

A PROPOSAL IN EQUITY: THE MARRIAGE OF UNDUE INFLUENCE WITH UNCONSCIONABLE DEALING?

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INTRODUCTION

Most parties entering into legal transactions are equal in the common law's eyes regardless of whether they are affected by any personal disabilities. However, some may be less equal than others by reason of disabilities such as low intelligence, deafness, old age, unfamiliarity with English, emotional dependence or susceptibility to another's influence. Injustices arising from transactions entered into by parties with such disabilities are rarely redressed by the common law,¹ as to do so would conflict with its paramount purpose of upholding the validity of legal transactions, which is indispensable to the conduct of commerce and security of property rights. That endeavour is reserved for Equity.

And so Equity has granted relief to the elderly Italian couple who guaranteed their son's debts without true knowledge of the bank guarantee's effect and scope,² the lovesick solicitor who transferred real property to the object of his affections but regretted doing so when spurned,³ and the family of a testator who sold valuable land to his favoured nephew at a gross undervalue.⁴ Relief was granted for those transactions as they were held to be unconscionable dealings which could not be allowed to stand against the good conscience of Equity.⁵ Thus, the doctrine of unconscionable dealing draws equitable intervention upon the defendant's unconscientious exploitation of a plaintiff's special disability that placed it in an unequal position in dealing with the defendant.⁶

¹ It is noted that, with respect to signed legal documents, the common law defence of non est factum is 'available to those who are unable to read owing to blindness or illiteracy ... [or] those who through no fault of their own are unable to have any understanding of the purport of a particular document': *Petelin v Cullen* (1975) 132 CLR 355, 359–60 (The Court).

² *Commercial Bank of Australia Ltd v Amadio* ('Amadio') (1983) 151 CLR 447.

³ *Louth v Diprose* ('Louth') (1992) 175 CLR 621.

⁴ *Bridgewater v Leahy* ('Bridgewater') (1998) 194 CLR 457.

⁵ *Amadio* (1983) 151 CLR 447, 461 (Mason J); *Bridgewater* (1998) 194 CLR 457, 477–8 [73] (Gaudron, Gummow and Kirby JJ).

⁶ *Amadio* (1983) 151 CLR 447, 474 (Deane J).

Undue influence,⁷ a relative of unconscionable dealing, also redresses legal transactions involving unequal parties, where the source of inequality is the trust and confidence reposed by a plaintiff in an ascendant party that allows the latter to adversely affect the former's interests.⁸ Relief is given in circumstances where a plaintiff entered into a transaction without having given independent and voluntary consent to it as its will was subject to an ascendant party's influence.⁹ Put simply, undue influence acts on the impaired consent of the plaintiff in entering into a legal transaction.¹⁰

Despite their different underpinning rationales, undue influence may be significantly merged with unconscionable dealing through expanding the latter's categories of special disabilities to include relationships giving rise to undue influence. In doing so, the categories of special disabilities are also reorganised into *internal disabilities* (such as low intelligence, deafness, old age, unfamiliarity with English) that automatically puts a plaintiff in an unequal position in dealing with a defendant, and *external disabilities* (such as emotional dependence and relationships giving rise to undue influence) for which a plaintiff would only be placed in an unequal position upon being subject to a defendant or third-party (wrongdoer)'s exertion of influence. This distinction is made because it acknowledges the proper classification of exertion of influence by ascendant wrongdoers in relationships giving rise to undue influence as a type of wrong.

The proposed merger will be discussed in five sections. Section two outlines the elements and operation of undue influence and unconscionable dealing as they currently exist to provide the background for their merger. Section three articulates the key premise upon which the merger is founded, that exertion of influence in cases of presumed and actual undue influence is a wrong. Section four examines the rationale for the doctrines' merger, the framework of a proposed doctrine facilitating it and what will remain of undue influence after the merger. Section five puts forth three areas of private law to which the proposed doctrine may be applicable. Finally, Section six submits that the proposed doctrine presents a more coherent and efficacious framework for the operation of unconscionable dealing *and* undue influence, as a single doctrine is largely capable of embodying the principles and operation of the two doctrines.

⁷ This article deals solely with undue influence concerning *inter vivos* transactions and not undue influence exercised upon testators in making testamentary dispositions, which is the exclusive domain of the probate court: see, eg, RP Meagher, WMC Gummow and JRF Leane, *Equity: Doctrines and Remedies* (Butterworths, 3rd ed, 1992) 385 [1508].

⁸ See, eg, Rick Bigwood, 'Undue Influence: Impaired Consent or Wicked Exploitation?' (1996) 16 *Oxford Journal of Legal Studies* 503, 510.

⁹ *Amadio* (1983) 151 CLR 447, 461 (Mason J).

¹⁰ *Ibid* 474 (Deane J).

UNDUE INFLUENCE AND UNCONSCIONABLE DEALING

A Undue Influence

Under existing equitable principles, undue influence may be established in three ways.

First, through adducing evidence showing that the relationship between the parties to an impugned legal transaction and the transferred property or conferred benefit's value invoke a presumption that the transaction was obtained by undue influence, which if not rebutted will result in the transaction being set aside in Equity. As the authorities demonstrate, this is the approach by which the majority of undue influence claims are resolved.¹¹ The types of relationships necessary to invoke a presumption of undue influence are those where a transfer of property or conferral of benefit by a vulnerable plaintiff to an ascendant defendant is not natural and for which a suspicion of possible abuse of trust or confidence by the defendant is present in the procurement of the property or benefit.¹² Such relationships may also be fiduciary relationships in which trust and confidence are reposed by a plaintiff in the defendant for the latter to act in the former's best interests.¹³

The presumption of undue influence is a feature that distinguishes undue influence from unconscionable dealing, as there is no similar presumption of unconscionable dealing based on the existence of a relationship of trust or confidence. It provides a plaintiff with a valuable forensic advantage

¹¹ See, eg, *Haywood v Roadknight* [1927] VLR 512; *Johnson v Buttress* ('Johnson') (1936) 56 CLR 113; *Bank of New South Wales v Rogers* (1941) 65 CLR 42; *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113; *Union Fidelity Trustee Co of Australia Ltd v Gibson* [1971] VR 573; *McCulloch v Fern* [2001] NSWSC 406; *Hartigan v International Society for Krishna Consciousness Incorporated* [2002] NSWSC 810. See also RP Meagher, WMC Gummow and JRF Lehane, *Equity: Doctrines and Remedies* (Butterworths, 3rd ed, 1992) 386–7 [1511], 391–2 [1522].

¹² *Yerkey v Jones* ('Yerkey') (1939) 63 CLR 649, 675 (Dixon J). It should be noted that in England there is a clear distinction between relationships that automatically gives rise to a presumption of undue influence as a matter of law and relationships of trust and confidence that must be proved to be so as a matter of fact in order to invoke the presumption: *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 189 (Lord Browne-Wilkinson); *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 154 (Millett LJ). A similar distinction was drawn by Dixon J in *Johnson*: (1936) 56 CLR 113, 134–5.

¹³ The recognised fiduciary relationships of trustee/beneficiary, solicitor/client and guardian/ward were stated as attracting a presumption of undue influence by Latham CJ in *Johnson*: (1936) 56 CLR 113, 119. Such categories were also acknowledged and affirmed by Starke J in *Bank of New South Wales v Rogers*: (1941) 65 CLR 42, 51.

that would not be available if unconscionable dealing is pleaded as an avenue of relief.¹⁴

A defendant may rebut a presumption of undue influence by showing that a plaintiff's entry into the relevant legal transaction was 'the independent and well-understood act of a [person] in a position to exercise a free judgment based on information as full as that of the [defendant]'.¹⁵ Hence, a defendant must establish that the plaintiff knew and understood the effect of entering into the legal transaction and had acted independently of the defendant's influence in doing so. The facts and weight of burden required to be discharged in order to rebut the presumption will vary depending on the parties' relationship and circumstances.¹⁶ In practical terms, the defendant must show the plaintiff had received independent advice before entering into the transaction so as to be informed of the transaction's effect or that the plaintiff was not under its influence at the time of the transaction.¹⁷

Secondly, undue influence may be established where there is evidence that shows a plaintiff's consent was in fact obtained through another's active exertion of undue influence.¹⁸ This approach is stricter and more difficult than the first approach in establishing undue influence as there must be an actual and not presumed relationship in which the defendant was ascendant over a plaintiff and abused that ascendancy through exerting influence upon a plaintiff, which resulted in the plaintiff's will being overborne and unable to exercise an independent and voluntary judgment in respect of the property transfer or conferral of benefit.¹⁹

Thirdly, undue influence may be found upon a defendant's notice of the plaintiff having been subject to undue influence emanating from a third-party.²⁰ Such notice may be actual or constructive, with constructive notice arising in circumstances where a defendant possessed knowledge of facts

¹⁴ Peter Young, Clyde Croft and Megan Smith, *On Equity* (Lawbook, 2009) 311 [5.320].

¹⁵ *Johnson* (1936) 56 CLR 113, 134 (Dixon J).

¹⁶ *Westmelton (Vic) Pty Ltd v Archer* [1982] VR 305, 313 (The Court).

¹⁷ *Union Fidelity Trustee Co of Australia Ltd v Gibson* [1971] VR 573, 577–8 (Gillard J).

¹⁸ *Johnson* (1936) 56 CLR 113, 134 (Dixon J).

¹⁹ See, eg, G E Dal Pont, *Equity and Trusts Commentary and Materials* (Lawbook, 5th ed, 2011) 244; Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (Lawbook, 3rd ed, 2009) 542, quoting *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 189 (Lord Browne-Wilkinson). Two recent decisions in which actual undue influence was found are *Maher v Honeysett and Maher Electrical Contractors Pty Ltd* [2007] NSWSC 12 (29 January 2007) [130]–[143], [163] (Barrett J); *McCulloch v Fern* [2001] NSWSC 406 (28 May 2001) [64] (Palmer J).

²⁰ *Yerkey* (1939) 63 CLR 649, 677 (Dixon J); *Bank of New South Wales v Rogers* (1941) 65 CLR 42, 51 (Starke J).

sufficient to raise the possibility of a third-party's exercise of undue influence upon a plaintiff in a legal transaction but failed to make inquiry as to the existence of undue influence.²¹ Under the first limb of the rule in *Yerkey*,²² a defendant creditor may similarly be held liable through the undue influence of a third-party debtor (husband) upon a plaintiff guarantor (wife) with respect to guarantees where the confidence arising out of a marital relationship between the plaintiff and third-party gives rise to the potential exertion of undue influence by the former in procuring the latter's entry into the guarantee as a volunteer.²³ Liability under the first limb of *Yerkey* was affirmed and reinforced by the High Court in *Garcia v National Australia Bank* ('*Garcia*').²⁴ The rule in *Yerkey* may also apply to situations where the relationship between a guarantor and third-party debtor is one of trust and confidence other than marriage.²⁵

B Unconscionable Dealing

The seminal case of *Commercial Bank of Australia v Amadio*²⁶ ('*Amadio*') laid down the requisite elements for establishing a claim of unconscionable dealing in Equity in Australia.

In *Amadio*, Deane J held that such a claim will be established if a plaintiff was afflicted with a special disability so as to:

- i) Result in the absence of a reasonable degree of equality between the plaintiff and defendant in dealings with respect to a legal transaction,
- ii) The disability was sufficiently evident to the defendant to make it prima facie unfair or unconscientious to procure or accept the plaintiff's assent to the impugned transaction in the circumstances in which it was procured or accepted, and
- iii) Where such circumstances are shown to exist, the defendant fails to discharge its onus in showing the transaction was fair, just and reasonable.²⁷

²¹ See, eg, Jeannie Paterson, Andrew Robertson and Arlen Duke, above n 19, 562–3. A similar approach of 'deemed notice' on the part of a creditor is adopted in England with respect to third-party guarantee cases where the relationship of debtor and guarantor is one where there is a risk of undue influence exercised by the debtor upon the guarantor in relation to the guarantee's procurement: *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773, 814 [86]–[87] (Lord Nicholls).

²² (1939) 63 CLR 649, 684–5 (Dixon J).

²³ *Ibid.*

²⁴ *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 403–4 [17]–[21], 408 [31] (Gaudron, McHugh, Gummow and Hayne JJ).

²⁵ *Ibid* 404 [22] (Gaudron, McHugh, Gummow and Hayne JJ); *Kranz v National Australia Bank Ltd* (2003) 8 VR 310, 322 [31] (Charles JA). See also Young, Croft and Smith, above n 14, 327 [5.560].

²⁶ (1983) 151 CLR 447.

1 *Special Disability*

A plaintiff alleging unconscionable dealing must be afflicted by a special disability which seriously affects its ability to make a judgment as to its best interests,²⁸ or which renders the plaintiff unable to make a worthwhile judgment as to what would be in its best interests.²⁹ Thus, unlike undue influence, unconscionable dealing focuses on a plaintiff's inability to judge what is in its best interests as a result of being afflicted with a special disability rather than the deprivation of a voluntary will capable of exercising independent judgment.³⁰

The categories of special disability are not closed, but those traditionally recognised by Equity for the purposes of unconscionable dealing were outlined in an oft-cited statement of Fullagar J in *Blomley v Ryan*.³¹

2 *Defendant's Knowledge of Plaintiff's Special Disability*

The existence of a special disability alone will not be sufficient for a plaintiff to succeed in a claim of unconscionable dealing, as the defendant must know the circumstances giving rise to the special disability and its effect on the plaintiff.³²

The standard of knowledge on the part of a defendant required for relief under unconscionable dealing will be satisfied by either the defendant's actual knowledge or wilful ignorance³³ of circumstances indicating the serious effect of a special disability on a plaintiff's ability to make a judgment as to its best interests.³⁴

²⁷ Ibid 474 (Deane J).

²⁸ Ibid 462 (Mason J).

²⁹ *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 74 [46] (Gummow and Hayne JJ).

³⁰ Ibid.

³¹ *Blomley v Ryan* (1956) 99 CLR 362, 405 (Fullagar J). A recent citation was *Aboody v Ryan* [2012] NSWCA 395 (4 December 2012) [64] (Allsop P, Bathurst CJ and Campbell JA agreeing) [excluding gender as a category]. The High Court in *Louth and Bridgewater* has suggested that strong emotional dependence or affection may also act as a special disability.

³² *Amadio* (1983) 151 CLR 447, 462 (Mason J). The current High Court has rejected constructive notice as being sufficient to constitute knowledge in relation to unconscionable dealing: *Kakavas v Crown Melbourne Limited* ('*Kakavas*') (2013) 298 ALR 35, 66–8 [150]–[162] (The Court).

³³ 'Wilful ignorance' could mean the defendant shutting their eyes to the plaintiff's obvious special disability: Jeannie Paterson, Andrew Robertson and Arlen Duke, above n 19, 554.

³⁴ *Amadio* (1983) 151 CLR 447, 462 (Mason J); *Kakavas* (2013) 298 ALR 35, 67 [155]–[157] (The Court).

3 *Defendant taking Unconscientious Advantage of Plaintiff's Special Disability*

Once a plaintiff has established it was afflicted with a special disability and that the defendant knew it, then the defendant will bear the onus to rebut a presumption that it acted unconscionably in procuring the plaintiff's entry into the impugned legal transaction by showing that the transaction itself was fair, just and reasonable.³⁵ Accordingly, in the absence of evidence adduced by the defendant rebutting such a presumption, a court may infer that the impugned transaction was unconscientious.³⁶

FOUNDATIONAL PREMISE OF PROPOSED MERGER

The merger of undue influence with unconscionable dealing under the proposed doctrine is predicated upon the premise that exertion of influence upon plaintiffs in relationships giving rise to undue influence, presumed or actual, is a wrong.

The exertion of influence by a wrongdoer upon a plaintiff in a relationship giving rise to undue influence to procure the plaintiff's entry into a legal transaction may be classified as a wrong because it entails a violation of the 'normative expectations arising from [a] relationship of trust and confidence'³⁷ shared between the plaintiff and wrongdoer. This is because the former has entrusted the latter with its trust and confidence for the purpose of protecting its interests.³⁸ Thus, the essential element of the relevant wrong is acting inconsistently with the limit imposed on the exercise of a wrongdoer's power over the plaintiff, such that its ascendant position is used to further its own gains or interests rather than to protect or advance the plaintiff's interests.³⁹ Accordingly, as exertion of influence upon plaintiffs in relationships giving rise to undue influence is a wrong, it follows that the classification of relationships giving rise to undue influence as a category of special disability within unconscionable dealing is consistent with the doctrine's classification as a wrongs-based doctrine because it grants relief for the exploitation of a plaintiff's special disability.⁴⁰

³⁵ *Amadio* (1983) 151 CLR 447, 474 (Deane J).

³⁶ *Louth* (1992) 175 CLR 621, 632 (Brennan J).

³⁷ Mindy Chen-Wishart, 'Undue Influence: *Beyond* Impaired Consent and Wrongdoing towards a Relational Analysis' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law : Essays in Memory of Peter Birks* (Oxford University Press, 2006) 220.

³⁸ *Ibid* 221.

³⁹ Bigwood, above n 8, 510.

⁴⁰ James Edelman and Elise Bant, *Unjust Enrichment in Australia* (Oxford University Press, 2006) 33.

There are at least three forms of exertion of influence that constitute active exploitation of plaintiffs and should be characterised as wrongs:

- A) Where a defendant received benefits from the plaintiff with notice that a third-party had exercised undue influence upon the plaintiff,⁴¹
- B) Where gifts are transferred by a plaintiff to a defendant as a result of the latter's active exertion of influence, and
- C) Where the defendant has received benefits or property from a plaintiff affected by exertion of influence in a relationship giving rise to undue influence that is also a fiduciary relationship.

A Where Defendant has Notice of Third-Party's Undue Influence

In regard to cases where undue influence has been exercised by a third party, it is respectfully observed that, contrary to the view of two renowned legal scholars,⁴² a wrongs-based approach was favoured by Dixon J in *Yerkey*⁴³ as well as having been applied in the English decision of *Credit Lyonnais Bank Nederland NV v Burch* ('*Credit Lyonnais*')⁴⁴ and more recently by Barrett J in *Khan v Khan*.⁴⁵ The common element of such an approach is that a defendant must possess actual or constructive notice of the third party's wrongdoing in the form of undue influence exercised upon the plaintiff.⁴⁶ The legal transaction representative of this approach is the third-party guarantee where a third-party guarantor acts as a volunteer in securing the debts or financial obligations owed by a debtor (with whom the guarantor has a marital or close personal relationship entailing trust and confidence) to a lending or financial institution.⁴⁷ This is supported by the fact that both *Yerkey* and *Credit Lyonnais* were concerned with third-party guarantees.

In *Khan v Khan*, Barrett J appeared to have formulated a general principle by which Equity would grant relief in respect of a defendant's acquisition of benefits from a plaintiff with notice that the benefit was conferred by the plaintiff through a third-party's undue influence. His Honour held that '[a] third party recipient of benefit (Z), who knowingly takes with notice of the

⁴¹ Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1, 75–6.

⁴² Edelman and Bant, above n 40, 32.

⁴³ (1939) 63 CLR 649, 675–8.

⁴⁴ [1997] 1 All ER 144.

⁴⁵ (2004) 62 NSWLR 229.

⁴⁶ *Yerkey* (1939) 63 CLR 649, 677–8, 684–5 (Dixon J); *Credit Lyonnais* [1997] 1 All ER 144, 153 (Millett LJ); *Khan v Khan* (2004) 62 NSWLR 229, 235 [21] (Barrett J).

⁴⁷ Edelman and Bant, above n 40, 231–2; G E Dal Pont, *Equity and Trusts Commentary and Materials* (Lawbook, 5th ed, 2011) 257.

undue influence exerted upon the disponor (Y) by the person having ascendancy (X), takes unfair or unconscientious advantage of a situation in which a force against which equity will grant relief is known by him or her to be at work'.⁴⁸ Accordingly, it is submitted that *Khan v Khan* provides clear judicial support for the characterisation of cases where a defendant has notice that a plaintiff has been subject to a third-party's undue influence as instances of wrongdoing.

B Gifts Transferred as a Result of Defendant's Exertion of Influence

Another legal transaction that illustrates undue influence manifesting as a wrong is gifts made through influence exerted by a defendant upon a plaintiff where the defendant is an ascendant party the plaintiff is dependent upon or in whom the plaintiff has reposed trust and dependence.⁴⁹ This form of undue influence arose in *Louth* and *Bridgewater*, where the defendant induced transfers of absolute and partial gifts of real property respectively from the plaintiff⁵⁰ through an abuse of its ascendant position by exercising influence upon the plaintiff in obtaining gifts that were made to the plaintiff's detriment.⁵¹

In the recent case of *McCulloch v Fern*,⁵² a pecuniary gift was made through a defendant's egregious exertion of influence upon a thoroughly trusting and dependent plaintiff.⁵³ Justice Palmer held that the defendant had clearly exercised undue influence in obtaining the plaintiff's gift, which was made to the plaintiff's great detriment.⁵⁴

⁴⁸ (2004) 62 NSWLR 229, 235 [21], citing *Amadio* (1983) 151 CLR 447, 462 (Mason J) and *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378. See also RP Meagher, WMC Gummow and JRF Lehane, *Equity: Doctrines and Remedies* (Butterworths, 3rd ed, 1992) 396–7 [1530].

⁴⁹ *Johnson* (1936) 56 CLR 113, 134–5 (Dixon J).

⁵⁰ For the sake of convenience, 'plaintiff' also refers to Bill York (the transferor in *Bridgewater*) because it is his relationship with Neil York (defendant) that attracts an undue influence analysis.

⁵¹ Although both *Louth* and *Bridgewater* were decided on the basis of unconscionable dealing, it is arguable that the facts of both cases would have also attracted relief for undue influence had the nature of the relationship between the plaintiff and defendant and the impugned conduct of the defendant been examined pursuant to the principles outlined by Dixon J in *Johnson*. It is noted that *Louth* is characterised as an undue influence case in a recent Equity text: Michael Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012) 222–3.

⁵² [2001] NSWSC 406 (28 May 2001).

⁵³ *Ibid* [51]–[62] (Palmer J).

⁵⁴ *Ibid* [62], [64].

C Exertion of Influence in Fiduciary Relationships

As some of the relationships giving rise to a presumption of undue influence may also be classified as fiduciary relationships,⁵⁵ it follows that the receipt and retention of benefits or property by a fiduciary defendant from its principal plaintiff through the exertion of influence could constitute a breach of the established fiduciary duties.⁵⁶ This is so as the fiduciary would likely have placed its own interest in conflict with duties owed to the principal and acquired benefits or property whilst serving as a fiduciary without the principal's informed consent. Consequently, as a breach of duty is well-acknowledged to be a wrong under current legal taxonomy,⁵⁷ fiduciary defendants who breach their fiduciary duties due to the receipt and retention of benefits from their principals through undue influence would have committed a wrong.

D Exertion of Influence is a Wrong

Thus, in the three categories of cases above, it is strongly arguable that the cause of action in claims setting them aside are for wrongs committed by the defendant, rather than an impairment of the plaintiff's autonomy and consent constituting unjust enrichment grounding a restitutionary action.⁵⁸

This is because the defendant in those three categories of cases are not 'completely passive recipient[s]'⁵⁹ of the benefits or property given by the plaintiff due to their active exertion of influence or notice of another's wrong. It is further argued that the first limb of *Yerkey* cannot be characterised as a rule founded upon unjust enrichment⁶⁰ as impairment or absence of the plaintiff's consent to the relevant transaction is not the *sole* basis of the action for two reasons.

First, the impairment or absence of the plaintiff (wife)'s consent in cases falling within the first limb of *Yerkey* may be the result of active influence exerted by a third-party (husband). Accordingly, as the guarantee may have been procured through a husband's abuse of his ascendant position as manifested in the form of influence exerted upon the wife,⁶¹ the guarantee is better characterised as the product of a wrong rather than defects in the plaintiff's consent.

⁵⁵ See n 13 above.

⁵⁶ *Moss v Moss (No 2)* (1900) 21 LR (NSW) Eq 253, 258 (Simpson J).

⁵⁷ Birks, above n 41, 10; Edelman and Bant, above n 40, 31.

⁵⁸ Edelman and Bant, above n 40, 239.

⁵⁹ James Edelman and Elise Bant, 'Setting Aside Contracts of Suretyship: The Theory and Practice of Both Limbs of *Yerkey v Jones*' (2004) *Journal of Banking and Finance Law and Practice* 5, 14.

⁶⁰ *Ibid* 11, 14–15.

⁶¹ *Yerkey* (1939) 63 CLR 649, 684–5 (Dixon J).

Secondly, cases falling within the first limb of *Yerkey* may involve the defendant (financier)'s notice of influence exerted by the husband.⁶² The characterisation of the first limb of *Yerkey* as an action based on unjust enrichment does not adequately address the element of notice. This is because the role of notice in *Yerkey* cases is to fix the financier with knowledge of the relationship between the husband and wife that may give rise to undue influence by the husband.⁶³ Thus, the role of notice in *Yerkey* cases *a fortiori* encompasses the fixing of a financier with knowledge of the husband's wrong in actively exerting influence upon his wife in procuring a guarantee. In light of the role of notice in *Yerkey* cases, the suggestion that a financier's knowledge of the existence of a marriage between the debtor and guarantor gives rise to the financier's assumption of 'the risk that the wife was ... subject to undue influence in entering into the [guarantee]'⁶⁴ does not sustain the characterisation of the first limb of *Yerkey* as a rule based on unjust enrichment. On the contrary, what the financier has assumed in such cases is the risk that the wife's guarantee was procured through the *wrong* of her husband.

Therefore, the first limb of *Yerkey* is better characterised as a rule based on the wrong of a third-party rather than the plaintiff's impaired consent.

MERGER OF UNDUE INFLUENCE WITH UNCONSCIONABLE DEALING

A Unconscionable Dealing Modified

It is proposed that undue influence should be merged to a significant extent with unconscionable dealing under a proposed doctrine of unconscionability ('proposed doctrine') by incorporating the relationships giving rise to undue influence (presumed and actual) as a category of special disability.

The relationships giving rise to undue influence are characterised as a form of special disability because plaintiffs in such relationships are likely to be unable to protect their best interests and are therefore particularly vulnerable to exploitation. Consequently, the trust and confidence reposed by the plaintiffs in ascendant wrongdoers by virtue of their relationship

⁶² Ibid 677–8 (Dixon J).

⁶³ Ibid 677, 684–5 (Dixon J).

⁶⁴ Edelman and Bant, above n 59, 11, 15.

may be abused to benefit the wrongdoers,⁶⁵ which constitutes conduct recognised as equitable fraud.⁶⁶

Another justification for characterising relationships giving rise to undue influence as a category of special disability is that some of them are fiduciary relationships,⁶⁷ relationships that Equity has traditionally regarded as being vulnerable to abuse and manipulation⁶⁸ and thus conferred strong protection upon. Consequently, such relationships should attract the same protection in the context of unconscionable dealing on the basis of their peculiar susceptibility to abuse, namely that a plaintiff principal in such a relationship is afflicted with a special disability in its dealings with the fiduciary wrongdoer.

However, the relationships giving rise to undue influence falling within the special disability category's purview are not limited to fiduciary relationships. The category encompasses relationships for which a presumption of undue influence can be enlivened from the presence of circumstances and inference of facts establishing an ascendant wrongdoer's special influence over a plaintiff.⁶⁹ Accordingly, under the proposed doctrine, relationships giving rise to undue influence are classified as an external disability because plaintiffs in such relationships are extremely vulnerable to the influence of ascendant wrongdoers and are likely to be placed in a position of special disadvantage in dealing with defendants as a result of such influence.

B Elements of the Proposed Doctrine

The proposed doctrine would set aside an impugned legal transaction against a defendant in circumstances where:

- i) A plaintiff was afflicted with a special disability in dealing with the defendant by reason of being subject to an internal or external disability.
- ii) The defendant had actual notice or was wilfully ignorant⁷⁰ of such a disability at the time of the transaction's procurement, which in turn gives rise to a presumption that the transaction is affected by unconscionability

⁶⁵ Bigwood, above n 8.

⁶⁶ *Nocton v Lord Ashburton* [1914] AC 932, 954 (Viscount Haldane). See also the discussion of equitable fraud in *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1, 631–2 [4845]–[4850] (Owen J).

⁶⁷ See n 13 above.

⁶⁸ *Johnson* (1936) 56 CLR 113, 135 (Dixon J); RP Meagher and Adrian Maroya, 'Crypto-Fiduciary Duties' (2003) 26 *University of New South Wales Law Journal* 348, 350.

⁶⁹ *Johnson* (1936) 56 CLR 113, 135 (Dixon J).

⁷⁰ As the High Court had held in *Kakavas* that constructive notice cannot satisfy the knowledge requirement of unconscionable dealing: see above n 32.

and hence the plaintiff would have a prima facie right in Equity to set aside the tainted transaction.

iii) The defendant may rebut the presumption and defeat the plaintiff's right to set aside the transaction by demonstrating, to the civil standard, that it had exercised reasonable care and efforts in ensuring that the plaintiff was aware of the transaction's true effect and terms (such as through providing the plaintiff with independent and competent legal advice).

iv) If the special disability was an external disability, the defendant may defeat the plaintiff's right by proving to the civil standard that it did not exert any influence upon the plaintiff or that the influence exerted did not put the plaintiff at a special disadvantage in their dealings pertaining to the legal transaction (such as the plaintiff had been fully informed of the transaction's propriety and wisdom in light of all relevant circumstances before entering into it).

C Key Features of the Proposed Doctrine

The proposed doctrine is defendant-focused as Equity has traditionally served to prevent the exercise of legal rights procured by defendants through means that would shock the conscience. Therefore, the focus of inquiry for the proposed doctrine is whether the defendant has engaged in conduct or acted in a manner so as to merit the intervention of Equity to prevent the unconscientious exercise of its legal rights.

A defendant-oriented doctrine would better account for external disabilities that may render plaintiffs extremely vulnerable to influences exerted by wrongdoers and deprive them of the capacity to consider and act in their best interests such as emotional dependence or great affection. This is because it is the influence emanating from the relationship between a plaintiff and wrongdoer that renders the plaintiff's emotional dependence or great affection a special disability, unlike internal disabilities that are the product of nature (such as deafness and low intelligence⁷¹ or old age⁷²) or arise from one's upbringing or life experience (such as an unfamiliarity with the English language⁷³). The scope of external disabilities also extends the proposed doctrine's application to circumstances where a wife entered into a loan guarantee as the result of improper influence on the part of her husband, which attracts equitable intervention pursuant to the rule in *Yerkey*.

It follows that the proposed doctrine distinguishes between special disabilities that are *intrinsic* to a plaintiff and automatically places the

⁷¹ *Wilton v Farnworth* (1948) 76 CLR 646.

⁷² *Amadio* (1983) 151 CLR 447.

⁷³ *Ibid.*

plaintiff at a special disadvantage in dealing with a defendant (such as congenital or physical handicaps) and those that only place a plaintiff at a special disadvantage through the impact of *external* influences (such as the exploitation of emotional dependence and influences emanating from relationships giving rise to undue influence). Thus, the defining characteristic of an external disability is that it does not *in and of itself* put a plaintiff in a disadvantageous position for dealing with a defendant⁷⁴ as the disability may inhere in many ordinary relationships (including parents and children, siblings and good friends) where neither party may automatically be at a special disadvantage in respect of dealings pertaining to a legal transaction. It is only the extreme vulnerability of a plaintiff to a wrongdoer's exploitation of an external disability that puts the plaintiff at a special disadvantage in dealing with a defendant and thereby result in an external disability having the same effect as an internal disability in attracting equitable intervention.

Although the classification of special disabilities giving rise to equitable intervention under the proposed doctrine are different, the doctrine's operation will be consistent as its ultimate purpose is to relieve aggrieved plaintiffs of legal transactions affected by unconscionability, which occurs when a plaintiff's special disability, whether internal or external, has been subjected to unconscientious exploitation by a wrongdoer.

From a logistical and procedural perspective, the proposed doctrine may also reduce the need for a plaintiff to plead both unconscionable dealing and undue influence, which has occurred frequently in recent litigation.⁷⁵ This may reduce the time and legal expenses required for resolving disputes as well as sparing courts from having to receive pleadings and hear arguments on claims based on both doctrines.

D Implications of the Proposed Doctrine

In light of the above analysis, it follows that any detriment or liabilities a plaintiff may incur which flowed from a legal transaction resulting from a wrongdoer's exertion of influence must be obviated by setting the transaction aside unless the defendant can show that the exertion of influence did not have a causal connection with the plaintiff's entry into the legal transaction. This is the basis for imposing the onus on a defendant to show that the effect of any influence it exerted upon the plaintiff did not result in the plaintiff being placed at a special disadvantage in respect of its entry into the impugned transaction in order to defeat the plaintiff's right as outlined in section 4B.

⁷⁴ Mindy Chen-Wishart, above n 37, 203.

⁷⁵ See, eg, *Da Yun Xu v Fang Lin* [2005] NSWSC 569; *Johnson v Johnson* [2009] NSWSC 503; *Tillett v Varnell Holdings Pty Ltd* [2009] NSWSC 1040; *Courtney v Powell* [2012] NSWSC 460; *Grace v Grace* [2012] NSWSC 976.

Moreover, as the underpinning rationale of the proposed doctrine is to redress equitable wrongdoing and relieve unconscientious legal transactions, the defendant should bear the burden of establishing its defence with respect to proving it did not commit a wrong or that the wrong did not cause the plaintiff to enter into the legal transaction.

The defendant should bear the onus under the proposed doctrine as both undue influence and unconscionable dealing require the defendant to rebut a presumption raised by the plaintiff.⁷⁶ Put simply, by imposing the onus on the defendant, the proposed doctrine effectively adopts the onus of proof of the doctrines subsumed by it.

Although it appears that a defendant may be easily absolved of liability for its wrongdoing under the proposed doctrine if its exertion of influence did not cause a plaintiff to enter into a legal transaction, the defendant may still be subject to other forms of liability at common law or in Equity (such as a trustee who had exerted influence upon a beneficiary in acquiring trust property will likely be liable to hold that property on constructive trust despite the influence being ineffective⁷⁷) notwithstanding that the transaction is not set aside.

E **Remnants of Undue Influence**

As discussed above, the scope of the proposed doctrine's application with respect to undue influence cases is limited to those where the plaintiff in a relationship giving rise to undue influence was subject to an exertion of influence by a wrongdoer. For instances where the plaintiff's entry into an impugned legal transaction is not the product of conscious exploitation (such as where undue influence arises purely from an ascendant party's status and not the exertion of influence)⁷⁸ but rather an impairment of the plaintiff's autonomy and consent,⁷⁹ the cause of action is based on the recipient of a benefit conferred or property transferred through the transaction being unjustly enriched due to the vitiation of the plaintiff's consent to it.⁸⁰ Accordingly, the existing undue influence doctrine would continue to operate as an independent and separate equitable doctrine to grant relief in those cases.

⁷⁶ See section 2 above.

⁷⁷ A constructive trust is likely to be imposed because the trustee has created a situation where its own interest conflicts with its fiduciary duty to the beneficiary and the acquisition of a gain is made through the use of a trustee's fiduciary position: *Chan v Zacharia* (1984) 154 CLR 178, 199 (Deane J).

⁷⁸ Chen-Wishart, above n 37, 204.

⁷⁹ Edelman and Bant, above n 40, 31.

⁸⁰ *Ibid* 239; Peter Birks, above n 41, 75.

THE PROPOSED DOCTRINE'S PRACTICAL APPLICATIONS

A Areas of Application

As foreshadowed in section one, the proposed doctrine may have some application in relation to third-party guarantees, gifts and legal transactions involving an inequality of bargaining power between the parties.

B Third-Party Guarantees

The proposed doctrine would encompass third-party guarantees procured in circumstances currently addressed by unconscionable dealing, undue influence and the rule in *Yerkey*.⁸¹ The adoption of the proposed doctrine's application to third-party guarantees would provide greater certainty for the conduct of commerce as banks and financial institutions only need to be concerned with and advised upon a single body of equitable principles rather than two under which their guarantees may be impugned and set aside as unconscionable transactions. It would also produce greater consistency in the law as it is *solely* the conduct of a creditor in unconscionably exploiting a guarantor's special disability, internal or external, that enlivens the proposed doctrine's operation to grant equitable relief.

The proposed doctrine would operate to set aside a guarantee against a creditor in circumstances where:

- i) The guarantor was afflicted with a special disability in dealing with the creditor,
- ii) That the creditor possessed actual notice or was wilfully ignorant of this disability at the time of the guarantee's procurement,

⁸¹ It should be noted that ss 76–78 of the *National Credit Code (National Consumer Credit Protection Act 2009)* (Cth) sch 1) provides for reopening and review of 'unjust' guarantee transactions, with the meaning of 'unjust' including unconscionable, harsh or oppressive: *National Credit Code* s 76(8). The criteria by which a guarantee transaction may be determined as being 'unjust' includes the use of undue influence (s 76(2)(j)) and elements resembling those of unconscionable dealing, such as guarantors' possible inability to protect their own interests due to their age, physical or mental condition (s 76(2)(f)), and whether the creditor took measures to ensure that the guarantor understood the nature and implications of the guarantee and the adequacy of such measures (s 76(2)(k)). However, these provisions appear to provide relief for *substantive* unfairness as well in relation to the terms and effects of third-party guarantees rather than solely *procedural* unfairness that is concerned with the procurement of third-party guarantees, which is the subject of discussion here: Jeannie Paterson, Andrew Robertson and Arlen Duke, above n 19, 569–70.

iii) Which in turn gives rise to a presumption that the guarantee is affected by unconscionability and hence the guarantor would have a prima facie right in Equity to set aside the tainted guarantee.

However, the creditor may rebut the presumption and defeat the guarantor's right to set aside the guarantee by:

i) Demonstrating, to the civil standard, that it had exercised reasonable care and efforts in ensuring that the guarantor was aware of the true effect and terms of the guarantee (such as through providing the guarantor with independent and competent legal advice), or

ii) Where the special disability was an external disability, by proving to the civil standard, that the guarantor was not subject to a third-party debtor's influence in entering into the guarantee or that the guarantor had been fully informed of the transaction's propriety and wisdom in light of all relevant circumstances before entering into it.⁸²

A potential problem with the proposed doctrine's application to third-party guarantees is that creditors will be subject to the presumption that a guarantee is affected by unconscionability and the guarantor's right to set aside the guarantee should they possess any actual notice or was wilfully ignorant of a relationship giving rise to an external disability. This would be highly likely if the creditor had been dealing with the debtor and guarantor on a frequent basis (such as if both parties to a relationship giving rise to an external disability have longstanding accounts with the same bank). Consequently, it may seem that the proposed doctrine would impose an unjustifiably onerous burden on creditors in relation to third-party guarantees. It is appreciated that the burden may be even greater in cases of relationships giving rise to an external disability falling within the first limb of the rule in *Yerkey*⁸³ as a bank is highly likely to be acquainted with the relationship of a married couple in its dealings with them.

However, upon closer analysis, the burden imposed on creditors is not necessarily a great one. This is because so long as they took reasonable steps to fully inform guarantors of the propriety and wisdom of entering into the guarantee in light of all relevant circumstances or obtain the means for this purpose, they will rebut the presumption of unconscionability and defeat the guarantor's right. The procedures that a creditor is required to take in order to satisfy a court that it has taken reasonable steps will vary depending on the nature and circumstances of a guarantor's external disability and the extent of the creditor's notice or knowledge with respect to the disability's effects. Two considerations to be taken into account in determining if the procedures taken by a creditor constitute reasonable

⁸² This adopts a measure suggested by a commentator with respect to the first limb of *Yerkey*: see Murray Brown, 'Undue Confusion over *Garcia*!' (2009) 3 *Journal of Equity* 72, 95.

⁸³ (1939) 63 CLR 649, 684 (Dixon J).

steps are: i) whether the guarantor obtains or is likely to obtain a material benefit under the guarantee and ii) whether the guarantor had already possessed full or significant knowledge of the guarantee's contents and effects before entering into it. Thus, if a guarantor obtains a material benefit under the guarantee or possessed full knowledge of its contents and effects, the procedures required to be taken by a creditor to satisfy a court that it has taken reasonable steps will be less onerous than where the guarantor did not obtain a material benefit or possessed no knowledge of the guarantee's contents and effects.

Accordingly, creditors are not unduly disadvantaged under the proposed doctrine as it imposes a coherent and predictable duty upon them to ensure that guarantees given by guarantors afflicted with a special disability are not procured in circumstances which Equity would regard as unconscionable. This is especially so where a guarantor and debtor are in a relationship giving rise to an external disability and the creditor has had a course of dealings with both of them.

The proposed doctrine's practical application in relation to third-party guarantees is also fairer for creditors and generates greater certainty for the conduct of commerce than an equitable doctrine that attributes liability upon creditors through notice of guarantees having been procured via debtors' exploitation of guarantors' external disabilities in the form of exertion of influence.⁸⁴ This is because the focus of inquiry under the proposed doctrine is upon whether the creditor had any *direct* notice of a guarantor's external disability that would render the guarantor vulnerable to unconscionable exploitation in entering into a guarantee if the guarantor was in a relationship giving rise to an external disability, rather than *indirect* notice of a debtor's actual exploitation of the guarantor's external disability in the guarantee's procurement.⁸⁵ Moreover, it appears artificial to suggest a creditor will be deemed to possess notice of a debtor's exploitation of a guarantor's external disability if inquiries are not made of the guarantor as to their knowledge and understanding of the guarantee.⁸⁶ Instead, the better view is it will be unconscionable for a creditor to retain the benefits of a guarantee if such inquiries have not been made upon being aware of a guarantor's external disability. Such a view is also to be

⁸⁴ An approach that is favoured by the English courts in relation to husbands' undue influence in the procurement of their wives' entry into guarantee contracts securing debts on their behalf: see, eg, *Barclays Bank plc v O'Brien* [1994] 1 AC 180; *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773.

⁸⁵ *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773, 814 [87] (Lord Nicholls).

⁸⁶ *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 196 (Lord Browne-Wilkinson).

preferred as it accords with the High Court's sentiments in *Garcia*⁸⁷ when affirming the application of the rule in *Yerkey* in contemporary Australia.⁸⁸

C Gifts

In *Louth*, Brennan J observed that Equity sets aside gifts obtained through unconscionable dealing and undue influence on the same substantial basis and that such a similarity between the two doctrines may allow for the principles of one to be applied with respect to cases falling within the other's domain.⁸⁹ In light of this observation, it follows that the proposed doctrine operates to combine the jurisdictions of Equity in setting aside gifts procured through unconscionable dealing or undue influence.

The proposed doctrine would accommodate both gifts made by donors who were afflicted with an internal disability (which likely resulted in a lack of knowledge about the gift's true value on their part⁹⁰) and gifts made by donors afflicted with an external disability (which likely resulted in the making of the gift with some or full knowledge of its true value but that the donor did not rationally consider the gift's true value before making it due to the effect of influence exerted by a defendant upon an external disability such as emotional dependence or great affection⁹¹ as well as relationships giving rise to undue influence).

Accordingly, the proposed doctrine would serve as a better basis for justifying Equity's intervention in setting aside gifts where the emotional dependence or affection of the plaintiff towards a defendant renders the former extremely vulnerable to the latter's exploitation. This is because it may be difficult to establish those disabilities as special disabilities under the current unconscionable dealing doctrine. Such a difficulty is well-demonstrated by the dissenting judgments in *Louth*⁹² and *Bridgewater*,⁹³ which held that there was no special disability on the part of the donor.

1 Case Study: *Louth v Diprose*

In *Louth*, the majority held that a solicitor (Louis Diprose) harbouring inveterate affections towards a woman (Mary Louth) who did not reciprocate them was afflicted with a special disability that rendered Mary's exploitation of Louis's affections in obtaining a gift of real property

⁸⁷ (1998) 194 CLR 395.

⁸⁸ Ibid 410–11 [39]–[40] (Gaudron, McHugh, Gummow and Hayne JJ).

⁸⁹ (1992) 175 CLR 621, 627–8.

⁹⁰ Such as in *Wilton v Farnworth*: (1948) 76 CLR 646, 654–5 (Rich J).

⁹¹ Such as in *Louth* and *Bridgewater*.

⁹² *Louth* (1992) 175 CLR 621, 655 (Toohey J).

⁹³ *Bridgewater* (1998) 194 CLR 457, 469 [37], 471–2 [46]–[47] (Gleeson CJ and Callinan J).

as falling within the scope of unconscionable dealing and for the gift to be set aside on that basis.⁹⁴ However, Toohey J⁹⁵ and subsequent academic literature⁹⁶ have questioned if Louis was in a position of special disability relative to Mary and whether the doctrine of unconscionable dealing was applicable at all in that case.

Such criticism is grounded upon the fact that Louis was an educated professional who did not suffer from any of the conventional afflictions recognised as special disabilities for the purpose of unconscionable dealing (which are internal disabilities under the proposed doctrine) as outlined in *Blomley v Ryan*,⁹⁷ whereas Mary was a single mother whose educational attainments and financial remuneration were inferior to Louis.

However, the criticism that Louis was not suffering under a special disability relative to Mary may be answered with the proposition that his emotional dependence upon Mary was an external disability that rendered Louis extremely vulnerable to influence exerted by Mary. Thus, under the proposed doctrine, Louis was afflicted with a special disability in his dealings with Mary as his emotional state was extremely susceptible to her influence emanating through her affections towards him, which left Louis in a position of special disadvantage in dealing with Mary after being influenced by the 'false atmosphere of crisis' contrived by Mary.⁹⁸ Accordingly, it was Mary's exploitation of Louis's external disability that placed him in a position of special disadvantage in dealing with her rather than any internal disability. It follows that the facts in *Louth* would attract the proposed doctrine's application.

The circumstances of Louis and Mary's relationship were sufficient to draw the inference that Mary was in an ascendant position of influence over Louis by reason of his infatuation.⁹⁹ Accordingly, their relationship was a relationship giving rise to an external disability that would likely result in Louis being placed in a position of special disadvantage in dealing with Mary upon her influence and for which it would be unconscientious for Mary to retain Louis's gift procured through the exertion of her influence. It follows that as Mary possessed actual knowledge of Louis's infatuation

⁹⁴ *Louth* (1992) 175 CLR 621, 630–2 (Brennan J), 638–9 (Deane J), 641–2 (Dawson, Gaudron and McHugh JJ).

⁹⁵ *Ibid* 655.

⁹⁶ See, eg, Lisa Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*' (1994) 19 *Melbourne University Law Review* 701, 721–2; G E Dal Pont, *Equity and Trusts Commentary and Materials* (Lawbook, 5th ed, 2011) 318; Jeannie Paterson, Andrew Robertson and Arlen Duke, above n 19, 558.

⁹⁷ (1956) 99 CLR 362, 405 (Fullagar J).

⁹⁸ *Louth* (1992) 175 CLR 621, 624 (Mason CJ), 636–8 (Deane J), 642 (Dawson, Gaudron and McHugh JJ).

⁹⁹ As the majority acknowledged in *Louth*: (1992) 175 CLR 621, 636 (Deane J), 642 (Dawson, Gaudron and McHugh JJ).

with her and the special disability it generated in him,¹⁰⁰ the presumption that Louis's gift was affected by unconscionability and a prima facie right to set it aside arose.

As Mary had exerted influence upon Louis, the only defence available to her is to show that the influence did not put Louis at a special disadvantage in their dealings pertaining to Louis's gift. Mary would not be able to establish the defence because it was clear that Louis had made the gift as a result of Mary's exercise of influence over him by contriving an atmosphere of crisis intended to induce Louis to make the gift to her.¹⁰¹ Having failed to establish any defences, Mary would be unable to rebut the presumption that Louis's gift was free from the effect of unconscionability and defeat his right to set the gift aside.

Therefore, the same outcome in *Louth* is reached through the proposed doctrine's application.

2 *Benefits of Proposed Doctrine in relation to Gift Cases*

The above analyses in sections 3B and 4D demonstrate that the procurement of gifts through exertion of influence by wrongdoers upon the external disabilities of plaintiffs constitute wrongs committed by wrongdoers.¹⁰² Accordingly, under the proposed doctrine, plaintiffs are entitled to have their gifts made through acting upon influence exerted by wrongdoers set aside in Equity unless a defendant is able to establish either of the two available defences. The relief of rescission is granted as it is a veritable means of obviating the effects of the wrongs committed by wrongdoers. This is because as the plaintiff was given no consideration in transferring the gift's title to the wrongdoer, the plaintiff would not be required to effect substantial restitution¹⁰³ in order to rescind the gift transaction.¹⁰⁴

However, under the existing unconscionable dealing and undue influence doctrines, it may be difficult for plaintiffs whose external disabilities have been subject to the influence of wrongdoers to obtain similar relief available under the proposed doctrine. This is because neither of the two doctrines

¹⁰⁰ *Louth* (1992) 175 CLR 621, 642 (Dawson, Gaudron and McHugh JJ).

¹⁰¹ *Ibid* 637–8 (Deane J).

¹⁰² The reference here is to wrongdoers rather than defendants to encompass the scenario where a third-party exerts influence upon a plaintiff's external disability to effect a gift to a defendant.

¹⁰³ *Alati v Kruger* (1955) 94 CLR 216, 223–4 (Dixon CJ, Kitto, Webb and Taylor JJ).

¹⁰⁴ The plaintiff's right to rescission is, of course, subject to the equitable limits to rescission, particularly where the proprietary rights of third-parties has intervened (such as where the wrongdoer has sold the gift to a bona fide purchaser for value without notice).

has yet to clearly recognise exertion of influence upon external disabilities as a category of legal event fitting within the framework of its cause of action.

As undue influence is predominantly focused upon the impairment of plaintiffs' consent,¹⁰⁵ it may be difficult for plaintiffs afflicted with external disabilities to succeed in setting aside gifts made as the result of a wrongdoer's exertion of influence, particularly in circumstances where the external disability cannot be properly characterised as a relationship giving rise to undue influence. This difficulty is substantiated by the dearth of cases in which actual undue influence was found or successfully established by the plaintiff.¹⁰⁶ Similarly, unconscionable dealing has yet to clearly recognise external disabilities as special disabilities for their exploitation to constitute wrongs warranting relief notwithstanding that *Louth*¹⁰⁷ and *Bridgewater*¹⁰⁸ were decided on the basis of unconscionable dealing.

Consequently, the proposed doctrine provides a viable avenue of relief for plaintiffs afflicted with external disabilities to set aside gifts that are the product of wrongdoers' influence. This is because under the proposed doctrine, a plaintiff may rely on a rebuttable presumption to set aside their gifts so long as the defendant possessed actual knowledge or was wilfully ignorant of the plaintiff's external disability, whereas a plaintiff would have to prove that the gift was the product of influence exerted by a wrongdoer under actual undue influence, the other potential source of relief.¹⁰⁹ Accordingly, it is likely to be easier to obtain relief under the proposed doctrine than actual undue influence.

The proposed doctrine is also not unfair to defendants because they may rebut the presumption in favour of plaintiffs and defeat their right to set aside gifts by demonstrating that reasonable steps had been taken to ensure they were aware of the effect of the transaction facilitating the gift's transfer.

¹⁰⁵ See, eg, James Edelman, 'Review: Hanoch Dargan, The Law and Ethics of Restitution' (2006) 69 *Modern Law Review* 131, 133.

¹⁰⁶ See, eg, n 19; Young, Croft and Smith, above n 14, 314 [5.380] n 233.

¹⁰⁷ It is noteworthy that amongst the majority justices in *Louth*, only Deane J explicitly addressed the issue of emotional dependence as a special disability, but his Honour's comments were clearly directed at Louis Diprose's particular circumstances and not as general propositions: (1992) 175 CLR 621, 638.

¹⁰⁸ It is curious that the majority justices (Gaudron, Gummow and Kirby JJ) did not make clear findings as to whether the party alleged to be afflicted with a special disability (Neil York) was indeed so afflicted, making only brief mention of the relevant findings in the lower courts: (1998) 194 CLR 457, 477 [70], [72]. See also Anne Finlay, 'Can We See the Chancellor's Footprint?: *Bridgewater v Leahy*' (1999) 14 *Journal of Contract Law* 265, 274–5.

¹⁰⁹ Young, Croft and Smith, above n 14, 314 [5.380].

The reasonable steps required to be taken will vary depending on the nature and severity of the plaintiff's disability, but may range from informing the plaintiff so as to ensure he or she possesses full knowledge of the gift transaction's nature and effects to engaging a lawyer to advise the plaintiff of the propriety and wisdom of the transaction.

D Legal Transactions Involving Inequality of Bargaining Power between the Parties

1 *The Effect of Inequality of Bargaining Power in Equity*

In *Lloyds Bank Ltd v Bundy*,¹¹⁰ Lord Denning MR suggested in *obiter* that unconscionable dealing and undue influence are doctrines underpinned by a common feature of inequality of bargaining power between the parties to a legal transaction,¹¹¹ whereby equitable relief is given to a party:

who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.¹¹²

Lord Denning's view that undue influence rested upon the inequality of bargaining power between parties to a legal transaction was doubted in *National Westminster Bank Plc v Morgan*,¹¹³ in which Lord Scarman held that inequality of bargaining power was not an appropriate doctrinal basis for undue influence.¹¹⁴ However, Lord Scarman did not appear to disregard entirely the proposition that inequality of bargaining power played a vital role in the operation of undue influence, as he commented that the starting point for considering whether a legal transaction was procured through the exercise of influence is its disadvantageous character and one for which the common law cannot grant relief.¹¹⁵

In Australia, the position on the role of inequality of bargaining power in unconscionable dealing or undue influence has not received definitive exposition.¹¹⁶ However, it is noted the majority in *Australian Competition and*

¹¹⁰ [1975] QB 326.

¹¹¹ *Ibid* 337–8.

¹¹² *Ibid* 339.

¹¹³ [1985] AC 686.

¹¹⁴ *Ibid* 708.

¹¹⁵ *Ibid* 709.

¹¹⁶ Although Mason J had held in *Amadio* that a difference in the bargaining power of parties to a legal transaction cannot *by itself* attract equitable intervention under the unconscionable dealing doctrine: (1983) 151 CLR 447, 462.

*Consumer Commission v CG Berbatis Holdings Pty Ltd ('ACCC v Berbatis')*¹¹⁷ held, in the context of the application of statutory provisions pertaining to unconscionable conduct in trade or commerce,¹¹⁸ that inequality of bargaining power does not constitute a special disability for the purposes of establishing unconscionable dealing.¹¹⁹

2 *Inequality of Bargaining Power and the Proposed Doctrine*

Although Australian Equity appears to have rejected any notion that inequality of bargaining power would be sufficient per se to constitute special disability attracting equitable intervention,¹²⁰ it is argued that upon an analysis of unconscionable dealing and undue influence cases under the proposed doctrine it is clear that inequality of bargaining power is a concomitant feature of both internal and external disabilities. Therefore, inequality of bargaining power should be characterised as an essential incident of the disabilities.

However, the nature of the inequality of bargaining power associated with internal and external disabilities are different. In instances of internal disabilities, the inequality of bargaining power arises directly from the disability as a plaintiff afflicted with one is automatically placed in a position of weaker bargaining power relative to a defendant, whereas a plaintiff afflicted with an external disability is deprived of a position of equal or greater bargaining power relative to the defendant through acting upon the influence exerted by a defendant. This distinction is vividly illustrated by the internal disabilities of the Amadios in *Amadio* and the external disability of Louis Diprose and Bill York in *Louth* and *Bridgewater* respectively.

In *Amadio*, the Amadios' old age and limited understanding of written English inadequate for dealing with a loan guarantee¹²¹ automatically placed them in a position of weaker bargaining power relative to the Commercial Bank of Australia in relation to the guarantee as they did not possess the requisite capacity to comprehend or inquire about the facts and matters relevant to the protection of their interests pertaining to the guarantee's execution.

In contrast with the Amadios, Louis Diprose (a qualified solicitor) and Bill York (an experienced farmer and businessman) were both capable of comprehending or inquiring about the facts and matters relevant to their

¹¹⁷ (2003) 214 CLR 51.

¹¹⁸ *Trade Practices Act 1974* (Cth) s 51AA(1); now *Competition and Consumer Act 2010* (Cth) sch 2 (Australian Consumer Law) s 20(1).

¹¹⁹ *ACCC v Berbatis* (2003) 214 CLR 51, 64 [11]–[14] (Gleeson CJ), 77 [56] (Gummow and Hayne JJ), 115 [184] (Callinan J).

¹²⁰ *Ibid* and n 116.

¹²¹ *Amadio* (1983) 151 CLR 447, 477 (Deane J).

interests pertaining to the legal transaction they had entered into. Accordingly, they were not automatically placed in a position of weaker bargaining power relative to Mary Louth and Neil York respectively. Nevertheless, by virtue of their external disabilities (emotional dependence in the form of Louis Diprose's infatuation with Mary Louth and Bill York's great affection towards his nephew Neil York), Louis Diprose and Bill York were ultimately trapped in a position of weaker bargaining power in relation to the legal transaction they executed as a result of acting upon the influence of Mary Louth and Neil York. Accordingly, the inequality of bargaining power between the plaintiffs and defendants in *Louth* and *Bridgewater* was generated through the defendants' influence and its impact on the plaintiffs' external disabilities.

Therefore, through classifying special disabilities attracting equitable intervention into external and internal disabilities, the proposed doctrine provides greater recognition to the inequality of bargaining power existing between afflicted plaintiffs and defendants, and the likelihood that defendants may unconsciously exploit it with respect to impugned legal transactions. It follows that the proposed doctrine's operation also serves to prevent defendants from taking advantage of an inequality of bargaining power arising from internal or external disabilities.

CONCLUSION

As the above analyses demonstrate, it is possible to effect a significant merger of undue influence with unconscionable dealing under the proposed doctrine through recognising that relationships giving rise to undue influence is a form of special disability as the exertion of influence by ascendant wrongdoers upon plaintiffs in such relationships is a wrong.

The classification of special disabilities into internal and external disabilities under the proposed doctrine would produce three great benefits.

First, the characterisation of emotional dependence and familial affection as external disabilities clearly recognise them as special disabilities attracting relief under unconscionable dealing. This recognition is founded upon the basis that disabilities such as emotional dependence and familial affection may render afflicted plaintiffs extremely vulnerable to influences exerted by wrongdoers, which result in them being placed in a position of special disadvantage in dealing with defendants just like plaintiffs in relationships giving rise to undue influence, particularly in gift cases.

Secondly, the proposed doctrine provides greater certainty and consistency for both guarantors and creditors of third-party guarantees in relation to the circumstances for which such guarantees may be impugned and set

aside in Equity, as well as greater coherence with respect to the same matters for gifts procured through influence exerted upon the external disabilities of plaintiffs.

Thirdly, the proposed doctrine acknowledges that inequality of bargaining power may serve as a criterion for drawing equitable intervention and relief with respect to legal transactions affected by unconscionability. It is submitted that to do so is especially appropriate as the proposed doctrine is largely based upon unconscionable dealing, an equitable doctrine that grants relief against legal transactions repugnant to good conscience, particularly where a stronger party takes advantage of a weaker party subject to a special vulnerability.

Thus, it is submitted that the proposed doctrine would serve as a veritable means of assisting Equity in remedying injustices arising from legal transactions entered by plaintiffs afflicted with external disabilities due to the exertion of influence by wrongdoers.