

ILL-GOTTEN CONTRACTS IN NEW ZEALAND: PARTING THOUGHTS ON DURESS, UNDUE INFLUENCE AND UNCONSCIONABLE DEALING – KIWI-STYLE?

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This article considers the private-law doctrines of duress, undue influence and unconscionable dealing as they have fared at the hands of New Zealand's judiciary. It speculates, necessarily briefly, on whether there is anything distinctively "Kiwi" about the courts' formulation of and approach to those three doctrines in New Zealand, whether individually or as a related set. It concludes that because New Zealand's courts have borrowed from different, and not entirely consistent, jurisprudential sources of inspiration in relation to the development of each of the subject doctrines, what has resulted is a suite of exculpatory doctrines that are not as intellectually coordinated as they could and should be.

I INTRODUCTION

It is a considerable honour and pleasure to be invited to contribute to a celebration of David McLauchlan's long and distinguished academic career. Such recognition of David is undeniably deserved for his significant contributions to teaching, scholarship, and contract and commercial law reform in New Zealand (and, of course, beyond).

David will not recall the first time that he and I met, but I certainly do. It was in 1986, when I was enrolled as an undergraduate law student in a course, "Advanced Contract and Tort", at the University of Auckland. He had been invited by Francis Dawson, one of the lecturers in the course, to conduct a class on contractual mistake. The Court of Appeal had relatively recently delivered its controversial decision in *Conlon v Ozolins*.¹ So vivid is my recollection of that precise moment,

* Professor of Law, Bond University, Queensland. In preparing this contribution, I have drawn, at points liberally, on my prior writings in the field. These are referenced at appropriate junctures in the footnotes.

¹ *Conlon v Ozolins* [1984] 1 NZLR 489 (CA).

almost a quarter-century ago, that I recall exactly where I was sitting in the classroom, as well as what I was wearing on the day: a deep blue, v-necked polyester sweat shirt, with the white circular insignia of "Otumoetai Golf Club" displayed prominently on the left breast. I remember this because the first words I heard David's lips manufacture were these: "You, in the blue sweater, can you please recite the facts of the case and talk us through the reasoning of the majority and minority Judges?" (the index finger of his right hand was also pointing, like a handgun, directly at my head). After stammering fecklessly through the facts and what I understood to be their Honours' reasoning, I was let off the hook and the learned Professor did not call upon me again that day. He had obviously deciphered that no seeds could germinate on such barren ground, and he diverted in search of more fertile pastures.

Just three years later I had transported myself to Australia to embark upon a PhD, ironically on the subject of contractual mistake (although I was talked into tackling a rather different topic within a day or two of arriving). The next occasion I met David was in 1995, when I had been invited to comment on a paper² that he and Charles Rickett presented at the Sixth Annual Journal of Contract Law Conference, "The Changing Law of Contract", held in Auckland in mid August of that year. We have been in regular contact ever since, even recently authoring an article together.³

Deciding what to write for my contribution to this special issue of the VUWLR exercised me for a time. First and foremost, I thought it sage not to foray into David's well-marked intellectual turf, which of course only made the task more challenging. His writing is so voluminous across a vast array of contract- and commercial-law-related subject matter. I asked David for a copy of his list of publications to assist me with my options, and what arrived was a document approximating in size the White Pages for the entire Wellington district! My own publications list, in contrast, more closely resembles the entrée menu at Valentines Restaurant, Petone. In the end I have settled on what is familiar territory for me: the law relating to duress, undue influence and unconscionable dealing. I have published domestically on the first of those three exculpatory doctrines,⁴ but never on the other two. It is perhaps timely, moreover, that I should finally say something about the undue influence and unconscionable dealing doctrines in and for New Zealand. This is not only because there have been some important local and international cases involving those equitable doctrines in recent years, but also because I write this contribution almost literally on the eve of my departure for

2 Published as CEF Rickett and DW McLauchlan "Undue Influence, Financiers and Third Parties: A Doctrine in Transition or the Emergence of a New Doctrine?" [1995] NZ Law Review 328. My own contribution to the proceedings is published as R Bigwood "Undue Influence: 'Impaired Consent' or 'Wicked Exploitation?'" (1996) 16 OJLS 503.

3 D McLauchlan and R Bigwood "Lapse of Offers Due to Changed Circumstances: A Contract Conversation" (2011) 27 JCL (forthcoming).

4 See R Bigwood "The Elements of Duress in New Zealand Law Today: A Case for Ockham's Razor?" (2004) 10 NZBLQ 326; "Contractual Duress and the Supreme Court" [2005] NZLJ 140; "Threats' versus 'Warnings'" [2009] NZLJ 385 ["Threats vs Warnings"].

legal academia in Australia. My comments are therefore offered very much in the spirit of "parting thoughts".

Of course, the starting point for discussion of ill-gotten transactions, in any Anglo-Commonwealth legal system, must be the classical liberal conception of transfer and exchange. Subject to capacity and legality, each individual is in general free to dispose of his or her property and labour as he or she sees fit. It is not for the state, at least through the agency of politically unaccountable judges, to second-guess the wisdom of interpersonal transactions, whether they be contracts or gifts. This injunction applies no matter how "improvident, unreasonable, or unjust" the particular transaction may appear to be.⁵ The common law, including equity, does not exist to assist, officiously or paternalistically, those "who repent of foolish undertakings" or regretted dispositions.⁶

That a transaction is objectively concluded, however, is no mark of its justness. For despite appearances (the outward manifestation of consent) it may be that the transaction was in reality the product of "victimisation": "an unconscientious use of the power arising out of the circumstances and conditions of the ... parties",⁷ consisting "either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances".⁸ It is therefore always open to the sufferer of such victimisation (the party who has been subjected to an improper motive for action) to seek the state's assistance in suppressing or avoiding the resultant transaction on grounds of its lack of (procedural) justice or fairness. However, the law generally requires such a party to channel his or her exculpatory claim, based on such grounds, through a well-recognised doctrinal category such as fraud, incapacity, duress, undue influence or unconscionable dealing.

As mentioned, this contribution is directed only to the final three doctrines in that list. In my conclusion, I want to speculate, necessarily briefly, on whether there is anything distinctively "Kiwi" about the New Zealand's courts' formulation of and approach to those three doctrines, whether severally or as a coordinated set. It will be argued that if New Zealand's law relating to duress, undue influence and unconscionable dealing is to be seen as distinctive in any way, this can only be for the apparently eclectic spirit of its development. But eclecticism is undesirable when it produces (or risks producing) disharmony in the conceptual and practical order of doctrines invoked to achieve corrective justice in the field of ill-gotten transactions, including contracts.

II DURESS

Of the three doctrines selected for discussion in this contribution, duress probably presents as the most stable and intellectually coherent. Lord Scarman's two-element test for duress in *Universe*

5 *Brusewitz v Brown* [1923] NZLR 1106 (SC) at 1109 per Salmond J [*Brusewitz*].

6 *Nichols v Jessup* [1986] 1 NZLR 226 (CA) at 235 per Somers J [*Nichols*].

7 *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484 at 490 per Lord Selborne LC.

8 *Hart v O'Connor* [1985] AC 1000 (PC) at 1024 per Lord Brightman.

*Tankships Inc of Monrovia v International Transport Workers Federation*⁹ was endorsed a decade ago by the Court of Appeal in *Haines v Carter*,¹⁰ and before that by Tipping J (then in the High Court) in *Shivas v Bank of New Zealand*.¹¹ Lord Scarman's test conceives of duress as comprising:¹²

- (1) pressure amounting to compulsion of the will; and
- (2) the illegitimacy of the pressure exerted.

In *Pharmacy Care Systems Ltd v Attorney-General*,¹³ however, the Court of Appeal managed to craft five elements out of those regular two, as well as appending two additional criteria (the sixth and seventh, below) that cannot properly be regarded as "elemental" to duress at all:¹⁴

First, there must be a threat or pressure. Secondly, that threat or pressure must be improper. Thirdly, the victim's will must have been overborne by the improper pressure so that his or her free will and judgment have been displaced. Fourthly, the threat or pressure must actually induce the victim's manifestation of assent. Fifthly, the threat or pressure must be sufficiently grave to justify the assent from the victim in the sense that it left the victim with no reasonable alternative. Sixthly, duress renders the resulting agreement voidable at the instance of the victim. This may be addressed either by raising duress as a defence to an action, or affirmatively, by applying timeously to a court for avoidance of the agreement. Seventhly, the victim may be precluded from avoiding the agreement by affirmation.

The confounding and unnecessarily proliferative nature of this reformulation of duress speaks for itself.¹⁵ It was pleasing, therefore, when subsequently, in *McIntyre v Nemesis DBK Ltd*,¹⁶ the Court of Appeal reinstated Lord Scarman's compendious two-element test from *Universe Tankships*, albeit in an order converse to that presented and applied by his Lordship in that case: First, there

9 *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 (HL) at 400 per Lord Scarman [*Universe Tankships*].

10 *Haines v Carter* [2001] 2 NZLR 167 (CA) at [108] and [112] per Young J for the Court.

11 *Shivas v Bank of New Zealand* [1990] 2 NZLR 327 (HC) at 344–345 per Tipping J.

12 *Universe Tankships*, above n 9, at 401 per Lord Scarman. See also *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152 (HL) at 165G per Lord Goff of Chieveley.

13 *Pharmacy Care Systems Ltd v Attorney-General* (2004) 2 NZCCLR 187 (CA) (McGrath, Hammond and O'Regan JJ; judgment given by Hammond J) [*Pharmacy Care*].

14 *Ibid*, at [98] per Hammond J.

15 See R Bigwood "When Exegesis Becomes Excess: The Newborn Problematics of Contractual Duress Law in New Zealand" (2005) 21 JCL 208.

16 *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [2010] 1 NZLR 463 [*McIntyre*].

must be the exertion of illegitimate pressure on the victim. Secondly, the imposition of that pressure must have compelled the victim to enter the contract.¹⁷

The *McIntyre* Court also explained that although the *Pharmacy Care* Court referred to the seven constituents of its list as "elements", "they are not elements in the ordinary sense. ... [They are] ... best regarded as legal propositions of relevance to duress."¹⁸ But with respect to the Court, that cannot be true of the first five items in the list, all of which were expressed as imperatives. Because the word "must" was used in relation to each of those items, the *Pharmacy Care* Court surely intended them to be understood as "elements in the ordinary sense".

That small quibble aside, it is notable that under both Lord Scarman's and the Court of Appeal's recent approach, duress is treated normatively. The legal question of whether an alleged victim acted "under duress" is inextricably tied to the question of what the parties' respective background "rights" were in the circumstances of the encounter that produced the impugned transaction. The conceptual crux of duress is seen to lie in the *wrongfulness* (illegitimacy) of the conditional proposal issued in support of the specific demand (the threat), and the *acceptability* of the alternatives existing for the target of the threat at the time of entry into the impugned transaction (the appropriate standard of causation also being met). It is also crucial to observe and respect what is the most salient structural feature of Lord Scarman's two-pronged formulation in *Universe Tankships*, namely, that each element comprises an *independent* test for duress. Each test is necessary, but neither alone is sufficient, to establish duress. In other words, pressure is not adjudged to be "illegitimate", under the second element of the test, *just* because it caused a loss of freedom for the target or left her with "no practical/reasonable choice" under the first element, "compulsion of the will".¹⁹

Also, and relatedly, the two-pronged duress inquiry is lexically ordered, which is why I prefer the Court of Appeal's reversal of the criterial sequence from *Universe Tankships* above. Strictly speaking, the court should not move to assess whether there has been "compulsion or coercion of the will" of the victim (for example, an absence of a reasonable alternative and a causal decision to enter into the impugned transaction) until it has *first* been determined that the alleged victim had "illegitimate pressure" applied to her. This is because conditional proposals that are not "threats" because they are not "illegitimate" or "wrongful" relative to the claimant's ex-ante baseline of legal entitlements, are simply not capable of creating "coercive" choice situations in the first place. They may well be "exploitative" for the purposes of founding an unconscionable dealing claim, below,

17 Ibid, at [20] per O'Regan J for the Court. I have argued elsewhere that if this move is not deliberate, it is nevertheless an intellectual windfall. See Bigwood "Threats vs Warnings", above n 4, at 385.

18 *McIntyre*, above n 16, at [22].

19 Put differently, modern courts have emphasised that "legitimate" pressure does not constitute duress even though it "compels" (causes) the target to act against her will: *Barton v Armstrong* [1976] AC 104 (PC) at 121 per Lords Wilberforce and Simon of Glaisdale.

but they cannot strictly speaking constitute "legal coercion" for the purpose of making out a duress claim.

Given space limitations, I shall make some necessarily cursory remarks in relation to each of the tests under the two-stage duress inquiry just described.²⁰

A Illegitimacy of Pressure: a Rights-based Approach

The Court of Appeal in *McIntyre* correctly observed that a duress claim "cannot succeed unless there has been the exertion of *illegitimate* pressure".²¹ But what, in legal contemplation, is "*illegitimate* pressure"? Strictly speaking, it is a "threat": a credible conditional proposal (in support of a specific demand) to make someone *worse off* relative to where she is entitled to be, which entitlement is adjudged against the "threatening" party's independent rights, duties and disabilities as these might affect the "threatened" party. This approach is again seen most clearly in Lord Scarman's judgment in *Universe Tankships*, where it is suggested that in instances of threatened "unlawful action", such as independent crimes and torts, the pressure will virtually always be considered illegitimate.²² But his Lordship famously went on to state that "[d]uress can ... exist even if the threat is one of lawful action", citing blackmail as an example.²³ The illegitimacy of such lawful-act duress, he explained, was to be found not in the nature of the pressure as such, but rather in the "nature of the demand", that is to say, in the circumstances of the pressure in combination with the demand.²⁴

An enduring and important issue for New Zealand's courts is whether a threatened breach of contract, used in support of a specific demand (typically a gratuitous contract modification), is automatically illegitimate by virtue of its formal "unlawfulness".²⁵ The Court of Appeal in *McIntyre*

20 My most expansive, but no longer fully current, discussion of the subject is in R Bigwood *Exploitative Contracts* (Oxford University Press, Oxford, 2003) at ch 7 [*Exploitative Contracts*].

21 *McIntyre*, above n 16, at [26].

22 *Universe Tankships*, above n 9, at 400C per Lord Scarman: "The origin of the doctrine of duress in threats to life or limb, or to property, suggests strongly that the law regards the threat of unlawful action as illegitimate, whatever the demand."

23 *McIntyre*, above n 16, at [26].

24 *Ibid.*

25 It is sometimes denied that breach of contract is necessarily a "wrong" and, on the contrary, that it is even a *right* enjoyed by the breaching party: *Nav Canada v Greater Fredericton Airport Authority Inc* (2008) 290 DLR (4th) 405 (NBCA) at [46] per Robertson JA [*Nav Canada*]: "a threatened breach of contract is not only lawful but in fact constitutes a right which can be exercised subject to the obligation to pay damages and possibly to an order for specific performance". But this is clearly against such leading British Commonwealth authorities as *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239 (HL) at 253 per Lord Lindley ("Any party to a contract can break it if he chooses; but in point of law he is not entitled to break it even on offering to pay damages") and *Zhu v Treasurer of NSW* [2004] HCA 56, (2004) 218 CLR 530 at [129].

thought not. Although for the purposes of the appeal the Court "proceed[ed] on the basis that a threat to breach a contract is unlawful and generally illegitimate",²⁶ it also stated:²⁷

Having said that [threats to breach a contract are unlawful and generally illegitimate], we observe that care must be taken to distinguish between (illegitimate) threats and (legitimate) warnings. Where one party warns the other that, as a matter of commercial reality, it will not be able to perform its contractual obligations unless changes are agreed to, this does not amount to a threat.

The Court is not referring here to cases where one party, after asserting a bona fide claim of right, strikes a genuine compromise with the other party even though the former's claim was, as it later transpires, without merit;²⁸ it is envisioning instead the situation where a party proposes, in support of a demand for something to which they are not otherwise lawfully entitled, to break a contract "when a change in circumstances beyond their control has meant that they are genuinely unable to perform".²⁹

As I have respectfully argued elsewhere,³⁰ this can only be a recipe for bad law, especially considering that the Court in *McIntyre* had available to it the (unexercised) option of pursuing a solution that achieved the "commercial flexibility" their Honours desired while leaving the existing doctrinal unity of contract law intact. To repeat what I argued:³¹

[I]t is a mistake ... to assume that a strict rights-based approach to the illegitimacy of pressure in this context leaves less (or too little) room for judicial flexibility, or would necessarily result in "economic duress" being found more frequently than under the contemplated alternative approach. There is a considerable difference between saying that, unless justified by positive law, credible conditional proposals to breach a contract in support of a specific demand are perforce illegitimate by reason of their unlawfulness and concluding that the resultant transaction is (or should be) defeasible because of duress. There may well be no duress because, despite the illegitimacy of pressure applied or experienced by the victim, there was no sequent "compulsion of his or her will" under the independent compulsion test for duress. There may have been no compulsion either because the pressure was not a "significant cause" in

26 *McIntyre*, above n 16, at [31].

27 *Ibid*, at [32].

28 The legitimacy of proposals to pursue or exercise honest-but-mistaken contractual claims or rights unless certain demands are met are complicated by policy-driven considerations and desiderata that do not feature, or at least are significantly weaker, in the sorts of situation that the Court has in mind in its approval of the distinction between "threats" and "warnings".

29 *McIntyre*, above n 16, at [30], quoting Salmon J in *Attorney-General for England and Wales v R* HC Auckland CP641/98, 6 December 2000 at [115].

30 Bigwood "Threats vs Warnings", above n 4.

31 *Ibid*, at 387. For a fuller account of this alternative approach to the (il)legitimacy of proposed breaches of contract, see Bigwood, above n 20, at 340–344.

the victim's ultimate decision to accede or, even if it was, that the court might, under the "no reasonable alternative" test, adjudge submission to the demand itself to have been a "reasonable" alternative for the victim in the circumstances given, say, the "factual benefits" resulting from the continued contractual relationship.

... [A] number of well-known unsuccessful duress claims can be explained in this way, such as *The "Siboen and the "Sibotre"* [1976] 1 Lloyd's Rep 293 and *Pao On v Lau Yiu Long* [1980] AC 614. There is, accordingly, no need to manipulate, in a haphazard and oblique way, our ordinary conception of contractual rights and obligations under the "illegitimate pressure" arm of the two-pronged duress inquiry.

From the standpoint of traditional contract law, there can be no meaningful or principled distinction between a contractor's "unwillingness" to perform his contractual obligations and his "unableness" to do so (short of legal frustration). The client has an undoubted *right* to performance, and the contractor, regardless of his motives or beliefs, is leading the client to believe that, intentionally or otherwise, he (the contractor) is going to violate that right, and hence commit an uncompensated harm against the client, unless the client agrees to or does whatever the contractor demands. If the *result* of that communication is actually to force the client's will, the law of contractual duress can surely draw no coherent or stable distinction between the contractor's (violative) conduct that is aimed at coercing the client, and the contractor's (violative) conduct that unintentionally has a coercive effect on her.³² Contractual rights must be taken seriously *as rights*.

If the point were ever to come before the Supreme Court of New Zealand, therefore, it is my hope that that Court would recognise that actual or proposed breaches of contract are, if not justified or excused by some *orthodox* principle or countervailing policy of law, *invariably* illegitimate for the purposes of the independent "pressure" arm of the two-pronged duress inquiry. Although breach of contract is perhaps not as serious a matter as (some) crimes and torts, the suggestion that it may sometimes be "not illegitimate" for a party to breach, or threaten to breach, his or her contract (in support of a demand for something to which she or he is not otherwise entitled) is nothing short of denying that contracts create genuine legal rights. Although it is true that Lord Scarman used the milder language of "illegitimacy" over "illegality" or "unlawfulness" in formulating his test for duress in *Universe Tankships*, such a formulation was necessary if the category of lawful-act duress were also to be recognised. Although pressure applied by lawful means can be "illegitimate" if accompanied by the wrong (malicious or exploitative) motives, the logic does not apply in the reverse direction, so that a proposed rights-violation made with good motives³³ can be "de-illegitimatised" for the purposes of the pressure arm of the duress inquiry. The law of duress seeks

32 See, for example, *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] QB 705.

33 For example, in the belief that it was commercially reasonable or for the right ends.

to vindicate, rather than alter, the scheme of rights that is the context of the parties' interaction. Although lawful-act duress cases demonstrate that justifiable limitations may be placed upon the exercise of a party's lawful rights, powers, freedoms or privileges in the interests of preserving the other party's genuine autonomy in the transaction in question, this limitation is imposed on the first party by the law, in virtue of the parties' relative circumstances, and not by the second party himself. To advise, as the Court of Appeal does in *McIntyre*, that it may not be illegitimate for a contractor to breach, or propose to breach, his contract with his client (in support of the contractor's specific demand) if the contractor is merely "warning" the client, or acting "non-opportunistically" in changed circumstances beyond the contractor's control, is effectively to suggest that the client's rights are somehow destructible by the contractor unilaterally and without compensation if the contractor is acting from the right commercial motives.³⁴

Again, I emphasise that it does not follow that a rights-respecting approach to "illegitimacy of pressure" for the purposes of the duress inquiry would produce a concept of economic duress that was intolerably inflexible or unsympathetic to the contractor's plight in the benign scenario-type envisioned by the Court in *McIntyre*. A rights-based conception of duress does not exclude "pragmatic" and "flexible" solutions in the resolution of real-life duress claims. However, pragmatism and flexibility ought to be introduced in a principled way, which involves introducing them not under the "pressure" arm of the duress inquiry but rather at the independent "compulsion" stage of that inquiry. That, in my view, is the least controversial solution to the sort of case that the Court of Appeal in *McIntyre* was envisioning when introducing its distinction between "threats" and "warnings", as it is a solution that essentially leaves the parties' background rights and duties robustly intact.

B Compulsion of the Will: "No Reasonable Alternative" Plus Causation

My suggestion that judges should make better use of the "coercion" arm of the duress inquiry when adjudicating the sort of benign scenario that the Court of Appeal had in mind when recommending the de-illegitimation of some proposed breaches of contract is rendered more plausible by the fact that that Court, both in *McIntyre* and in *Pharmacy Care* before it, has managed to progress us to a sophisticated, and philosophically defensible, conception of "compulsion of the will", that is, under its "no reasonable alternative" test for duress.

The Court in *McIntyre* began by confirming that the notion of "compulsion of the will" under the second test for duress does not mean that the victim's will must be "overborne" in the sense that, as a result of the pressure, the victim was "completely deprived of any free will" or "psychologically

34 Indeed, Mance J (as he then was) in *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620 at 637 (QB) [*Huyton*] noted that such a suggestion was "by no means uncontentious". See also *Nav Canada*, above n 25, at [62]–[63] per Robertson JA: "the supposed good faith of the coercer should not impact on the victim's contractual right and expectation to receive performance in accordance with the original terms of the contract".

crippled";³⁵ rather, it means that the other party's illegitimate pressure had the effect of reducing the victim's variety of options to the point where she had "no reasonable alternative" but to submit, quite intentionally, to the pressure, by complying with the other party's demand, which the victim did in fact do for that reason.³⁶ As the Court had earlier stated in *Pharmacy Care*, "the threat or pressure must be sufficiently grave to *justify* the assent from the victim in the sense that it left the victim with *no reasonable alternative*".³⁷ Moreover, in assessing the "no reasonable alternative" test, the Court in *McIntyre* adopted³⁸ the view expressed in *Pharmacy Care*³⁹ that such a test:⁴⁰

... reflects Patrick Atiyah's suggestion that duress is ultimately concerned with "the permissible limits of coercion in our society", and "the extent to which society can legitimately require people to stand up to threats when they are made, rather than to submit and litigate afterwards" Whether there was a reasonable alternative will depend on all the relevant circumstances, including the characteristics of the victim, the relation of the parties, and the availability of professional advice to the victim.

It is pleasing that the Court in *McIntyre* has reinforced the place and significance of the "no reasonable alternative" test in New Zealand. That test, which is consistent with highly developed rights-based philosophical accounts of the subject,⁴¹ emphasises that a legal finding of coercion (or "compulsion of the will") does not turn merely on the application of straightforward empirical or psychological phenomena. On the contrary, modern courts are increasingly recognising that the *legal* question of whether the target of "illegitimate pressure" was "compelled" to accede to the threatening party's demand, and could thus be said to have acted under responsibility-relieving "duress", involves two intellectually distinct (but practically interactive) inquiries. It does not merely involve asking whether, as a matter of factual inducement or subjective causation, the victim actually submitted to the other party's demand because of the illegitimate pressure rather than, say, for some other reason that the victim herself deemed sufficient. As Mance J (as he then was) observed in *Huyton SA v Peter Cremer GmbH & Co*:⁴²

35 *McIntyre*, above n 16, at [64].

36 *Ibid*, at [66]–[67].

37 *Ibid*, at [98] (emphasis added).

38 *Ibid*, at [67].

39 *Ibid*, at [96].

40 This proposition has also been adopted as correct in Australia; see *Scolio Pty Ltd v Cote* (1991) 6 WAR 475 (WASC) at 484 per Ipp J (Seaman J concurring).

41 See, for example, G Dworkin "Compulsion and Moral Concepts" (1968) 78 *Ethics* 227 at 229; J Raz "Liberalism, Autonomy and the Politics of Neutral Concern" (1982) 7 *Midwest Studies in Philosophy* 89 at 110; A Wertheimer *Coercion* (Princeton University Press, Princeton, 1987) at 268.

42 *Huyton*, above n 34, at 638.

[A] simple inquiry whether the innocent party would have acted as he did "but for" an actual or threatened breach of contract cannot ... be the hallmark of deflection of will. ... [R]elief must ... depend on the Court's assessment of the qualitative impact of the illegitimate pressure, objectively assessed. ... [The illegitimate pressure must be] of a nature or quality, or sufficiently significant in objective terms in deflecting the will, to justify relief.

On this view, the question of whether a party was "compelled" to accede to the other party's demand, and hence to have acted legally "involuntarily", must be a question of both:

- (1) whether that party was in fact induced by the other party's illegitimate pressure to accede; and
- (2) notwithstanding the first party's subjective decision actually to accede, whether that party nevertheless had available to her adequate legal or extra-legal alternatives that, given her individual circumstances and characteristics, she ought reasonably to have pursued instead of surrendering to the illegitimate pressure.

As signalled by use of the phrase "ought reasonably to have pursued", the inquiry under (2) is an unavoidably normative one, as it necessarily involves the court making a judgment as to the "acceptability" (or otherwise) of the target's post-threat alternatives, or concerning the "reasonableness" or "justifiability" of the target's decision to succumb to the (illegitimate) pressure rather than, say, pursuing a legal or extra-legal alternative that would have been at least as effective, practicable and efficient a means of deflecting the pressure as the ex-post claim based on duress itself. A negative answer to the question of whether the target of the pressure "ought" to have acceded in the circumstances, given her objective alternatives, must be seen to function as a substantive limitation on the duress claim, because exculpation from a concluded transaction for duress could not plausibly rest on the target's own view of her situation and options, and the decision subjectively made by her. People do not act "under duress" merely because they (or their legal advisers) think they do. Some independent adjudicative assessment of the choices actually available to the target at the time of submission to the alleged coercer's demand is thus required. The latest instalments on the duress doctrine from the New Zealand Court of Appeal have arguably now supplied the means to that end, through the Court's "no reasonable alternative" test.

III UNCONSCIONABLE DEALING

Although this doctrine has its genesis in a protectionist jurisdiction concerned with a special class of case (catching bargains with expectant heirs, reversioners and remaindermen just of age), antipodean courts eventually came to view the older line of cases as establishing a principle of broader operation, applying potentially to a wide range of interactions.⁴³ In its modern setting, the

43 *Blomley v Ryan* (1956) 99 CLR 362 at 386 per McTiernan J [*Blomley*], citing *White and Tudor's Equity Cases* (7th ed, Sweet & Maxwell, London, 1897) vol 1 at [313].

gist of the unconscionable dealing complaint lies in the abuse of a superior bargaining position and not simply with the notion of "bad bargain" or "inequality of bargaining power".⁴⁴ For this reason, contemporary formulations of the doctrine in Australia and New Zealand have emphasised the need for the claimant to show equitable wrongdoing in the manner of the superior party taking "unconscientious advantage of" the claimant's "disabling condition or circumstances".⁴⁵ Relief, it has been said, is dependent precisely upon "exploitation by one party of another's position of disadvantage in such a manner that the former [cannot] in good conscience [insist on or retain] the benefit of the bargain".⁴⁶ As the antipodean version of the doctrine is currently formulated, therefore, the party seeking equitable interference with a transaction on the basis of unconscionable dealing must show:⁴⁷

- (1) that he or she was "by reason of some condition [or] circumstance ... placed at a special disadvantage vis-à-vis [the superior party]"; and
- (2) that "[u]nfair or unconscientious advantage [was] then taken [by the superior party] of the opportunity thereby created".

For New Zealand, the leading statement of the jurisdiction is now to be found in *Gustav & Co Ltd v Macfield Ltd*.⁴⁸ There the Supreme Court held⁴⁹ that the Court of Appeal's decision⁵⁰ in the litigation had dealt fully and accurately with the authorities on unconscionable dealing. The Court of

44 Compare I Hardingham "Unconscionable Dealing" in P Finn (ed) *Essays in Equity* (Law Book Company, Sydney, 1985) at ch 1.

45 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 463 per Mason J [*Amadio*]. Compare *Blomley*, above n 43, at 429 per Kitto J; *Moffat v Moffat* [1984] 1 NZLR 600 (CA) at 605–606 per McMullin J and 606–607 per Somers J. In *Gustav & Co Ltd v Macfield Ltd* [2008] NZSC 47, [2008] 2 NZLR 735 (SC) at [6] [*Gustav*], Tipping J (for the Court) said:

Equity will intervene, when one party in entering into a transaction, unconscientiously takes advantage of the other. That will be so when the stronger party knows or ought to be aware that the weaker party is unable adequately to look after his own interests and is acting to his detriment.

I am not sure, however, what is meant in this context by the words "and is acting to his detriment". Certainly, material detriment has never been a requirement of equitable intervention in this context, although it will usually be present as an empirical matter.

46 *Amadio*, *ibid*, at 489 per Dawson J. Compare *Blomley*, *ibid*, at 415 per Kitto J.

47 *Amadio*, *ibid*, at 462 per Mason J.

48 *Gustav*, above n 45.

49 *Ibid*, at [6].

50 *Gustav & Co Ltd v Macfield Ltd* [2007] NZCA 205.

Appeal's summary of the principles warrants setting out in full, as it provides a convenient platform for discussion of the subject as it presently concerns us:⁵¹

1. Equity will intervene to relieve a party from the rigours of the common law in respect of an unconscionable bargain.
2. This equitable jurisdiction is not intended to relieve parties from "hard" bargains or to save the foolish from their foolishness. Rather, the jurisdiction operates to protect those who enter into bargains when they are under a significant disability or disadvantage from exploitation.
3. A qualifying disability or disadvantage does not arise simply from an inequality of bargaining power. Rather, it is a condition or characteristic which significantly diminishes a party's ability to assess his or her best interests. It is an open-ended concept. Characteristics that are likely to constitute a qualifying disability or disadvantage are ignorance, lack of education, illness, age, mental or physical infirmity, stress or anxiety, but other characteristics may also qualify depending upon the circumstances of the case.
4. If one party is under a qualifying disability or disadvantage (the weaker party), the focus shifts to the conduct of the other party (the stronger party). The essential question is whether in the particular circumstances it is unconscionable to permit the stronger party to take the benefit of the bargain.
5. Before a finding of unconscionability will be made, the stronger party must know of the weaker party's disability or disadvantage and must "take advantage of" that disability or disadvantage.
6. The requisite knowledge may be that of the principal or an agent, and may be actual or constructive. Factors associated with the substance of a transaction (for example, a marked imbalance in consideration) or the way in which a transaction was concluded (for example, the failure of one party to receive independent advice in relation to a significant transaction) may lead to a finding that the stronger party had constructive knowledge. So, in the particular circumstances the stronger party may be put on enquiry, and in the absence of such enquiry, may be treated as if he or she knew of the disability or disadvantage.
7. "Taking advantage of" (or victimisation) in this context encompasses both the active extraction and the passive acceptance of a benefit. Accordingly, as Tipping J said in *Bowkett* at 457, an unconscionable victimisation will occur where there are:

... circumstances which are either known or which ought to be known to the stronger party in which he has an obligation in equity to say to the weaker party: no, I cannot in all good conscience accept the benefit of this transaction in these circumstances either at all or unless you have full independent advice.

51 Ibid, at [30].

8. If these conditions are met, the burden falls on the stronger party to show that the transaction was a fair and reasonable one and should therefore be upheld.

As to the relevance of transactional imbalance (or substantive unfairness), the Court of Appeal added:⁵²

While factors such as a marked imbalance in consideration or procedural impropriety are generally present in unconscionability cases, neither is a prerequisite for relief. However, if there is no significant imbalance in consideration or if the weaker party received full independent advice it is unlikely that any issue of unconscionability will arise.

Let us now consider, necessarily briefly, the accuracy and intellectual coherence of the above principles.

A Principle 1

There are no real controversies here, except perhaps that New Zealand courts unfortunately continue to refer to the jurisdiction as "unconscionable bargain".⁵³ That label is inappropriate for two reasons: first, the doctrine extends to gifts as well as to bargains;⁵⁴ second, as the Court of Appeal's remarks about the relevance of transactional imbalance confirm, the "unconscionability" that justifies equitable interference with an impugned legal contract does not reside definitionally in the "bargain" at all, that is, in the comparative merits of the obligations or benefits and burdens exchanged. The objection, rather, lies in the *manner* with which the stronger party has treated the other party, who was particularly vulnerable to him, when procuring or receiving the transaction in question. Having followed the leading Australian cases in this field⁵⁵ (in contrast to the more impoverished United Kingdom ones⁵⁶), one would have expected New Zealand courts to also have appropriated the Australian nomenclature of "unconscionable *dealing*" (or at least "unconscionable conduct"⁵⁷) in relation to the jurisdiction.

52 Ibid, at [31].

53 In the Supreme Court, Tipping J (for the Court) referred to "unconscionable *transactions*" being subject to equitable intervention: *Gustav*, above n 45, at [6] (emphasis added). That, with respect, is better terminology.

54 See *Wilton v Farnworth* (1948) 76 CLR 646; *Louth v Diprose* (1992) 175 CLR 621.

55 Especially *Amadio*, above n 45.

56 I have in mind here those statements of the jurisdiction in the United Kingdom that are still rooted significantly in *Fry v Lane* (1888) 40 Ch D 312. See, for example, N Bamforth "Unconscionability as a Vitiating Factor" [1995] LMCLQ 538.

57 Some senior courts and textbook writers in Australia continue to refer to the jurisdiction by the rather imprecise badge of "unconscionable conduct" rather than "unconscionable dealing". See, for example, *Amadio*, above n 45, at 461 per Mason J; *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2003] HCA 18, (2003) 214 CLR 51 [*Berbatis*]; *ANZ Banking Group v Karam* [2005]

B Principle 2

Few problems are evident here either. However, that the jurisdiction exists to protect specially disadvantaged parties from exploitation when entering into transactions with much stronger others does not entail that "exploitation", *stricto sensu*, must be shown in order to justify relief in the particular case. I take it as axiomatic that exploitation is not an accidental or merely casual process of victimisation, but rather involves something *deliberate* on the part of the stronger party: that the superior party acted either purposely or with reckless disregard for the known special vulnerability of the claimant, intentionally turning, actively or passively, the claimant's relative characteristics or circumstances to his, the superior party's, own ends. But as Principle 6 in the Court of Appeal's summary of the jurisdiction makes clear, New Zealand's courts, like Australia's, have been prepared to incorporate attenuated knowledge criteria into the unconscionable dealing inquiry – standards such as "should have known", "ought to have known", "being put on inquiry", "constructive knowledge (or notice)", and the like.⁵⁸ If these standards are to be taken seriously, one can only conclude that the courts are not using the exploitation concept consistently with its true criteria and dedicated conceptual meaning.

Venning J recently recognised the force of this argument in *Sayers v Burton*,⁵⁹ attributing to me the argument that "the doctrine of constructive notice should be ruled out as an appropriate criteria [sic] of knowledge".⁶⁰ For the record, though, I do, in the publication to which his Honour was referring, accept that something less than actual knowledge can suffice to justify equitable intervention with transactions in the name of unconscionable dealing, only not if "anti-exploitation" is viewed as the *exclusive* justificatory foundation of the jurisdiction. Exploitation will often exist in fact where there has been unconscionable dealing, but an analysis of a number of the leading cases (those involving "passive" victimisation, especially) reveals that what is actually being regulated here is something akin to what I have dubbed "transactional neglect" rather than deliberate exploitation.⁶¹ Indeed, I have argued elsewhere that courts should effect a paradigm shift from

NSWCA 344, (2005) 64 NSWLR 149 [*Karam*]; JW Carter, E Peden and G Tolhurst *Contract Law in Australia* (5th ed, LexisNexis Butterworths, Chatswood NSW, 2007) at ch 24; NC Seddon and MP Ellinghaus *Cheshire & Fifoot's Law of Contract* (9th Australian ed, LexisNexis Butterworths, Chatswood NSW, 2008) at ch 15. However, the label of "unconscionable/unconscientious dealing", which I much prefer, is commonly employed in the specialist academic literature in that jurisdiction. See, for example, Hardingham, above n 44; T Duggan "Unconscientious Dealing" in P Parkinson (ed) *The Principles of Equity* (LBC Information Services, North Ryde NSW, 1996) at ch 5.

58 See, for example, *Amadio*, above n 45, at 462; *ASB Bank Ltd v Harlick* [1996] 1 NZLR 655 (CA) at 662 per Gault J for the Court; *Nichols*, above n 6, at 235 per Somers J.

59 *Sayers v Burton* (2009) 11 NZCPR 39 (HC) at [85]–[88].

60 *Ibid*, at [87], referring to Bigwood *Exploitative Contracts*, above n 20, at ch 6.

61 Indeed, one of the principal manifestations of superior-party "neglect" in this context is likely to be where D, who merely has "reason to know" of P's special disability (but not actual knowledge thereof), fails to take

exploitation to legal neglect in this field.⁶² Properly conceived, such a shift ought to make no difference to the way in which the doctrinal criteria are formulated, and the cases administered and decided, in this area of the law, so that no greater risk should be posed for the general security of contractual relationships than is currently tolerated under the "anti-exploitation" rationalisation of the jurisdiction. Only the law's terminology at the conceptual justificatory level should alter.

C Principle 3

That the requirement of a "qualifying disability or disadvantage" should be described by the Court as an "open-ended concept" is both puzzling and unfortunate. It is puzzling because in the immediately preceding sentence the Court had already tethered the requirement conceptually to the restricting notion of "[a] condition or characteristic which significantly diminishes a party's ability to assess his or her interests".⁶³ The fact that *that* inquiry unavoidably involves a variable, fact-dependent evaluative standard or qualifying threshold does not make the disability or disadvantage criterion "open-ended". The criterion, rather, is parasitic on some very basic ideas and practices that are well embedded in the laws relating to the ascription of responsibility for public acts affecting others (such as the actus reus of a crime or the signifying of one's assent to a contract). Indeed, I have long considered there to be a substantial identity between the "special disadvantage" criterion of unconscionable dealing and the notion of "agency-responsible" conduct,⁶⁴ such that it is useful when pondering the first criterion of an unconscionable dealing claim to consult, *mutatis mutandis*, HLA Hart's well-known conditions of excuse in relation to criminal responsibility.⁶⁵ These are enumerated in his "Responsibility Principle": "[W]hat is crucial is that those whom we [hold legally

reasonable precautions against the realistic chance of P being specially disadvantaged relative to him in the transaction proposed. That is to say, if in exercising care with reference to the matter in question a reasonable person in D's position would predicate his actions upon the assumption of its possible existence and take such steps as are reasonable in the circumstances to reduce the chance to an acceptable level.

- 62 Bigwood *Exploitative Contracts*, above n 20, at ch 9; R Bigwood "Contracts by Unfair Advantage: From Exploitation to Transactional Neglect" (2005) 25 OJLS 65.
- 63 This is obviously an adaptation of Mason J's test for "special disadvantage" in *Amadio*, above n 45, at 462: "the disabling condition or circumstance [must be] one which seriously affects the ability of the innocent party to make a judgment as to his own best interests".
- 64 For a lucid discussion of the concept of "agency-responsibility" see generally J Evans "Choice and Responsibility" (2002) 27 Australian Journal of Legal Philosophy 97, especially at 99–101. Basically, in order to be "agency-responsible" for one's conduct (for example, for the purpose of assigning blame, or indeed praise, for that conduct), the conduct must appropriately be connected to the actor as a moral agent and possess features that make it worthy of "blame" (or, as the case may be, "praise"). A person is only blameworthy (or praiseworthy) for conduct that was relevantly related to *choices* that she or he made or was capable of making at the relevant time. We must be able to say that the agent could have, through choice, made things otherwise than what they became as a result of his conduct.
- 65 See generally the essays collected in HLA Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press, Oxford, 1968).

responsible] should have had, when they acted, the normal capacities, physical and mental, ... and a fair opportunity to exercise these capacities."⁶⁶

Most "specially disadvantaged" persons do not, on account of their age, enfeebled intellect, inexperience, or declining health, have the "normal capacities" for acting in an agency-responsible manner when entering into a contract. They typically lack the understanding, reasoning and control of conduct assumed to be necessary for playing in games of advantage, strategy and power. They lack the ability or the capacity to understand relevant options, predict their consequences, and relate them to their own values or preferences. They are, in short, characteristically *beneath* the task of free competitive bargaining. Others, like the marooned Arctic whalers rescued for an exorbitant fee in the famous American case of *Post v Jones*,⁶⁷ recognise and understand perfectly well their options and consequences (that is, what is in their "best interests"), but owing to their desperate circumstances (here, pressing need) or the conduct of the other party (for example, misleading conduct or application of pressure), they have been denied a "fair opportunity" to exercise their "normal capacities". What all such parties have in common, though, is that they are vulnerable to being used merely instrumentally⁶⁸ at the hands of an advantaged party who perceives the strategic opportunities arising from the serious bargaining disequilibrium *inter se*.

That the Court of Appeal in *Gustav* described the concept of "significant" or "special" disability or disadvantage as "open-ended" is unfortunate because the criterion is unquestionably the most defining feature of the jurisdiction. It both:

- (1) circumscribes the type of individual who might plausibly qualify for equity's consideration under the doctrine, hence delimiting the *scope* of the law's conception of unconscionable dealing; and
- (2) performs the lion's share of the normative work in crystallising the ensuing "unconscionability" judgment under the second phase of the equitable inquiry (Principle 4 in the Court's list of principles above).

This is because the second condition of the unconscionable dealing claim ("taking *unfair* or *unconscientious* advantage of the opportunity thereby created") is itself linked inexorably to the conditions under which the stronger party pressed for advantage against the weaker party: "Characterisation of disadvantage as 'special' involves recognition that it would be unconscionable

⁶⁶ *Ibid*, at 152. See also *ibid*, at 181, 201, 218 and 227.

⁶⁷ *Post v Jones* 60 US 150 (1856). See also *Akerblom v Price, Potter, Walker & Co* (1881) 7 QBD 129; *The Port Caledonia and The Anna* [1903] P 184; and *The Medina* (1875–1876) 1 PD 272.

⁶⁸ A person is not used merely instrumentally if she was not prevented, by the other party, from realising her own ends (autonomy) in a transaction or encounter *inter se*. See D Marietta Jr "On Using People" (1972) 82 *Ethics* 232 at 237.

knowingly to deal with the person so affected without regard to his or her disability."⁶⁹ Judges taking the special disadvantage criterion seriously, and not describing it as an "open-ended concept", assists to avoid excessive liberality in the courts exercising the unconscionable dealing jurisdiction to the prejudice of the general security of contractual relationships. Recent Australian decisions have confirmed that "special disadvantage" is not a trifling threshold,⁷⁰ and the courts in that jurisdiction have been quick to disavow any suggestion "that the principle applies whenever there is some difference in the bargaining power of the parties".⁷¹ This doubtless explains, as well, the Court of Appeal's opening sentence of Principle 3 in *Gustav*, that "[a] qualifying disability or disadvantage does not arise simply from an inequality of bargaining power."

D Principles 4, 5, 6 and 7

No heterodoxy is detected in these principles. Once the stronger party is sufficiently aware of the other party's special disadvantage, the inquiry then turns to consider what the stronger party *did* with the opportunity (for self-advancement) thereby created. Did he or she "victimise" the weaker party by "taking unfair or unconscientious advantage of" that party's serious inability to conserve her own best interests in the transaction in question? Such victimisation may, as the Court acknowledges (Principle 7), be active or passive, but in any event it must be "knowing" (Principles 5 and 6). Active victimisation tends to involve the deliberate creation, exacerbation or manipulation of the victim's special disadvantage, in order to set the stage for sequent extraction of the impugned benefit,⁷² whereas passive victimisation occurs typically by way of omission: the superior party sufficiently knows of the claimant's special disadvantage relative to him, but nonetheless fails to take whatever precautionary measures are necessary in the circumstances to restore a fair measure of formal equality between the claimant and himself, that is, before accepting the benefit of the impugned transaction with the claimant.

⁶⁹ *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* [2002] FCA 62, (2002) 117 FCR 301 at 323.

⁷⁰ *Berbatis*, above n 57; *Karam*, above n 57.

⁷¹ See for example *Amadio*, above n 45, at 462 per Mason J; *Berbatis*, above n 57, at [11] ("A person is not in a position of relevant disadvantage, constitutional, situational, or otherwise, simply because of inequality of bargaining power") and at [14] per Gleeson CJ: "Unconscientious exploitation of another's inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position."

⁷² See, for example, *Blomley*, above n 43 (purchasers supplying rum, which alcoholic vendor then drank before selling at a substantial undervalue); *Mundinger v Mundinger* (1969) 3 DLR (3d) 338 (wife entered into an "unconscionable transaction" with her husband while, inter alia, "affected by brandy which was liberally provided by the husband for reasons best known to himself"); *Harry v Kreutziger* (1979) 95 DLR (3d) 231 (BCCA) (pressure tactics and false assurances); *Diprose v Louth (No 1)* (1990) 54 SASR 438 (defendant manipulated plaintiff's infatuation by manufacturing an atmosphere of crisis where none existed).

E Principle 8

If the conditions in Principles 1-7 are met, the Court of Appeal in *Gustav* states that the "burden [then] falls on the stronger party to show that the transaction was a fair and reasonable one and should therefore be upheld".⁷³ Frankly, and with respect to the Court, perpetuation of such an illogical and anachronistic "principle" is bewildering. In my experience, this "shifting onus" formulation of the doctrine tends to be repeated from case to case without thought, analysis or explanation. Yet it is quite misleading and does not belong in a modern exegetical capture of unconscionable dealing, the emphasis of the jurisdiction having long shifted from staunch "protectionism" of weaker parties to that of denying "victimisers" the fruits of their unconscientious abuses of interpersonal power. Indeed, it is difficult to see how the shifting-onus approach would actually work in this context. Given that, under Principles 5, 6 and 7, it would already have been shown that the superior party "took advantage of" the claimant's known relative special disadvantage, what evidence could the superior party possibly adduce to show that the transaction was "a fair and reasonable one", so that it should be upheld?⁷⁴ Pritchard J, at first instance in *Nichols v Jessup*,⁷⁵ was certainly alive to this problem when he admitted that he found the shifting-onus approach "rather illogical in that once it appears that the stronger party has intentionally taken advantage of the weaker, it will be unlikely that he can show his conduct was fair, just and reasonable".⁷⁶ The problems with the shifting-onus approach have not gone unnoticed in Australian case law either,⁷⁷ nor, it would appear, in some of the more recent Canadian authorities.⁷⁸

Doubtless in all unconscionable dealing claims the persuasive burden falls and remains entirely on the claimant throughout.⁷⁹ Use of the language of "presumption" or "shifting onus" in this area is misleading and should be discarded in the same manner and for substantially the same reasons that

73 See also *Amadio*, above n 45, at 474 per Deane J, quoting Lord Hatherley in *O'Rorke v Bolingbroke* (1877) 2 App Cas 814 at 823, and citing *Fry v Lane*, above n 56, at 322, and *Blomley*, above n 43, at 428–429.

74 See also the authors' comments in G Spencer Bower, AK Turner and RJ Sutton *The Law Relating to Actionable Non-Disclosure and Other Breaches of Duty in Relations of Confidence, Influence, and Advantage* (2nd ed, Butterworths, London, 1990) at [23.20].

75 *Nichols v Jessup* [1985] ANZ Conv R 246 (HC).

76 *Ibid*, at 249.

77 *Louth v Diprose*, above n 54, at 632 per Brennan J. See also *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1 (SCSA) at 127, where there is discussion of the issue, but the Court assumed "for present purposes" that the burden does pass to the advantaged party in the context of unconscionable dealing.

78 *Smyth v Szep* [1992] 2 WWR 673 (BCCA) at 681–682 per Taylor JA. See also *Gindis v Brisbane* 2000 BCCA 73, (2000) 183 DLR (4th) 431 at [22] per Newbury JA.

79 *Louth v Diprose*, above n 54, at 632 per Brennan J: "At the end of the day ... it is for the party impeaching the gift to show that it is the product of the donee's exploitative conduct."

the House of Lords gave in *Royal Bank of Scotland plc v Etridge (No 2)*⁸⁰ for jettisoning (or at least downplaying) the language of "presumption" in relation to the equitable category of Class 2 ("presumed") undue influence, which will be discussed further below. Drawing an analogy with the doctrine of *res ipsa loquitur* at common law, three of their Lordships in *Etridge* considered the onus of proof to rest throughout on the complainant who was alleging wrongdoing in the nature of undue influence, and that the effect of the "presumption of undue influence" in the so-called "Class 2" cases (involving relationships of "trust and confidence") was merely "descriptive of a shift in the evidential onus on a question of fact".⁸¹ In other words, "presumption" here means "permissible inference", in the sense that the probative weight of the established basic facts would alone suffice to discharge the claimant's persuasive burden in the absence of sufficient contrary proof by the defendant.⁸² As soon as the defendant adduces countervailing evidence, however, it is then a matter of deciding whether the claimant has succeeded in meeting her burden "on the balance of probabilities", that is, after the court has "drawn the appropriate inferences of fact upon a balanced consideration of the whole of the evidence at the end of a trial in which the burden of proof rested upon the plaintiff. The use, in the course of the trial, of the forensic tool of a shift in the evidential burden of proof should not be permitted to obscure the overall position."⁸³

These words strike me as entirely applicable to the equitable jurisdiction to relieve against an unconscionable dealing (although ironically, for reasons I shall tender below, they are entirely ill-suited to the Class 2 undue influences cases to which they were actually directed in *Etridge*). They afford a strong reason for discarding any perception of, and consequent reference to, an onus reversal in formal statements of the criteria of the jurisdiction in New Zealand.

F The Role of Transactional Imbalance and Procedural Impropriety in Determining "Unconscientious" Advantage-Taking

The Court of Appeal's summary of the "relevant principles" of unconscionable dealing in *Gustav* also endorses the view that substantive unfairness ("a marked imbalance in consideration") is not a prerequisite for relief under the jurisdiction. This is unexceptionable, of course, at least as the doctrine has come to be formulated in the antipodes:⁸⁴ "The quality of the bargain (or the adequacy of the consideration) has never been either a necessary or a sufficient element for

80 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773 (HL) [*Etridge*].

81 *Ibid.*, at [16] per Lord Nicholls.

82 Compare also *Louth v Diprose*, above n 54, at 632 per Brennan J.

83 *Ibid.* See also *ibid.* at [93] per Lord Clyde, [106]–[107] per Lord Hobhouse of Woodborough and [160]–[161] per Lord Scott of Foscote.

84 That is not true of other Commonwealth legal systems, such as Canada. See R Bigwood "Antipodean Reflections on the Canadian Unconscionability Doctrine" (2005) 84 Can Bar Rev 171.

establishing unconscionable dealing.⁸⁵ "While any apparent unfairness of the bargain is a factor for consideration it is not the touchstone."⁸⁶ Yet despite the criterial irrelevance of "transactional imbalance" to unconscionable dealing, it is nevertheless well recognised that the existence (or otherwise) of substantive unfairness performs an important, if not vital, forensic function in assisting the claimant to make out her case.⁸⁷ This is especially so in instances of so-called "passive" victimisation, where there are, given the nature of that vice, typically no "overt" acts of abuse to which the claimant can point. However, the Court of Appeal's statement that "if there is no significant imbalance in consideration ... it is unlikely that any *issue* of unconscionability will arise",⁸⁸ comes dangerously close to gainsaying the mainstream view that the doctrine of unconscionable dealing disciplines procedural unconscionability rather than substantive unconscionability. Perhaps all that the Court meant by that statement was that if there is no significant imbalance in the benefits and burdens distributed under the transaction, it is unlikely that, *as a matter of proof*, a claim of unconscionability could successfully be made out on the balance of probabilities. That would be a less problematic statement.

More alarming, though, is the Court's suggestion that "procedural impropriety" is not a prerequisite for relief in this field. But if, as per Principles 3–8 of the Court's exegetical summary, actively or passively taking unconscientious advantage of another's known special disadvantage for one's own benefit is not "procedural impropriety", then what is it? For the purposes of the unconscionable dealing inquiry, "victimisation", whatever form it takes, *is* procedural "unconscionability"-hence-"impropriety".

IV UNDUE INFLUENCE (INTER VIVOS TRANSACTIONS)⁸⁹

Of the three doctrines discussed in this contribution, undue influence is far and away the slipperiest. That was not always the case, but it has become so. This is in large measure because of a series of poorly reasoned House of Lords' decisions beginning with *National Westminster Bank plc v Morgan*⁹⁰ in 1985 and ending with *Royal Bank of Scotland plc v Etridge (No 2)* in 2001. All of

85 *Berbatīs*, above n 57, at [96] per Kirby J.

86 *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157 (CA) at 174 per Richardson J [*Contractors Bonding*].

87 See *Blomley*, above n 43, at 405 per Fullagar J:

[I]nadequacy of consideration, while never of itself a ground for resisting enforcement, will often be a specially important element in cases of this type. It may be important in either or both of two ways – firstly as supporting the inference that a position of disadvantage existed, and secondly as tending to show that an unfair use was made of the occasion."

88 Emphasis added.

89 Large tracts in this section of the contribution reproduce, mostly in edited form, material from R Bigwood "From *Morgan* to *Etridge*: Tracing the (Dis)Integration of Undue Influence in the United Kingdom" in JW Neyers, R Bronaugh and SGA Pitel (eds) *Exploring Contract Law* (Hart Publishing, Oxford, 2009) at ch 15.

90 *National Westminster Bank plc v Morgan* [1985] AC 686 (HL) [*Morgan*].

those decisions, apart from *Morgan*, concerned the question of the enforceability of a suretyship transaction between a financier and a surety (typically the wife of the financier's debtor), where the surety claimed to have entered into the impugned transaction with the financier because she had been the victim of antecedent equitable wrongdoing, such as undue influence, at the hands of the third-party debtor, typically the surety's husband. Unfortunately, such cases have had a disproportionate effect on the formulation of the principles of undue influence *outside of* the secured loan transaction market – so much so, in fact, that in the United Kingdom it is now virtually impossible to distinguish undue influence practically and intellectually from unconscionable dealing (at least as it is formulated in the antipodean jurisprudence). The former has lost the narrow meaning and specific function that it once possessed. This, in my view, is a state of affairs that should firmly be resisted in New Zealand, as it has been in Australia, but there are signs already that the courts in this country will blindly follow, without dissection, reflection or analysis, the "first principles" of undue influence elaborated in *Etridge*. As the Court of Appeal recently observed in *Hogan v Commercial Factors Ltd*:⁹¹ "While the *Barclays Bank* and *Etridge* decisions are creative in relation to the circumstances in which banks are affected by undue influence which has been exercised against a surety by the principal debtor, *they are otherwise merely declaratory of the law of undue influence*."⁹² If that statement is true, undue influence can stand no hope of surviving as an independent jural category apart from duress and unconscionable dealing. Worse, vulnerable parties who traditionally were protected by virtue of the strong policy preferences expressed in the original doctrine of "presumed" undue influence can no longer rest secure in the belief that their special interests will adequately be served, that is, by a framework of regulation and analysis that does not respect and maintain the essential "fiduciary" underpinnings of Class 2 undue influence.

A The Traditional "Classes" of Undue Influence

It is habitual, if not compulsory, to begin every discussion of undue influence with a description of the traditional "classes" of undue influence: Class 1 "actual" undue influence, and Class 2 "presumed" undue influence. The importance of this distinction, however, was significantly eroded in *Etridge*. There their Lordships viewed the difference between the two classes as forensic rather than substantive: the adjectival labels of "actual" and "presumed" undue influence merely reflect the alternative ways of proving the same thing, which is "undue influence" (or "unfair persuasion").⁹³

91 *Hogan v Commercial Factors Ltd* [2006] 3 NZLR 618 (CA). See also *Public Trust v Ottow* (2009) 10 NZCPR 879 (HC) at [49]–[58], where Asher J applied the *Etridge* undue influence principles.

92 *Ibid*, at [36] per William Young J for the Court (emphasis added). J Burrows, J Finn and S Todd *Law of Contract in New Zealand* (3rd ed, LexisNexis NZ Ltd, Wellington, 2007) at 351 also assert that the *Etridge* principles "now provide the foundation for future developments in [New Zealand]".

93 For Lord Nicholls, the difference was essentially that Class 1 cases involve "overt" forms of wrongful persuasion that were capable of proof without the necessity of "inference". Class 2, or "relationship" cases, in contrast, typically involved "non-overt" forms of persuasion, which could only be proved with the assistance of permissible inferences.

But certainly until 1985 in the United Kingdom, it was undeniable that each class of undue influence regulated a very different species of equitable wrongdoing. Class 1 undue influence was not limited to special "antecedent relationships of influence" and could occur in regular arm's-length transactions. These were basically "pressure" cases in equity that, today, could easily be administered under the common law's (now expansive) duress doctrine (which includes lawful-act duress). The focus of Class 1 undue influence was hence purely transactional and remedial. It served no higher, overtly "public policy", goal of preserving the integrity of generic tasks or relations of a "fiduciary" nature.

Class 2 undue influence, in contrast, was *sui generis* and "relationship-dependent". Unlike Class 1 undue influence, it could only occur within the context of a relation possessing "fiduciary characteristics" (hence its long-standing association with relations involving "dependence and trust", "trust and confidence", and the like). It was, unmistakably, a category within the framework of fiduciary regulation. It shared with wider fiduciary law the same generic functional purpose or substantive policy goal of controlling the narrow mischief of disloyal opportunism by those legally required to act for, or on behalf of, or in the interests of, another. The foundation for intervention in such cases was thus framed by reference to "public policy" (or "trust maintenance", "risk management", "prophylaxis") rather than in terms of a specific "wrongful act" having been proved against the influential party on the normal civil preponderance. Public policy dictated that relations or tasks marked by the fiduciary function should be protected from the mere *possibility* of abuse (in contrast to the "probability" or "substantial likelihood" of the same), including abuse in the manner of an unauthorised use of any special capacity to influence that was associated with such relations or tasks.

The "presumption" of undue influence in the Class 2 line of cases thus had to be understood in that light. It was not "genuinely evidential" like other possible forms of presumption,⁹⁴ but rather a pragmatic legal construction, a policy-inspired tool directed at safeguarding the integrity of fiduciary relationships, tasks or functions beyond the immediate transaction at hand. It was, in other words, a procedural prophylactic device motivated by the strong public desire to avoid unauthorised conflicts of interest and duty by those expected or required to act exclusively in the interests of another. Basically, the presumption worked to manage the risk, when real, against natural human tendencies to disloyalty. So, as soon as the right combination of circumstances existed – opportunity (fiduciary influence), incentive (the impugned benefit), and epistemological uncertainty (serious detection and evidentiary problems) – equity indulged in a presumption that self-interest and temptation had operated in the particular case: that what was feared had materialised.⁹⁵ It presumed

94 In fact, under the rules relating to the regulation of fiduciary tasks or functions, the court was authorised to give *artificial effect* to the claimant's evidence, so that it carried greater evidential weight than it would ordinarily bear outside the context of the special relation.

95 As Salmond J made clear in *Brusewitz*, above n 5, at 1110 (emphasis added):

that fiduciary influence had been exercised, actively or passively, and in any event conflictually,⁹⁶ in the procurement or receipt of the impugned benefit. It then cast upon the benefiting party, if he wished to maintain the benefit, the burden of positively⁹⁷ demonstrating a negative, namely, that undue influence had *not* been exercised. Granted, such an essentially strict-liability approach increased the risk of misattributing undue influence to factually innocent influential parties, but this was simply a concession to the overt public policy, hence a risk worth running.

Now, in my view, no better illustration of this "public policy" approach to Class 2 undue influence exists than the majority's analysis in *Johnson v Buttress*,⁹⁸ a 1936 decision of the High Court of Australia. In fact, Dixon J's pellucid and masterly examination of the subject in that case should be celebrated as the exemplar in this particular field, rather than the judgments in *Etridge*.⁹⁹

[A relation in which undue influence occurs is] ... such a relation of superiority on the one side and inferiority on the other ... and therefore such an opportunity and temptation for the unconscientious abuse of the power and influence so possessed by the superior party, as to justify the legal presumption that such an abuse actually took place and that the transaction was procured thereby.

Instructive in this connection, too, is JC Shepherd *The Law of Fiduciaries* (The Carswell Company Ltd, Toronto, 1981) at 149–150.

96 That is to say, it was presumed that the impugned benefit was the result of D acting inconsistently with his responsibility to use his special influential capacity exclusively in the interests of P, who was subject to the influence and had entrusted D with her welfare.

97 Note that the burden was upon D to show *affirmatively* that the transaction was P's free and properly understood act, or otherwise not the result of an abuse of his position. This meant that P's independence could not be shown simply by the *absence* of any evidence that D had exercised influence over P.

98 *Johnson v Buttress* (1936) 56 CLR 113 [*Johnson*].

99 Sir Eric Sachs' judgment in *Lloyds Bank Ltd v Bundy* [1975] QB 326 (QB), and Dunn and Slade LJ's judgments in *National Westminster Bank plc v Morgan* [1983] 3 All ER 85 (CA) are also instructive. Although the law of undue influence appears to differ from state to state in the United States, the reader's attention is drawn to *Martinelli v Bridgeport Roman Catholic Diocesan Corp* 196 F 3d 409 (1999) at 421, fn 6, in which the Court, applying Connecticut law, observed that the conventional view is that the normal rule (that a person alleging a wrong must prove it)

... is somewhat relaxed in cases where a fiduciary relation exists between the parties to a transaction or contract, and where one has a dominant or controlling force or influence over the other. In such cases, if the superior party obtains a possible benefit, equity raises a presumption against the validity of the transaction or contract, and casts upon such party the burden of proving fairness, honesty, and integrity in the transaction or contract. ... Therefore, it is only when the confidential relation is shown together with suspicious circumstances, or where there is a transaction, contract, or transfer between persons in a confidential or fiduciary relationship, and where the dominant party is the beneficiary of the transaction, contract, or transfer, that the burden shifts to the fiduciary to prove fair dealing. A fiduciary seeking to profit by a transaction with the one who confided in him had the burden of showing that he has not taken advantage of his influence or knowledge and that the arrangement is fair and conscientious.

In encapsulating Class 2 undue influence in *Johnson*, Dixon J referred to those cases where the source of the power to exercise control over another party's will or freedom of judgment lay in the situation where "the parties ... antecedently stand in a relation that gives to one an authority or influence over the other from the abuse of which it is proper that he should be protected".¹⁰⁰ Where the parties stood in such a relation, the influential party who received "property of substantial value", for example by way of gift, from the other party could not retain beneficial title to the subject matter of the gift "unless he satisfie[d] the court that he took no advantage of the donor, but that the gift was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee".¹⁰¹ Such a burden fell upon the one who received substantial benefits within the context of certain well-known relationships that "by their very nature import influence". (These would be known today as "Class 2A relationships of influence".) By way of example, Dixon J mentioned the familiar relations of solicitor-client, parent-child, physician-patient, guardian-ward, and fiancé-fiancée, but his Honour was also quick to signal that the burden of justifying the transaction was not confined to fixed categories. Rather, it rested upon a principle, and the *fiduciary* principle no less:¹⁰²

It applies whenever one party occupies or assumes towards another a position naturally involving an ascendancy or influence over that other, or a dependence or trust on his part. One occupying such a position falls under a duty in which fiduciary characteristics may be seen. It is his duty to use his position of influence in the interest of no one but the man who is governed by his judgment, gives him his dependence and entrusts him with his welfare.

When such a party took a substantial gift of property from the dependent or trusting party, Dixon J explained, or entered into a transaction that "[wears] the appearance of a business dealing", a presumption against the validity of the disposition arises in the latter party's favour, so that it becomes "incumbent upon [the transferee] to show that it cannot be ascribed to the inequality between them which must arise from his special position".¹⁰³ Such a presumption, in his Honour's

And "[s]hifting the burden of proof protects fiduciary relationships by helping to ensure that the fiduciary acts consistently with the responsibilities such relationships entail" (ibid, at 421). And (ibid):

To be sure, where the fiduciary has not received some kind of benefit that would engender suspicion and there is no other evidence of wrongdoing [for example, where the sole claim is fiduciary's negligence in failing to preserve assets and allegation of fraud or conflict of interests], the burden of proof remains on the plaintiff.

And: "Finally, as in other instances in which the burden shifts to the fiduciary to show fair dealing, such proof must be by 'clear and convincing evidence'" (ibid, at 423).

¹⁰⁰ *Johnson*, above n 98, at 134.

¹⁰¹ Ibid.

¹⁰² Ibid, at 134–135.

¹⁰³ Ibid, at 135.

view, rested upon a "firm foundation" of policy, and upon other considerations that united to justify strict fiduciary regulation, namely:

- that the transferee may be taken to possess a peculiar knowledge not only of the disposition itself but also of the circumstances that should affect its validity;
- that the transferee chose to accept a benefit that may well proceed from an abuse of the authority conceded to him, or the authority reposed in him; and
- that the relations between the transferor and the transferee are so close as to render it difficult to disentangle the inducements that led to the transaction.¹⁰⁴

Dixon J also emphasised that this rule must not be narrowed:¹⁰⁵

[T]he risk must not be run of fettering the exercise of the jurisdiction by an enumeration of persons against whom it should be exercised; the relief stands upon the general principle applying to all the variety of relations in which dominion may be exercised by one person over another.

There is, to my knowledge, no equivalent meticulous analysis of the subject by a New Zealand court,¹⁰⁶ but *Johnson* continues to be affirmed as good law at the highest judicial level in Australia.¹⁰⁷ However, that case would have to be reasoned and decided differently under the now prevailing approach to undue influence in the United Kingdom, that is, in the light of the House of Lords' pronouncements on the subject in *Etridge*.

B Enter Etridge

Whatever may have been the legal position in the United Kingdom on Class 2 undue influence before 1985, the "fiduciary" conception of that form of claim has progressively dissolved in that jurisdiction since that time.

First, in *Morgan*, in 1985, Lord Scarman, on behalf of the House of Lords, denied that the basis for relief in this area was "a vague 'public policy'"; rather, he said, it was "specifically the victimisation of one party by the other".¹⁰⁸ But his Lordship's judgment was poorly reasoned and

104 Ibid.

105 Ibid, at 136, clearly echoing the words of Chelmsford LC in *Tate v Williamson* (1866) LR 2 Ch App 55 at 61 (Ch).

106 But see the discussion of Cooke J in *Coleman v Myers* [1977] 2 NZLR 225 (CA) at 331–332.

107 *Breen v Williams* (1996) 186 CLR 71 at 82 per Brennan CJ: fiduciary duties arise from two distinct but frequently overlapping sources: (a) agency, and (b) relationships of ascendancy or influence by one party over another, or dependence or trust on the part of that other. See also *ibid*, at 107 per Gaudron and McHugh JJ, 133–134 per Gummow J.

108 Above n 90, at 705, citing Lindley LJ in *Allcard v Skinner* (1887) LR 36 Ch D 145 at 182–183 (Ch).

heavily criticised by academics at the time.¹⁰⁹ It was unsurprising, therefore, that in 1994, in *CIBC Mortgages plc v Pitt*,¹¹⁰ Lord Browne-Wilkinson flagged the question of the juridical nature of Class 2 undue influence, thereby re-opening the possibility that the traditional account of undue influence might eventually be restored. In an obiter remark his Lordship stated that the House of Lords might need to consider "the exact limits of *Morgan* ... in the future", in particular the relationship, if any, between the fiduciary principle and Class 2 undue influence.¹¹¹ But when the opportunity finally arose for rigorous examination of that matter in *Etridge*, in 2001, the House of Lords failed to address (let alone rescue) the fiduciary account of Class 2 undue influence. On the contrary, and with scant reference to the prior decisions and scholarly literature on the subject, the House asserted that "presumed undue influence" was not a distinct legal phenomenon, but rather merely an example of the way in which undue influence could be proven in a certain category of case involving relationships that were peculiarly vulnerable to abuse by way of non-overt acts of persuasion. In every case the claimant bears the onus of proving undue influence in fact, so that *all* successful claims in this area must necessarily involve undue influence that is "actual" in the sense that the claimant has managed to establish her case against the wrongdoer on the normal civil standard.¹¹² In some cases, however – in particular those falling under the traditional nomenclature of "presumed" (Class 2) undue influence – she succeeds by way of factual inference from naturally preponderating primary facts that were proven by her and insufficiently answered by counter-evidence on the other side. In other words, "presumption" here means "permissible inference", and the mandatory effect and prophylactic content and function of the traditional presumption have vanished.

Demotion of the traditional presumption in the Class 2 undue influence cases is not the only evidence of the House of Lords' evisceration of the fiduciary rationale in *Etridge*. Lord Nicholls of Birkenhead, with whom the other Law Lords agreed, stated (without citation of authority or even an example) that the principle in the so-called "relationship" cases (that is, Class 2 undue influence) was not confined to instances of "abuse of trust and confidence" but extended to wider arm's-length power-vulnerability relationships as well – to "cases where a vulnerable person has been

109 A convenient summary of the various academic views on the *Morgan* decision, within a short period of it being handed down, is to be found in Wilson J's judgment in *Geffen v Goodman Estate* (1991) 81 DLR (4th) 211 (SCC) at 222–226. My own criticisms of *Morgan* are in Bigwood *Exploitative Contracts*, above n 20, at 392–398, 413–423 and 451–456. Lord Scarman's reasoning was recently eschewed in Ireland; see *Prendergast v Joyce* [2009] IEHC 199, (2009–2010) 12 ITEL 250 (Ir HC) at 267 per Gilligan J: "It seems wholly ... detrimental to the public policy objective stated in *Allcard* ... to adhere to the reasoning of Lord Scarman [in *Morgan*]."

110 *CIBC Mortgages plc v Pitt* [1994] 1 AC 200 (HL).

111 *Ibid*, at 209.

112 See especially Lord Clyde, above n 80, at [93].

exploited".¹¹³ However, if that is true, it must surely be impossible now to distinguish undue influence, both practically and intellectually, from other exculpatory doctrines, unconscionable dealing especially. Undue influence and unconscionable dealing might just as well, on such a capacious view of the former, be amalgamated into a single plea of avoidance, as indeed some writers have been arguing for a while.¹¹⁴

Moreover, if their Lordships were correct in *Etridge* that the distinction between Class 1 and Class 2 undue influence is merely forensic and not substantive, it must also follow that the so-called subcategory of "Class 2B undue influence"¹¹⁵ should be abandoned on the ground of redundancy, just as three of their Lordships in the case preferred.¹¹⁶ But on the traditional fiduciary-based account of Class 2 undue influence, the distinction between a Class 2A undue influence claim and a Class 2B undue influence claim merely echoed the familiar distinction that subsists in wider fiduciary law between "status-based" fiduciaries and "fact-based" fiduciaries, respectively. On this view, *two* "presumptions" were operative in the Class 2A cases, namely, a garden-variety *factual* presumption/inference of "fiduciary influence" as between the parties to the impugned transaction, and, upon proof of a "suspicious" transaction *inter se*, a policy-based *legal* presumption that "undue influence" worked to produce that transaction. There was, however, only one "presumption" operating in the Class 2B cases, namely, a policy-based legal presumption that "undue influence" worked to produce the impugned transaction. But the two policy-based legal presumptions in each subcategory of case operated in an equivalent way, were triggered by the same basic set of facts, and were devices of substantive policy rather than genuinely evidential. Of course, there will be cases where the full facts are known to the court, so that the circumstances of the individual case might well support an inference of undue influence having actually occurred *inter se*, independent of artificial presumption. But such cases ought not to obscure the overall reality that the presumption, while strictly superfluous in the instant case, nevertheless survives for its original, policy-inspired reasons. Indeed, Dixon J was alive to this point in *Johnson v Buttress* when he observed the occasional practice, even at that time, of some courts, when armed "with the presence of circumstances which might be regarded as presumptive proof of express influence", and in

113 *Ibid*, at [11] per Lord Nicholls.

114 Hardingham, above n 44, at 18; A Phang "Undue Influence – Methodology, Sources and Linkages" [1995] JBL 552; D Capper "Undue Influence and Unconscionability: A Rationalisation" (1998) 114 LQR 479, and David Capper "The Unconscionable Bargain in the Common Law World" (2010) 126 LQR 403; Andrew Phang and Hans Tjio "The Uncertain Boundaries of Undue Influence" [2002] LMCLQ 231 at 232–234 and 241–243, and A Phang and H Tjio "Drawing Lines in the Sand? Duress, Undue Influence and Unconscionability Revisited" (2003) 11 RLR 110 at 117–120.

115 That is, cases like *Johnson v Buttress*, above n 98, which involve an ad-hoc relationship of influence that is proven in fact but which nevertheless simply reflects the type of "influence" that is presumed in the status-based "fiduciary" relations comprising the Class 2A cases.

116 *Etridge*, above n 80, at [92] per Lord Clyde, [107] per Lord Hobhouse and [161] per Lord Scott.

connection with the Class 2B special relations of influence in particular, to treat the case as if it "were not governed by the presumption but depended on an inference of fact".¹¹⁷ But for his Honour the existence of circumstances that might generate a suspicion that "active circumvention" had been practised¹¹⁸ was merely an incidental fact, and a "cause why cases *which really illustrate the effect of a special relation of influence in raising a presumption of invalidity* are often taken to decide that express influence which is undue should be inferred from the circumstances".¹¹⁹

C Should New Zealand's Courts Take the Etridge "First Principles" of Undue Influence Seriously?

Given the Court of Appeal's view in *Hogan* that the *Etridge* judgments were "merely declaratory of the law of undue influence", there is a danger that successive New Zealand courts will see no reason to re-examine the correctness of those judgments, that is, in relation to the "first principles" of undue influence (in contrast to the *separate* principles relating to third-party disability in the enforcement of a suretyship transaction, which was the main subject matter of the *Etridge* appeals). Although it is true that their Lordships in *Etridge* presented the law of undue influence as if it had always been that way, that is a portrayal that simply belies an alternative legal reality traceable through a respectable line of nineteenth- and twentieth-century authorities,¹²⁰ not to mention Dixon J's consummate account of the subject in *Johnson v Buttress*, above. For the fact remains that the House's (implicit) rejection of the fiduciary account of Class 2 undue influence in *Etridge* was asserted rather than fully reasoned. None of the earlier authorities in support of the conventional fiduciary rationale were openly considered and then rationally rejected. The traditional jurisprudence appears simply to have been ignored, and assertion somehow became the substitute for analysis. The rejection was *sub silentio*. There was certainly no frontal and convincing attack on

117 *Johnson*, above n 98, at 135. In making these remarks his Honour referred to Scrutton LJ's observation in *Lancashire Loans Ltd v Black* [1934] 1 KB 380 at 404 (KB), that common law judges were inclined in this area "to rely more on individual proof than on general presumption, while considering the nature of the relationship and the presence of independent advice as important, though not essential, matters to be considered on the question whether the transaction in question can be supported".

118 For example, the presence of manifestly inadequate consideration in combination with the special antecedent relation between the parties.

119 *Johnson*, above n 98, at 136 (emphasis added).

120 See, for example, *Gibson v Jeyes* (1801) 6 Ves Jun 267, 31 ER 1044 (Ch) at 1049–1050; *Huguenin v Baseley* (1807) 14 Ves Jun 274, 33 ER 526 (Ch) at 531 and 532; *Billage v Southee* (1852) 9 Hare 534 at 540, 68 ER 623(QB) at 626; *Wright v Vanderplank* (1856) 8 De GM & G 133 at 137, 44 ER 340 (Ch) at 342; *Tate v Williamson* (1866) LR 2 Ch App 55 (Ch) at 60; *Allcard v Skinner* (1887) 36 Ch D 145 (Ch) at 171; *Bradley et al v Crittenden* [1932] SCR 552 at 559; *Tufton v Spemi* [1952] 2 TLR 516 at 522 (CA) per Sir Raymond Evershed MR, and at 530 per Jenkins LJ; *Lloyds Bank Ltd v Bundy* [1975] QB 326 (QB), especially the judgment of Sir Eric Sachs; *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428 (QB) at 448–449.

the judicial intuition or substantive policy goal that originally justified strict fiduciary regulation in Class 2, "presumed", undue influence cases.

For those reasons it is hoped that New Zealand's Supreme Court, if and when it is confronted with the option of adopting (or not) the *Etridge* undue influence principles, will respond reflectively, and not merely reflexively, to the matter. First, the Court must determine whether Class 2 undue influence properly falls, or ought to be regarded as falling, within the ambit of a "fiduciary" accountability and liability regime. There can be no doubt historically that it once did, but whether the jurisdiction should continue to be seen as a contextual application of fiduciary regulation will require the Court to appreciate and apply the conventional boundaries of that generic form of regulation.¹²¹ In my view, it ought to be accepted and acknowledged that Class 2 undue influence falls squarely within the ambit of the policy goal of maintaining the integrity of "trusting" relationships or institutions, essentially by deterring opportunism by those who, because of their special influence, purport (or are otherwise legally required) to act for or on behalf of or in the interests of another (rather than in pursuance of a contrary self-interest or conflicting duty).

Second, if it is determined that Class 2 undue influence does properly belong within a fiduciary accountability and liability regime, the Court will next have to decide whether the strict operation of that regime should nevertheless be relaxed or modified in relation to the Class 2 line of cases. Such relaxation or modification should not occur, however, without the Court first credibly responding to the conventional rationale that existed for the strict accountability regime in first place. Plausible reasons must be furnished as to why we should now comfortably reject the original premises for the strict regulation. Without gainsaying the possibility of such reasons coming forward, I submit it would be highly surprising if the risk of the mischief of opportunism in special relations of influence were any less demonstrable today than in the past. Surely those who concede deferential trust in their decision-making to others, or who are otherwise subordinate within a special relationship of influence, are as vulnerable to exploitation today as they ever were. On the other side, it is doubtful whether twenty-first-century actors, when tempted by ready opportunities to make secret personal gains, are as a generalisation any less likely to surrender to the self-regarding impulse than their nineteenth-century counterparts. Indeed, in the wider fiduciary setting it has been argued that there appears to be no "plausible basis for sending a new signal that the regulation of opportunism [in limited-access arrangements] should now be scaled back".¹²² Similarly, for Class 2 undue influence, it might be argued that allowing the presumption of undue influence to affect only the burden of production (*Etridge*) and not the burden of persuasion (*Johnson*) is problematic on the ground that the presumption itself embodies strong policy preferences that are not adequately served if only the burden of production is affected.

121 As to which, see generally R Flannigan "The Boundaries of Fiduciary Accountability" (2004) 83 Can Bar Rev 35; [2004] NZ Law Review 215.

122 R Flannigan "The Strict Character of Fiduciary Liability" [2006] NZ Law Review 209 at 212.

D A False Distinction, and the Real Distinction, Between Undue Influence and Unconscionable Dealing

As I have argued, the *Etridge* judgments must inexorably lead to collapse of the intellectual and practical boundary between undue influence and unconscionable dealing. It is perhaps most common in the jurisprudence for undue influence and unconscionable dealing to be distinguished in this way:¹²³

[A] plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker.

But this is, with respect, a facile differentiation that can be sustained neither in practice¹²⁴ nor in theory.¹²⁵ Again, it is an assertion of a distinction that tends to be mindlessly repeated in the cases and commentary on the subject, without reflection or analysis, and despite the progressive development of the unconscionable dealing jurisdiction that has occurred in Australasia. That the distinction is an inconsiderate one is underscored in New Zealand by the fact that in *Contractors Bonding Ltd v Snee*,¹²⁶ Richardson J, after stating the above-quoted distinction (apparently with approval) proceeded to approve of the encapsulation in *Halsbury's Laws of England* that "undue influence consists in the gaining of an unfair advantage by an *unconscientious use of power* by a stronger party against a weaker ... The doctrine is founded on the principle that equity will protect the party who is subject to the influence of another from *victimisation*."¹²⁷ On this view, the conceptual thread that links undue influence and unconscionable dealing must be "unconscientious use (abuse) of interpersonal power", which abuse in *both* situations functions to compromise, actively or passively, the innocent party's apparent "consent" to the impugned transaction. Both

123 *Morrison v Coast Finance Ltd* (1965) 55 DLR (2d) 710 (BCCA) at 713 per Davey JA. See also *Amadio*, above n 45, at 461 and 474; *James v Australia and New Zealand Banking Group Ltd* (1986) 64 ALR 347 (FCA) at 389 per Toohey J. The distinction was confirmed yet again by the majority of the High Court of Australia in *Bridgewater v Leahy* [1998] HCA 66, (1998) 194 CLR 457 at 477–478.

124 Compare R Clark *Inequality of Bargaining Power: Judicial Intervention in Improvident and Unconscionable Bargains* (The Carswell Company Ltd, Toronto, 1987) at 110: "Despite the theoretical distinction drawn in *Morrison v Coast Finance* between undue influence and the unconscionability doctrine, there is little evidence in the decided cases to support it." Recently, in *Karam*, above n 57, the New South Wales Court of Appeal, after stating the subject distinction from *Amadio*, also noted that in both undue influence and unconscionable dealing claims, "it remains a combination of the conduct or circumstances of each party which must be taken into account" (above n 45, at [46]).

125 The correlativity demanded by corrective justice must apply equally across both doctrines, so that consistency would require undue influence to be rationalised in a manner similar to unconscionable dealing, for example, as requiring proof of transactional "wrongdoing" such as interpersonal exploitation. Generally, see Bigwood, *Exploitative Contracts*, above n 20, at 472–473.

126 *Contractors Bonding*, above n 86.

127 *Ibid.*, at 165, quoting *Halsbury's Laws of England* (4th ed, 1991) vol 18 at [332] (emphasis added).

doctrines thus take "sufficiency of consent" and the other party's "unconscientious use of power" (producing that consent) into account, weighing each in the "justice" equation.

The most commonly cited distinction between undue influence and unconscionable dealing is thus a false and misleading one. The real distinction between the two claims lies in the essential fiduciary nature of Class 2 undue influence and the *non*-fiduciary nature of unconscionable dealing, which applies to arm's-length transactions. Hence, by stripping Class 2 undue influence of its fiduciary underpinnings, the House of Lords in *Etridge* renders that class of undue influence essentially indistinguishable from other exculpatory categories or pleas in avoidance, especially unconscionable dealing. In particular, the doubt cast by several of their Lordships upon the utility of the Class 2B subcategory of case seems to leave little room for an understanding of Class 2 undue influence apart from unconscionable dealing, the criteria of which seem perfectly suited to the administration of many undue influence claims.¹²⁸ But this has a lamentable consequence that I respectfully submit New Zealand courts should avoid at all costs:¹²⁹

[T]o the extent that both doctrines can be understood as legal devices for the protection of vulnerable parties, it cannot be said that victims of unconscionable dealing and victims of relational undue influence are 'vulnerable' (to victimisation) in quite the same way. 'Specially disadvantaged' parties under the unconscionable dealing jurisdiction are typically inept, weak, or unable to advance their best interests when entering into voluntary or consensual transactions with much stronger others, but that is not because they have *renounced* playing for advantage themselves in such transactions. They would or might press for advantage or pursue self-interest *inter se* if only they could, but *ex hypothesi* their special relative disability inhibits them from doing so on the occasion in question. Such persons are disadvantaged, but they are not 'exposed'. Deferentially trusting parties, in contrast, characteristically *have* surrendered, partially or completely, control in their decision-making to another and so are susceptible to a much greater extent and to a higher order of wrongdoing altogether. They are, to the extent of their surrender, truly *exposed*, and their exposure is to betrayal or treachery no less. The corollary of such greater vulnerability and risk on the one side must be greater obligation on the other, which is *fiduciary* obligation. We may question, therefore, whether such parties would be adequately protected – their interests properly served – if their petitions for exculpation from impugned transactions were consigned to administration through what is effectively an unconscionable dealing inquiry only.

128 As Mason J stated in *Amadio*, above n 45, at 461:

There is no reason for thinking that the two remedies [of unconscionable dealing and undue influence] are mutually exclusive in the sense that only one of them is available in a particular situation to the exclusion of the other. Relief on the ground of unconscionable ... [dealing] will be granted when unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary, just as it will be granted when such advantage is taken of an innocent party who, though not deprived of an independent and voluntary will, is unable to make a worthwhile judgment as to what is in his best interest.

129 Bigwood, above n 89, at 429–430.

V CONCLUSION: A DISTINCTIVELY "KIWI" LAW OF DURESS, UNDUE INFLUENCE AND UNCONSCIONABLE DEALING?

I ask this question in part provocatively, for one can discern in the leading authorities no self-conscious attempt by New Zealand courts¹³⁰ to fashion a distinctively "indigenous" law of duress, undue influence and unconscionable dealing. But the fact remains that New Zealand is a small legal system and, in virtue of that, its courts often must look beyond their own jurisdictional borders in the development of domestic law. There is nothing inherently wrong with that practice, of course, but my sense in relation to the three doctrines discussed in this contribution is that judicial cherry-picking has occurred across a variety of jurisdictions, each possessing its own "distinctive" doctrinal emphases and criteria, such that the result for New Zealand is that our suite of exculpatory doctrines – duress, undue influence and unconscionability, especially – are not as well coordinated as they could and should be.

To illustrate, the modern law of duress in New Zealand has drawn most significantly on the United Kingdom jurisprudence, particularly Lord Scarman's two-pronged test in *Universe Tankships*. That test has also been adopted in Australia,¹³¹ making New Zealand's law of duress broadly consistent with that of our nearest legal neighbour. But the most recent developments in the contractual duress area in New Zealand have clearly been inspired by United States jurisprudence on the subject,¹³² which has, arguably, left us with a duress doctrine that is more sophisticated and progressive than its modern Australian counterpart. This is because United States law has doubtless been better tested and developed than Commonwealth law on the subject, and certainly modern Australian¹³³ (as well as Canadian¹³⁴) courts continue to struggle with the doctrine, especially in relation to the category of economic duress.

130 In contrast to the Law Commission, which once tried, unsuccessfully, to promote general reform of this area of the law; see Law Commission "*Unfair*" *Contracts* (NZLC PP11, 1990).

131 See, for example, *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 (NSWCA) at 45 per McHugh JA.

132 In reading *Pharmacy Care* in particular, one cannot fail to notice the extent to which the corresponding law in the United States impressed the New Zealand Court of Appeal in that case. This is exemplified, for example, by the Court's approving references to such sources and authorities as: Professor Dawson's "Economic Duress – An Essay in Perspective" (1947) 45 Mich L Rev 253 (*Pharmacy Care*, above n 13, at [91] and [95]); the American Law Institute's *Restatement of the Law of Contracts* (2nd ed, St Paul, Minnesota, 1981) (above n 13, at [92]); Justice Cardozo's views in *Union Exchange National Bank v Joseph* 131 NE 905 (1921) (above n 13, at [94]); and, though perhaps most influential overall, the (now late) EA Farnsworth's treatment of the subject in his *Contracts* (Boston, Little Brown, 1982) at 260 (above n 13, at [94]).

133 See for example *Karam*, above n 57. For commentary on this aspect of the case, see R Bigwood "Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales" (2008) 27 UQLJ 41.

When one turns to consider the state of the doctrines of unconscionable dealing and undue influence, the eclecticism of New Zealand law is even more pronounced. New Zealand has borrowed its unconscionable dealing doctrine largely from the leading Australian authorities on that subject (especially *Blomley* and *Amadio*), but its modern undue influence doctrine is likely to represent what is now the law in the United Kingdom in that field (*Etridge*). But those are not wholly consistent inspirational sources to follow. The United Kingdom does not have the fully developed unconscionable dealing doctrine that Australia does, and Australian courts continue to respect the essential fiduciary personality of Class 2 undue influence. This allows for easy maintenance of a division of function and labour between the two doctrines – a division arguably not possible under the House of Lords' capacious encapsulation of undue influence in *Etridge*. So, having borrowed from the Australian courts on one doctrine (unconscionable dealing), and the United Kingdom courts on the other (undue influence), New Zealand courts have, I suggest, unwittingly produced a legal order where neither doctrine can retain its original character and achieve its original purposes. The expansion of the duress and unconscionable dealing doctrines in legal systems outside of the United Kingdom has tended to eliminate the need for a broader, undisciplined, application of the undue influence concept. New Zealand certainly enjoys expansive duress and unconscionable dealing doctrines, so its courts should resist adopting the *Etridge* "first principles" of undue influence to the extent that those principles trespass upon the constabulary ambit and function of those other two doctrines. They should, therefore, also reinstate an essential fiduciary regulative approach to Class 2 undue influence claims.

134 See most recently *Nav Canada*, above n 25. I have argued elsewhere that this decision represents a retrograde step in the development of the duress doctrine in Canada: R Bigwood "Doctrinal Reform and Post-Contractual Modifications in New Brunswick: *Nav Canada v Greater Fredericton Airport Authority Inc*" (2010) 49 CBLJ 256.