cattle'.
210 Ibid: 'Bill had the goal of retaining the properties as an integrated farming enterprise under reliable and experienced management.'
211 Ibid 489–90 (Gaudron, Gummow and Kirby JJ): 'the tendency of the older man to fall in with the wishes of the younger, is illustrated by the following passages from Neil's cross-examination …'
212 Ibid 490 (Gaudron, Gummow and Kirby JJ).
213 *Bridgewater v Leahy* (Unreported, Supreme Court of Queensland, de Jersey J, 23 August 1995) 11.

comment' and in any event, 'Neil responded … not … with a view to influencing Bill, or exploiting any capacity for domination of Bill.'[214]

Further, the dependence (if it did exist) may, rather than being intrinsically emotional in nature, just have been a manifestation of the not uncommon commercial practice whereby firm owners (Bill) act on the advice of their day-to-day managers (Neil) — and thus any dependence was both commercial and reasonable.

The second proposition was that Bill was dependant upon Neil because he was the only candidate who could provide reliable and experienced management and maintain the business as an integrated farming enterprise.[215] This is a dubious ground on which to base 'emotional dependence' for several reasons. First, the goal being pursued is rational, legitimate and commercial — not emotional. Secondly, even the majority concedes that it is Bill's own goal[216] — thus rather than being dependent on others to make decisions for him, Bill is utilising others to achieve his own commercial purpose. Thirdly, numerous economic arguments could be raised to justify Bill's decision.[217]

In the future, *Xu* may be seen as a watershed case heralding a shift back towards neoclassicism in the law of unconscionable dealing. Despite the existence of highly exceptional factual circumstances which provided a strong basis for equitable relief under the doctrine of unconscionable dealing, the Supreme Court of New South Wales nonetheless held that (a) 'emotional dependence', rarely, if ever constitutes a valid 'disability'; and (b) even gross 'substantive unfairness' does not in and of itself suffice to demonstrate 'unfairness' in law for the purposes of the doctrine.

The focus of the legal enquiry in *Xu* was not whether the 'disability' under which the putative victim laboured was of a 'special' nature according to the test of impaired judgement, but whether the weakness of 'emotional dependence' could constitute a valid 'disability' on the facts of the case. Since the Court answered this question in the negative (ie there was no 'disability'), there was no need to apply the test of impaired judgement to determine whether the non-existent 'disability' was of a 'special' nature. In other words, the focus was on step one, rather than step two, of the two-step analysis averted to earlier.

Unlike the High Court in *Bridgewater*, Barrett J in the Supreme Court of New South Wales does not regard 'emotional dependence' as an easily established type

---

214 Ibid.

215 *Bridgewater* (1998) 194 CLR 457, 493 (Gaudron, Gummow and Kirby JJ): 'Bill's goal to preserve his rural interests intact and his perception that Neil was the candidate to provide reliable and experienced management thereof were significant elements in his emotional attachment to and dependency upon Neil.'

216 Ibid 492–3.

217 See above fn 137–40.

of 'disability'. The effect of *Xu* is that it is highly unlikely that 'emotional dependence' will be regarded as a 'disability' unless truly exceptional factual circumstances can be shown.

Even then, it is difficult to envisage what those circumstances could be, given that the facts in *Xu* were about as exceptional as could be imagined — in addition to the fact that the putative victim-client transferred his main financial asset[218] and place of residence[219] at a gross undervalue[220] to a prostitute[221] with no clear commercial purpose,[222] there was evidence of a greeting card whereby the prostitute declared that the client was the 'love of [her] life'[223] and she 'want[ed] to marry [him]'.[224] On this evidence, not only was the emotional intensity of the relationship in *Xu* greater and more explicit than that in *Bridgewater*, but an identifiable commercial purpose to the transaction was absent.[225]

In *Bridgewater*, the best that the majority could offer in terms of exceptional circumstances was that the putative victim, Bill (the firm owner) always did what the alleged coercer, his nephew, Neil (the firm's employee and day-to-day business manager), told him to do and evidence was led to the effect that the only thing Neil had ever been denied was a tractor.[226] Furthermore, even proponents of the decision acknowledge an easily discernible and legitimate commercial purpose to the transaction.[227]

---

218 *Xu* (2005) 12 BPR 23 131, 23 133 (Barrett J).

219 Ibid.

220 At between $145 000–$200 000 undervalue: ibid [17] (Barrett J). The client-plaintiff even paid the deposit for the prostitute-defendant *and* paid her rent when he continued to reside there: at ibid [9], [18] (Barrett J).

221 Ibid [3] (Barrett J): 'The defendant was, at that time (and at all other material times), working as a prostitute.'

222 Cf even the majority in *Bridgewater* (1998) 194 CLR 457, 492 does not deny the existence of a commercial purpose to the disputed transaction: 'Bill had the goal of retaining the properties as an integrated farming enterprise under reliable and experienced management'. Further, not even avowed admirers of the majority decision such as Burns can deny that Bill's goal was to maintain the 'economic viability' of his firm: Burns, above n 5, 341.

223 *Xu* (2005) 12 BPR 23 131, 23 132 (Barrett J).

224 Ibid.

225 In fact, the putative-victim himself argued that the purpose of the transfer was non-commercial — to encourage the prostitute to marry him so they could start a family together: *Xu* (2005) 12 BPR 23 131, 23 136 (Barrett J): 'the plaintiff says that the defendant threatened to withdraw her affection for him if he did not sell and that she had expressed an intention to cease working as a prostitute, to live with him and to conceive a child by him, at the time that the contracts were exchanged.'

226 *Bridgewater* (1998) 194 CLR 457, 489–90 (Gaudron, Gummow and Kirby JJ).

227 Burns, above n 5, 341: 'the only way that he [Bill] could achieve the goal of preserving the *economic viability* of the pastoral holdings was to transfer significant parts of the property to his nephew' (emphasis added).

Incredibly it was the Supreme Court of New South Wales in *Xu* and not the High Court in *Bridgewater* which was willing to find that the relevant relationship was 'essentially commercial'[228] in nature and hence no 'emotional dependence' existed. Surely it can be said that the relationship between Bill and Neil of partner and partner,[229] owner and day-to-day-manager,[230] or owner and chief book keeper,[231] is at least as commercially professional in nature as that of prostitute and client.

Invariably there were some elements of an intimate personal relationship in *Xu* — a man was clearly fond of a woman. Nonetheless, the Court was still able to acknowledge that in spite of a degree of overlap between the personal and the commercial (as is inevitable in a society where family members and close friends go into business together) the relationship was still 'essentially commercial'[232] in nature. It is puzzling then why the majority could not reach a similar conclusion in *Bridgewater* where the facts even more strongly supported a finding that the motivation behind the disputed transfer was a sound commercial decision.

VIII COMPARATIVE ANALYSIS WITH OTHER COMMON LAW JURISDICTIONS

A *General Trends in Contract Law in Other Common Law Jurisdictions*

Further support for this article's criticisms of the legal reasoning and result of *Bridgewater* can be found in a comparison with other prominent common law jurisdictions. In England and Wales, the legal test, stated in *Royal Bank of Scotland plc v Etridge [No 2]*,[233] is whether the putative victim 'enter[ed] into [the] transaction with [their] eyes open so far as the basic elements of the transaction are concerned'.[234] Bill would have satisfied this test as even the majority was forced to concede that Bill 'acted as he did with his eyes open, and with a full understanding of what he was doing'.[235]

Similarly, *Bridgewater* would most likely have been decided differently under US unconscionability law which examines the 'commercial setting, purpose and effect'[236] of the disputed transaction. Since it has already been established that (1) the 'setting' for the disputed transaction in *Bridgewater* was substantially 'commercial' in nature; and (2) the transaction had a discernible and entirely

---

228 *Xu* (2005) 12 BPR 23 131, 23 133 (Barrett J).

229 *Bridgewater* (1998) 194 CLR 457, 483 (Gaudron, Gummow and Kirby JJ).

230 Ibid.

231 Ibid.

232 *Xu* (2005) 12 BPR 23 131, 23 133 (Barrett J).

233 [2002] 2 AC 773.

234 Ibid 805 (Lord Nicholls).

235 *Bridgewater* (1998) 194 CLR 457, 490, citing *Diprose v Louth [No 2]* (1990) 54 SASR 450, 453.

236 *Restatement (Second) of Contracts* § 208 (1981), modelled after UCC § 2-302.

legitimate commercial 'purpose' and 'effect';[237] it is likely that the US courts would not have intervened on the basis of unconscionability.

Such comparisons with the result which would be obtained in overseas common law jurisdictions, whilst certainly not conclusive, may be persuasive as they represent further evidence that *Bridgewater* really was a 'borderline'[238] case resulting from an unusually expansive interpretation of the law which involved some questionable legal reasoning and logic.

In general, it appears that US[239] unconscionability law is drifting back towards a neoclassical approach which accords due respect to freedom of contract. Australian contract law must keep up with overseas jurisdictions in order to maintain international competitiveness in a globalised economy where freedom of contract is essential to the smooth functioning of the market mechanism, and even minute differences in comparative advantage can have profound implications for a nation's economic growth and welfare. Fortunately, the empirical evidence indicates that that is precisely what is happening, as Australian courts have largely ignored the majority decision in *Bridgewater* in adopting a conception of unconscionable dealing which is consonant with neoclassicism.

B *Relevant Policy Considerations*

In the leading judgment in *Barclays Bank plc v O'Brien*,[240] Lord Browne-Wilkinson expressly canvassed as a policy consideration in a husband-wife surety case, 'the need to ensure that the wealth currently tied up in the matrimonial home does not become economically sterile'[241] so as to maintain 'the flow of loan capital to business enterprises.'[242] The economic arguments submitted by this article in relation to *Bridgewater* are not dissimilar to those propounded by Lord Browne-Wilkinson in *O'Brien*.

First, the need to maintain the commercial viability and competitiveness of family businesses by allowing the owners to allocate and transfer ownership of the firm on the basis of employee productivity and the level of effort exerted, as opposed to blood ties and familial obligations.

Secondly, the need to maintain an important source of capital and labour — in *Bridgewater*, Neil could have, and most likely would have, taken his capital and his

237 Ibid.
238 Cockburn, above n 44, 155; Duggan, above n 27, [505].
239 Recently (from around 1980) American courts have begun to re-embrace freedom of contract: Mooney, above n 43, 29.
240 [1994] 1 AC 180, 188 (Lord Browne-Wilkinson).
241 Ibid.
242 Ibid.

labour elsewhere,[243] if Bill had not been able to entice him with the ultimate incentive of eventual ownership of the firm if he would commit his capital and labour to the firm. This is exactly what should happen in a labour market — in order to retain and attract the most productive labour, firms have to offer the highest wage or if not, other rewards and incentives such as eventual ownership of the firm. This indicates the existence of an efficient, well-functioning labour market in which the judiciary should not be interfering. Moreover, family members are a vital source of labour for family-run SMEs. Supply could potentially be disrupted by the *Bridgewater* majority's implicit prohibition of the provision of adequate incentives and rewards for effort, to family members working in a SME.

Information economics warns of two potential dangers associated with such a conception of the doctrine of unconscionable dealing. First, moral hazard (hidden action) means that in the absence of commensurate rewards for hard work, family members will exert lower effort and the economic performance of the SME will suffer accordingly. Secondly, adverse selection (hidden information) means that if employers are then forced to dip into the general labour market (where they will not be as easily exposed to claims of 'emotional dependence' and litigation under the doctrine of unconscionable dealing), it will be hard to separate the wheat from the chaff, given the limited information available to employers about potential employees from a common labour pool.

The doctrine of unconscionable dealing needs to acknowledge and accommodate the importance of labour productivity, individual utility maximisation and economic growth. This article argues that by:

1. legally defining 'unfairness' as 'procedural unfairness' and restoring 'substantive unfairness' to the status of an evidentiary factor;

2. ensuring that the well-established and rigorous test of impaired judgement is used to determine whether a disability is of the 'special' kind required by the doctrine of unconscionable dealing; and

3. ensuring that 'emotional dependence' remains an exceptional 'disability' with a high evidentiary threshold;

it is possible to meet the economic requirements of contemporary society with three minor technical refinements to the doctrine of unconscionable dealing, which are in any event consonant with the most recent interpretations and applications of the doctrine in the Supreme Court of New South Wales.

---

243 *Bridgewater* (1998) 194 CLR 457, 483 (Gaudron, Gummow and Kirby JJ): 'Bill … feared that Neil would cease working for the partnership and would concentrate his efforts instead on the Injune Land. He encouraged Neil to sell it.'

IX CONCLUSION

This article has argued that *Bridgewater* breached the proper boundaries of the doctrine of unconscionable dealing by intervening where intervention was neither appropriate nor justifiable according to the correct interpretation and application of the law. Further, it has been demonstrated that the *Bridgewater* conception of the doctrine is inconsonant with the neoclassical theory which underpins a market economy. Unsurprisingly, more than one commentator has openly described *Bridgewater* as 'borderline'.[244]

Further, this article has endeavoured to illustrate the dangers entailed in the siren call of equitable decisions such as *Bridgewater* which blithely disregard well-established legal principles and tests in favour of superficially attractive, but ultimately nebulous concepts of personal morality dependent on subjective value judgements. The empirical study conducted revealed that in practice, the intermediate appellate courts are adopting a narrow approach towards the doctrine of unconscionable dealing which all but ignores the broad *Bridgewater* conception that is formally binding on them. The mere fact that courts have repeatedly and even systematically ignored a formally binding interpretation of fundamental elements of a legal doctrine, is of itself, an indication that those elements are open to criticism. Thus, the doctrinal changes advocated by this article have, in practice, already been made. All that is required now is a formal change.

Atiyah was right about one thing — unconscionability can be regarded as the 'acid test of any version of liberal contract theory'.[245] A neoclassical approach shows that the *Bridgewater* conception of unconscionable dealing fails that test. The salient difference between Atiyah and neoclassicists lies in the conclusions derived from that result. Whereas Atiyah argues that the correct response is to abandon the neoclassical approach to contracts entirely,[246] this article argues that it is possible and indeed preferable, to modestly refine the doctrine of unconscionable dealing so that it is consonant with neoclassicism by eliminating substantive unfairness as an element of the doctrine.

All that is required is a formal recognition of the changes which in practice have already been put into effect through the judicial interpretation and application of the doctrine in intermediate appellate courts.[247] The modest technical refinement proposed will more sharply delineate proper boundaries for the doctrine in the context of a liberal democracy and a market economy where individual autonomy, economic efficiency and the separation of law and morality, must be maintained.

---

244 Cockburn, above n 44, 155; Duggan, above n 27, [505].

245 Atiyah, *Essays on Contract*, above n 39, 132.

246 'Freedom from Freedom of Contract' as one wit put it: see A L Terry, 'Freedom from Freedom of Contract' [1975] *New Zealand Law Journal* 197.

247 See, eg, *Xu* (2005) 12 BPR 23 131.

Pacta sunt servanda has appropriately been described as the guiding principle of the law of contract in a market economy.[248] But, as is so often the case with the common law, there is no such thing as an absolute principle. This article recognises the need for *some* standard in the market bargaining process — that is why it argues for the retention of 'procedural unfairness' as an element of the doctrine of unconscionable dealing. Finally, it acknowledges and openly supports a role for Parliament in protecting the 'less powerful in society'[249] and promoting social equity.

248 Sneddon, above n 4, 567.

249 Ibid.