

## Undue Influence and the Conscience of the Court

Undue influence is a curiously equivocal doctrine; concerned purely with implied pressure, it forces the courts to delve into the psychological dispositions of the respective parties in order to determine whether, on the facts of the case, there is some illegitimate intention or absence of willpower - and to determine what is needed to prove such factors, on the balance of probabilities. The question raised is whether such a doctrine can be defined in any meaningful way, or, being too ambiguous for any strict process of determination, the decision should be left to the conscience of the court.

In 1985, in his judgement in *National Westminster Bank v Morgan*,<sup>1</sup> Lord Scarman expressly submitted his preference for the latter view, stating that 'definition is a poor instrument when used to determine whether a transaction is or is not unconscionable'. This essay will explore whether such a view can hold true with regard to recent case law, and from a practical perspective; whether the flexible model Lord Scarman endorses is in fact logical and desirable. It could be posited that Lord Scarman's view is reconcilable with a strict procedural approach for ascertaining the existence of the tentatively named 'unconscionable bargain',<sup>2</sup> although such an approach would mean carefully defining the scope of undue influence, particularly with regard to the principles of duress.

It is submitted, with regard to the judicial proceedings of the past century, that Lord Scarman is largely correct in his depiction of a 'court of conscience'; the only major question involves the scope of this conscience. Since the late nineteenth century, when Lindley LJ stated 'no court has ever attempted to define undue influence',<sup>3</sup> there have in fact been many attempts to explicitly specify the meaning of the doctrine, not exclusively by academics. One conspicuous example is Lord Browne-Wilkinson's categorisation of actual and presumed undue influence in *Barclays v O'Brien*<sup>4</sup>. For the most part, however, the courts have kept their rules intentionally ambiguous, slowly evolving but largely unchanging. Under the current jurisprudence, the more specific the principle regarding undue influence, the more difficulty judges appear to have applying it consistently. The idea of 'manifest-disadvantage'<sup>5</sup> as will be discussed is a strong example of this, proposed by Lord Scarman himself.<sup>6</sup> As Lord Nicholls observed some years later, '[t]his label has been causing difficulty'<sup>7</sup>, seemingly because it was being interpreted *too literally* by judges. *Royal Bank of Scotland v Etridge*<sup>8</sup> goes some way to demonstrating the ground rules of the doctrine; considered to be the current leading case in presumed undue influence, a number of the judgements therein exemplify quite how ambitious a task it is to rule in this area while successfully maintaining consistency and avoiding ambiguity.

The rules laid down in *Etridge*<sup>9</sup> can be summarised as follows. The first hint of undue influence must be established by the existence of influence itself<sup>10</sup>. As has already been realised at common law, there are certain relationships with which bring influence by default, including, for example, that between parent and child<sup>11</sup> or medical practitioner and patient<sup>12</sup>. For all other relationships, any influence should be determined objectively, assessed purely on an evidential basis<sup>13</sup>. Mere influence is not sufficient however - as Lord Nicholls states, '[i]t would be absurd for the law to presume that every gift ... or every transaction ... was brought about by undue influence'; thus the 'undue' element must be proved. Traditionally this was shown by a 'manifest disadvantage'<sup>14</sup> on the part of the claimant - however, as has been discussed, in certain types of cases this was found to

- 
1. *National Westminster Bank v Morgan* [1985] 1 All ER 821 (HL)
  2. That case with Denning / unconscionability.
  3. *Allcard v Skinner*
  4. *Barclays Bank v O'Brien*
  5. A proviso of presumed undue influence: suggestive of unfair dealings.
  6. See 1
  7. *Royal Bank of Scotland v Etridge*
  8. *see last Etridge*
  9. *See above Etridge*.
  10. As argued by Stone & Cunningham
  11. *Bainbrigge v Brown*
  12. *Mitchell v Homfray*
  13. Objective evidence of influence in *Etridge*.
  14. See manifest disadvantage above

be impossible to objectively verify,<sup>15</sup> thus a more open ended question should be used; that is, whether the transaction 'calls for an explanation'.<sup>16</sup> After these facts have been established, undue influence is presumed, and the burden of proof can be transferred to the defendants, to be rebutted with proof that the claimant exercised independent willpower<sup>17</sup>, among various other equitable defences.

*Etridge*<sup>18</sup> will hence be analysed in the order it was presented. There appears to be little wrong with establishing influence by some objective means; if the claimant can demonstrate a *de facto* lack of willpower, not necessarily caused by the alleged influencer but by definition entwined within the relationship between the two parties, the existence of influence is readily apparent, thus seemingly outside the realm of conscience *per se*. This test should be enough by itself; if influence can not be demonstrated by objective evidence, it would seem that it can not be deemed fair to allege influence at all. Thus the concept of relationships which give an instant presumption of influence<sup>19</sup> (an apparent imposition of the 'court of conscience', which has taken the doctrine of balancing probabilities to an unnatural conclusion) seems to only impede fairness on a conceptual level. Obviously this has not been wholly intentional on the part of the courts, but such a side effect is only inevitable in an evolving society where morals and types of relationships are continually subject to change. By way of example: before the twentieth century, the relationship between a husband and wife gave an instant supposition of influence, and was deemed to fall into the category Lord Browne-Wilkinson labelled as a '2A' in *Barclays v O'Brien*<sup>20</sup> - however after *Howes v Bishop*<sup>21</sup> and *Bank of Montreal v Stewart*<sup>22</sup>, this position was reversed. For comparison, one precedent set by *Allcard v Skinner* was that the relationship between a spiritual advisor and a follower should fall into 2A.<sup>23</sup> This presents the absurd suggestion that a clergyman might have more implicit influence over an individual than their wedded spouse; other inconsistencies like this can be easily spotted, and are indeed inevitable in a society where the importance of relationship types are so prone to change. It is thus submitted that this particular principle has no place in contract law; if indeed a relationship does herald influence, it should be measured objectively on a case by case basis, not through societal relics made binding by judicial precedent.

The extent to which this approach ties in with Lord Scarman's position is not wholly clear. Lord Scarman does state that 'definition is a poor instrument', but it is clear that some form of process must be available to courts in the interests of both legal certainty and judicial precedent. It must be determined exactly what meaning of *definition* Scarman intends to convey; and it is submitted, with strong regard for the ethical inconsistencies discussed previously, that his ideas entail law refraining from prescribing in any great detail exactly what *constitutes* undue influence. The process itself by which undue influence should be found, on the other hand, must be reasonably clear; indeed Lord Scarman himself offers a number of guidelines through his judgement in *Morgan*.<sup>24</sup> With regards to legal certainty; it might be argued that the principles of undue influence, especially those in a court of conscience, should be those governing the society of the day - and with respect for the current flexibility of the courts in this area, it seems that this is in fact already the case., barring the limitations of precedent. Thus, it must be expected that any decision of conscience would also be that reached by a reasonable person, given the facts of the case - which is as much certainty as might be afforded in any area of the law.

The next test is that formerly known as *manifest disadvantage*<sup>25</sup> - and a strong opinion is delivered by Lord Nicholls in relation to Lord Scarman's position; 'This label is being understood and applied in a manner which does not accord with the meaning intended by Lord Scarman', he states, the preferable test being whether 'the transaction is ... readily explicable by the relationship of the parties'.<sup>26</sup> If we do take Scarman's principle in this way, the reading of his view expressed earlier is all but verified; he advocates a *method* for determining what

---

15. An example being when a wife acts as surety for a husband's loan: in such a case she may be unduly influenced but not disadvantaged in any quantifiable way.

16. Nicholls, *Etridge*

17. The most common test in this case is whether the claimant procured independent advice, e.g. from a solicitor.

18. See *Etridge* above

19. See above.

20. *Barclays v O'Brien*

21. *Howes v Bishop*

22. *Bank of Montreal v Stewart*

23. *Allcard v Skinner* 2A relationship

24. An example being...

25. *manifest disadvantage ... again*

26. *Etridge* manifest d. test.

constitutes the undue nature of the agreement, in a very broad sense, but does not prescribe the exact situations in which undue influence might occur, thereby safeguarding it from likely antiquation. Whether this paradigm is desirable is a difficult question; it appears to fall squarely in the grounds of unconscionability, giving the court a very wide margin to set aside a contract deemed to be unfair. The disadvantage of this is that on the face of it, it restricts freedom of contract, and could be argued to be an over-cautious way of protecting individuals from bad bargains under the veil of undue influence. On the contrary, however, an unfair bargain can never affirmatively *prove* the existence of undue influence, only demonstrate its increased likelihood on the balance of probabilities.

In exploring the scope of undue influence, the doctrine of duress must inevitably be discussed, particularly with regards to Browne-Wilkinson's 'Actual Undue Influence'. It is often stated that one of the confusing elements of undue influence is its overlap with duress. It is submitted that this overlap may not be as profound as it is made out to be - and in fact, that the dividing line between the two doctrines is an important one - that is, whether or not the influence is explicitly used to force the transaction in question. It follows logically that any actual undue influence should be available as a claim of duress providing it is used overtly; Birks and Chin describe such scenarios as 'cases of pressure, and considering any case of undue influence is unlikely without some form of pressure felt by the claimant, it can be concluded that they mean pressure on the part of the defendant. They advocate litigating such cases using the doctrine of duress - and this is readily conceded. Having two doctrines simply for the purpose of allowing different types of influence is an unnecessary surplus - as Devenney and Chandler posit, '[p]erhaps the doctrine of economic duress will be a vehicle for such a merger'. This is not to say that actual undue influence has no further place in the law, simply that the explicit relationship between the threat and the formation of the contract should draw the dividing line between the two doctrines. Although this may appear arbitrary at first, it can be reconciled with Scarman's view by noting that pressure of an overt nature is largely a question of fact over conscience, and if conscience is to be applied it should at least be done consistently.

Birks and Chin's agenda in the previously cited notion of pressure is to allow for their main argument, that undue influence can only be based on the claimant's mental or psychological capacity, and whether the defendant acted illegitimately is largely irrelevant. They submit that the doctrine of unconscionability limits this perspective, owing to the implication that the defendant must act in a way which is unreasonable; however if we take Scarman's apparent meaning of conscience - that of the court, as opposed to so-called unconscionable conduct - it is clear that a claimant-sided approach is limiting. Naturally the claimant's mindset must be compromised in some substantial way for undue influence to be possible, barring any defences on the part of the defendant. The difficulty, however, is with regards to the remedies the courts have granted; for the most part taking a single tar-brush to each of the defendants where claims have been successful. It is conceded that when forced to choose between an unduly influenced claimant and a wholly innocent defendant, the courts must rule in favour of the claimant. It is likely in such cases, owing to the principle of manifest disadvantage, that the transaction will be largely beneficial to the defendant; however, regardless of this, the contract is for the most part simply set aside. If as Lord Scarman recommends the court is bound to *decide* based on conscience, it should *remedy* based on conscience, and the contract should be adjusted accordingly, with regards to the level of freedom the claimant was given when making it. It could even be argued that in cases where the defendant acted unconscionably, even by simply acknowledging the claimant's lack of willpower and not acting accordingly, their level of maliciousness should be taken into account when resolving the established undue influence. It is submitted that simply setting the contract aside is only a realistic solution in them most extreme cases, that is where there is a total lack of willpower or consciability on the parts of either respective party. A strong reason for this is the potential for abuse where presumed undue influence is claimed - it may be that the claimant intentionally kept themself at arms length from independent control over the contract in question; in doing so they manufacture a get-out clause which is impossible to prove in any meaningful way.

Lord Scarman's principle, if it can be taken to be what it has been expounded to mean throughout this essay, is without a doubt not in full effect in current jurisprudence; although it is clear for the most part that under the guise of formal rules a large amount of discretion is used. Two clear areas of needed reform rear themselves if a court of conscience is to be realistic. Firstly, the scope of determination with regards to the doctrine must be limited to method over substance, so as to avoid the notable historical and societal inconsistencies which have manifested themselves over the ages. Secondly the powers of remedy afforded to the judge must be used to their full capacity, so as to avoid unfairness where there are mitigating factors not great enough to offset the presumption of undue influence. Thus a court of conscience might be fully realised.