Chapter Six

BRINGING UNDUE PRESSURE TO BEAR II: Undue Influence

Chapter Contents

1. INTRODUCTION ......................................................................................... 439
   1.1. The Traditional Classes of Undue Influence: "Actual"
        and "Presumed" Undue Influence ................................................................. 445

2. RELATIONAL UNDUE INFLUENCE ............................................................ 454
   2.1. Introduction .............................................................................................. 455
   2.2. The Presumption of Undue Influence ....................................................... 459
       2.2.1. Raising the Presumption I: The Opportunity of
              Obtaining Influence and of Abusing It ............................................... 460
              2.2.1.1. The relative positions of the parties: the
                      nature of the "relationship of influence" ............................................. 461
                      2.2.1.1.1. Relationships deemed to be ones
                               of influence ............................................................................. 468
                      2.2.1.1.2. De facto relationships of influence ............................... 470
                      2.2.1.2. Advisers .............................................................................. 473
       2.2.2. Raising the Presumption II: Transaction as
              Suspicion of Abuse ............................................................................. 479
              2.2.2.1. The "public policy" basis for raising the
                       presumption of undue influence ..................................................... 483
              2.2.2.2. The "victimisation" basis for raising the
                       presumption of undue influence ..................................................... 486
2.2.2.3. The underlying rationale of relational undue influence .................................................. 487

2.2.2.3.1. The manifest disadvantage requirement .................................................................. 490

2.2.3. Rebutting the Presumption of Undue Influence .............................................. 500

2.2.3.1. Competent independent advice ............................................................................. 503

2.2.3.2. Other factors advanced to show independence .................................................. 508

2.2.3.2.1. Fair outcomes .................................................................................................. 508

2.2.3.2.2. Full disclosure ............................................................................................... 510

2.2.3.2.3. Causation ...................................................................................................... 512

3. CONCLUSION .................................................................................................................. 516

* * * * *

The difference between legitimate persuasion and excessive pressure, like the difference between seduction and rape, rests to a considerable extent in the manner in which the parties go about their business.¹

There is no head of equity more difficult of application....²

... 'undue influence' is a subtle something that defies definition.³

[When a gift bears no proportion to the situation of the giver, to his rank in life, and to his circumstances, and no cause is shewn which, according to the constitution of human nature, and the common and ordinary operations of mere love and esteem, might naturally beget such bounty, it carries its own death-wound ... along with it, and proclaims itself upon view, to be the offspring of fraud and imposition.]⁴


³ Boland v. Aycock, 12 S.E. 2d 319, at 321 (1940).

⁴ Per Wilmot L.C. in Bridgeman v. Green (1757) Wilm. 58, at 64.
1. INTRODUCTION

It is commonly said that the mark of a good salesperson lies in his or her ability to persuade. The exercise of such an ability, moreover, is generally considered to be socially useful, at least in the sense that it tends to facilitate the consummation of economic transactions. What is more, given the nature of the bargaining game itself, techniques of persuasion are reasonably to be expected (to a greater or lesser extent) in many, if not most, precontractual negotiations. Indeed, persuasive conduct tends regularly to play an important role where the relevant market is one that is less than perfectly competitive. In some measure, therefore, it is desirable that such behaviour is legally to be tolerated in the activities of commerce. In the name of protecting and defending the vulnerable from the exploitative or manipulative practices of the powerful, however, there must be limits to the use of certain capacities or opportunities to influence or to persuade in bargaining. When, we are thus disposed to ask, does persuasion in law become excessive, unfair or victimising; when, in the context of contract formation, does "influence" warrant the epithet "undue"?

Now, as its coinage suggests, undue influence essentially involves the wrongful exercise of influence by one contracting party over the other. And, like the various other legal doctrines considered in this thesis, it is concerned, at its logical core, with unfair advantage-taking or exploitation. As Dixon J., as he then was, once said of the jurisdiction to set aside transactions on the ground of undue influence, its foundation lies in

---

5 Where a market is perfectly competitive, persuasion should tend to play a minor or no role in contract formation: 'buyers and sellers either take the uniform market price of a homogeneous commodity, or they do not'. Cf. Eisenberg, M., "The Bargain Principle and its Limits" (1982) 95 Harv. L. Rev. 741, 773; Comment, "Unconscionability in Standard Forms" (1976) 64 Calif. L. Rev. 1151, 1154.

6 Willard King points out that the word "undue" is in daily use as the 'mildest sort of an epithet': "Undue Influence in Wills in Illinois" (1935) 2 U. Chi. L. Rev. 457, 460.

7 In Union Bank of Australia Ltd v. Whitelaw [1906] V.L.R. 711, for example, Hodges J. defined undue influence as 'the improper use of the ascendancy acquired by one person over another for the benefit of himself or someone else, so that the acts of the person influenced are not in the fullest sense of the word his free, voluntary acts' (id, 720).
... the prevention of an unconscientious use of any special capacity or opportunity that may exist or arise of affecting the alienor's will or freedom of judgment in reference to such a matter.\(^8\)

Special problems arise, however, as they do in the area of duress, in determining the precise limits of pressure or persuasion. The law should want, of course, to tolerate more forms of influence than it condemns; for as Isaacs J. pointed out in Watkins v. Combes,\(^9\) 'influence may be used wisely, judiciously and helpfully', and generally to the benefit or advantage of the person receiving the advice or subject to the influence. In addition, it may, among other things, produce socially beneficial results.\(^10\)

At one level, it is true that undue influence and duress share much in common.\(^11\) Each is concerned with one party's ascendancy over another in circumstances where the transaction in question cannot be said to be wholly free or voluntary. Indeed, the constant resort to the pseudo-psychological language of "pressures" on the will, "controlling", "subverting" or "overbearing" the "free will" or "voluntary judgment", or "substituting" one's own will for the will of another,\(^12\) in the various definitions and explanations of undue influence, reflects the familiar idiom and imagery of the classical coercion tests. Despite the marked differences in emphasis,\(^13\)

---

\(^8\) Johnson v. Buttress (1936) 56 C.L.R. 113, 134.

\(^9\) (1922) 30 C.L.R. 180, 193-4.

\(^10\) As Kekewich J. said in the trial court in Allcard v. Skinner (1887) 36 Ch. D. 145, at 157-8:

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

\(^11\) Duress has been described as the 'extreme of undue influence': 25 Am. Jur. 2d "Duress and Undue Influence", §1, p. 353. There are also, of course, some notable differences: see Sections 1.1. and 3., below.


\(^13\) In the case of undue influence the exploiter or victimiser works his will not merely on or against the will of the victim but, specifically, through it. Cf. Fingarette, H.,

440
therefore, this may suggest that there is no important *conceptual* difference between undue influence and duress.\(^\text{14}\) Both areas of law seek to control the *process* rather than the outcome of transactions; and both seem to rest on an implicitly normative view that some motivations are compatible with voluntary action and others are not. Whilst the degree of pressure or persuasion that will be characterised as "unfair" or "undue" will depend on a variety of circumstances, the ultimate question is the same in each case: was the contractual result produced by means that seriously impaired the free exercise of the plaintiff’s judgment?

It would be dangerous, however, to rely too heavily upon the above-stated question as representing a comprehensive statement of principle. The mistake lies, of course, in treating either duress or undue influence conceptually as matters of causation.\(^\text{15}\) Both "legitimate" (or "commercial") pressure and "duress", and "influence" and "undue influence" might empirically or psychologically have the same effect in producing a party's intention to contract, but the law does not intervene in all such cases.


\(^{14}\) Although as will be argued below, the law does draw important analytical distinctions, especially insofar as legal method or technique is concerned. See Section 1.1., below.

\(^{15}\) Some commentators seem to fall into this trap. Shepherd, J., *The Law of Fiduciaries* (1981), 200, for example, describes the concern of the undue influence doctrine by use of the following example:

[A] 20-year-old son gives his lottery winnings to his father. The court asks: Did the son make the gift because he personally wanted to (e.g. out of love and affection for his father), or because the father’s influence overcame or was substituted for the son’s independent will?

It may partly be correct that, unlike duress according to the two-pronged theory, undue influence is essentially empirical or psychological; but it only wears the appearance of being so. While it is true that once the criteria for undue influence are set, the determination that one party exerted undue influence over the other essentially depends on psychological facts, despite the obvious difficulties in ascertaining these; in many decided cases the underlying purpose of the detailed evidentiary examination into the psychological motivations of the complainant is the essentially normative view that some motivations are compatible with voluntary action, while others are not. This was the point argued in connection with the law of duress in Chapter Five above.
Influence cannot be branded as “undue” merely because it is persuasive and effective; the law simply does not condemn all persuasion, entreaty, importunity, and intercession. Both duress and undue influence are concerned with the one party causing or being responsible for the other having ‘unacceptable motivations’\textsuperscript{16} for manifesting her contractual assent. Clearly, then, each doctrine has significant normative aspects to its application.\textsuperscript{17} In each case, we are concerned with a superior party who wrongfully provides an ordinarily free and rational person with what appears to be reason for doing what the influencer desires. Yet again, the will is not “overborne”. Whether by threats, nondisclosure, argument, or persuasion, what the ascendant party has done in the undue influence context (like the coercer) is wrongfully make the option put to the subservient party (i.e., of entering into the transaction in question) appear to be a reasonable thing to do in the circumstances.\textsuperscript{18} As Fingarette remarks:\textsuperscript{19}

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

The rationale of the doctrine, therefore, lies not merely in the actions, circumstances or condition of the subservient party herself. Rather, undue influence operates to police the conduct or “conscience” of the recipient of a beneficial transaction, whether it be contract or gift,\textsuperscript{20} moving from the subservient party. The justification for such supervision is said to ‘arise[...]


\textsuperscript{17} Cf. Fingarette, “Victimization”, op. cit., 112-3. This is reflected in the “illegitimate” pressure or “threat” requirement in duress cases, and in the “undueness” component of the undue influence formulation.

\textsuperscript{18} Cf. Fingarette, id, 113.

\textsuperscript{19} Id, 114.


442
out of [considerations of] public policy and fair play’. The recipient of the transaction, moreover, may be the person actually exercising the pressure or influence (in this context, the co-contracting party himself), or it may be some third person claiming through him. In this chapter, however, the discussion is principally confined to the dyadic situation only.

It is not possible to state in advance the various types of motivations considered by the courts to be unacceptable for the purpose of satisfying the undue influence jurisdiction, as this will require a meticulous determination upon the facts of each case. The primary issue in all such cases, however, is whether the transaction is explicable by reference to the "ordinary" motives usually found in the type of relationship in question. In general, the desire to satisfy one's "positive" feelings for another (natural love, affection, gratitude, etc.) will count as an acceptable motivation, but the desire to be free from the "negative" pressure or influence of another will not. The line of demarcation between these two motivations is of course difficult to draw.

---


22 An action can only be brought against the ascendant party, or against someone claiming through him, or who is in some other way implicated in the alleged exercise of influence: see Roche v. Sherrington [1982] 2 All. E.R. 426; [1982] 1 W.L.R. 599; Contractors Bonding Ltd v. Snee [1992] 2 N.Z.L.R. 157. In short, a third party may be affected by a claim of undue influence if he or she had knowledge, actual or with reason to know, that the transaction in question was tainted by undue influence, or that there was an agency relation between the third party and the party exerting influence within the scope of that relation. Many recent cases have involved bankers who have encouraged their customers (cf. non-customer: O'Hara [1985] B.C.L.C. 52) to guarantee debts owed to the bank by a near relative: cf. e.g., Lloyds Bank Ltd v. Bundy [1974] 3 All E.R. 757; National Westminster Bank v. Morgan [1985] A.C. 686; Cornish v. Midland Bank plc [1985] 3 All E.R. 513; Bank of Credit and Commerce International S.A. v. Aboody [1989] 2 W.L.R. 759. Special and particular rules, however, apply to guarantees procured from a wife (or perhaps an elderly parent) to secure a husband's (or adult child's) debts: Yerkey v. Jones (1938-9) 63 C.L.R. 649; Barclays Bank plc v. O'Brien [1992] 4 All E.R. 983. Generally, see Sneddon, M., "Unfair Conduct in Taking Guarantees and the Role of Independent Advice" (1990) 13 U.N.S.W. Law Journal 302; Chin, N., "Undue Influence and Third Parties" (1992) 5 J.C.L. 108.

23 For a discussion of third-party considerations, see authorities cited ibid, especially Sneddon, ibid.

24 Cf. Allcard v. Skinner (1887) 36 Ch. D. 145. There is an obvious parallel here with the old equitable undue pressure (or actual undue influence) cases involving coercion: see Williams v. Goude (1828) 1 Hagg. Eccl. 557, 581, cited in Winder, 3 Mod. L. Rev. 97, at 104.
Before embarking upon a more detailed survey of this area of law, the writer will first point out the futility of any attempt to state a precise, exhaustive definition of undue influence. Both courts and commentators have repeatedly been forced to assert that no precise formula can be advanced;\(^{25}\) and that there are many factors, the interaction and combination of which will move a court to the conclusion that "undue influence" has produced a result that should not be allowed to stand. The recurrent emphasis that everything depends upon a 'meticulous examination of the facts',\(^{26}\) and our due acknowledgement that the reported decisions are thus more or less *sui generis*, indicates clearly that each case is but an instance of the application of a principle\(^{27}\) transcending a definitional approach. Any attempt at definition, therefore, appears to be quite misplaced. Perhaps the

The influence to vitiate an act must amount to force and coercion destroying free agency—it must not be the influence of affection and attachment—it must not be the mere desire of gratifying the wishes of another; for that would be a very strong ground in support of [an] act ... there must be proof that the act ... was done merely for the sake of peace—so that the motive was tantamount to force or fear. (Emphasis added.)

\(^{25}\) A cogent statement to this effect is that of Lord Scarman in *National Westminster Bank v. Morgan* [1985] 1 A.C. 686, 709:

... I would wish to give a warning. There is no precisely defined law setting limits to the equitable jurisdiction of a court to relieve against undue influence. This is a world of doctrine, not of neat and tidy rules. The courts of equity have developed a body of learning enabling relief to be granted where the law has to treat the transaction as unimpeachable unless it can be held to have been procured by undue influence. ... Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case.

One cannot also ignore the possibility of a deliberate, strategic circumvention of a definitional approach. Lord Chelmsford L.C., in *Tate v. Williamson* (1866) L.R. 2 Ch. App. 55, and speaking of the jurisdiction exercised by equity over the dealings of those persons standing in certain fiduciary relations, said '... the Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise' (*id*, 61).


\(^{27}\) *Viz.*, unconscionability, or equitable fraud.
best one can aim at instead is a description of the circumstances in which the jurisdiction has been applied.28

Accordingly, the writer will proceed upon the assumption that no general rule can be laid down as to what shall constitute ‘undue influence’; that it is an expression which calls for elaboration within the many litigated fact situations. At best, one can attempt to supply a contextual, rather than a verbal, identification of undue influence.29

1.1. The Traditional Classes of Undue Influence: “Actual” and “Presumed” Undue Influence

The jurisdiction to relieve against undue influence, which applies to inter vivos transactions,30 was the creation of the courts of equity. In historical terms, this equitable body of law seems to have been authored in response to two not entirely distinct concerns.31 With the first, we are already familiar.32 The early common-law doctrine of duress, with its inability to capture the more subtle and insidious forms of coercive influences and pressures, effectively left unregulated a miscellany of unfair bargaining practices affecting and concerning the volitional quality of a party’s manifested contractual assent. Thus, whilst the common law was concerned mainly with the regulation of certain criminal and tortious behaviour in bargaining, equity exercised a separate and wider jurisdiction over contracts made without free consent, in instances where the influence

28 Cf. Antonovic v. Volker (1986) 7 N.S.W.L.R. 151, where Mahoney J.A. (at 165), suggested that unconscionability, as a principle of equity, was ‘better described than defined’.


30 We are not directly concerned here with the form of undue influence governed by probate law. Generally, see Meagher et al., op. cit., 372, para. 1507.

31 The “concerns” here are “not entirely distinct” because both merely represent specific manifestations of conduct which equity regarded as fraudulent or unconscionable: cf. Lord Hardwicke’s third species of fraud in Earl of Chesterfield v. Janssen (1750) 2 Ves. Sen. 125, at 155-6.

32 See Chapter Five (duress).
or pressure fell short of common-law duress. The courts of equity considered it contrary to prevailing standards of propriety in dealing for one party to extract a contract from another party, when that other party was, on account of her peculiar impairment of bargaining power, in special need of protection from the imposition of the first party. These prevailing standards of decent behaviour were, in particular, defined and administered through the notion of "equitable fraud".33

The second concern of equity, supporting the development of a distinct branch of equitable law, stemmed primarily from that court's special regard for certain relationships in which the opportunity or capacity to dominate or influence another person—i.e., to affect that other person's will—arose or existed for purposes collateral or extrinsic to the specific relationship between them. The endemic feature of these relationships was that, on account of the one party's unusual reliance on the other's personal honesty, loyalty and good faith that existed in fact or that was thought necessary for the performance of so-called "fiduciary" functions, the ordinary standards of bargaining (self-reliance, caveat emptor, and the like) as between the parties were considered inappropriate and inapplicable.34 With great jealousy, therefore, the courts of equity would scrutinise any dealing between the parties to such a relationship to ensure that the one with the opportunity or capacity to influence did not abuse it. Very strict controls were placed on the use of the superior party's position, that he should exercise his power only for the benefit of the other party.

In consequence of these seemingly discrete concerns of equity, as the law of undue influence was applied and developed, it branched into two distinct heads, or classes.35 Under the first class of undue influence, the opportunity or capacity to exert influence

33 Cf. Symons v. Williams (1875) 1 V.L.R. (Eq) 199, at 216 per Barry J.


35 The classic exposition of this development is considered to be that of Lord Justices Cotton and Lindley in Allcard v. Skinner (1887) 36 Ch.D. 154 (at 171 and 181, respectively).
may be found in no antecedent relation but in a particular situation, or in the deliberate contrivance of the party. If this be so, facts must be proved showing that the transaction was the outcome of such an actual influence over the mind of the ... [victim] ... that it cannot be considered his free act. 36

This "actual" undue influence, then, is linked directly to duress, in that the cases arising under it are those where, to use the words of Lindley L.J. in Allcard v. Skinner,

... there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by [the party exerting influence]... 37

Consistent, too, with the law of duress is the allocation of the burden of proof in this class of case. The onus of proving the illegitimate and vitiating effect of the pressure brought to bear rests affirmatively upon the party seeking relief from the transaction. 38 The basic justification given for judicial intervention in such cases also parallels that in duress. Relief, if forthcoming, is justified according to the principle that 'no one shall be allowed to retain the benefit arising from his own fraud or wrongful act'. 39

The second class of undue influence applies to relationships in which one party (D) is, because of a fiduciary-like role positively assumed by him, or, more usually, conceded in him by the other party (P), possessed of a peculiar opportunity or capacity to divert to himself or some third person a donative or contractual benefit from P. Owing to the unique power of influence that such a relation is presumed naturally to give to D over P, the law treats it as unsafe to assume that unfair advantage was not in fact taken of D's resultant superior bargaining position on the occasion of any dealing.


37 (1887) 36 Ch.D. 154, 181.


39 Allcard v. Skinner (1887) 36 Ch. D. 145, 171 per Cotton L.J.
between $D$ and $P$. Accordingly, equity raises a rebuttable presumption that a substantial gift from, or a (materially disadvantageous?) contract with, $P$ was improperly procured—the result of the *undue* influence of $D$. Should $D$ wish to sustain the benefit of a transaction entered into under such circumstances, both as a bare matter of public policy, and because of the difficulty of proving that undue influence was in fact exercised, especially where it is of the most subtle kind, it is incumbent upon $D$ affirmatively to show that no unfair advantage was in fact taken, but that the benefit he received 'was the independent and well-understood act of [$P']', who was 'in a position to exercise a free judgment based on information as full as [$D$'s own]'. Unlike the first class of undue influence, however, the traditionally expressed foundation for judicial intervention in this class of “presumed” undue influence, so-called, is framed not on the ground that a wrongful act was committed by the ascendant party, but rather on the ground of public policy. Specifically, the equitable jurisdiction to relieve against undue influence in this second class of case is designed to regulate the possible abuse of the special relations existing between the parties, and the influence arising therefrom. In either class, however, equity is concerned to guard against one party abusing his superior bargaining position.

It is sometimes said that the line dividing the two classes of undue influence is a thin one; but as we shall see, this is only true in part. Whilst the language of “actual” and “presumed” undue influence makes for convenient terminology in distinguishing the proof requirements applying to the respective classes of case, they prove generally not to capture the distinct substantive, empirical, and normative criteria that have tended to

---

40 Or, sometimes, in any dealing between $P$ and a third party at $D$'s direction.

41 See Section 2.2.2.3.1., below.

42 *Johnson v. Buttress* (1936) 56 C.L.R. 113, 134 per Dixon J.

43 There has been some shift away from this approach, particularly in England, and towards a stricter “victimisation” rationalisation of undue influence: Section 2.2.2.2.


448
apply in each class. The cases in which the concept and language of "undue influence" have been developed and applied demonstrate not only quite varied approaches to the burden of proof, the existence of particular antecedent circumstances or relations, and the immediate psychological effect upon the victim of the influence, but also, in most instances, that the nature and manner of affecting the free will of the victim is, in each case, quite different.

As the first class of undue influence has been applied by the courts in the nineteenth and twentieth centuries, it seems primarily to have been concerned with regulating conduct that was straightforwardly coercive, albeit falling short of actual common-law duress. Consequently, many instances

46 See text, supra, at p. 447.

47 Section 2.2.

48 As with duress, the victim in most cases of "actual" undue influence clearly knows what she is doing when she submits to the coercerer's demands. In general, she acts simply out of fear. The victim in a large number of presumed undue influence cases, however, invariably believes that she is acting in accord with her independent wishes, not as the result of threats. Instead, she acts out of reliance, believing that the party exercising influence over her is acting in her best interests. Indeed, she may enter into the transaction in a state of euphoria, or some lesser state of content, rather than fear. Cf. also, Chunn, L., "Duress and Undue Influence—A Comparative Analysis" [1970] 22 Baylor L. Rev. 572. For a psychological analysis of undue influence, see Shaffer, T., "Undue Influence, Confidential Relationship, and The Psychology of Transference" (1970) 45 Notre Dame Lawyer 197.

49 Due to its natural affinity with the modern duress doctrine, we find that many "actual" undue influence cases involve a specific threat, although ordinarily not of such a serious nature as to warrant the invocation of the strict common-law doctrine of duress. Presumed undue influence, however, does not require any enquiry into the precise nature and manner of the superior party's conduct, but it is generally understood to embrace far more subtle and insidious means of exerting pressure or influence: excessive persuasion, argument, pleading, some deception, trickery, or other machination may suffice. Undue influence may include conduct that wears down, by importuning, tears, persistent discussion, and the like, a party already circumstantially susceptible. Sometimes, all the ascendant party need do is tell the subservient party 'with a very confident and knowing air that the gift or other transaction is a good idea' (cf. Shepherd, op. cit., 214).

of actual undue influence, or "undue pressure" as it is sometimes known,\(^{51}\) were, and still remain, indistinguishable from those cases which today may be decided according to the two-pronged theory of coercion expounded in Chapter Five.\(^{52}\) Indeed, it is arguable that the extraordinary expansion of the scope of common-law duress in the latter part of this century has to a considerable extent undercut the importance of the concept of actual undue

\(^{51}\) Winder, "Undue Influence and Coercion" (1939) 3 M.L.R. 97; Cope, M., Duress, Undue Influence and Unconscionable Bargains (1985), 73-6.

\(^{52}\) The nature of "undue" in the undue influence formulation here finds its parallel, if not its synonym, with the notion of "illegitimacy" in the law of duress. Hence, the manner in which one party's capacity to influence the other is exercised might give rise to similar judgmental refinements seen in our discussion of the proposal prong of the two-pronged theory of duress. Thus, in Williams v. Bayley (1866) L.R. 1 H.L. 200, for example, where a bank made it clear that they had it in their power to prosecute the son of a man whose signature they sought to a mortgage in their favour, Lord Cranworth L.C. (at 209-10) explained the distinction between legitimate pressure and undue influence thus:

> [I]t is not pressure in the sense in which a Court of equity sets aside transactions on account of pressure, if the pressure is merely this: 'If you do not do such and such an act I shall reserve all my legal rights, whether against yourself or your son.' If it had only been, 'if you do not take on yourself the debt of your son, we must sue you for it,' I cannot think that that amounts to pressure, when the parties are at arms' length, and particularly when, as in this case, the party supposed to be influenced by pressure had the assistance of his solicitor.... But if what really takes place is this: If you do not assist your son, by taking on yourself the payment of these bills and notes on which there are signatures which are said, at least, to be forgeries, you must not be surprised at any course we shall take, meaning to insinuate, if not to say, we shall hold in our hands the means of criminally prosecuting him for forgery.

In other words, at least an implied threat must be found. Thus, a bank's actively taking advantage of a father's natural affection for his son, for the purpose of applying pressure to the father to secure a private advantage unrelated to the bank's private and public right or power to press criminal charges against the son, was seen as an "undue" (illegitimate) exercise of the capacity to influence.

The requirements of actual undue influence were recently stated by the English Court of Appeal in Bank of Credit and Commerce International S.A. v. Aboody [1989] 2 W.L.R. 759, at 782 per Slade L.J.:

> Leaving aside proof of manifest disadvantage, we think that a person relying on a plea of actual undue influence must show that (a) the other party to the transaction (or someone who induced the transaction for his own benefit) had the capacity to influence the complainant; (b) the influence was exercised; (c) its exercise was undue; (d) its exercise brought about the transaction.

influence. According to recent Australian academic and judicial pronouncements, moreover, it is to be doubted whether the formal separation of two jurisdictions can be, or need be, sustained.\footnote{See Cope, op. cit., 61, 68-9, 72-8; Hardingham, I., "Unconscionable Dealing", in Finn (ed), Essays on ,19-24. Duggan J., in Farmers’ Co-operative Executors & Trustees Ltd v. Perks (1989) S.A.S.R. 339, 405 acknowledged that circumstances which constituted duress would also establish a case of actual undue influence. Agreeing with Cope (\textit{id.}, 61, para. 125), his Honour also observed that 'there is good reason for subsuming all the duress cases under the first class of undue influence, the old common law kinds of duress constituting but an extreme example of actual undue influence' (\textit{ibid}). Cf. 25 Am. Jur. 2d “Duress and Undue Influence”, §1, p. 353: duress described as the 'extreme of undue influence'. Greig and Davis, however, drawing upon the different types of pressure and psychological features present in each case, suggest that it is difficult to support Duggan J.'s comments: Third Cumulative Supplement to The Law of Contract, 1991, at 192. In this writer's view, the proper distinction between the two classes of undue influence lies not in the psychological or empirical features of the case, but in the presence or absence of a special antecedent relation. To be sure, some cases involve pressure exercised within the context of a special antecedent relation, whether or not these pressures are coercive and fear producing, and some cases are concerned only with influences which are coercive \textit{per se}, notwithstanding that no fiduciary relation exists. It is argued, therefore, that Duggan J.'s comments are valid only insofar as they relate to the latter category of cases.} This writer will treat them as coterminous.

In any event, whilst the typical factual pattern in this class of "actual" undue influence involves a situation in which the party against whom the influence was allegedly exerted was at that time peculiarly sensitive to its exercise, the source of this sensitivity characteristically arises for reasons that are altogether unassociated with the type of antecedent relation to which the second class has become bound. This is to say, when we are dealing with those cases in which a rebuttable presumption of undue influence arises, in practice our analysis shifts from one concerned with actual undue influence—essentially an express use of coercive pressure—to the entirely different issue of whether there is an antecedent "relationship of influence"\footnote{See Section 2.2.1.1., below.} between the parties, from which the court will be asked to \textit{infer} that undue influence continued down to the time of contract. Once such a relationship is proved, and a contractual dealing has taken place, for reasons of public policy,\footnote{These are discussed in Section 2.2.2.1., below.} the traditional approach is that the presumption that influence existed, and was unduly exercised, arises. Logically, this does not

\footnote{See Section 2.2.1.1., below.}
then require any detailed enquiry into the precise nature and manner of the exercise of the influence.\textsuperscript{56} Since the law presumes that certain relationships are ripe for abuse, a specific illegitimate use of influence need not be shown; advantage can be taken of trust and confidence in the most subtle and insidious modes of persuasion.\textsuperscript{57}

\textsuperscript{56} There does not, therefore, seem to be a need to have a separate category of "actual" undue influence that occurs within the context of a special antecedent relationship, such a relationship being on its own sufficient to give rise to the presumption of undue influence. This is especially highlighted in England, now that the manifest disadvantage requirement has been applied both to actual and presumed undue influence: cf. \textit{Bank of Credit and Commerce v. Aboody} [1989] 2 W.L.R. 759, esp. at 779.

\textsuperscript{57} A number of cases involving the presumption of undue influence have in fact displayed features common to both classes of undue influence, such that a finding of undue influence might have been supported on both bases. In \textit{In re Craig, decd.} [1971] 1 Ch. 95, for example, Ungoed-Thomas J. (at 104), saw the distinction between "actual" and "presumed" undue influence as procedural rather than substantive in character:

\begin{quote}
[T]he presumption seems to me in general at any rate to amount substantially in practice now to no more than the passing of the onus of proof where the amount (or nature) of the gift and the relationship of trust and confidence would, in the ordinary course of trial, pass independently of any special formulation of the passing of the presumption.
\end{quote}

And, as Slade L.J. said in \textit{Bank of Credit and Commerce International S.A. v. Aboody} [1989] 2 W.L.R. 759, 779: 'The presumption is after all "only a tool of the lawyer's trade"'.

The possibility of a dual finding can be evidenced, in particular, by those judicial pronouncements which hold, as an additional ground for relief, that both a presumptive relationship of undue influence and the exercise of actual undue influence has been established on the same facts. Cf. \textit{Bennet v. Vade} (1742) 2 Atk. 324, at 326; \textit{In re Craig, decd.} [1971] Ch. 95, 121; \textit{Farmers' Co-operative Executors & Trustees Ltd v. Perks} (1989) 52 S.A.S.R. 399, 417; \textit{Bank of Credit and Commerce International S.A. v. Aboody} [1989] 2 W.L.R. 759, 779: 'On the facts of many cases, it may be equally open to the court to find in favour of the complaining party either on the grounds that undue influence has been proved or that on the particular facts a presumption arises which has not been rebutted'. Indeed, when Lindley L.J. described the cases involving actual undue influence in \textit{Allcard v. Skinner} (1887) 36 Ch. D. 145, at 181, he spoke of 'some unfair and improper conduct, some coercion from outside, some over-reaching, some form of cheating, generally though not always, some personal advantage obtained by a donee in some close and confidential relation' (emphasis added). Clearly this statement is too narrow to encompass all the cases invoking the jurisdiction, although there are some that are consistent with it: see \textit{Nottidge v. Prince} (1860) 2 Giff. 246; 66 E.R. 103; \textit{Roberston v. Robertson} (1930) Q.W.N. No. 41 in [1930] Qd. St. R.; \textit{In re Craig, decd.} [1971] 1 Ch. 95; \textit{Farmers' Co-operative Executors & Trustees Ltd v. Perks} (1989) S.A.S.R. 339. All of these cases, however, seem to involve straightforwardly coercive behaviour, at least of an implied or inferential kind, which was sufficient to overcome the natural resistance of a victim likely to be vulnerable to the particular threat. \textit{Bank of Credit and Commerce International S.A. v. Aboody} [1989] 2 W.L.R. 759 affords an example of actual undue influence or pressure exerted by means other than coercion, although there was some deception. In that case a wife was under
Accordingly, the true distinction between the respective classes of case appears to reside in the type of relational context within which the particular abuse of the opportunity or capacity to influence occurs, and not necessarily in the particular manner one goes about exercising influence or pressure: the observable *modus operandi*, so to speak. While each class of case is concerned to prevent one party abusing his ascendant position in bargaining, in order properly to distinguish between the two classes, it is necessary first to enquire into the nature or source of the acquisition of such a position (power). In the one class of case the ascendency arises solely by virtue of a special antecedent relationship of influence\(^{58}\) in the other it need not. Therefore, the conventional terminology of "actual" and "presumed" undue influence proves generally to be uninstructive for the purpose of drawing the crucial analytical distinction between the two classes of case, which appears principally to reside in the presence or absence of a special antecedent relation. And whilst those terms may nevertheless (conveniently) capture the distinctive approaches taken to the burden of proof in each class of case, what is of greater analytical significance is that the allocation of the burden of proof is itself first contingent upon the presence or absence of such a relation. The conventional terminology, therefore, is in reality one step removed from that criterion which truly ordains the distinction between the classes: the presence or absence of a special relationship of influence. Accordingly, it is suggested here that there is some merit in relabelling the conventional classes of undue influence, "nonrelational undue influence" and "relational

pressure from her husband to sign a charge over her home to secure the liabilities to a bank of a family company. Largely to keep the peace, and perhaps out of a sense of duty to her husband, she did so. The wife, however, trusted her husband without questioning when he presented her with the necessary documents to sign. Knowing of his own influence, and by deliberately concealing the substantial risks involved in the transaction, the husband procured his wife's signature. The wife was described by the English Court of Appeal as being 'a mere channel through which the will of [her husband] operated' (id, 784). However, because the presumption of undue influence was not relied upon by the parties (they did not challenge the trial judge's finding of actual undue influence), no discussion of the precise nature of the relationship between the husband and wife was required in the Court of Appeal.

Obviously, where there is some evidence of an actual exercise of influence, but the presumption is nevertheless being relied upon, the defendant, in the absence of a manifest disadvantage requirement, will have a more difficult time rebutting that presumption.

\(^{58}\) Section 2.2.1.1.
undue influence" respectively.\textsuperscript{59} For analytical purposes, therefore, nonrelational undue influence is treated here as being synonymous with duress, thus requiring positive proof of illegitimate pressure according to the two-pronged theory of duress proffered above; relational undue influence, on the other hand, is considered to be a distinct equitable category which will, upon proof by the plaintiff of a transaction between herself and the other party to a special relationship of influence,\textsuperscript{60} involve a shift in the burden of proof to the defendant.

In the pages that follow, only relational undue influence will be considered; for as Professor Finn has pointed out, it is this second head of undue influence alone which has become bound to the existence of fiduciary obligation—'to an obligation arising because a person is so circumspected as regards another that he has a right to expect that other to exercise good faith towards him'.\textsuperscript{61}

\section{2. RELATIONAL UNDUE INFLUENCE}

\textit{Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A [fiduciary] is held to something stricter than the morals of the market place.}\textsuperscript{62}

\textsuperscript{59} The writer hopes the reader will tolerate a usage which does not represent orthodoxy. Cf. Birks, P., \textit{An Introduction to the Law of Restitution} (1985), 184, referring to the classes of undue influence as 'actual' and 'relational', respectively. In Birks, P., \textit{Restitution — The Future} (1992), 44-7, the distinction between 'relational' and 'extra-relational' undue influence is introduced to capture the same idea. Birks also points out that there can be 'presumed relational undue influence' and 'actual relational undue influence', \textit{id}, 45, a distinction essentially endorsed by this writer in the discussion in the text above.

\textsuperscript{60} See Section 2.2.1.1., below.

\textsuperscript{61} Finn, P. D., \textit{Fiduciary Obligations} (1977), 83 (hereafter: Finn, \textit{Fiduciary Obligations}).

\textsuperscript{62}Per Cardozo J. in \textit{Meinhard v. Salmond} (1928) 164 N.E. 545, at 546.
2.1. Introduction

When a friend wrongs you, you feel betrayed; when a mere acquaintance does so, you feel merely cheated.

In our society, we expect, and are entitled to expect, more of some than of others. For example, we count on our friends, our family, our lovers, our colleagues, confidants, and advisers in various ways in which we do not, and cannot, count on just anyone. The fact is, we trust that these classes of individual will behave towards us in ways that we do not trust mere strangers or even acquaintances will. After all, each possesses, within the scope of our relationship or our dealing, unique opportunities to help or to hurt us. This should, in turn, quite naturally involve special expectations, commitments and responsibilities. When these expectations, commitments and responsibilities are disappointed, our chief complaint is grounded in a breach of trust. We complain that our justifiable reliance in the disposition of that other person has been misplaced; indeed, often, that we have been betrayed.

On occasion, the law will recognise and protect the expectations, commitments and responsibilities arising from our special relationships with others. Where special trust has been reposed, or dependence or reliance conceded by one party in, or in consequence of, her relationship with the other, an influence or ascendancy is assumed by the law to have been acquired by that other party. What is recognised to follow is a relationship where, because of the ascendant party’s position in it, he has, or is presumed to have, a peculiar power to affect, and to affect adversely, the interests of the

---


64 Goodin, R., Protecting the Vulnerable (1985), 98.

other party who has, or who is presumed to have, entrusted him with her own welfare. The law, accordingly, and no doubt morality,\(^6\) enjoins that such power is to be exercised, if at all, only for the benefit of that other party who is, or is presumed to be, especially vulnerable to the exercise of that power. Such is the general nature of the fiduciary obligation; and such is the concern of fiduciary law. The aforementioned injunction, however, extends only to matters within the scope of the parties’ relation, although it is clear that a relationship can have varied purposes, some of which are consistent with fiduciary obligation and others of which are not.\(^6\)

The basic justification for the law’s desire to recognise and to regulate relationships of a fiduciary nature, appears to be

informed by considerations of public policy aimed at preserving the integrity and utility of such relationships given the expectation that the community is considered to have of behaviour in them, and given the purposes they serve in society.\(^6\)

In practical terms, the law regulates such relationships by imposing extraordinarily high standards of acceptable conduct on the fiduciary. This it


\(^{67}\) This seems to parallel closely the court’s treatment of the purchasing rule in fiduciary law. Thus, as Lord Blackburn observed in McPherson v. Watt (1877) 3 App. Cas. 253, at 270-71, for example, a solicitor-client case:

If [the fiduciary] purchases ... in a manner totally unconnected with what he was employed in before, no doubt an attorney may purchase from one who has been his client, just as any stranger may do ... being in no respect bound to do more than any other purchaser would be. But when he is purchasing from a person property with respect to which the confidential relation has existed or exists, it becomes wrong of him to purchase without doing a great deal more than would be expected from a stranger. (Emphasis added.)

Cf. also, Finn, Fiduciary Obligations, 180. Thus, in Allison v. Clayhills (1907) 97 L.T. 709, Parker J. (at 712) suggested that the presumption would not apply if a solicitor bought a horse from a client who had retained him to conduct an action for slander, the relationship of influence existing only in respect of the latter. Cf. also, Union Fidelity v. Gibson [1971] V.R. 573.

does essentially by proscribing the fiduciary’s possible use of the power and of the opportunities his position gives or has given him to act inconsistently with the special responsibility of acting only in the interests of his beneficiary. Given the strongly prophylactic nature of this branch of law, moreover, a mere dishonest or disloyal tendency in a dealing between the fiduciary and his beneficiary is considered to be enough to justify both a presumption of wrongdoing, and a shifting of the burden of proof to the fiduciary to show the fairness of the transaction as a whole.

In Australia at least, the relationships which traditionally have been the concern of the category of relational undue influence have tended to exemplify closely the fiduciary relationship and the principles and methods of equity which apply to them (in particular as demonstrated through the strongly prophylactic operation of the undue influence doctrine, which includes the use of such equitable techniques as a presumption of wrongdoing, a reversal of the onus of proof, and a relaxed notion of causation). The consummate statement to this effect is surely that of Dixon J. in Johnson v. Buttress. In describing the type of relationship in which one party may naturally acquire ascendency or influence over another, and to which a presumption of undue influence would apply, his Honour said:

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.

69 Cf. Finn, id, 2. Finn (id, 28) rejects the proposition that the principle is a prescriptive one in what it exacts. Save in a very distinctive class of case, the fiduciary principle does not, of itself, provide an independent source of positive obligation going beyond the aim of exacting loyalty in relationships.

70 The law of England, especially since National Westminster Bank plc. v. Morgan [1985] A.C. 686, appears to be heading rapidly in an alternative direction. See Sections 2.2.2.2. and 2.2.2.3.1.

71 (1936) 56 C.L.R. 113.


The characteristic common to all [the presumptive relationships] appears to be that [the ascendant party] will advise and afford guidance to the other in
Now, once we acknowledge that the undue influence jurisdiction applies equally to contracts as to gifts, we seemingly begin to face a paradox. In the present context, the subservient party to the particular dealing in question has a dual role: she is both an independent actor, namely, a participant in the negotiation process, and a beneficiary to the fiduciary expectation. These roles ineluctably stand in conflict, and resolving the obvious tensions between them has proved particularly problematical for the courts, both here and (especially) overseas. The fiduciary standard simply is not one suited to the generality of contractual relationships and dealings. The very concept of contractual negotiation, with its emphasis on self-interested pursuit, and only exceptionally with “neighbourhood”, implies ulterior motives of a sort that are incompatible with the type of relationship which attracts the law of relational undue influence. In this class of undue influence cases, the purpose of the parties’ broader relationship is not to promote or to mediate between their several interests; rather, it is to secure the paramountcy of one party’s interests over those of the other. This does not operate to bar the fiduciary from ever contracting with his beneficiary, however; but should he choose to do so, he is bound to show that the advantage he received was the product of a dealing at arm’s length, or was authorised by law. This is reflected in the reversal of the onus of proof, which follows the presumption of wrongdoing.

We can see more clearly the fiduciary principle at work here as we turn now to consider in greater detail the presumption of undue influence. In the following section, two principal questions will require our attention: when will the presumption of undue influence arise; and how might it be rebutted? Within these questions, however, there lie many more.

---

and for the purpose of such relationship solely in the interests and for the benefit of the other.


458
2.2. The Presumption of Undue Influence

Equity does not take the view that all relationships in which one party is able to exercise influence over the motivations of the other are, perforce, the subject of suspicion. Something more is required. Accordingly, it has constantly been emphasised that there are two elements, one factual, the other normative, common to the relationships from which a presumption of undue influence arises: first, one party was, down to and at the time of the transaction, especially placed to exercise influence over the other; second, the contract's procurement was prima facie inexplicable in the absence of that influence being exercised.74 In the words of Dixon J. in Yerkey v. Jones,75 what must be shown of the presumptive relationships is:

(a) 'the ... existence of an opportunity of obtaining an ascendancy or confidence and of abusing it ...'; and

(b) '... that in none of those relations is it natural to expect the one party to give property to the other. That is to say, the character of the relation itself is never enough to explain the transaction and to account for it without suspicion of confidence abused'.76

The writer shall consider in turn these common features of the presumptive relationships, discussing in particular the various specific criteria which have been developed and applied to each respectively. Two significant points are noted from the outset, however. First, it is criterion (b) in particular which has undergone some recent divergence in approach among the major common law jurisdictions considered in this thesis. Second, the presumption is an important and useful device by which undue influence will be imputed in cases where such wrongdoing is both likely and difficult to establish. We find this to be even more so given the fact that the presumption of undue influence does not itself involve an inference as to


75 (1939) 63 C.L.R. 649.

76 Id, 675. The writer has added emphasis to highlight the point that it is the transaction within the relation that raises the suspicion and not simply the relation itself.
the precise way in which the particular exercise of influence is considered to be “undue”.

2.2.1. Raising the Presumption I: The Opportunity of Obtaining Influence and of Abusing It

You cannot inquire how much influence there was; it is enough in the contemplation of the law, that the influence existed, that there is a possibility that it may be abused.77

Given that the purpose of the doctrine of relational undue influence is ‘to prevent the relations which existed between the parties and the influence arising therefrom being abused’,78 it is crucial to examine closely the relations existing between the bargaining parties, to see whether one holds a position vis-à-vis the other which is peculiarly capable of abuse. Traditionally, the cases involving relational undue influence, from which a presumption of undue influence arises, are divided into two subcategories:

(a) where between the parties a special antecedent relationship exists such that by its very nature the law will automatically assume that one party has the capacity to influence the actions and the choices of the other party; and

(b) where the party seeking relief from the transaction is charged with affirmatively proving that the relation existing antecedently between herself and the other party was in fact such as naturally to involve an ascendancy or influence by the one over the other.79

It is clear that the two subcategories are the same in kind; they differ only in their proof. In either case, therefore, any suspicious benefit received by the ascendant party from the other, or received by a third party at the ascendant party’s direction, is presumed to be the outcome of the use-hence-misuse of the former’s position of influence.

77 Per Baron V.-C. in Morgan v. Minett (1877) 6 Ch.D. 638, at 647.


2.2.1.1. The relative positions of the parties: the nature of the "relationship of influence"

A finding of undue influence is generally said to require a special relationship between the parties that makes one of them peculiarly susceptible to influence or persuasion by the other. The mere fact that the victim is weak, physically or mentally infirm, aged, lacking in business acumen, or even enthusiastic for the other’s cause, however, does not suffice in the absence of such a relation, although such characteristics may be important probative factors in showing that such a relation existed.\(^80\) Whilst reportedly there is no relationship to which the presumption of undue influence cannot apply,\(^81\) such a presumption will only arise if the party seeking relief from the transaction can show that at the time of contracting there was, between herself and the party allegedly exercising his manipulative capacity, a "relationship of influence".\(^82\)

Such a relationship has been described variously,\(^83\) although it is today clear that the use of any rigid terminology in this area must be carefully

---

\(^{80}\) See *Union Fidelity Trustee Co. v. Gibson* [1971] V.R. 573, at 575.


... it is neither feasible nor desirable to attempt closely to define the relationship, or its characteristics, or the demarcation line showing, the exact transition point where a relationship that does not entail [the fiduciary expectation] passes into one that does.

\(^{82}\) In *Allcard v. Skinner* (1887) 36 Ch. D. 145, for example, Cotton L.J. (at 171) spoke of the situation 'where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor'.

\(^{83}\) In *Johnson v. Buttress* (1936) 56 C.L.R. 113, reference was made to a relationship in which the stronger party is 'in a position to exercise dominion over [the weaker] by reason of the trust and confidence reposed' in the former: *id*, 119 per Latham C.J. In the same case, Dixon J. spoke of 'a relation that gives one an authority or influence over the other (id, 134), and McTiernan J. referred to 'trust and confidences in and ... dependence on ...' (id, 142). Cf. also, *Goldsworthy v. Brickell* [1987] Ch. 378, 400 (Nourse L.J.). Other examples include a relationship in which there is: 'a duty to advise' (*Allcard v. Skinner* (1887) 36 Ch. D. 145, 181 per Lindley L.J.); 'a duty of fiduciary care' (*Lloyds Bank Ltd v. Bundy* [1975] Q.B. 326, 340 (per Sir Eric Sachs); *Horry v. Tate & Lyle Refineries Ltd* [1982] 2 Lloyd's Rep. 416, 423 (per Peter Pain J.); 'a special
avoided. In general, the constant feature of those relationships attracting the doctrine of relational undue influence is that one party is justified in assuming that the other will not act in a manner inconsistent with the former’s welfare; that the first party is given to believe that she can rely upon the second party for disinterested advice and guidance, and that, accordingly, that second party will be motivated solely by the first party’s welfare and interests, in, and for the purposes of, the relationship between them. Such a relationship will not necessarily be inferred merely from proof that the second party has some influence or authority over the first, or that the first party reposes some trust or confidence in him, however slight that influence, authority, trust or confidence may be. Not just any

relationship’ (Tufton v. Sperni [1952] 2 T.L.R. 516, 530 (per Jenkins L.J.); ‘a fiduciary relationship’ (In re Craig, decd. [1971] Ch. 95, 100 (per Unggoed-Thomas J.); Tufton v. Sperni [1952] 2 T.L.R. 516, 530 (per Jenkins L.J.); Tate v. Williamson (1866) L.R. 2 Ch. App. 55, 60-61 (per Lord Chelmsford L.C.); or where the ascendant party can be expected to display: ‘altruism’ (Tiplady, 48 M.L.R. 580); ‘candour and protection’ (Zamet v. Hyman [1961] 3 All E.R. 933, 937 (Lord Evershed M.R.); ‘care and providence’ (Huguenin v. Baseley (1807) 14 Ves. 273, 300 (Lord Eldon L.C.).


I believe that the Lords Justices were led into a misinterpretation of the facts by their use, as is all too frequent in this branch of the law, of words and phrases such as ‘confidence,’ ‘confidentiality,’ ‘fiduciary duty’. There are plenty of confidential relationships which do not give rise to the presumption of undue influence (a notable example is that of husband and wife...); and there are plenty of non-confidential relationships in which one person relies upon the advice of another, e.g., many contracts for the sale of goods.


As was stressed in Goldsworthy v. Brickell [1987] Ch. 378, however, what must be looked for is a relationship of influence, not domination: at 404-6, 414-7, per Parker and Nourse L.J.J., explaining some of Lord Scarman’s remarks apparently to the contrary in National Westminster Bank v. Morgan [1985] A.C. 686.


85 Cf. Restatement (Second) of Contracts, § 177(1).


87 ‘Blind and unquestioning trust is not required’, however: Tufton v. Sperni [1952] 2 T.L.R. 516, at 524 per Evershed M.R.
manipulative capacity will do. The court must ultimately be satisfied that there is an ascendancy and a reliance such that one party to the relationship is ‘... governed by [the other’s] judgment, gives him his dependence and entrusts him with his welfare’. Thus, whatever the relationship involved, it is indeed one ‘in which fiduciary characteristics may be seen’.

In order to identify such fiduciary characteristics, it is crucial to examine and determine the precise nature of the relationship existing between the contracting parties. In Professor Finn’s view, what must be

---

88 As Professor Finn reminds us:

It is obviously not enough that one is in an ascendant position over another: such is the invariable prerequisite for the unconscionability principle. It is obviously not enough that one has the practical capacity to influence the other: representations are made, information is supplied (or not supplied) as of course with the object of, and in fact, influencing a host of contractual dealings. It is obviously not enough that the other party is in a position of vulnerability: such is the almost inevitable state in greater or lesser degree of all parties in contractual relationships. It is obviously not enough that some degree of trust and confidence are there: these are commonly placed in the skill, integrity, fairness and honesty of the other party in contractual dealings. It is obviously not enough that there is a dependence by one party upon the other: as the good faith cases illustrate, a party’s information needs can occasion this. Indeed elements of all of the above may be present in a dealing—and consumer transactions can illustrate this—without a relationship being in any way fiduciary.


89 Johnson v. Buttress (1936) 56 C.L.R. 113, 135 per Dixon J. See also Nourse L.J. in Goldsworthy v. Brickell [1987] Ch. 378, at 401:

[T]he degree of trust and confidence is such that the party in whom it is reposed, either because he is or has become an adviser of the other or because he has been entrusted with the management of his affairs or everyday needs or for some other reason, is in a position to influence him into effecting the transaction of which complaint is later made.

90 Cf. Johnson v. Buttress (1936) 56 C.L.R. 113 135 per Dixon J.

91 In Tufton v. Sperni [1952] T.L.R. 516, Jenkins L.J. warned against an inadequate examination of the relationship (id, 530, citing Re Coomber [1911] 1 Ch. 723):

It would of course, be wrong to work backwards from the undeniable fact of an unconscionable bargain and endeavour to construct some fiduciary relationship between the parties on the strength of which to set it aside. That is a temptation which must be firmly resisted. It must be shown that the
shown is that the actual circumstances of the relationship in question entitle one party to expect, or justify one party’s existing expectation, that the other will act in her interests in and for the purposes of the relation between them. The relative positions of the parties—any ascendancy, influence, or vulnerability existing between them; any trust, confidence or dependence reposed in one by the other—is of key importance in determining this issue, but only to the extent that this *evidences* a relationship suggesting the above entitlement.\(^\text{92}\) To this end, the critical matter becomes the *role* that the ascendant party has assumed, or should be taken to have assumed, in the relationship in question:

It must so implicate that party in the other’s affairs or so align him with the protection or advancement of that other’s interests that foundation exits for the “fiduciary expectation”.\(^\text{93}\)

---

Finn would probably argue that such a warning was not adhered to by the English Court of Appeal in *Lloyds Bank v. Bundy* (cf. Finn, “Contract and the Fiduciary Principle” (1989) 12: U.N.S.W. Law Review 76, at 96); as it would also appear to have little application in some North American jurisdictions (cf. Finn, “The Fiduciary Principle”, *op. cit.*). See also, Finn, “Fiduciary Law and the Modern Commercial World”, Chp. 1 in McKendrick, E. (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (1992): ‘Put simply ... a person becomes a fiduciary, not because of his status, but because of what he assumes or is taken as having assumed to do in a particular relationship’ (*id*, 38).

\(^\text{92}\) Cf. *Re Brocklehurst’s Estate* [1978] Ch. 14, 41, *per* Bridge L.J.:

If one looks at the facts of the decided cases where a presumption of undue influence has been held to arise, the typical features characterising the relationships are, first, a duty on the donee to advise the donor, secondly, a position of actual or potential dominance of the donor by the donee, and thirdly a measure of confidence and trust reposed by the donor in the donee. The third characteristic is, no doubt, always present and this accounts for frequent reference to relationships giving rise to the presumption as fiduciary relationships.

\(^\text{93}\) Finn, “The Fiduciary Principle”, 47. Cf., also, *per* Griffiths J. in *Standard Investments Ltd v. C.I.B.C.* (1984) 5 D.L.R. (4th) 452 (Ont. H.C.), where his Honour saw the linchpin of the fiduciary relationship as residing in mutual undertaking and reliance. At p. 483 he said this:

It is the undertaking to act for and on behalf of another which imports the fiduciary responsibility. The conflict of duty and interest rule applies not
Such a role may exist or arise in a variety of ways and in a variety of settings, but whatever its origin, the same warning is applicable to all cases: whilst every relationship of influence is essentially fiduciary in its nature, the label "fiduciary" is itself terminologically inadequate to distinguish effectively the relationship which does give rise to a presumption of undue influence from that which does not. Although all relationships of

simply because of the placing of trust and confidence but, in my view, because of the undertaking of the fiduciary to act for or on behalf of his principal.

94 For example, it may exist or arise by nature, independent of human will, such as in the parental or quasi-parental relationship, or it may have been brought about by the voluntary action of the parties themselves, such as in the professional relations of solicitor and client, or it may have originated by circumstances and conduct generally. See, also, Finn's treatment of the fiduciary relationships existing or arising as 'legal phenomenon' and those which exist or arise as 'factual phenomenon': id, 31 et seq.

95 A classic judicial statement to this effect is that of Cozens-Hardy M.R. in Re Coomber [1911] 1 Ch. 723, at 726-7:

I do not think it is true to say that any confidential relation between donor and donee is sufficient to set up a presumption against the validity of the gift; or, in other words, that it is for the donee under the gift to establish that all such precautions have been taken as would admittedly be necessary in the case of some confidential relations. There are confidential relations in which there is a presumption of undue influence. Take the common case (I say the common case because it is one of which the books are full) of solicitor and client. A solicitor cannot, in ordinary circumstances, take a gift from his client in a manner in which he is the solicitor because there is from that relationship in itself a presumption of undue influence; a presumption which, of course, may be rebutted. It may be rebutted in various ways; most frequently by proving that the solicitor told his client "I cannot take this unless you have independent advice; consult an independent solicitor, put the matter before him, and he must explain the matter fully to you." That is one instance. Another instance is, of course, where a young person, whether male or female, immediately after attaining twenty-one, makes a gift to a parent or a person standing in loco parentis. Where a gift is made under such circumstances, there is a presumption of undue influence which requires something to rebut it; but to apply that to every fiduciary relation and every relation of confidence is, I venture to think, not according to any authority and distinctly contrary to principle.

And Fletcher Moulton L.J. said (at 729):

Fiduciary relations are of many types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him.
influence are linked essentially to fiduciary obligation or expectation,96 not
all relationships which are “fiduciary”, in the sense that they give rise to the
circumscribed duties of loyalty and disclosure, are deemed necessarily to
involve influence.97 As the learned trial judge said in the Queensland case
of Cowen v. Piggott:98

In my opinion, this mistakes the principles involved and blurs the
distinction between contracts induced by undue influence and those
made with a person to whom fiduciary duties are owed. It is true that
a person in a position to exercise undue influence owes duties to the
other party that are the same as, or similar to, the duties owed by a
fiduciary to a person whom he advises. But the converse is not
necessarily true. The mere fact that a person occupies a fiduciary
position does not mean that any contract he enters is presumed,

96 There is some academic dissension from this proposition in New Zealand. Professor David
McLauchlan, for example, suggests, contrary to the views stated here, that the dominant party
in a relationship of interest need not owe a duty to act on behalf of or in the interests of the
other party: ‘The former may be entitled to act solely in his or her own interests but, if s/he
wishes to take the benefit of a transaction with the other party, s/he must behave
scrupulously so as to avoid the appearance of undue influence’: McLauchlan, D. W., “Unfair
The effect of this statement, of course, is to suggest that the standard of “neighbourhood”, as
opposed to the standard of “loyalty”, applies to the present jurisdiction. Although
McLauchlan cites no direct authority for his proposition (he could easily have cited Bank of
Credit and Commerce International S.A. v. Abody [1989] 2 W.L.R. 759), it seems misguided,
for two essential reasons. First, his above-quoted statement directly contradicts the principles
borne out of actual case authority, in particular, the Australian authorities following Johnson
v. Buttress. Second, if undue influence is indeed an exemplification of the unconscionability
standard of neighbourhood, then, a priori, there is no reason to give to the parties’
relationship the special protection the law affords to those relations fiduciary in nature. The
concomitant of this, as in the case of unconscionable dealings, is that there would be no
justification for the application or operation of a presumption of causative wrongdoing in cases
of undue influence. This would, of course, be quite contrary to the current administration of such
cases.

Kos and Watts likewise consider that a fiduciary relationship is not a necessary precondition
for a relationship of influence: S. Kos and P. Watts, Unjust Enrichment—The New Cause of
Action (New Zealand Law Society Seminar, February 1990), paras. 7.6 and 7.15. (contra, see,
e.g., Cope. op. cit., 81; Meagher, et al., op.cit, 378).

97 Though often this will be the case: Smith v. Kay (1859) 7 H.L.C. 750, 771. Sometimes,
however, the precise distinction between fiduciary law and undue influence is not observed in
per Dunn L.J.

98 (1989) 1 Qd.R. 41.

466
without further proof of reliance, to be the product of that relationship.  

Of course, the problems in denoting the precise circumstances where a fiduciary relationship is also to be considered as one of "influence" are only exacerbated by the current uncertainty surrounding the defining features of the fiduciary relationship itself. Sometimes fiduciary relationships arise only on account of the special influence one party has over another. These instances excepted, however, the preferable approach in all the presumptive relationships of influence is to examine closely the facts of the case at hand to see whether the nature of the particular fiduciary relationship justifies a court's inference that the requisite influence exists. This point emerges and is reinforced as we turn now to consider some concrete examples from both subcategories of the presumptive relationship: those arising by presumption of law, and those which are proved.

99 Id., at 44 (per McPherson J., as quoted by Connelly J. in the Full Court). Cf. also Mr Spencer Bower's comments of almost eighty years ago. He comments that it often happens that

the two relations, and the duties arising out of them, coexist and coalesce; but this is accidental, and, even, in such cases, it is very necessary to bear in mind the essential distinction, in thought and in theory, between the two. In the cases of fiduciary relations, as such, there is no question of 'influence', and in cases of 'influence', as such, there is no question of fiduciary relation; though usually, no doubt, the fiduciary relation gives scope and occasion for the 'influence', whilst the 'influence' leads to the establishment, or is exercised and expressed in the form, of a fiduciary relationship.


100 Generally, see Finn, "The Fiduciary Principle", op. cit.

101 Ibid.

102 Cf. Re Coomber [1911] 1 Ch. 723, 728-9 per Fletcher Moulton L.J.
2.2.1.1. Relationships deemed to be ones of influence

In its search for the types of relationships which justify the generalisation that "influence" naturally exists, the law has produced a quite sizable list of relations that are automatically deemed to be ones of influence. While there may remain some difference of opinion about the particular relations belonging to this class,\(^\text{103}\) the list is generally held to include the following relationships: parent-child and guardian-ward,\(^\text{104}\) solicitor-client,\(^\text{105}\) medical adviser-patient,\(^\text{106}\) religious adviser-devotee,\(^\text{107}\) engaged couples\(^\text{108}\) (but not husband and wife),\(^\text{109}\) and, but doubtfully,\(^\text{110}\) trustee and cestui que trust.\(^\text{111}\) Since one is naturally to expect the presumption of

\(^{103}\) Generally, see Finn, Fiduciary Obligations, 84, n. 12; Cope, op. cit., 85-97.


\(^{110}\) Cf. Finn, Fiduciary Obligations, op. cit., 84, n. 20.


468
influence to arise most readily in connection with the adviser class of fiduciaries,\textsuperscript{112} the list has been held to exclude the relations of principal-agent\textsuperscript{113} and employer-employee.\textsuperscript{114}

Yet for all that, it is perhaps too simplistic to say that a presumption of influence should arise automatically from certain generic relationships \textit{per se}. Influence, being the very personal type of power it is, transcends defined categories. An unquestioning presumptive approach simply ignores the reality that in each defined category of fiduciary relationship some beneficiaries retain their independence while in others they do not. The writer would thus follow Shepherd, who suggests that the external relationship is merely one piece of evidence speaking to the question of whether influence in fact existed.\textsuperscript{115}

Some courts, too, have appeared more inclined to require that a manipulative capacity on the part of the fiduciary be proved, even where the relationship is well established as one deemed to be that of influence.\textsuperscript{116} Hence in \textit{Moody v. Cox & Hatt},\textsuperscript{117} the presumption of undue influence was rejected in a solicitor-client relationship.\textsuperscript{118} And in \textit{Allcard v. Skinner} itself,

\textsuperscript{112} See discussion in Section 2.2.1.1.2.1., below.

\textsuperscript{113} \textit{Re Coomber} [1911] 1 Ch. 724; Cope, \textit{op. cit.}, 83-4; but cf. Sheridan, \textit{Fraud in Equity} (1957), 89. An aggrieved principal may, in the absence of proof of a relationship of influence, nevertheless have a remedy for abuse of confidence: cf. e.g., \textit{Bank of Credit and Commerce International S.A. v. Aboody} [1989] 2 W.L.R. 759, 778; Winder, "Undue Influence and Fiduciary Relationships", \textit{op. cit.}, 282.

\textsuperscript{114} \textit{Matthew v. Bobbins} (1980) 256 E.G. 603.


\textsuperscript{116} Cf. \textit{Lancashire Loans Ltd v. Black} [1934] 1 K.B. 380, at 404 \textit{per} Scrutton L.J., remarking on the inclination of common-law judges 'to rely more on individual proof than on general presumption'. Cf. also, \textit{Johnson v. Buttress} (1936) 56 C.L.R. 113 135 \textit{per} Dixon J.

\textsuperscript{117} [1917] 2 Ch. 71.

\textsuperscript{118} \textit{Id.}, 79-80 \textit{per} Lord Cozens-Hardy M.R.: 'The duty to disclose is quite consistent with the absence of undue influence, and that is all that seems to me to be involved here.\textellipsis [T]he solicitor here had not any undue influence over his client, who was an independent man of business and who would not have looked to him for advice on the propriety of this transaction\textellipsis'. Cf. also, \textit{Allison v. Clayhills} (1907) 97 L.T. 709, a case involving an application to set aside a lease between solicitor lessor and client lessee. Parker J. (at 711)
where a generic presumptive relationship between lady superior and member of a sisterhood existed, the court, in order to ascertain the precise relationship between the donor and donee, examined closely the particular rules by which the member was bound, including the rules obliging her to regard the voice of the superior as the voice of God, and prohibiting her seeking the advice of any extern without leave of the superior.  

There is, in the final analysis, much to be said against raising an automatic presumption of influence upon mere proof of a specified relationship. A preferable approach instead is to continue, as some courts have done, in raising the presumption only where the facts of the case themselves actually bespeak an actual relationship of influence. Inferences should arise from particular facts and not formal relationships.

2.2.1.1.2. De facto relationships of influence

Despite some judicial inclination to require actual proof of influence in any case, it is well recognised that even if the relationship between the parties is not one falling within the aforementioned well-established categories, the presumptive relationship of influence may be proved as a matter of fact. Generally speaking, one would expect the problems here to be compounded by the need to show a de facto fiduciary relationship,

---

119 (1887) 36 Ch. D. 145, at 184-5 per Lindley L.J. Cf., however, Westminster (Vic) Pty. Ltd v. Archer and Shulman [1982] V.R. 305, where it was held that the established presumption applied to all solicitor-client relations but the extent to which evidence is required to rebut it varied from case to case. Cf. also, Billage v. Southee (1852) 9 Hare 534, a case involving a doctor-patient relationship. The doctor was said to be in a relation of confidence with his patient when he extracted a promissory note for an excessive sum is circumstances 'when the patient's position in life was about to be changed' (id, 540): the patient's daughter was about to marry a nobleman of high rank, hence about to come into a fortune. In Zamet v. Hyman [1961] 1 W.L.R. 1442, Lord Evershed M.R. commented that under modern conditions, one should not necessarily assume the existence of influence in a man over his fiancée.

120 Cf. Finn, Fiduciary Obligations, 85: 'In the usual parent-child relationship the court would require little persuasion as to the existence of influence—at least where the child is an infant. But in many solicitor-client and trustee-beneficiary relationships it is difficult to see why influence should be presumed automatically when the actual relationship is manifestly not one of influence'; cf. also, Shepherd, op. cit., 211-3; Cowen v. Piggott (1989) 1 Qd. R. 41, at 44-5 (Connolly J.), re: accountant/financial adviser and client.
additionally being one in which a particular manipulative capacity is held by the fiduciary over his beneficiary. In practice, however, these two issues merge nicely; for the typical scenario in the de facto influence cases is one in which a party renders herself vulnerable to being exploited or manipulated by the other in a transaction between them simply because the expectations engendered by the parties’ relationship itself justifies her expectation that she will not be exploited or manipulated. Thematically, these cases characteristically demonstrate:

[T]he relaxation of one party’s self-interested vigilance or dependent judgment in favour of the other’s protection or judgment because the circumstances of the relationship justify the belief that the other is acting or will act in the former’s interests.

Many examples of this theme can be seen in the case law. For example, relationships of influence have been shown to exist between a well-educated adult child and his less well-educated and elderly parents; a husband and his wife; an estate agent and his client; a manager and a young and inexperienced entertainer; an elderly man and his lady companion/secretary; a lodger and his elderly landlady; an employer’s

---

121 While one might have difficulties in establishing such facts as are necessary to show that a fiduciary relationship existed between the parties at their time of contracting, as noted in the text above, not all fiduciary relationships will involve the “influence” required to give rise to the presumption of undue influence. That influence will additionally require some independent proof.


127 In re Craig, decd. [1971] Ch. 95; see also, Johnson v. Buttress (1936) 56 C.L.R. 113. In In re Craig, decd. (id, 107, 119-20) the facts were so strong that the judge would have been prepared to hold that actual undue influence was exercised. There the donee was described as ‘a middle-aged woman at the height of her powers ... markedly able and competent, of a
insurers and an employee. But perhaps far and away the most interesting area in which the limits of relational undue influence are now being tested concerns the relationships between financial advisers and their clients—in particular, the relations between banks and their customers or borrowers. In recent times, after all, the question of the potential fiduciary status of various investment or financial advisers has afforded an opportunity for significant judicial and academic interest. What this all demonstrates, for present purposes, at least, is that the modern fashion of employing such advisers is a clear illustration that the categories of the presumptive relationships of influence are not considered to be closed. Such advisory-type relationships, moreover, when fiduciary in nature, tend naturally to necessitate a strongly manipulative capacity on the part of the fiduciary, sufficient to give rise to the presumption of influence.

managing disposition and strong personality; ... physically and mentally tough and powerful, and combines these formidable qualities with a charming manner. The donor, an 84-year-old widower, was described as ‘dependent on [the donee] for his comforts and emotionally for her companionship and for her participation in his business affairs ... a failing and vulnerable old man’.


129 Horry v. Tate and Lyle Refineries Ltd [1982] 2 Lloyd’s Rep. 416; for criticism, see Greig and Davis, op. cit., 968.


133 The cases often refer to this capacity as being such as to render the beneficiary vulnerable to being governed by the fiduciary’s judgment or interests, or such that the former’s mind was in effect ‘a mere channel through which the will of [the latter] could operate: cf. Bank of Credit and Commerce International S.A. v. Aboody [1989] 2 W.L.R. 759, 784; Tufton v. Sperni [1952] 2 T.L.R. 516, 530, 532.
2.2.1.2.1. Advisers

The adviser doubtless assumes an important role in any society ordered through an elaborate division of labour and function. As a corollary of his station, the adviser naturally assumes toward another a position of ascendency—at least in knowledge and in judgment—within the scope of the relations or dealings between them. And while we may expect much of some advisers in our society, our expectation ordinarily falls well short of that standard of other-regardingness exacted by fiduciary law: loyalty. It would, accordingly, be erroneous to assume that merely because one relies, without more, upon another for advice there is a necessary "relationship of influence".


135 That is, one who is in the business of, or who voluntarily, or at the invitation or request of another, offers or provides advice, counsel, information, opinions or forecasts to that other for the purpose of informing her in making a decision.

136 The adviser is, on account of his ascendency, generally perceived to be possessed of a strong capacity to influence the choices and actions of the recipient of his information or advice, especially where that advisee is, in the circumstances, reasonably entitled to rely or to depend upon her adviser and his advice. This, after all, is the very intention of the advisory function. And whilst this possession of a strong manipulative capacity should provide ample justification for our desire to police and to regulate the relations or dealings between advisers and their advisees, this desire does not of itself justify fiduciary regulation: as is shown in Chapter Seven, the general law of misrepresentation—negligent misrepresentation in particular—bears testimony to this. Note also the possible applicability of s. 52 of the Trade Practice Act 1974 (Cth); cf. Commonwealth Bank v. Smith (1991) 102 A.L.R. 453. Cf. Finn, "The Fiduciary Principle", op. cit., 49, n. 282, citing Merrill Lynch, Pierce, Fenner & Smith Inc. v. Boeck, 377 N.W.2d 605 (1985), 609.

137 For example, we rely on the adviser for his honesty, skill, due care, accuracy, full and frank disclosure, and the like. These expectations themselves ordain various legal responsibilities in contract, tort, or equity: cf. Cornish v. Midland Bank plc [1985] 3 All E.R. 513: duty to take care in making statements; Commonwealth Bank v. Smith (1991) 102 A.L.R. 453.

138 Another problem in ascertaining precisely what is to be expected of advisers in our society stems from the reality that the term "adviser" indeed covers too diverse a range of social and business possibilities to be of much analytical utility. Types of advice, and hence our expectations, commitments, etc., surrounding or arising therefrom, differ widely. Despite how important we might perceive the particular advice to be, we naturally will expect different standards of conduct in receiving advice from, say, our lawyer, stockbroker, or priest, from those we would expect from, say, our travel agent, beautician or automobile mechanic.
It is nevertheless clear today that a person can, by offering to give advice in a particular manner, or under peculiar circumstances, or in a particular relationship, cast himself in the role of a fiduciary, with all its attendant obligations, thereby limiting the extent to which, or by which, he may interact or transact with his advisee.\textsuperscript{139} Indeed, certain quite common groups of advisory-type relationships are typically of a fiduciary kind. Solicitors provide an obvious example,\textsuperscript{140} as do “religious” or “spiritual” advisers\textsuperscript{141} (including mediums),\textsuperscript{142} and investment counsellors or stockbrokers\textsuperscript{143} (particularly when these persons are acting in an advisory and not merely a representative or ministerial capacity).\textsuperscript{144} Yet, in the more disparate classes of adviser—of which bank managers in their financial dealings with a customer or a borrower, or in their bank’s contracting with a customer’s surety, provide a salient contemporary example\textsuperscript{145}—it is more than probable that a fiduciary relationship does not exist. The reasons for

\begin{itemize}
\item \textsuperscript{139} Cf. Hedley Byrne & Co. v. Heller & Partners [1963] 2 All E.R. 575, at 598 per Lord Hodson.
\item \textsuperscript{140} Wright v. Carter [1903] 1 Ch. 27; Allison v. Clayhills (1907) 97 L.T. 709; Brown v. Premier Trust Co. and Holmes [1947] 1 D.L.R. 593.
\item \textsuperscript{142} Lyon v. Home (1868) L.R. 6 Eq. 655.
\item \textsuperscript{144} The primary justification for imposing fiduciary responsibilities on these types of adviser seems to be that the function which the adviser represents himself as performing, and for which he is consulted,
\item \textsuperscript{145} Negotiations or contractual dealings between vendors and purchasers and franchisors and franchisees provide others.
\end{itemize}
this are broadly twofold, though discernibly interconnected: first, the party giving advice or information in such cases patently has, and is expected to have, a personal interest in the matter; second, that party is, in the absence of an automatic, public-policy based imposition of fiduciary responsibility, reasonably entitled to expect that the advisee, because of her station, knowledge, etc., will exercise an independent judgment based on all the information available to her, including that which was contained in the advice, and that she will thereby assume responsibility for preserving, or failing to preserve, her own interests in reaching a decision upon the matter in question.

146 As Dunn L.J. reminded us in the English Court of Appeal in National Westminster Bank plc v. Morgan [1983] 3 All E.R. 85, at 91: ‘Banks are not charitable institutions...’; and Lord Scarman in the House of Lords [1985] A.C. 686, at 701: it is ‘... business for profit so far as the bank ... [is] concerned’. Cf., also, Stenberg v. Northwestern Nat. Bank of Rochester, 238 N.W. 2d 218 (1976), 219. One suspects that Mark Twain disliked banking institutions. He once said that ‘A banker is someone who lends his umbrella when it shines and wants it back when it rains’. Mark Twain, of course, was a bankrupt.


The adviser might otherwise be justified in expecting that the advisee will assume responsibility for her own interests, such as where he simply provides explanatory information about the nature and effect of the transaction: cf. Cornish v. Midland Bank plc [1985] 3 All E.R. 513.

Yet for all that, commercial relationships, generally, we would expect as a matter of course to stand in conflict with the imposition of fiduciary functions, because, ordinarily, the parties are able, or are expected, to preserve and promote their own interests in their dealings inter se. Cf. Bowkett v. Action Finance Ltd [1992] 1 N.Z.L.R. 449, at 462 per Tipping J:

I am a firm believer in the view that equity must tread carefully when intervening in commercial relationships. There is no room for such intervention on a tender moralistic basis. The circumstances must be such as call loudly for equitable relief; as it is sometimes put the circumstances must shock the conscience of the court.

But this of course is not to preclude absolutely the application of equitable principles into the commercial market-place. As Mason J. said in Hospital Products Ltd v. United States Surgical Corporation (1984) 156 C.L.R. 41, at 100:

... it is altogether too simplistic, if not superficial to suggest that commercial transactions stand outside the fiduciary regime as though in some way commercial transactions do not lend themselves to the creation of a
It is not surprising, therefore, that relations between banks and their customers or borrowers can be problematic. While banks and their managers may desire to foster the image of sources of assistance and advice in matters connected with finance and banking, and while business today may desire total financial service from banks, the relationship with such entities is not one from which the courts will presume, in the absence of special or unusual circumstances, that the subservient party has been influenced.

Our greatest difficulty in the banking cases, as in other commercial contexts, lies in determining when the facts dictate that unbridled self-interest, or even neighbourhood, has given way to its extreme obverse: altruism. The manifest several interest of the party providing advice or information presents an obvious impediment to our finding a fiduciary relationship (qua relationship of influence) in most instances; for while they must be honest and discharge the duty of care that the law imposes upon them, banks, and like institutions, are not as a general rule curators of their customers' and borrowers' best interests. The "fiduciary responsibility", therefore, represents and requires a 'crossing of the line' from ordinary to special responsibilities. All the attendant circumstances of the case at hand

relationship in which one person comes under an obligation to act in the interests of another. The fact that in the great majority of commercial transactions the parties stand at arm's length does not enable us to make a generalisation that is universally true in relation to every commercial transaction. In truth, every such transaction must be examined on its merit with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship.


Indeed, banks aggressively advertise themselves as competent and willing advisers.


must demonstrate that 'something more'\textsuperscript{152} needed to justify the advisee's superadded entitlement to expect that the adviser is, and consequently must, act in the advisee's own interests.

One case in which that "something more" was found was the somewhat infamous\textsuperscript{153} \textit{Lloyds Bank v. Bundy}.\textsuperscript{154} In that case, a relationship of influence was shown to exist between a bank and its customer, an elderly Mr Bundy, who had mortgaged all his assets to the bank to guarantee its loans to his son, who was also a customer of the bank. In commenting on the relationship between the bank and its elderly customer, Sir Eric Sachs said this:\textsuperscript{155}

It not infrequently occurs in provincial and country branches of great banks that a relationship is built up over the years, and in due course the senior officials may become entrusted counsellors of customers of whose affairs they have intimate knowledge. Confidential trust is placed in them because of a combination of status, goodwill and knowledge. Mr Head [the Bank's manager] was the last of a relevant chain of those who over the years had earned, or inherited, such trust whilst becoming familiar with the finance and business of the Bundy's.

In contrast to \textit{Lloyd's Bank v. Bundy} is \textit{National Westminster Bank plc v. Morgan},\textsuperscript{156} where a mere five-minute encounter between a bank


\textsuperscript{153} Not only does Lord Denning M.R.'s judgment in that case expound the dubious doctrine of inequality of bargaining power, discussed and dismissed elsewhere in this work (see Chapter Four, n. 32), but it has also been doubted whether the case can be supported on a fiduciary (qua relational undue influence) basis: see Finn, "Contract and the Fiduciary Principle", op. cit., 96, arguing that the case is only supportable on an unconscionability basis. Eisenberg, too, through invoking the concept of 'transactional incapacity', would treat \textit{Lloyds Bank v. Bundy} as an unconscionability case: Eisenberg, "The Bargain Principle and its Limits" (1982) 95 Harv. L. Rev. 741, at 767: '...the real vice of the transaction was that the bank had led a relatively unsophisticated person into a transaction with a severe though not readily apparent potential for unfairness, without pointing out the need for expert advice'.

\textsuperscript{154} [1975] Q.B. 326.


477
manager and his customer was held to be insufficient to establish the kind of relationship required to raise a presumption of undue influence. In reaching their decision, the House of Lords correctly stressed that a banker-customer relationship is usually considered to be a commercial relationship in which both parties deal at arm’s length (an oblique reference perhaps to the fact that the relationship in question was perceived to be one which served the several interests of the parties thereto), and it was against this background that a court was to ask when a bank will become a fiduciary *vis-à-vis* its customer or borrower. In the ordinary case, each party is expected to look after his or her own interests in their dealing *inter se*, and thus the relationship could not be fiduciary. A banker, in the Court’s view, was generally free to explain the nature of a proposed transaction to his customer without risking a charge of undue influence, because such an activity is considered to be in the ordinary course of banking business.\(^{157}\) However, the Court continued, should a banker go further and advise on more general matters germane to the wisdom of the transaction, he may begin to ‘[cross] the line into the area of confidentiality’. According to Lord Scarman, this then requires a ‘meticulous examination of the facts’, including the history leading up to the transaction, to ascertain whether or not that line has indeed been crossed.\(^{158}\)

For all that, however, and whatever the actual combination of factual conditions needed to give rise to the fiduciary expectation, one influential commentator in the field suggests that, at least in the present context, the

---


To dominate the will of another simply means to exercise a persuasive influence over him or her. The ability to exercise such influence may arise from a relationship of trust or confidence but it may arise from other relationships as well.

478
fiduciary entitlement is unlikely to be found beyond three distinctive circumstances: 159

(1) where the course of the relationship can found the expectation not only that advice is and will be given but also that it will where necessary be given adversely to the bank’s interest…; 160

(2) where the bank has created the expectation that it is acting and will act in the customer’s interest in a matter because its own interest therein is represented to be a formal one…; 161

and (3) where the bank, though expected to act in its own interest in the actual dealing inter se, has created the expectation that it will otherwise advise in the customer’s interests, for example, on the wisdom of an investment proposal in respect of which a loan application is made. 162

Despite the uncertainty that is likely to continue to plague this area for some time, 163 the principles and circumstances discussed above appear recently to have been favourably received by the Full Court of the Federal Court of Australia in Commonwealth Bank of Australia v. Smith. 164

2.2.2. Raising the Presumption II: Transaction as Suspicion of Abuse

Even if the relationship existing between the parties is such that a presumption of influence arises, the presumption of undue influence is not


160 Finn suggests that if Lloyds Bank Ltd v. Bundy [1975] Q.B. 326 is supportable on a fiduciary basis (as opposed to unconscionability), it must be on this ground: ibid.


163 Yet the opportunities for the courts to develop and to clarify this area of law should continue to increase as future cases arise. Failed financial ventures, especially those following the Stock Market failure of 1987, probably accounts for the opportunities presently existing for the courts to investigate, inter alia, the outer limits of fiduciary obligation in the area of banking and finance generally.

164 (1991) 102 A.L.R. 453, at 476-77: The lending bank advised a long-term customer, with limited general business experience, upon the wisdom of the purchase of a hotel leasehold, the vendor also being a customer of the bank. Given the earlier dealings and the relative business experience of adviser and advisee, the adviser-manager’s assumption of the role of bringing the parties together, his acting as a financial adviser and the advisees’ complete faith in him, the Full Court of The Federal Court of Australia held that a fiduciary relationship arose.
perfected, or does not crystallise, until a transaction is entered into, within the context of the relationship in question, which is of such a character that it is prima facie explicable only on the basis that the influence stemming from the parties’ relationship was in fact abused. This particular presumption is an entirely different matter from the presumption that influence existed in the first place.

This second criterion for raising the presumption of undue influence—suspicion of abuse—itself involves two presumptions. First, the essentially empirical presumption that influence has in fact been used; and the generalisation that persons with power arising from personal influence may be tempted to use that power is a particularly strong one. Linked to this empirical presumption is yet another empirical presumption: causation. This is to say, when a court presume[s] that personal power has been used, there is then a completely separate presumption that there is a causative connection between the exercise of the influence and the actions of the victim. Generally speaking, the stronger the influence, and the more closely connected it is to the transaction in question, the more likely it is that the influence played a part in the transaction.\textsuperscript{165} It is this likelihood of causative effect, moreover, that seems to justify the law’s inference that the influence did, to a greater or lesser extent, in fact cause the subservient party to enter

\textsuperscript{165} In this connection, there may be some use in distinguishing between cases involving gifts and those involving contracts: see the discussion by Turner & Sutton, op. cit., paras. 22.36-40, pp. 578-82. In the case of a substantial gift, for example, the transaction will invariably be referable to the relation, and the influence stemming therefrom: see Union Fidelity v. Gibson [1971] V.R. 573. In that case the executors of a Miss Dunn’s estate sought to have a gift of £15,000 set aside on the grounds of undue influence. The £15,000 had originally been lent to the defendants, who were estate agents and financial advisers for Miss Dunn, and was secured by a first mortgage over the defendants’ land. Some three years later, Miss Dunn signed a discharge of the mortgage, the defendants subsequently contending that she had made them a gift of the outstanding debt in gratitude for past services. In setting aside the transaction, Gillard J., in the Supreme Court of Victoria, commented that where circumstances exist, such that a substantial gift is made to someone who is not a close blood relative, but who was primarily a friend in business activities, this fact alone should naturally raise a suspicion in one’s mind as to how the transaction came about (id, 579). In the case of a business transaction, however, the nature of the transaction might itself assist in determining the influence, and hence the inference of causation.
the impugned transaction, thus throwing upon the ascendant party the obligation of proving the contrary.\textsuperscript{166}

Now, in any given case, it is clear that the court’s presumption of undue influence involves more than merely the aforementioned empirical presumptions.\textsuperscript{167} The general presumption of undue influence most importantly involves the normative presumption that the particular exercise of personal power was in law a misuse of that power, and, as such, that it produced in the victim of its exercise unacceptable motivations for action. In taking a presumptive approach to this normative criterion, moreover, the law is implicitly making yet another, less particular judgment. In each human relationship in which influence is capable of misuse, one invariably finds a party who has a peculiarly strong opportunity for abusing his fiduciary power. Thus, in presuming that an abuse of that power has occurred, the law is, inevitably, doing no more than admitting or acknowledging the rather sad but nevertheless regularly exhibited human propensity for advancing one’s own interests at the expense of another’s. This becomes important below, for in Australia certainly, it is this feature in particular which seems to justify ‘some measure of suspicion that active circumvention has been practised’,\textsuperscript{168} necessitating, in turn, the shifting of the burden to the ascendant party to remove any doubt surrounding the transaction in question.\textsuperscript{169}

Naturally, our several responses to the criteria required to raise the rebuttable presumption of undue influence will be coloured largely by what

\textsuperscript{166} See Section 2.2.3.

\textsuperscript{167} Recall Isaacs J.’s point in Watkins v. Combes (1922) 30 C.L.R. 180, at 193-4:

\begin{quote}
influence may be used wisely, judiciously and helpfully. But ... more than mere influence must be proved so as to render influence, in the language of the law, ‘undue’.
\end{quote}

See also the discussion by Lord Hatherley L.C. in Turner v. Collins (1871) L.R. 7 Ch. App. 329, at 339.

\textsuperscript{168} Cf. Johnson v. Buttress (1936) 56 C.L.R. 113, 135 per Dixon J.

\textsuperscript{169} See Section 2.2.3.
we take to be the rationale underlying the doctrine of relational undue influence.\textsuperscript{170} Special problems arise in this context, however, owing mainly to the fact that the law of undue influence applies to gifts as well as to contracts.\textsuperscript{171} As Lindley L.J. remarked in \textit{Allcard v. Skinner}, the presumption of undue influence would not arise unless the gift was ‘so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act’.\textsuperscript{172} But,

[w]hen the transaction is not one of gift but one of purchase or other contract, the matters affecting its validity are necessarily somewhat different. ... Instead of examining how the subordinate party came to confer the benefit, a court examines the propriety of what wears the appearance of a business dealing.\textsuperscript{173}

Now, where the transaction is one of contract and not of gift, there are two lines of authority, essentially prescribing what appear to be quite distinct bases for raising the presumption of undue influence. According to one line of authority, in addition to establishing a relationship of influence, the party seeking relief must show substantive unconscionability in the terms of the resultant contract before the presumption is raised.\textsuperscript{174} According to the other line of authority, as with gifts,\textsuperscript{175} the presumption is raised merely by proof of

\begin{itemize}
    \item \textsuperscript{170} Generally, see Section 2.2.2.3.
    \item \textsuperscript{171} Cf. Winder (1940) 4 Conv. (N.S.) 274, who argues that the rules of undue influence apply only to gifts. But see, Meagher, \textit{et al.}, para 1523.
    \item \textsuperscript{173} \textit{Johnson v. Buttress} (1936) 56 C.L.R. 113, 135-6 per Dixon J.
    \item \textsuperscript{175} Despite the substantiability requirement with gifts, gifts comprise, by their very nature, a manifest disadvantage: see, also, Section 2.2.2.3.1.
\end{itemize}
a commercial transaction taking place between the parties\textsuperscript{176} to a relationship of influence; the relative distribution of benefits and burdens under the resultant contract being a material, though often vital, factor in rebutting the presumption.\textsuperscript{177} For convenience sake, the latter approach shall be referred to as the "public policy" basis for raising the presumption of undue influence, while the former shall be referred to as the "victimisation" basis for the same.

\textit{2.2.2.1. The "public policy" basis for raising the presumption of undue influence}

\textit{In the Court of Equity in case of a benefit or contractual advantage obtained from a person coming within certain defined relations, ... it is enough to prove the existence of such a relation to throw on the recipient of the advantage the burden of proving independent advice to the donor and in other respects justifying the transactions.}\textsuperscript{178}

While the presumption of undue influence is a useful 'tool of the lawyer's trade whose function it is to enable him to arrive at a just result by bridging a gap in the evidence at a point where, in the nature of the case, evidence is difficult to come by',\textsuperscript{179} there must always be sufficient cause, and a sufficient catalyst, for its operation. Under the public policy approach to

\textsuperscript{176} Or between the subservient party and a third party at D's direction.

\textsuperscript{177} Cf. Johnson \textit{v. Buttress} (1936) 56 C.L.R. 113, at 135-6 \textit{per} Dixon J; Bester \textit{v. Perpetual Trustee Co. Ltd} [1970] 3 N.S.W.L.R. 30, at 35 \textit{per} Street J; Meagher, \textit{et al.}, para. 1511, 1523; Finn, \textit{Fiduciary Obligations}, op. cit., 86, who refers to this approach as the 'better view'.

\textsuperscript{178} \textit{Per} Scrutton L.J. in \textit{Lancashire Loans Ltd v. Black} [1934] 1 K.B. 380, at 404. Cf. also, \textit{Daly v. Sydney Stock Exchange Ltd} (1986) 160 C.L.R. 371, at 387 \textit{per} Brennan J.: The usual case in which a court of equity is asked to intervene to set aside a conveyance or transfer on sale between a fiduciary and the person to whom he stands in a fiduciary relationship is a purchase at an undervalue or a sale at an excessive price, but unfairness in the terms of an impugned contract is not a condition of its avoidance. The fiduciary may have failed in his duty in some respect other than the obtaining of fair consideration. A conveyance or transfer on sale may be set aside though the terms of the contract are fair if it appears that the fiduciary has failed to give the advice which he is bound to give in respect of that contract.

\textsuperscript{179} \textit{Per} Bridge L.J. in \textit{Re Brocklehurst's Estate} [1978] Ch. 14, 43; \textit{cf. In re Pauling's Estate} [1964] Ch. 303, 336 \textit{per} Willmer L.J.
undue influence, a presumption is said to arise because proof of a special relationship of influence is considered to be evidence of a very peculiar opportunity for the ascendant party to abuse his influence, and that any possible use of that influence is regarded as an abuse, or, at least, as calling for justification.\textsuperscript{180}

The public policy approach, therefore, is informed by the conventional fiduciary rationale. Where the fiduciary deals with his beneficiary, as opposed to where he directs her to deal with some third party,\textsuperscript{181} there is a presumption, similar to the presumption against self-dealing and conflict of interest and duty,\textsuperscript{182} that the fiduciary has put his own interests ahead of, and in conflict with, his beneficiary’s, and that he has used a power of influence over the beneficiary to benefit himself in the transaction. According to such a view, the whole doctrine of relational undue influence is based upon ‘a recognition, and a necessary distrust, of the infirmities of human nature’.\textsuperscript{183}

\textsuperscript{180} See Johnson \textit{v.} Buttress (1936) 56 C.L.R. 113, 135 per Dixon J.; National Westminster Bank \textit{v.} Morgan (1983) 3 All E.R. 85, at 90 (C.A.) per Dunn L.J. Cf. also, Slade L.J. (at 92), who comments that the presumption is made on the basis of a public policy directed to mitigating ‘the risk of a particular relationship existing between the two parties and the influence arising therefrom being abused’.

\textsuperscript{181} The conflict of interest and duty rationale operates only in the dyadic situations considered here. Different considerations may apply where the fiduciary himself receives no derivative benefit, but rather directs that the benefit move to a third person: it may indeed be a wholly unrelated and charitable institution. This situation may require actual investigations into the fiduciary’s motivations for this direction, and whether he was in fact purporting to act in the best interests of his beneficiary. There may in this case, therefore, be a real need to show a reason for suspicion, for the fact of the transaction does not of itself demonstrate possible abuse. What is more, even if the transaction can be shown to have been the product of undue influence, there is the added difficulty of establishing the third party’s knowledge (or reason to know) of the fiduciary’s wrongful exercise of power. Generally, see the ideas canvassed by Professor Finn, in Finn, P., ‘The Liability of Third Parties for Knowing Receipt or Assistance’ (unpub. m/s, Department of Law, R.S.S.S., The Australian National University, 1992, 35 pp. To be published by Carswell, Canada, in 1993).

\textsuperscript{182} Cf. Kerr \textit{on Fraud and Mistake, op. cit.}, 186; Finn, \textit{Fiduciary Obligations}, Chp. 11; Shepherd, \textit{op. cit.}, Chp. 9. Cf. also, Waters, D. (1986) 65 Can. B. Rev. 37, at 58: ‘Undue influence, though now a distinct body of law, is essentially a violation of the conflict of interest and duty rule’.


484
‘It is a question of tendency and temptation’,\textsuperscript{184} rather than proof of individual wrongdoing in each particular case.\textsuperscript{185} Human nature being what it is, the law recognises that there is a danger in the relation between a fiduciary and his beneficiary that the former will be swayed by interest rather than by duty, thus prejudicing the very party whom he is duty-bound to protect.\textsuperscript{186}

It is against this background of suspicion about the human spirit that we find the doctrine of relational undue influence assumes a strong prophylactic role. The basis for the doctrine’s presumptive operation appears to reside in the fact that the law regards certain relationships, or points within relationships, as ‘transcending mere commercialism’, even when they are, in some instances, in a professional or business context.\textsuperscript{187} Principally, therefore, it is the protection of the sanctity of these societal bonds that seems to underlie the public policy approach to undue influence.\textsuperscript{188}

\textsuperscript{184} Spencer Bower, Turner & Sutton, \textit{ibid}.

\textsuperscript{185} Thus, as Farwell J. pointed out in \textit{Powell v. Powell} (1900) 1 Ch. 243, at 246:

On the authorities it appears to me not to be a question of actual pressure, or deception, or undue advantage, or want of knowledge of the effect of the deed. The mere existence of the fiduciary relation raises the presumption, and this must be rebutted by the donee.


\textsuperscript{186} The editors of \textit{Kerr on Fraud and Mistake, op. cit.}, at 186, thus remark that the rule would not appear to be founded upon principles of morality, although some would disagree:

The objection, notice, is that people in a vulnerable position are exploitable— not necessarily that they are exploited. It is, \textit{ceteris paribus}, immoral to tolerate a serious risk of immoral outcomes (e.g., exploitation) even if that risk never actually becomes reality ....


\textsuperscript{188} Lord Eldon thought that the integrity or sanctity of these bonds was so strong that he ventured to say that in the relationship between solicitor and his client, the solicitor should
2.2.2.2. The “victimisation” basis for raising the presumption of undue influence

The public policy approach to undue influence was expressly rejected by the House of Lords in *National Westminster Bank plc v. Morgan.* In that case, Lord Scarman held that the basis for relief was ‘not a vague “public policy” but specifically the victimisation of one party by the other’. Essentially, what is required under this approach is that, in addition to proving a special relationship of influence, the party seeking relief from the transaction must also show that the resultant bargain was in some way materially disadvantageous to her, and indeed manifestly so. According to Lord Scarman, then, no presumption of undue influence could arise in

virtually under no circumstances accept a gift from his client: *Hatch v. Hatch* (1804) 9 Ves. Jun. 292, 296-7. Cf. also, *Re Holmes’ Estate* (1861) 3 Giff. 337, 345, per Stuart V.-C. See, also, Sections 2.2.2.3. and 2.2.2.3.1., below. Finn, “The Fiduciary Principle”, *op. cit.*, 52, summarises nicely the justification for the law’s presumption of wrongdoing in the fiduciary (especially adviser/service provider) context as several and interconnected:

... the likelihood of an ascendency and a dependence arising in such relationships; the opportunity for advantage taking therein when personal benefits should not be expected; and the need to maintain the integrity and utility of relationships of social importance.


191 In *Bank of Credit and Commerce International S.A. v. Aboody* [1989] 2 W.L.R. 759, Slade L.J. suggested that a transaction would be considered “manifestly disadvantageous” to the victim if it would have been obvious to any independent and reasonable person who considered the transaction at the time with knowledge of all the relevant facts. Hence, ‘the overall disadvantageous nature of a transaction was not manifest if it only emerged after a fine and close evaluation of its various beneficial and detrimental features’ (*id*, 780). In *Aboody’s case*, it was held that even though a husband had exercised actual undue influence over his wife to get her to guarantee overdraft facilities for their company and to charge her house, it had not been proved that the transactions were manifestly to her disadvantage. In determining whether or not the giving of the transaction was manifestly disadvantageous to the giver, the seriousness of the risk of enforcement to the giver, in practical terms, had to be balanced against the benefits gained by the giver in accepting that risk. In *Aboody’s case*, the court considered that had the husband’s business operations prospered, the wife would not have complained; it was a joint risk and enterprise. Surely, however, the issue here was not the magnitude of the risk but whether the wife understood and appreciated the risk. See, also, *Petro v. Woodstead Finance Ltd* [1986] Financial L.R. 158.
respect of a transaction which provided 'reasonably equal benefits for both parties'.

Whatever the legal character of the transaction, the authorities show that it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence. In my judgment, therefore, the Court of Appeal erred in law in holding that the presumption of undue influence can arise from the evidence of the relationship of the parties without also evidence that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it.

It is clear from this that it is unfair advantage-taking, that is, exploitation, which is highlighted under the victimisation approach to undue influence. It also follows that the presumption of undue influence is not, of itself, a ground for relief. It absolves the claimant from having to show that the alleged influence actually existed and had been exercised, but it does not absolve her from the need to establish that the impugned transaction was manifestly to her disadvantage. However, it is questionable whether the manifest disadvantage requirement is, or should be, a sine qua non to relief at all, let alone a necessary condition for our raising a suspicion that active exploitation has been practised. The modern approach of the English courts, in particular, has had the effect of obscuring the underlying criteria—if not on occasion supplanting them—especially as regards the evidentiary procedures involved. This point will become more sharply focused as we turn now to consider the underlying rationale of relational undue influence.

2.2.2.3. The underlying rationale of relational undue influence

The law does not prohibit persons making gifts to or conferring benefits upon other persons standing in positions of trust and

---


193 Ibid.

194 The recent decisions appear to comprise an unfortunate merging of undue influence with what we understand to be the doctrine of unconscionable dealings in Australia.
confidence towards them, whether from motives of affection, 
gratitude or otherwise, so long as the gifts or benefits are the 
voluntary and well understood acts of such.\textsuperscript{195}

A convenient starting point in any discussion of the rationale 
underlying the doctrine of undue influence is to be found in this famous 
passage from Lord Lindley’s speech in Allcard v. Skinner:\textsuperscript{196}

The principle must be examined. What then is the principle? Is it 
that it is right and expedient to save persons from the consequences of 
their own folly? or is it that it is right and expedient to save them from 
being victimised by other people? In my opinion the doctrine of 
undue influence is founded upon the second of these two principles. 
Courts of Equity have never set aside gifts on the ground of the folly, 
imprudence, or want of foresight on the part of donors.... On the other 
hand, to protect people from being forced, tricked or misled in any way 
by others into parting with their property is one of the most legitimate 
objects of all laws; and the equitable doctrine of undue influence has 
grown out of and has been developed by the necessity of grappling 
with insidious forms of spiritual tyranny and with infinite varieties of 

Thus, in the present context at least, a\textsuperscript{197} principal concern of the law 
of undue influence is the policing, prevention and regulation of exploitative

\textsuperscript{195} Per Starke J. in Bank of New South Wales v. Rogers (1941) 65 C.L.R. 42, at 54.


\textsuperscript{197} It is clear that there are at least two concurrent themes or objects of the law of undue influence. In addition to the obvious goal of preventing undesirable contracting and donative practices, an apparent legitimate object of the undue influence doctrine resides in the discouragement of those who have undertaken fiduciary duties from acting in such a way that they have a personal interest in not carrying them out. One perceived function of relational undue influence is ‘to prevent the relations which existed between the parties and the influence arising therefrom being abused’: Allcard v. Skinner (1887) 36 Ch. D. 145, 171 \textit{per} Cotton L.J., 181 \textit{per} Lindley L.J. (emphasis added); cf. Tufton v. Sperni [1952] 2 T.L.R. 516, 532 \textit{per} Jenkins L.J. It is clear, therefore, that the law of undue influence can be seen as having a twofold purpose.

Professor Finn, “The Fiduciary Principle”, \textit{op. cit.}, 44-5, has written that this dual role of the undue influence doctrine has given some cause for uncertainty, particularly about where the judicial emphasis should lie in such cases. The prevention of possible abuses of one party’s influence over another clearly represents the more dominant theme in Australia and the United Kingdom. As Finn reports, however, the dominant concern in the United States and Canada is with protecting another’s trust and confidence from possible abuse (cf. also the New
bargaining and donative practices, or victimisation. The law is not concerned with merely relieving individuals from improvident bargains.

It is clear, then, that undue influence here shares an affinity with other doctrines concerned with more active forms of exploitative abuse, or manipulation: namely, fraud and duress. All these doctrines involve questions of process and not of result. They are all concerned with the genuineness of the victim’s manifested contractual assent; asking, specifically, how that assent was produced, and whether or not the victim was subject to an improper motive for her action. Our real complaint in undue influence cases is that the victim’s volition or consent was not independent of the superior party’s influence, and hence can not be seen as truly voluntary-hence-responsible. This is, primarily, purely a processual question: a matter not of where a party ends up at all, but rather how she came to occupy her present position. The recent practice by the English

Zealand authority of Coleman v. Myers [1977] 2 N.Z.L.R. 225, at 332 per Cooke J.), whereby the law’s purpose is perceived and expounded in conventional fiduciary terms: affecting another’s “volition” or “will” is just one way in which advantage can be taken in a fiduciary relationship (ibid). Finn subsequently comments that, despite the varied emphases, both themes are present in the case law of all the major Commonwealth countries; and they acknowledge and complement one another. ‘Both respond to vices which can occur in relationships in which an ascendancy or influence is acquired, a dependence or trust conceded’: id, 45. This is perhaps no more cogently acknowledged in Anglo-Australian law than by Lord Chelmsford in Tate v. Williamson (1866) L.R. 2 Ch. App. 55, at 61, where his Lordship observed:

Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be allowed to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed. (Emphasis added.)

198 Cf. also, Allcard v. Skinner (1887) 36 Ch. D. 145, at 172 per Cotton L.J.

199 As Sir Raymond Evershed M.R. said in Tufton v. Sperni [1952] 2 T.L.R. 516, at 519: ‘Extravagant liberality and immoderate folly do not of themselves provide a passport to equitable relief’; and Lord Wilmot L.C. in Bridgeman v. Green (1757) Wilm. 58, at 60: ‘our laws, very unfortunately for the owners, leave them at liberty to dissipate their fortunes as they please, to the ruin of themselves and their families’.

courts,\(^{201}\) and by some others,\(^{202}\) of insisting upon proof of manifest
disadvantage as a *sine qua non* to relief in relational undue influence cases
(and not merely giving rise to a *suspicion* of such victimisation) obscures
this important point, and is analytically misguided. These points, however,
deserve a somewhat closer look.

2.2.2.3.1. The manifest disadvantage requirement

In *Allcard v. Skinner*,\(^{203}\) Lindley L.J. suggested that where the gift or
advantage received was a very small one, the presumption of undue
influence would not arise, and thus proof of actual use of influence will be
required before the transaction is set aside.\(^{204}\) Lord Scarman seized upon this
suggestion in *National Westminster Bank v. Morgan*, and, relying on two
Privy Council decisions,\(^{205}\) held that, whether proof or presumption is relied
on, it is essential to relief on the ground of undue influence that the contract


\(^{202}\) The *Morgan* decision has been rejected by the Supreme Court of Queensland in *Baburin v. Baburin* [1990] 2 Qd. R. 101. However, in *Farmers’ Co-operative Executors & Trustees Ltd v. Perks* (1989) S.A.S.R. 339, the Supreme Court of South Australia (Duggan J) had ‘no hesitation’ in following *Morgan*. Cf. *James v. A.N.Z. Bank* (1986) 64 A.L.R. 347, 390 per Toohey J. *Morgan* has also found some favour in the High Court of New Zealand (see, e.g., *Sareckzy v. Fodermayer* (1986) 1 N.Z.B.L.C. 102,492; *Contractors Bonding Ltd v. Snee* [1992] 2 N.Z.L.R. 157, 166 per Richardson J.), but see Watts, P. G. [1990] N.Z. Recent Law Review 350, and McLauchlan, D. W. [1991] N.Z. Recent Law Review 311, 330-3. The manifest disadvantage requirement has recently been discussed (*obiter* in the context of commercial transactions) by the Supreme Court of Canada. In *Geffen v. Goodman* (1991) 81 D.L.R. (4th) 211, the majority of the Court thought that the manifest disadvantage requirement is irrelevant where the impugned transaction is voluntary, such as a gift or bequest. However, where the transaction was a commercial exchange, Wilson and Cory JJ. (at 227-8) suggested that there must be proof of undue disadvantage to the plaintiff, or else undue benefit to the defendant. While expressly declining to reach a conclusion on the issue, La Forest and McLachlin JJ. (at 240), ventured to say that they did not agree with the proposition that the law would never interfere with a contract that does not produce a manifestly disadvantageous result. The issue thus appears still to be open in Canada.

\(^{203}\) (1887) 36 Ch. D. 154.

\(^{204}\) *Id.*, 185.

‘must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence’. The view was taken that the presumption did not arise unless the transaction itself was shown to be ‘wrongful’, and that in this context “wrongful” meant that the transaction ‘constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it’.

Lord Scarman observes, doubtless correctly, that it is difficult to identify any reported authority, where a transaction was set aside, that was not manifestly to the disadvantage of the person influenced. This may be true in an empirical sense, but we should question whether any analytical or doctrinal significance should attach to this fact. As a general fact, it would be surprising if victims of undue influence chose to complain when the relevant transaction turned out favourably, or at least not disadvantageously, for them. It is true that the smaller the advantage or benefit received, the less motivated the ascendant party is likely to have been to have abused his position (thus when considering the case of gifts, there must be some point at which the reduction of motive becomes so small as to destroy the presumption altogether), although in this regard, an important distinction needs to be drawn between gifts and contracts. The reductionist reasoning is not so straightforwardly applicable in the latter case, for we intuitively

---


207 Ibid.

208 Ibid. It is clear here that when Lord Scarman is talking about “advantages” he is meaning material advantages (i.e., advantages from Chapter Four) and not strategic advantages (i.e., advantages from Chapter Four): see text above, Section 2.2.2.1.


210 Shepherd, op. cit., introduces a subjective element here, however, for he points out that it is the size of the gift in the eyes of the recipient that counts and not those of the subservient party: id, 219.

211 Say, where the gift is a mere token. Until this point is reached, however, the evidence of the benefit received merely goes to the strength of the presumption. Cf. Ibid.
assume that different motivations inform a bargain transaction from those which inform a gift. In a gift situation, no material reciprocity is expected or required.212 Where the parties’ dealing wears the appearance of a business transaction, however, we naturally begin to assume that while each party is out to benefit the other in some way,213 the bargaining environment is by nature an inherently non-altruistic one. It must be remembered, too, that in terms of the writer’s “exploitation” thesis, the “benefit” or “advantage” sought and received as a result of the exercise of contracting power (advantages1 from Chapter Four) is the contract itself. The “benefits” or “advantages” that the House of Lords speak of in Morgan’s case—substantive or material benefits or advantages (advantages2 from Chapter Four)—are themselves relevant merely in a contingent sense.214 As a processual conception, undue influence is concerned with the former and not with the latter form of “advantage”-taking. The effect of the Morgan’s case, however, is plainly to afford advantages2 some higher analytical significance; indeed elevating them to the status of a definitional ingredient of the undue influence jurisdiction.

Two additional points arise from Morgan’s case which bear further elaboration. First, in making his comments, Lord Scarman seems not necessarily to be concerned with questions of substance (that is, that manifest disadvantage may itself be an ingredient or element of undue influence), but rather with questions of proof and inference.215 Second, according to the House of Lords, whether one is concerned with actual or presumed

212 Thus, if gift transactions are successfully to be challenged, it is not relevant to consider the validity of the exchange and the substantive equality of it, because, by definition, no consideration is provided, or, if it is provided, the consideration is past: see Morgan’s case, op. cit; Geffen v. Goodman (1991) 81 D.L.R. (4th) 211, at 228, 239.

213 The doctrine of consideration itself ordains this.

214 See Chapter Four, Section 2.2.2.1.

215 At [1985] A.C. 686, 703, his remarks are introduced by commenting on the Court of Appeal’s view ‘that in cases where public policy requires the court to apply the presumption of undue influence there is no need to prove a disadvantageous transaction’; and he concludes (at 704) by referring to the Court of Appeal’s ‘error of law’ in holding that the presumption of undue influence could arise without proof of disadvantage’. Cf. Goldsworthy v. Brickell [1987] Ch. 378, at 415 per Parker L.J.
relational undue influence, the "undueness" in the undue influence formulation is a necessary product both of a transaction's processes and of its results. In this writer's view, both these points are contentious.

On the issue of proof, the traditional stance has been that where the presumption, and not actual proof, of undue influence was relied upon, unfair disadvantage was merely a factor that spoke to the rebuttal of the presumption and was not a factor in raising the same. Equally, it is clear that the House of Lords' formulation in Morgan's case changes the onus of proof in this regard. The effect of Morgan is to require an enquiry into the substantive merits of the transaction before the presumption is made. Such an enquiry can no longer be hidden behind the veil of "presumptive" reasoning.


217 Cf. Lloyds Bank v. Bundy [1875] Q.B. 316, 343 per Sir Eric Sachs: presumption rebutted by proof that transaction 'truly for the benefit of the person influenced'. For Australia, see Johnson v. Buttress (1936) 56 C.L.R. 113, at 135-6 per Dixon J., a view, moreover, that is preferred by most Australian commentators: see Meagher et al., para. 1523; Finn, 86; Greig & Davis, 963. See also, Cope (1986) 60 A.L.J. 87, 96-7.

218 Cf. Ogilvie (1986) 11 Can. Bus.L.J. 503, 509: 'As an evidentiary matter then, the establishment of undue influence must begin at the end and not at the start of the transaction under consideration'.


One potential problem with this approach, however, is similar to that encountered when discussing the related doctrine of unconscionable dealings in Chapter Four. On undue influence's and unconscionable dealings' relatedness, see Hardingham, "Unconscionable Dealing", in Finn (ed), Essays in Equity (1985),1, 18. Professor Treitel remarks that the suggestion that the presumption can only arise if the transaction is shown to be "wrongful" in truth leaves no room for the operation of any presumption: Treitel, G. H., The Law of Contract (8th ed., 1991), 367, at n. 47. Given the House of Lords' apparent preoccupation with whether 'the wrongfulness of the transaction' can be established, it should hardly matter whether a presumption arises or victimisation is shown to have existed on the facts. The whole emphasis where the presumption applies, however, is upon raising the suspicion of abuse; the focus is not upon the legally recognised abuse itself. To say, therefore, that a presumption arises once all the essential or determinative facts are before the court, and unfairness or impropriety has been shown, comes close to practical tautology. Treitel's fears, however, may appear exaggerated. For when we were considering the desirability of the presumptive approach to unconscionable dealings, this writer's conclusion—that there was no longer any scope for such an approach—was based as much (if not more so) upon the consideration that
But this arguably misconceives the proper evidentiary role of the presence or absence of substantive disadvantage, which speaks merely to the **strength** of the presumption of the exercise of undue influence, and which in turn determines the strength of the evidence required to rebut it. Hence, in *Johnson v. Buttress*, for example, Latham C.J. suggested that the presumption would be more difficult to rebut where an illiterate or weak-minded person entered into a transaction that was patently unfair in its terms or its extent, such as where the transactor disposes or contracts away virtually all of her property for an inadequate consideration; but less difficult to rebut where the disposing party was not subject to personal disabilities and entered into a transaction for full value extending only to an insubstantial part of her property.\textsuperscript{220} The issue of rebutting the presumption of undue influence is resumed below.\textsuperscript{221}

Questions of proof aside, the nature of "undue" in the "undue influence" formulation needs to be addressed. For whatever the true nature of the epithet, in the present context, "undueness" in the exercise of a party's influence must be the same whether it is proved or presumed.\textsuperscript{222}

Like the "unconscionable" in the "unconscionable dealings" formulation, or the "illegitimate" in the "illegitimate pressure" formulation (under the first prong of the two-pronged theory of duress), the "undue" in the "undue influence" formulation represents a condemnatory legal

---

\textsuperscript{220} (1936) 56 C.L.R. 113, at 120.

\textsuperscript{221} Section 2.2.3.

\textsuperscript{222} The English courts make this clear by insisting upon the "manifest disadvantage" measure of undueness to both classes of relational undue influence.

494
conclusion about the exercise of a particular manipulative or exploitative capacity. The primary issue for determination in this context, however, is whether the "undueness" in relational undue influence cases is merely a matter of impropriety in the processes of the impugned transaction, or whether it is also a matter of unfairness in the outcomes. The traditional approach of Australian courts has favoured the former approach. The effect of the recent judicial pronouncements from English courts in particular, however, is clearly to adopt the latter view.

What is ultimately being complained of in any given instance of relational undue influence is twofold: first, that the fiduciary expectation has been breached; and, second, that on account of such a breach, the transaction entered into lacked the quality of "independence" on the part of the beneficiary—that independence being considered the hallmark of genuine personal consent—which has been eroded by the fiduciary's influence. This need not mean that the fiduciary has 'bullied' or 'dominated' the subservient party; rather, all the proper inference of fact need be in such

---

223 Our problems are further compounded here, because the "undue" in the "undue influence" formulation does not appear to denote any restricted or well-defined concept of aberrant behaviour, such as does common law duress or deceit, both of which are capable of comparatively definite proof. While an 'active circumvention' is invariably inferred in all undue influence cases, the particular manner or form of behaviour actually complained of may vary greatly from case to case in its degree of activeness. The traditional presumptive approach to undue influence, however, is not to enquire into the particular manner by which the influence has been exercised, or its precise nature.


225 Indeed, it is logically unsound in some cases to suggest that the ascendant party must have used coercion of applied pressure per se. This remains true even if it is correct to suggest that where the ascendant party does not rebut the presumption against him, he must necessarily have been guilty of some impropriety or exploitative conduct in failing to ensure that the subservient party was free from the influence of the relationship.

Some reported cases of relational undue influence have involved a fiduciary eroding his beneficiary's consent by very active means indeed: for example, by express or implied use of a domineering capacity or threats (e.g., Farmers' Co-operative Executors & Trustees Ltd v. Perks (1989) S.A.S.R. 339; In re Craig, decd. [1971] Ch. 95), or failing to give full or sufficient information (cf. Bank of Credit and Commerce International S.A. v. Aboody [1989] 2 W.L.R. 759), or otherwise directing the influence, such as, by excessive persuasion or argument, tears, pleading, discussion, or trickery towards the achievement of an improper, usually self-serving objective. But a case of undue influence need not consist of such over-reaching behaviour. Undue influence may be asserted or exercised when the ascendant party merely uses his
cases is that he simply ‘failed to ensure that the plaintiff was emancipated from the dependence or excessive reliance in him’,\(^\text{226}\) and this is exclusively a matter of process.

In deciding whether the weaker party has been “victimised” (for legal purposes), the court should want in most cases to take into account any inequality of exchange that has occurred. But if it can shown by other means that the special relationship existing between the parties has been abused to obtain any sort of benefit that otherwise would not have been made, it seems arguable in principle that the benefit should not be allowed to stand in the hands of its recipient, since it was obtained by an independently unfair act; and it is a truism that no-one should be permitted to retain any benefit arising from his own fraud or wrongful act.\(^\text{227}\) At the very least, the independently unfair act in this context inheres simply in the violation of the fiduciary expectation, which, as a bare matter of public policy, is worthy of the law’s protection. An apparent equality on the face of the exchange does not guarantee that the integrity of the special relation existing between the parties has not been jeopardised.\(^\text{228}\)

---


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


\(^\text{228}\) As Slade L.J. at the Court of Appeal level in \textit{National Westminster Bank v. Morgan} [1983] 3 All E.R. 85 recognised (at 92),

> [w]here a transaction has been entered into between two parties who stand in the relevant relationship to one another, it is still possible that the relationship and influence arising therefrom has been abused, even though the

496
Thus, because of the fiduciary connection in this context, there is a strong argument to be made that the influenced party should be allowed, free of the influence, to review a transaction, notwithstanding the nature of the equality in the resultant exchange.\textsuperscript{229} In \textit{McPherson v. Watt},\textsuperscript{230} for example, Lord Blackburn, speaking of a breach of the fiduciary obligation owned by a solicitor to his client, said that the client:

\begin{quote}
... is entitled to say, "This may be a very fair and proper bargain, but I do not choose to let it stand." I think the law ... is that in such cases we do not inquire whether it was a good bargain or a bad bargain, before we set it aside. The mere fact that you, being in circumstances which made it your duty to give your client advice, have put yourself in such a position that, being the purchaser yourself, you cannot give disinterested advice, your own interests coming in conflict with this, that mere fact authorizes him to set aside the contract if he chooses so to do.\textsuperscript{231}
\end{quote}

Simply as a matter of public policy, we should thus require the fiduciary to show more clearly that there was no undue influence.

Even accepting for the moment that we should wish to consider the question of substantive disadvantages for the purpose of judging whether or not a particular transaction is legally to be condemned, it is not so clear why we should accept, as the English courts seem to have done, an objective measure of manifest disadvantage.\textsuperscript{232} The doctrine of undue influence has

\begin{quote}
transaction is, on the face of it, one which, in commercial terms, provides reasonably equal benefit for both parties.
\end{quote}

That is to say, the mere fact that the exchange was a fair one does not mean that the weaker party truly "participated" in the bargaining process, forming a free and independent judgment on the matter in question.


\textsuperscript{230} (1877) 3 App. Cas. 254.


\textsuperscript{232} In testing manifest disadvantage in \textit{Bank of Commerce & Credit v. Aboody}, for example, the Court of Appeal asked whether it would have been obvious to any independent and reasonable person who considered the transaction at the time, with knowledge of all the relevant facts, that the subservient party had been disadvantaged.
traditionally been accepted as having a subjective basis. Thus, 'there may be all sorts of reasons, apart from the price' why a party, when fully apprised of the consequences of the transaction, might not wish to proceed. In a case of a sale at fair market value of a family heirloom, for example, one might simply prefer to keep the subject matter, and might never have considered parting with it in the absence of the other party's influence. Shepherd argues that we must recognise the distinction between influence being used to control the conditions or terms of a transaction, and influence going to whether the transaction takes place at all. The subservient party's interests may best be served simply by retaining the subject-matter of the transaction.

There is much in favour of the argument that Morgan, and the cases following it, should not be adopted into Australian law. Whether or not undue influence was exercised is a subjective matter, of which an objectively

---

233 Cf. Court of Appeal decision in National Westminster Bank plc. v. Morgan [1985] A.C. 686, at 90 per Dunn L.J. As Meagher et al., argue, para. 1523, 'even if the weaker party has received full value this should not shut him out from having the sale set aside; for the decision to sell may have been the outcome of such an actual influence over the mind of the seller that it cannot be considered his free act. Acting independently he may have wished to retain his property; the consideration received may be adequate in law but no substitute for his personal loss'. This was also the approach of the High Court of Australia in the context of unconscionable dealings: see Chapter Four, Section 4.1.2.2.2.

234 Shepherd, op. cit., 218.

235 An insistence upon such a requirement in undue influence cases in Australia, moreover, would imply that this jurisdiction is now out of line with the approach taken to the (related) unconscionable dealing jurisdiction. To recall the words of Fullagar J. in the unconscionable dealings case of Blomley v. Ryan (1956) 99 C.L.R. 362, 405,

It does not appear to be essential in all cases that the party at a disadvantage should suffer loss or detriment by the bargain.... But inadequacy 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....

Indeed, if a distinction was to be drawn between the respective jurisdictions, one would expect that a stronger case exists for requiring an inequality of exchange under unconscionable dealings. Those cases can at least take a passive form, requiring in turn some measure of substantive imbalance to justify the unconscionability judgment. What is more, the unconscionable dealings jurisdiction characteristically concerns contractual relations between non-intimates, where no public policy reasons exist for affording the parties any special protection of the law. Generally, see also Cope (1986) 60 A.L.J. 87.
assessed manifest disadvantage can, at best, provide no more than some evidence. Ultimately, however, neither a subjective nor an objective evaluation of the exchange is, or should be, decisive: what matters is the influence that led the subservient party to manifest her contractual assent. Undue influence is designed to protect more than mere commercial or even personal interests; rather, it is meant to protect the integrity of the bargaining process in a relational environment where abuse is both possible and likely, yet also difficult to establish.

In this way, there is no doubt that the “undueness” in the “undue influence” formulation is exclusively a processual concept. “Undue” in this context means that the influence in question had a wrongful constraining effect on the volition or independence of the plaintiff, who was entitled to have been placed in the hands of a party who had been concerned to secure her (the plaintiff’s) interests, and hers alone.\textsuperscript{236} If the criterion of manifest disadvantage does not lie at the heart of our complaints about the evils of undue influence, whether actual or presumed, \textit{a fortiori} it cannot be required merely to raise our suspicions of, and presumptions about, the existence of such wrongdoing either. The critical source of the recent divergence between English and Australian law in this area seems to reside in the apparent rejection by the English courts of the notion that the undue influence jurisdiction is essentially tied to the fiduciary relationship and its characteristics,\textsuperscript{237} whereas Dixon J. in \textit{Johnson v. Buttress} made it clear that in Australia the connection was central to our own understanding of the jurisdiction.\textsuperscript{238} The effect of the recent English decisions, therefore, is to slot undue influence uneasily into the category of “neighbourhood” responsibilities, occupied principally by our own unconscionable dealings jurisdiction; and away from that of “loyalty”, as associated exclusively with fiduciary obligation. This journey into “neighbourhood” is prone to compromise many relationships hitherto understood to warrant special


\textsuperscript{237} This rejection is most apparent in the judgment of Slade L.J. in \textit{Bank of Credit & Commerce v. Aboody} [1989] 2 W.L.R. 759, at 778-9.

\textsuperscript{238} (1936) 56 C.L.R. 113, at 135.

499
protection because of their standing and importance in the modern societies of both England and Australia. For this reason, there appears to be no possible reconciliation between the approaches taken under contemporary English and Australian law. According to our own law of relational undue influence, it seems only right that contract, and hence "neighbourhood", at best, must necessarily concede to the fiduciary principle.

2.2.3. Rebutting the Presumption of Undue Influence

... he who bargains in matters of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence.239

Whether by proof or presumption, once a relationship of influence is established, and it is shown that a substantial gift, or, in this context, a bargain, has been made with the ascendant party or according to his direction, then two presumptions are raised against that party and those claiming under him:

1) that such influence was exercised and operated upon the subservient party, thereby procuring the transaction; and,

2) that its exercise was improper and unfair—that is, that there was "undue" influence.

Any transaction will be undone, or otherwise relieved against, unless the stronger party can rebut one of these presumptions by taking 'upon himself the whole proof that the thing was righteous'.240 It is incumbent upon him to show that the transaction in question was procedurally fair.241

---

239 Gibson v. Jeyes (1801) 6 Ves. 266, at 278 per Lord Eldon L.C.


241 In the dyadic situation, it does not seem possible to separate the above presumptions. If undue influence is viewed purely in procedural terms, as being a violation of the autonomy implicit in the transaction, it is the very fact of influence being exercised, and of its having a causative effect upon the motivations of the subservient party (presumption 1), that renders the influence "undue" (presumption 2). The fiduciary's influence having a causative effect on the transaction, when he was indeed duty-bound to emancipate his own volition from that of his beneficiary, gives rise to the inference that the subservient party's motivations were not her own, and hence independent of the fiduciary's influence. As has been argued above, it is
There seems to be no set formula as to how the ascendant party’s onus might be discharged, ‘for influence ... varies in degree and kind’. Thus, the ascendant party may rebut the presumption in any way open to him. It is clear, however, that this burden is not easy to discharge for it will already have been established that the subservient party could have been influenced and, as we have seen, it is in general difficult to show precisely

this lack of independence implicit in the transaction which is our sole source of complaint about its “undueness”. Different considerations seem to arise in triadic situations, however, where the transaction is made between the subservient party and a third party, but with the motivation for the transaction originating nevertheless in the will of the fiduciary. In these cases, it seems that the “undueness” residing in the transaction lies not merely in the “dependence” of the beneficiary’s motivations (presumption 1 and 2), but also in the motivations of the fiduciary (presumption 2 alone) and the “conscience” of the third party who was in receipt of the transaction. At least in the dyadic situation, the general view is that the equitable jurisdiction operates irrespective of the ascendant party’s personal motives: Turner & Sutton, op. cit., paras. 25:06-09, pp. 675-8. But cf. Shepherd, op. cit., 205-6; Bullock v. Lloyds Bank [1955] Ch. 317. Third-party cases are not considered here, although despite the fiduciary’s influence’s causative affect, in order to rebut any presumption raised against him he must further show that the influence was not abused, but rather conscientiously used in the interests of his beneficiary, and that the resultant transaction was in every respect fair, just and reasonable. Yet even notwithstanding the fiduciary’s inability to be able to show these things, the transaction still seems safe, unless the third party is also charged with some knowledge (actual or with reason to know) of the fiduciary’s wrongdoing, and not merely of the exercise of his influence. Generally, see the ideas canvassed by Professor Finn, in Finn, P., “The Liability of Third Parties for Knowing Receipt or Assistance” (unpub. m/s, Department of Law, R.S.S.S., The Australian National University, 1992, 35 pp. To be published by Carswell, Canada, in 1993).

242 Johnson v. Buttress (1936) 56 C.L.R. 113, 134 per Dixon J. In Westmelton (Vic) Pty Ltd v. Archer and Shulman [1982] V.R. 305, the Victorian Full Court (at 313) emphasised that the extent and weight of the burden cast on the ascendant party and the matters which the court will require to be satisfied before a finding of undue influence is rebutted ‘vary enormously with all the circumstances of the case’ and that ‘it is pointless as well as unjustified to lay down any particular requirements for all cases, or indeed any classes of case, because the circumstances and the requirements will vary infinitely with the infinite variety of human affairs’.

243 In Union Fidelity v. Gibson [1971] V.R. 573, for example, Gillard J. commented (at 578) that ‘[a] donee often suffers a grave handicap in making out a case of a gift produced by affection or gratitude by laying the foundation for the proof of a relationship which with very little more can be transmuted from an innocent one raising the presumption of undue influence against him’. Some courts, however, have taken the presumption too far, stating it in terms which would render it unrebuttable: see Powell v. Powell [1900] 1 Ch. 243, at 246.

244 In Johnson v. Buttress (1936) 56 C.L.R. 113, for example, Dixon J. pointed out that the ascendant party may possess peculiar knowledge both of the transaction and the circumstances which could affect its validity; that the ascendant party has chosen to accept a benefit which
what did and did not influence a party in entering into a contract. Given the underlying rationale of the doctrine, with its primary concern on the "emancipation" of the subservient party from the influence or will of the ascendant one, judicial emphasis in Anglo-Australia law has been characterised by the requirement of affirmative proof of freedom, independence, and spontaneity of action on the part of the subservient party. In any event, therefore, what will need to be shown is that the ascendant party's fiduciary position was not used, hence abused, but that the transaction he received was, to recall the words of Dixon J., 'the independent and well-understood act of [subservient party], who was 'in a position to exercise a free judgment based on information as full as [the ascendant party's own]'.

---

may well have proceeded from an abuse of the special relation existing between them; and, that the relations between the parties are so close that it is difficult to disentangle the inducements which led to the transaction (id, at 135).

245 Generally, the evidence necessary to rebut the presumption will depend heavily upon the facts that were put before the court to prove the special relationship of influence and the suspicion of its abuse, that is, on the facts giving rise to the presumption in the first place.

246 See Allcard v. Skinner (1887) 36 Ch. D. 145, 171 per Cotton L.J. In Zamet v Hyman [1961] 1 W.L.R. 1442, Lord Evershed M.R. (at 1446) laid down a more concise test, asking whether the transaction was entered into 'only after full, free and informed thought about it'. Cf. also, Goldsworthy v. Brickell [1987] Ch. 378, 408; Union Fidelity Trustee Co. of Australia v. Gibson [1971] V.R. 573, 576; pure voluntary well-understood act'. Finn, however, reports of a shift in emphasis, mainly in North America, away from the familiar rhetoric of "free wills" and the like. The dominant judicial theme there resides in the confidence-abusing idea—a theme reflecting the classic fiduciary terms. He does note the compatibility of the themes, however: Finn, "The Fiduciary Principle", op. cit., 44-5; also see, n. 197, supra.

247 Johnson v. Buttress (1936) 56 C.L.R. 113, 134 per Dixon J. Almost invariably, this will involve satisfactory proof that the subservient party had competent and independent advice, or that she entered the transaction voluntarily, deliberately and advisedly, knowing its true nature and effect, and that her consent was not obtained by reason of the power or influence to which the relation gave rise.

It is clearly not sufficient that it should merely be shown that the subservient party understood what she was doing, for like the victim of duress and fraud, the issue here is how her contractual assent was produced. The problems here relate not wholly to a party's cognition, but principally to her freedom or autonomy. Lord Eldon made the point well in Huguenin v. Baseley (1907) 14 Ves. Jun. 275; 33 E.R. 526, at 535, when he said:

The question is not whether she knew what she was doing, had done or proposed to do, but how the intention was produced, whether all the care and providence was placed round her as against those who advised her which,
Whether or not the ascendant party's onus is ultimately discharged, however, will require a close examination of all attendant circumstances of the case at hand. But it is possible, notwithstanding the obvious dangers of generalisation, to identify a number of evidentiary factors to which the courts have repeatedly resorted in ascertaining whether the requisite freedom of will and intent has been demonstrated. Professor Finn, for example, identifies six such factors:248

(1) The age, education and physical condition of the subservient party[—]the greater his disabilities, the harder it is to discharge the onus;
(2) The circumstances surrounding the making of the gift or contract;
(3) "[Was] the transaction a righteous transaction, that is, was it a thing which a right minded person might be expected to do?"
(4) If the transaction was one of gift, was it improvident? Has the donor given away all, or practically all, of his property? If the transaction was one of contract, was the consideration adequate?
(5) From whom did the idea of the gift or contract originate?
(6) Was the subservient party independently advised?

2.2.3.1. Competent independent advice

Now, given the underlying rationale of the doctrine of undue influence, it is understandable that the majority of authorities on the subject

from their situation and relation with respect to her they are bound to exert on her behalf. (Emphasis added.)

Cf. Union Fidelity Trustee Co. v. Gibson [1971] V.R. 573, 576. Shepherd's view is that there is indeed only one way in which the presumption of undue influence can be rebutted: with proof of valid consent to the transaction (op. cit., 220). He suggests that consent can be contemporaneous with the contract, or subsequent, as where the subservient party's deliberate action or delay demonstrates her independence. This is not necessarily the proper rationale behind all cases of affirmation, however, for some do not arise by express or implied consent (i.e., conscious election), but are imputed by estoppel: Goldsworthy v. Brickell [1987] Ch. 378. Shepherd further treats proof of valid consent as being synonymous with proof that influence or power was not used in the procurement of the transaction, thus treating it as a breaking of the chain of causation between the influence and the transaction (ibid). The present writer does not wholly agree with Shepherd, however, for he does not point out the significance of the essentially normative criterion of "undueness", which, it has been argued, exists merely on account of causation in the dyadic situation. A fiduciary may indeed have used his influence or power to procure a gift or other advantage, but this may, especially in the third-party cases, upon a meticulous examination of the facts of the case at hand, be considered to have subjected the subservient party to an acceptable motivation for her action: that the exercise of the influence was not in the circumstances "undue".

248 Fiduciary Obligations, op. cit., 86 (footnotes omitted).
should place particular emphasis upon the last of these probative factors: the presence or absence of competent independent advice.\textsuperscript{249} The purpose of such advice is simply to demonstrate the requisite dependence and deliberation envisaged by Dixon J. above, thereby removing the suspicion that gave rise to the presumption of wrongdoing in the first place. In most circumstances it should\textsuperscript{250} be considered prudent for a party laid open to the presumption to recommend to the other party that she obtain competent\textsuperscript{251} and 'meaningful',\textsuperscript{252} truly independent\textsuperscript{253} advice.\textsuperscript{254} Indeed, in many cases the facts themselves will be such that the relationship in question is 'one which to any reasonably sensible person, who gave it but a moment's


\textsuperscript{251} In order to constitute "competent" advice sufficient to rebut the presumption, the advice given need not have come from a lawyer. The notion of competence implies that the giver of any advice should be qualified in respect of the subject-matter of the advice (see \textit{Demerara Bauxite Co. Ltd v. Hubbard} [1923] A.C. 673), and, further, that he should also be informed of all the material facts relating to the subject-matter at hand upon which to found an adequate opinion (see \textit{Wright v. Carter} [1903] 1 Ch. 27; \textit{Brusewitz v. Brown} [1923] N.Z.L.R. 1106; cf. \textit{Contractors Bonding Ltd v. Snee} [1992] 2 N.Z.L.R. 157, 166). Hence, in \textit{Watkins v. Combes} (1922) 30 C.L.R. 180 the advice was considered to be inadequate because the adviser was unaware of the material extent of the subservient party's estate or its nature, and was unaware of the terms of the contract.

\textsuperscript{252} The minimum requirement is to explain the real effect of any documents relating to the transaction, and to ensure that the subservient party understands the true nature and consequences of her act: see \textit{Bullock v Lloyds Bank} [1955] Ch. 317: advice must emphasise that subservient party is under no duty to do anything; \textit{Bester v. Perpetual Trustee Co.} [1970] 3 N.S.W.L.R. 30: advice must bring to subservient party's mind the significance of what is to be done.

\textsuperscript{253} The advice must truly be independent. In general, an adviser is independent if he or she is 'free from any taint of the relationship' between the parties: \textit{Re Coomber} (1911) 1 Ch. 723, 730. A solicitor acting for both parties to the transaction, for example, clearly would not constitute independent advice: cf. \textit{Powell v. Powell} [1900] 1 Ch. 243, 246; \textit{Watkins v. Combes} (1922) 30 C.L.R. 180, 188, 192, 197; \textit{Cavendish v. Strutt} (1903) 19 T.L.R. 483; \textit{Bank of Montreal v. Stuart} [1911] A.C. 120. Cf. also, \textit{Adenan v. Buise} [1984] W.A.R. 61.

thought, cried aloud the ... need for careful independent advice'. This might obtain, for example, where there is severe inequality between the parties, or where the transaction itself is of a particularly complicated nature.

Although it is not essential that the party presumed to have exerted influence need take steps to ensure that independent advice is actually received or taken, this will often be the surest and most convenient way to rebut the presumption. The general rule relating to independent advice is that all the adviser is required to do is to take care that the subservient party fully understands the nature of her act and its consequences; he does not have to insist that the advice be accepted. However, he must ensure, of


259 Indeed, in some early English cases it was suggested that the presumption can only be rebutted by independent advice: see Rhodes v. Bate (1866) L.R. 1 Ch. App. 252, at 257 per Turner L.J.; Powell v. Powell [1900] 1 Ch. 243, at 245, 246 per Farwell J.

260 As Fletcher Moulton L.J. put it in Re Coomber [1911] 1 Ch. 723, 730, all that the court will insist upon is that

... some independent person free from any taint of the relationship, or of the consideration of interest which would affect the act, should put clearly before the person what are the nature and consequences of the act. It is for adult persons of competent mind to decide whether to do an act, and I do not think that independent advice means independent and competent approval. It simply means the advice shall be removed from the suspected atmosphere and from the clear language of an independent mind they should know exactly what they are doing'.

Cf. also, Union Fidelity Trustee Co. of Australia v. Gibson [1971] V.R. 573, at 578, where Gillard J. took the view that if a party receives independent advice, and either misunderstands it or is given erroneous advice whereby she fails to appreciate or realise the consequences of the transaction, a court of equity would not set aside the transaction if the
course, that any advice is not rejected on account of the influence remaining.
In this connection, a passage from Lord Hailsham’s speech in Inche Noriah v. Shaik Allie Bin Omar\textsuperscript{261} is worthy of extensive quotation:\textsuperscript{262}

\begin{quote}

[T]heir Lordships are not prepared to accept that independent advice is the only way in which the presumption can be rebutted, nor are they prepared to affirm that independent legal advice when given, does not rebut the presumption unless it shown that the advice was taken. It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with full appreciation of what he was doing; and in some cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption. But the fact to be established is that stated in the judgment already cited of Cotton L.J.,\textsuperscript{263} and if evidence is given of circumstances sufficient to establish this fact, their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer. Nor are their Lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon, further than to say that it must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor.\textsuperscript{264}
\end{quote}

party otherwise understood the nature of the transaction and acted therein in the full exercise of her will.

\textsuperscript{261} [1929] A.C. 127.

\textsuperscript{262} Id, 135-6.

\textsuperscript{263} Allcard v. Skinner (1887) 36 Ch. D. 145, 171: was the gift ‘the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which [justifies] the Court in holding that the gift was the result of a free exercise of the donor’s will’?

\textsuperscript{264} In Inche Noriah, a widow consulted an independent lawyer before executing a deed of gift of valuable property in favour of her nephew. The lawyer, however, did not know one crucial fact—that the property involved comprised almost the entirety of the property she owned. The presumption that the nephew had exerted undue influence, therefore, was not rebutted. See also, Lancashire Loans Ltd v. Black [1934] 1 K.B. 380 at 413 (Lawrence L.J.), 404 (Scrutton L.J.), 420 (Greer L.J.); Re Brocklehurst’s Estate [1978] 1 All E.R. 767 (Bridges L.J.), 780 (Lawton L.J.); Brooke v. Alker (1976) 9 O.R. (2d) 409, 420; Union Fidelity Trustee Co. v. Gibson [1971]
Of course, independent advice need not be proved if it would have made no difference to the subservient party acting independently of the fiduciary’s influence, for this would suggest a break in the chain of causation between the influence and the transaction, not to mention that advice in an environment of putative fair equality (equilibrium bargaining conditions) is superfluous and unnecessary.

Whilst adequate independent advice will often be a decisive factor in demonstrating the requisite “emancipation” and “loyalty” intended by Dixon J. above, one cannot assume that such advice will, necessarily and by itself, be sufficient evidence to rebut the presumption of undue influence. Of course, proof of independent advice will ordinarily remove a good deal of suspicion that might surround the transaction, and thus diminish commensurately the need for proof of actual undue influence. However, the presumption is not rebutted simply by proof that the subservient party understood the transaction, or went in with her eyes open: the formation of her intention to enter the transaction must, above all else, be free from the stronger party’s influence. Notwithstanding the advice or information received, the


The purpose of obtaining advice is to enable the making of an independent choice. It may be that to an informed and intelligent listener advice confined to explaining will enable an intelligent choice to be made to the effect that the document being explained is acceptable to the party being asked to execute it. But the mere fact that a document is explained, and that no questions are asked nor criticism made of it by the party to whom it is being explained, does not tend strongly in favour of the conclusion that this party made a deliberate and intelligent choice to adopt each and every one of the provisions contained in the document.


266 See text below, Section 2.2.3.2.3.

267 Thus, for example, a solicitor does not discharge his duty to the subservient party, his client, merely by satisfying himself that that party understood and desired that the transaction take place. In light of the continuing features of the case that give rise to the fiduciary relation, he must also satisfy himself that the transaction was in every respect a righteous and proper one to make. If he cannot be so satisfied in this regard, then surely his duty is not only to advise his client not to complete the transaction, but also to refuse to act
general air of trust and confidence placed in the ascendant party’s judgment and advice in respect of the particular transaction—and hence his influence—might remain.268

2.2.3.2. Other factors advanced to show independent action

Proof of independent advice is not the only way in which the presumption of undue influence can be rebutted through the demonstration of independent and deliberative decision-making on the part of the subservient party.269 There may have been no advice at all, but some other evidence might exist which shows that the party in question entered freely and without unduly being influenced by the ascendant party.270 The common alternative items of proof include evidence that any consideration received by the subservient party was not inadequate, or that the terms of the resultant contract were otherwise not unduly onerous, and that full disclosure was made.271 The presumption might also be rebutted if the ascendant party can point to a break in the chain of causation between the influence and the transaction, which again is synonymous with “independence” in the dyadic relation.

2.2.3.2.1. Fair outcomes

In those jurisdictions not subscribing to the manifest disadvantage requirement, the adequacy of the exchange in a transaction is often listed as

268 Two good illustrations of this situation can be found in Wright v. Carter [1903] 1 Ch. 27, and Contractors Bonding Ltd v. Snee [1992] 2 N.Z.L.R. 157, 166-67 per Richardson J.: ‘Looked at overall I would conclude that the tainting effect of Mr Savage’s continuing influence over his mother remained even though she was advised by Mr Baker not to sign the mortgage’.


271 In Wright v. Carter [1903] 1 Ch. 27, at 50, 60, Stirling L.J. required three things to be established:

first, the client must be fully informed; secondly, he must have competent legal advice, and thirdly, the price which is given must be a fair one.
an important, and sometimes decisive, factor in determining whether or not the stronger party has discharged his onus. 272

If criticism is to be levelled at placing too great an emphasis on the adequacy-of-the-exchange factor in rebutting the presumption of undue influence, however, it parallels the criticism which accompanied our discussion of this criterion’s relevance in raising the presumption under the English law. It is necessary to recognise the distinction between influence being exerted to control the substantive terms or outcomes of a transaction, and influence going to whether the transaction takes place at all. Equity’s technique 273 has long been to treat an extreme disproportion in values in a bargain transaction as a flag of fraud, commanding explanation. Typically, this explanation was traced back to defects in the bargaining conditions and relations themselves—for example, some misplaced reliance, nondisclosure, extreme inequality of knowledge, experience, wealth, and the like—which, once detected, called for equity’s correction. However, despite the strong empirical or contingent connection between a fair outcome and the inference that fair bargaining conditions must have existed or were not abused, extreme care is needed when making such normative inferences. As was argued above, an objectively fair market price may follow a transaction in which influence has unduly been exercised over the volition of the subservient party. 274 There may, for example, be subjective indicators which render an objective measure of the equality of exchange inconclusive. 275


273 As recognised by Lord Hardwicke’s second category of fraud in Chesterfield v. Janssen (1751) 2 Ves. Sen. 125; 28 E.R. 82.

274 See, also, Chapter Three, Section 3.2.2. The opposite might also obtain. An unfair price may follow from a bargaining process in which both parties were acting freely and informedly. If we are to take the notion of contractual autonomy seriously, it must surely include the freedom to make bad bargains.

275 For example, an innocent motivation, such as an intention to confer a gift, may explain a transaction for an adequate but nominal consideration.
For the purpose of rebutting the presumption of undue influence, any inferences to be drawn from the substantive fairness or otherwise of a transaction should be weaker than any inferences to be drawn from, say, the presence or absence of independent advice. It is the latter which speaks directly to the detection and correction of the processual features of the bargaining relation with which the doctrine of relational undue influence is particularly concerned: namely, the ability of the subservient party to give an assent that is independent of the ascendant party’s influence.

2.2.3.2.2. Full disclosure

An additional factor that is generally cited as evidentially relevant to the rebuttal of the presumption of undue influence is adequate (i.e. full) disclosure on the part of the ascendant party.\(^{276}\) It has been said that the ascendant party can rebut the presumption against the transaction by proving that he disclosed to the subservient party every relevant\(^{277}\) fact.\(^{278}\) Owing to the fiduciary characteristics seen in the parties’ relation, any information obtained or possessed by the ascendant party is information the subservient party is entitled to expect would be used in her interests. While the point of proving disclosure is to assist the ascendant party in showing that the transaction was procedurally fair, and to ensure loyalty to the subservient party’s interests, the fact of full disclosure will not necessarily show fairness, since we are often considering the possibility of unfair pressure, which cannot simply be relieved by information and advice.\(^{279}\)

\(^{276}\) See Johnson v. Buttress (1936) 56 C.L.R. 113, 134 per Dixon J. However, some fiduciaries normally owe extensive duties of advice and disclosure independently of any relationship of influence.

\(^{277}\) Superior knowledge, or any other commercial advantage not flowing from the fiduciary’s influence, is irrelevant to the presumption of undue influence. See the four examples given by Shepherd, op. cit., 302-3.

\(^{278}\) There is some early authority to the effect that the presumption can be rebutted by evidence that there was full disclosure of all information together with accurate advice and explanation even although this was done without independent advice. See Blackie v. Clark (1852) 15 Beav. 595; 51 E.R. 669; Richards v. French (1870) 22 T.L. 327. However, in light of the discussion below, such authority should be treated with caution.

\(^{279}\) Though it may possibly be ameliorated. Where the fiduciary, such as an adviser, acquires his ascendancy through superior knowledge rather than, say, by pressure alone, we suspect
The purpose of disclosure here thus appears to be twofold. First, as in unilateral mistake cases (Chapter Eight), the purpose of disclosure is merely to inform the subservient party’s contractual decision-making, so as to correct any information asymmetries that will often naturally exist between some forms of fiduciary and their beneficiaries,\(^{280}\) and to place the parties on an equal footing, but not necessarily at arm’s length.\(^{281}\) Second, and distinct to the undue influence doctrine alone, the purpose of disclosure here is also to reveal independence.\(^{282}\) Since the doctrine of undue influence is concerned less with informed action than with free action, more than mere informational disclosure is required of the fiduciary (which will be compelled in any event), as is all that is required of the superior party in the situations canvassed in Chapters Eight and Nine below. As Shepherd points out, ‘the influence rules speak to the independence of a consent, not [wholly] to the facts considered in deciding whether to give that consent’.\(^{283}\) Thus, as in the fiduciary context, the emphasis here is on full disclosure, that is, disclosure required to put the parties into a position of equality regarding (1) the information each need to make an informed-hence-responsible decision, and (2) to put them at arm’s length, each free of the other’s influence. The necessary disclosure would thus appear to be ‘all-embracing’:

Both in cases of personal interest and of conflicting duty, the fiduciary is obliged to disclose not merely the nature and extent of the conflict but is obliged to give all that reasonable advice against himself (personal interest) or against the third party (conflicting duty) that he would have given if disinterestedly advising his beneficiary alone.\(^{284}\)

---

280 Notably, the adviser class of fiduciary.

281 Hence Dixon J.’s reference in Johnson v. Buttress to an ‘independent well-understood act of a man in a position to exercise a free judgment based on information as full as that of the [ascendant party]’: (1936) 56 C.L.R. 113, at 134 (emphasis added).

282 Hence Dixon J.’s reference in Johnson v. Buttress to the relationship of influence as being one ‘in which fiduciary characteristics may be seen’: id, 135.


If, in the face of such disclosure, the subservient party elects to continue with the relationship and to deal with the fiduciary, by analogy to the competent independent advice criterion, it is still possible that notwithstanding the informed nature of the transaction, the influence will remain. Not to place too great an emphasis on the significance of disclosure in rebutting the presumption of undue influence, therefore, Shepherd views informational disparities either as merely having some impact on evidentiary credibility,\textsuperscript{285} or else as speaking to the existence of a power to influence rather than to a misuse of that power.\textsuperscript{286}

Yet given the judiciary’s apparent emphasis on “competent independent advice”, the importance of full disclosure, as an additional, or substituted requirement for upholding the transaction, has been de-emphasised in many descriptions of the law; Dixon J. in \textit{Johnson v. Buttress} excepted. Despite the obvious importance of full disclosure in the present context, this judicial de-emphasis is probably symptomatic of the courts’ apparent assumption that where there has been adequate independent advice, disclosure from the ascendant party himself for the most part will become redundant and unnecessary.\textsuperscript{287}

### 2.2.3.2.3. Causation

Whether the alleged undue influence is actual or presumed, causation is a crucial element of proof, for the subservient party may be eager to benefit

---

\textsuperscript{285} Thus, as in \textit{Bank of Credit and Commerce International S.A. v. Aboody} [1989] 2 W.L.R. 759, where the ascendant party can be shown to have intentionally withheld information, it will be difficult for him to later convince a court that he declined to use the influence available to him to procure the transaction. Shepherd (\textit{id}, 204) comments how nondisclosure smacks of overreaching, and hence undermines the ascendant party’s credibility on important issues, especially whether influence was used.

\textsuperscript{286} For example, a failure to advise or inform correctly, or at all, (say, by drawing the subservient party’s attention to possible alternative courses of action) can readily increase the effect of unfair pressure, leading to a conclusion adverse to the ascendant party. Thus, Shepherd argues, if the ascendant party provides effective disclosure, he may reduce significantly the influence he has over the other party. This of course speaks to whether the presumption is raised rather than to whether it is rebutted: \textit{id}, 204. Cf. also, \textit{O’Connor v. Hart} [1985] A.C. 1000.

\textsuperscript{287} Generally, see Turner & Sutton, \textit{op. cit.}, paras. 21.26-28, at pp. 537-9
the ascendant one, without any influence on his part. However, this issue is not generally emphasised, either by courts or commentators; for in the case where undue influence is relational, and thus presumed, the necessary empirical connection between the ascendant party's wrongful exercise of influence and the subservient party's decision to enter into the transaction is not generally formulated in the language of causation, but rather in terms of the rebuttal of the presumption, which requires the ascendant party to show that the contract was not the proximate result of the relation, or, more specifically, the undue influence presumed to arise from a transaction within it. Accordingly, in the present context, the matter of causation today remains largely open and far from settled.

It is nevertheless possible to extrapolate a graduated series of tests and standards of causation from various judicial and academic pronouncements. There is, however, much to be said for the courts

---


289 For a discussion of causation in the context of nonrelational (actual) undue influence, see text above, Chapter Five, Section 4.2.1. (duress), and accompanying footnotes.

290 However, it is likely that the facts that tend to prove this want of connection between the influence and the transaction usually relate to the presence of influence in the first place, and hence would be relevant to raising the presumption of influence rather than to its rebuttal. Thus, it would be at an earlier stage of the evidence that the ascendant party should want to show, for example, that by reason of its subject matter, the transaction was of such a nature as to render it impossible or unreasonable to suppose that it could have been within the sphere of the influence alleged: see Montesquieu v. Sandys (1811) 18 Ves. 301, at 312 per Lord Eldon L.C.; Edwards v. Meyrick (1842) 2 Hare 60, 68-9 per Wigram V.-C.; Allison v. Clayhills, op. cit.

291 This may seem surprising given that some writers have viewed undue influence conceptually as a causation question: see Shepherd, op. cit., 200. This is not a conclusion that is wholly supported here. Cf. n. 15, supra.

292 At the stricter end of the scale, for example, is Malcolm Cope's suggestion that the undue influence must be the principal or substantial motivation for the transaction: Cope, op. cit., 72-3. (It appears that no one has suggested that the influence must be the sole motivating cause for the subservient party's entry into the transaction.) While admittedly Cope's test is enunciated in the context of actual—i.e., nonrelational—undue influence, there is no reason to suspect that the standard should vary for relational, or presumed cases. (But cf. Jacobs J.A. in Barton v. Armstrong [1973] 2 N.S.W.L.R. 598, at 610, who suggests that the requirements for proof of causation in undue influence may be stricter than in the law of duress.)

A more relaxed version of the standard, however, was recently expressed in Bank of Credit & Commerce v. Aboody [1989] 2 W.L.R. 759, at 785. In that case, the the English Court of Appeal
generally adopting a relaxed standard of causation in the present context. Because it is so difficult to show why a party entered into a contract,\(^{293}\) the courts in other contexts have adopted tests favourable to the party seeking relief. In misrepresentation\(^{294}\) and duress\(^{295}\) cases, for example, the wrongdoing party has the burden of disproving reliance or causative submission. Given the underlying rationale of the instant doctrine—in

took the view that in ordinary circumstances it would not be appropriate to exercise the undue influence jurisdiction in a case where the evidence establishes that on the balance of probabilities the complainant would have entered into the transaction in any event. *Id.*, 785 *per* Slade L.J. (This approximates Seddon’s test in the context of duress also: Seddon, N., in “Compulsion in Commercial Dealings”, in Finn, P. D. (ed.), *Essays on Restitution* (1990) 138-163, at 157.) While this may appear to follow closely the normal preponderance standard in civil trials, the Court does not in fact specify the test of causation, nor the burden of proof. Cf. Cartwright, *op. cit.*, 188. What is more, it does not prove that the contract was not made because of the undue influence. Cf. *Barton v. Armstrong* [1976] A.C. 104, 121 *per* Lords Wilberforce and Simon:

> We are also prepared to accept that a decisive answer is not obtainable by asking the question whether the contract would have been made even if there had been no threats because, even if the answer to this question is affirmative, that does not prove that the contract was not made because of the threats.

Given the emphasis in some cases of “channelled” or “substituted” wills (e.g., *Tufton v. Sperni* [1952] 2 T.L.R. 516, 530, 532; *Bank of Credit and Commerce International S.A. v. Aboody* [1989] 2 W.L.R. 759, 784), there may be some scope for a preponderance standard of causation if we consider the possibility that undue influence might be understood in *comparative* terms. This would be to say, the complainant’s will need not entirely be her own in order not to be unduly influenced in entering into a transaction; it needs only be more *hers* than another’s. This parallels roughly what Nozick calls the ‘closest relative’ view of coercion. A person acts freely, says Nozick, when ‘no other’s motives and intentions are as closely connected to ... [her] ... act’ as her own, regardless of the pressures under which she acts: Nozick, R., *Philosophical Explanations* (1981), 49. Cf. also, Wertheimer, *Coercion*, 88. However, it is difficult to see how such a sensitively slanted psychological enquiry could prove sufficiently certain in its application as to serve as an operational, legal standard.

The weakest version of the standard of causation in this context is probably that propounded by Meagher, Gummow and Lehane, who, on the strength of the duress case of *Barton v. Armstrong* [1976] A.C. 104, suggest a “contribution” standard: ‘that it is enough that the illegitimate means used was one reason why the complainant acted as he did. The court need not be satisfied that it was the predominant or the clinching reason’: (2nd ed., 1984), para. 1214, p. 333.

\(^{293}\) There is, of course, no neat and objective test for determining a person’s reason for doing an act. In law, however, the enquiry here is no more (or less) subjective than determining a person’s intent or knowledge: that is, we infer these from objective circumstances and evidence.

\(^{294}\) Generally, see Chapter Seven.

\(^{295}\) Generally, see Chapter Five.

514
particular its close association with fiduciary relationships, and its strongly prophylactic nature—one should expect the courts to be similarly biased towards parties who enter into a contract under undue influence. This is perhaps foreshadowed by Sir Eric Sachs’s remarks in *Lloyds Bank Ltd v. Bundy*, where his Lordship opined that once a duty of fiduciary care is established,

it is contrary to public policy that the benefit of the transaction be retained by the person under that duty unless he positively shows that the duty of fiduciary care has been fulfilled: there is no room for debate on the issue as to what would have happened had the care been taken.

Even putting the fiduciary (public policy) connection aside, however, when we consider the purpose of the doctrine in the context of voluntary and consensual transactions, the fact that the subservient party would have entered into the impugned transaction in any event should be of little relevance. Rather, what is of significance here is whether the intention or consent brought to the transaction was one freely, that is, independently produced. If the ascendant party cannot show independence by the various ways open to him (competent legal advice, fair outcomes, and full disclosure), the fact that the subservient party would not, or might not, have acted differently in any event does not alter or affect the fact that the consent

---


> When a party, holding a fiduciary relationship, commits a breach of his duty by nondisclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent’s action would be solely determined by some other factor .... Once the court has determined that the non-disclosed facts were material, speculation as to what course the constituent on disclosure, would have taken is not relevant.

relied upon by the ascendant party should not, because of the circumstances of the parties’ relationship and dealing, rise to legal or moral consequences.

It is possible to propose a graduated scheme of causation, linked to the spectrum of remedies available. Such a scheme might require, for example, quite low standards of causation where a less onerous, status-quo restoring remedy, such as transaction avoidance, is sought; but comparatively high standards of causation where more detrimental remedies, such as account of profits or constructive trust, are sought.\textsuperscript{298} Given causation’s strong affinity with "undueness" in the dyadic relation of influence, however, the desirability of remedy being, albeit indirectly, permitted to contrive our judgment in the special cases of relational undue influence can, on account of public policy alone, seriously be called into question. To resort to orthodoxy in this matter, remedies should follow our considered legal judgments; it is not the other way round.

3. Conclusion

In concluding this chapter the writer makes some brief comments about the relationship between relational undue influence and duress (considered in Chapter Five), and between relational undue influence and unconscionable dealings (considered in Chapter Four).

It was observed at the outset that undue influence and duress share no important conceptual differences, although the analysis applicable to each is strikingly dissimilar. Indeed, it has been observed in the course of this chapter that non-relational undue influence is, analytically \textit{and} conceptually, coterminous. Despite their vast analytical differences, relational undue influence and duress occupy much of the same conceptual territory too. Both are concerned with process, and not outcome; and both are concerned with the volitional deficiencies in a contracting party’s manifested contractual assent; in particular, as that assent has been, or is presumed to have been, the product of improper pressures, persuasion or influences brought to bear upon that party’s will by another. In either case, then, the

\textsuperscript{298} Cf. the ideas canvassed by Finn, “Good Faith and Nondisclosure”, \textit{op. cit.}, 167-8.
motivation for action originates more in the will of the superior party than in the will of his victim.

It would be misleading to suggest that no conceptual distinctions exist between relational undue influence and duress, however, even if the writer would not view them as important ones. In duress, one is concerned in particular with an unwarrantedly constrained volition, as one has had one’s choice wrongfully narrowed relative to some measure of choices one lawfully should be permitted to have under the “rules” of bargaining. The modus operandi of this form of choice constraint is a threat, which loosely produces a type of “fear” in its victim. Relational undue influence, however, need not be concerned with this sort of choice constraint, although we have seen that it might. Coercively diminished choices are not the gravamen of relational undue influence, for it is (misplaced) “reliance” more than “fear” that tends in these cases to be the immediate effect of the wrongful acts which produce the victim’s motivation for action. One is, rather, in the case of relational undue influence, concerned with a party’s will that is not independent of another’s, in particular where in law that other party’s will is deemed to be convergent with the first party’s. Undue influence, then, relates more to “misplaced reliance” than to “coercion”. Whilst the functionalist ethic of bargaining expects and requires individual responsibility, and hence admits of some coercive pressure under the rules of the bargaining game, the victim of relational undue influence never enters into such a “game” in the first place. Indeed, the nature of the fiduciary expectation wholly displaces the individual responsibility characteristically associated with bargaining, and justifies the subservient party’s actual or putative renunciation from playing in games of strategy, power or advantage with the ascendant party.

299 They are not important distinctions because they reside principally in the psychological or empirical features of the cases, and these features have intentionally been de-emphasised in this thesis.

300 What is more, it should be noted that the immediate result of the wrongful act in duress—fear—stems directly from the act itself; whereas in undue influence, the immediate result—trust, reliance, confidence, etc.—stems not directly from the wrongful act (i.e., the actual or presumed exercise of undue influence), but rather from the relationship or position of influence between the parties which proceeds it and which justifies the trust and reliance.
Unlike the victim of duress, but like the victim of deception, moreover, the victim of undue influence is not aware, before acting against to her own interests, that a wrongful act has been committed. To the contrary, she believes that the party exercising influence over her has acted in her best interests. In each case, however, the victimised party cannot be said to be acting “freely”, and hence responsibly, although in the case of undue influence her volition may be more subtly, less crudely affected, and thus will usually include an element of informational asymmetry or deception as well.\textsuperscript{301} Relational undue influence, as noted in Chapter Four, thus tends logically to occupy that part of the behavioural spectrum described by this writer as “manipulation”, whereas all forms of duress, including those forms parasitic on the application of unconscionability criteria, sit more comfortably at the “coercion” end of the spectrum.

Undue influence and unconscionable dealings, moreover, are also clearly related, for they share a common ancestry.\textsuperscript{302} Hardingham describes the conceptual overlap thus:

... both doctrines are designed to mitigate the risk of abuse by the stronger party of his position of special advantage. Abuse of a perceived position of special advantage is the thread that links these two equitable doctrines.\textsuperscript{303}

This perhaps explains why the courts today seem to be struggling so much to define the precise point of differentiation between unconscionable dealings and undue influence.\textsuperscript{304} Conceptually, both doctrines concern a

\textsuperscript{301} Presumably the victim of undue influence would not permit herself to be manipulated if she knew the true motivations (conflict of interest and duty) of her fiduciary.

\textsuperscript{302} In particular, in Lord Hardwicke’s third category of equitable fraud in \textit{Earl of Chesterfield v. Jansen} (1751) 2 Ves. Sen. 125; 28 E.R. 82: ‘... taking surreptitious advantage of the weakness and necessity of another: which knowingly to do is equally as against good conscience as to take advantage of his ignorance: a person is equally unable to judge for himself in one as in the other’: \textit{id}, 155-6; 100. Cf. also, McTiernan J. in \textit{Blomley v. Ryan} (1956) 99 C.L.R. 362, at 392.

\textsuperscript{303} Hardingham, “Unconscionable Dealing”, in Finn (ed), \textit{Essays in Equity} (1985) 1, 18.

form of "exploitation", although the source of the vulnerable party's exploitable circumstances, which displaces the "individual responsibility" ordinarily expected and required under the functionalist ethic of bargaining, is quite different in each. In unconscionable dealings, it is the vulnerable party's position of "special disadvantage", as these are brought about through some social or transactional disabling condition, which gives rise to the superior party's "neighbourhood"-like obligations positively to assist the

Although unconscionable conduct in this narrow sense bears some resemblance to the doctrine of undue influence, there is a difference between the two. In the latter the will of the innocent party is not independent an voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscionently taking advantage.

Cf. also, Toohey J. in James v. Australia and New Zealand Banking Group Ltd (1986) 64 A.L.R. 347, at 389. While not distinguishing between nonrelational undue influence and relational undue influence, it is clear that neither is concerned with "overborne wills", as such; although it appears that, unlike unconscionable dealings, both forms of undue influence are exclusively concerned with one's "freedom" as opposed to one's "deliberative" or "judgmental" capacities. Undue influence and unconscionable dealings, however, both relate to disadvantageous contracting positions, although one source of disadvantage arises solely on account of the "fiduciary expectation", and the other arises merely on account of the circumstantial social and transactional disabilities existing between non-intimates.

Cf., also, Deane J.'s articulation of the distinction in C.B.A. v. Amadio, id, 474:

The equitable principles relating to relief against unconscionable dealing and the principles relating to undue influence are closely related. The two doctrines are, however, distinct. Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party.... Unconscionable dealings looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity and good conscience that he should do so.

With respect, such an explanation highlights the doctrines' similarities rather than their differences. Arguably, both unconscionable dealings are concerned with the sufficiency of a party's contractual consent; and both are also concerned with the conduct of the stronger party: abuse of a dominant position, or unfair advantage-taking. Both the victim of undue influence and the victim of an unconscionable dealing can loosely be described as in a position of special disability. In the latter cases, this is because of some social or transactional disability, usually unconnected with the conduct of the other party, or a relationship shared with him. In the former case, the special disability (i.e., vulnerability to exploitation) arises precisely because of the parties' broader relationship and the reasonable expectations this produces in the weaker party. In the former case, the conduct of the stronger party is presumed, while in the latter it must be proved. The essential difference between the two doctrines resides in the precise source of the weaker party's vulnerability, and the legal techniques employed as a consequence.
vulnerable party, and, a fortiori, his duty not knowingly to exploit her. In relational undue influence cases, however, a party is vulnerable because of her special antecedent relational condition relative to the other party. This condition—special trust or reliance—moreover, ordains a duty of “loyalty” on the part of the superior party. Because the vulnerability is, or is presumed to be, so extreme in such cases, the law raises a presumption of wrongdoing from a mere dishonest or disloyal tendency, which is evidenced simply by a commercial transaction taking place between the parties to the relation, so that affirmative proof of “exploitation” (knowledge or reason-to-know of the exploitable circumstances and subsequent failure to assist prior to the transaction) is not required in the same way that it is in unconscionable dealings cases. The same public policy considerations do not attend relationships of “neighbourhood” as they do those of “loyalty”.305

In the final analysis, therefore, unconscionable dealings and relational undue influence are less distinct on account of the kind of disability tending to afflict the disadvantaged party in each case (all such disabilities will have the effect of removing her from equilibrium bargaining conditions, and the assumptions surrounding them), and more on account of their source. The different legal techniques (presumptions of wrongdoing, reversal of proof, etc.) and policies applicable to each equitable doctrine further attest to this definitional distinction between the two classes of case.

305 See Chapter Four, Section 3.2.2.1. This is why a case like Louth v. Diprose (1992) 110 A.L.R. 1. (cf. also, Diprose v. Louth (No. 1) (1990) 54 S.A.S.R. 438; Diprose v. Louth (No. 2) (1990) 54 S.A.S.R. 450) should clearly be founded as an action in unconscionable dealings; and resort to the language of undue influence, while linguistically appealing to “pressure” brought to bear in the case—an intelligent solicitor’s donative motivations being manipulated, inter alia, by an ex-lover’s threats of suicide—can only serve to create and perpetuate legal confusion, and risks a none-too-satisfactory merger of doctrine. This would be the writer’s major criticism against National Westminster Bank plc. v. Morgan [1985] A.C. 686 and Bank of Credit and Commerce International S.A. v. Aboody [1989] 2 W.L.R. 759.
Chapter Seven

ASYMMETRIC INFORMATION I: Misleading or Deceptive Conduct

Chapter Contents

1. GENERAL INTRODUCTION ................................................................. 522

2. AN INTRODUCTION TO THE BASIC ISSUES ARISING FROM "MISTAKE" AND "IGNORANCE" IN CONTRACT FORMATION ........................................... 531

3. CREATING OR EXACERBATING INFORMATIONAL ASYMMETRIES:
   MISLEADING OR DECEPTIVE CONDUCT IN CONTRACT FORMATION .......... 543
   3.1. The Forms of "Deception" to be Considered .................................. 551
       3.1.1. "Fraudulent" and "Non-Fraudulent"
       Misrepresentation ........................................................................ 556
       3.1.2. "Negligent" Misrepresentation: An Excursus ......................... 565
               3.1.2.1. Relationships of actual reliance ............................... 571
               3.1.2.2. Relationships of "assumed responsibility" ............. 574
       3.2. The Question of "Justifiable" Reliance .................................... 578

* * * * *
Any attempt to crystallize the law relating to mistake in assumptions in bargain transactions must perforce be made with diffidence, if it is to be justified at all. It must be recognized that all legal principles rest ultimately on policy, not logic.... A good rule must articulate the underlying policies clearly enough so that in close cases the court's attention will be directed to these policies.... The best approach is not to explore what the words in the rule mean, but rather what policies the rule is supposed to advance.  

Non consentit qui errat.  

[Knowledge ... is power....

1. General Introduction

All human action is predicated upon factual assumptions rational actors make about the world in which they live and interact. Contracting parties are no exception to this observation. Before entering into a contract, both parties ordinarily evaluate the general wisdom of the transaction—the proposed exchange of their respective performances—on the basis of a variety of assumptions, beliefs or thoughts with respect to perceived existing states of affairs. Sometimes these assumptions, beliefs or thoughts correspond accurately with the way things actually are in the world and sometimes they do not. It is always possible that either one, or both, contracting parties' decision to enter into their contract, or to assent to various terms contained therein, was influenced by "mistake", or perhaps sheer "ignorance"; that the factual assumptions about matters vital to their

---

1 Rabin, E., "A Proposed Black-Letter Rule Concerning Mistaken Assumptions in Bargain Transactions" (1967) 45 Tex. L. Rev. 1273, 1300. For Rabin's competing "policies", see n. 47, infra. Rabin's contribution to the law of mistake in the United States context is obvious when one sees how influential his work has been in foreshadowing the legal solutions and criteria embodied in Chapter 6 of the American Law Institute's Restatement (Second) of Contracts (1981) ("Mistake").

2 "He who makes a mistake does not consent." Sometimes expressed in the longer version: non videntur qui errant consentire.

particular dealing were erroneous, or, in some cases, absent altogether. Such erroneous factual assumptions, moreover, may have arisen for a variety of reasons, and the kinds of errors contracting parties can make are innumerable.

Doubtless, error may occur in the course of any intellectual process; but here we are specifically concerned with error which occurs in the making of a jural act, such as a contract, or, more particularly, the formation of the consent requisite to a contract. We are concerned with the juristic effects of action that has been produced by a mistaken belief, or simple ignorance, occurring within the process of contractual bargaining and promising—the culminating legal effect upon the sequel contractual relations of persons so engaged by reason of a mistake made by one or by both of them.

Broadly speaking, then, this is a chapter about knowledge, ignorance and mistake. With respect to mistake, we will examine both the mistakes

---

4 The American Law Institute's Restatement (Second) of Contracts, § 151, defines mistake as 'a belief that is not in accord with the facts'. In the present context, a working law-and-economics definition of the concept of mistake is given by Cooter and Ulen, Law and Economics (1988), at 259, as 'a contract imperfection created by asymmetric information'.

5 For the purposes of the present discussion, it is intended that any reference to "factual assumption" should have the same juridical connotation in the law relating to "misrepresentation" as it has in the law relating to "mistake" and to "nondisclosure". This is to say, the expression relates to 'any event or thing, present or past; and the present or past qualities, attributes, state, condition, and incidents, of any such event or thing': Cf. Spencer Bower, Turner & Sutton, The Law Relating to Actionable Non-Disclosure (2nd ed., 1990), 27.

6 For example, the co-contracting party's, or a third party's, acts or omissions may have caused or contributed to the first party's mistake, such as where he intentionally misrepresented an important fact about a basic assumption upon which the contract was made; or the first party simply may not have discovered, or could not have discovered, a particular fact relevant to her decision making.

7 For example, there may be, within the precontractual process, mistakes in the form of expression (oral or written); mistakes as to the identity of persons, or as to the value, extent or existence of the contractual subject-matter itself; mistakes in arithmetic, or as to any one of the myriad factors on which a contractor's judgment is based.

8 It is not always clear why we isolate mistake from other contract problems. Indeed, many doctrines appear to apply to contractual mistake other than just the doctrine of "mistake": e.g., the rules relating to contract formation (offer and acceptance); fraud, misrepresentation, judicial interpretation of express and implied terms, and so forth. At best, the separate
one makes oneself, and the mistakes that are caused by another, in particular, the other contracting party or a third party through whom he claims, whether this be through misrepresentation, concealment, or simply improper or incomplete disclosure (where there is some duty to speak). The chapter, and the two to follow, are not intended to be general, systematic surveys of the law of mistake, as such, for there will be careful confinement of topics for discussion within each chapter. In a number of respects, however, the concept of mistake considered here will be significantly broader than the standard text-book treatment of that subject. For example, grouped under the broad rubric of "mistake" are those cases where error has been induced by the positive misleading or deceptive conduct of one of the contracting parties, as in the case of misrepresentation. What is more, while the concept of "mistake" in the standard textbooks and commentaries is usually taken to signify merely a positive, but erroneously held, belief about certain factual matters pertaining to a party's (or the parties') contractual decision-making, here it is given an even wider application: extending to cover bare ignorance of some matter or thing relevant to the instant transaction. In the writer's view, the product of "error", self-induced or otherwise, and of "ignorance" is the same: namely, an informational asymmetry arising between the parties to the pre contractual negotiations. This, in turn, gives to one contracting party an informational advantage, and places the other at an informational disadvantage relative to him, which may severely affect the latter's ability to make meaningful, categories aid exposition of the various specific criteria applying to each of the "discrete" areas of law.

9 The positions of third parties will not be given specific treatment here. Broadly, the fraud of a third party may bind one contracting party through the principles of knowledge (notice) and agency. Bona fide third parties for value, or those materially relying without notice, will generally be protected from the consequences of a transaction infected by someone else's fraud. Cf. Restatement (Second) of Contracts, § 164, Comment (c); Prosser. "Misrepresentation and Third Persons" (1966) 19 Vand. L. Rev. 231.

10 Although a misrepresentation which gives rise to some legal effect usually involves a mistake on the part of the person to whom it is made, the term "mistake, in law, is usually understood to mean some misapprehension or misconception which has not been induced by misrepresentation.

welfare-enhancing decisions within the consensus-building process.\textsuperscript{12} Worse, informational disadvantages, especially when serious, introduce the possibility of legally cognisable wrongdoing in the manner of the informationally superior party unfairly exploiting or manipulating those parties less enlightened than himself.

While the conception of mistake may in this chapter hold a wider meaning than that usually ascribed to it by law, the meaning of mistake in law is still significantly narrower than in common usage. In its popular sense, “mistake” often refers to \textit{any} regretted or untoward consequence of one’s acting in ignorance or as a result of some positive misconception. In the present context, however, mistake is more a “normative” conception and less an experiential or psychological one. To enter into a contract under an obvious factual misapprehension is not necessarily legally to be mistaken.\textsuperscript{13} The juristic effect of error-induced action varies with the \textit{character} of the thought the law finds to have produced the action.\textsuperscript{14} Standard doctrine asserts that certain kinds of mistakes, and not others, have the effect of relieving a party of the normal legal consequences of her actions. This rests on the implicitly normative view that some mistakes produce motives that are compatible with consensual, hence responsible, action and others do not. Essentially, therefore, the questions to be asked here are similar to those posited elsewhere in this thesis: namely, is the mistake of a kind that mitigates or nullifies a party’s apparent consent to a contract? Has it produced in an otherwise free and rational person an unacceptable or “responsibility-relieving” motivation for action? Duress, undue influence, fraud, unconscionable dealing, mistake and the like, all prevent the formation of a contract, in the strictly subjective sense, because their presence means that an outward agreement is really something other than the

\textsuperscript{12} However, this is not to say that the various factors and considerations attending each concept are the same. Accordingly, the law relating to “mistake” (misleading or deceptive conduct and unilateral mistake in equity) and to “ignorance” (nondisclosure) will be given separate treatment below.

\textsuperscript{13} Note that the converse must necessarily obtain. A person can legally be mistaken even when, at least in her own mind, she was not mistaken: see \textit{Thieme v. Worst}, 745 P.2d. 1076 (1987).

 voluntary or consensual act of the party seeking relief. As one author recently pointed out, however, the law in this area ‘has not yet come to distinguish between those errors which are just part and parcel of the ordinary bargaining process, and those which make it unfair for the other party to rely on the “agreed” terms of the contract’.15

The counteractant to mistake or ignorance is accurate or reliable information;16 and it simply is not possible to understate the value of such information to contracting parties,17 or to social relations generally.18 In this respect, reliable information has been described by one author as the ‘basic currency of bargaining’.19 It is a precondition to meaningful choice.20 In economic terms, information, or knowledge, functions as a commodity in the market,21 and, as such, it is a prerequisite to the rational and efficient


17 Assuming, of course, that the possessor of the relevant information generally has the ability to interpret it.

18 Information asymmetries can generate and reinforce systems of inequality. When knowledge is unequally distributed, other important resources in a social system may be unequally distributed as a consequence. Cf. Scheppelle, K. L., Legal Secrets: Equality and Efficiency in the Common Law (1988), 23: ‘The social distribution of knowledge permeates social relations from the most intimate to the most personal, and much of what we think of as social structure grows out of the patterns of hidden and revealed knowledge’.


20 Schwartz, for example, points out that consumers do not become confused or make dysfunctional decisions in informationally rich environments: “Unconscionability and Imperfect Information: A Research Agenda” [1991] 19 Can. B. L. J. 437.

21 Cf. Kronman, op. cit. Very little seems to be immune from commodification nowadays: see Raden, M., “Market-Inalienability” (1987) 100 Harv. L. R. 1849, arguing that the tendency to commodify all personal values, things or attributes reflects an inferior conception of personhood, inhibits human flourishing, and undermines personal identity by conceiving of personal attributes, relationships, and commitments as monetisable and alienable from the self.
exchange of other commodities. A failure in the information market feeds through to the product market and results in inefficiency. The general exchange of information in the activities of commerce is thus desirable and is actively to be encouraged. It assists bargaining parties to make prudent choices in their decision-making, to match their preferences, and to efficiently allocate their resources. Essentially, it gives content to the idea of choice in any transaction. The economic conception of the role and function of information within the market-place, however, has further implications that warrant consideration at this juncture.

The question of positive misleading or deceptive conduct aside for the moment, an economic model of perfect competition assumes full information is available to market participants, although in reality such a state of affairs will scarcely, if ever in some markets, obtain. It simply is not possible to have perfect information about all the facts relevant to one's decision-making all of the time. But even with this said, it should not be thought that one 'require[s] every last shred of information to make a sensible choice'. In addition to being a precondition of choice, knowledge is also itself an object of choice. All things being equal, individuals are generally free to decide upon how much information they wish to acquire before making a choice. Assuming such a choice to exist, law-and-economics scholars then expect that rational actors will invest in seeking and withholding information up to the point at which the marginal cost of


23 Cf. Schwartz, A., "Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis" (1978) 127 U. Penn. L. Rev. 630, 633; Wonnell, op. cit., 382: 'Apart from its distributional effects, trading without disclosure [—information—] is a source of stark inefficiencies'.

24 This topic is considered at length in Section 3.


26 Cf. id., 25.

27 This depends to a certain extent on what a party already knows, as well as upon one's own prediction about chances that more knowledge will improve the decision enough to be worth one's while.
acquiring or withholding that information equals the expected marginal return of their investment. Knowledge, too, like most other economic, public goods, is often subject to the principle of “declining marginal utility”; for the more knowledge one has about a particular decision, the less each additional increment is worth. In any event, the decision to make a deliberate search for information—to acquire it and to process it—necessarily represents a large component of transaction costs in bargaining, which may in turn inhibit the promotion or facilitation of economically efficient outcomes. Naturally, these costs rise roughly in proportion to the amount of relevant information needed to make a meaningful decision.

Economic efficiency, however, is not the only consideration at stake here. Parties with greater access to information or knowledge almost invariably are in a position to manipulate the resultant bargain, whether consciously or unconsciously, to their advantage: to consummate a deal that would not otherwise have been made but for the mistake or ignorance, or, if it would have been made in any event, then on terms less favourable to the informationally superior party. For the extent to which one party is

28 See Birmingham, R. L., “The Duty to Disclose and the Prisoner’s Dilemma: Laidlaw v. Organ” (1988) 29 Wm. & Mary L. Rev. 249, emphasising the efficiency of over-investment in the search for information. One of the bases upon which Birmingham criticises Kronman’s work in the area of information and nondisclosure is that the latter’s contribution is ‘insensitive to the peril of overinvestment’: id, 283. Cf. also, Smith and Smith, “Contract law, Mutual Mistake, and Incentives to Produce and Disclose Information” (1990) 19 Journal of Legal Studies 467.

29 As a ‘public’ good, information demonstrates the properties of ‘jointness of supply’ and ‘impossibility of exclusion’. This is to say, one person’s consumption of information does not use it up in the sense of making it unavailable to others, although it may render knowledge less valuable in certain commercial contexts. Additionally, once knowledge is public it is then very difficult for one person to prevent another’s use of it. Granting property rights in the use of information is one way out of the ‘public-goods dilemma’: cf. Scheppele, op. cit., 29.

30 Cf. Scheppele, op. cit., 26. Cf. also, Nicholas, op. cit., 185, who criticises Kronman’s theory (see Chapter Nine, Section 2.1.) for oversimplistically disregarding this aspect of commercial information.

31 Generally, see Coase, R., “The Problem of Social Cost” (1960) 3 Journal of Law and Economics 1. In economics, the risk of mistake in general represents a cost to the individual parties as well as to society as a whole, ‘since the occurrence of a mistake always (potentially) increases the resources which must be devoted to the process of allocating goods to their highest-valuing users’: cf. Kronman, op. cit., 2-3.

528
informed or knowledgeable while the other remains ignorant in a
transaction or dealing between them, or has the capacity to manipulate the
information actually received by that other in the dealing between them, the
first party is possessed of a potentially significant strategic advantage over the
other, especially in social interactions where, as will be the case in most
contractual negotiations, the interests of both participants are not entirely
convergent.\textsuperscript{32} The party without knowledge, or with unreliable knowledge,
thus becomes vulnerable to the decision of the other to help or to hurt,
especially where that other party knows, or has reason to know, the sort of
information the other party considers vital to her own decision-making and
knows when to suppress or manipulate it to gain an advantage.

Bacon was surely correct, then, when he postulated that knowledge is
power;\textsuperscript{33} for informational advantages enable some people to \textit{control} others.
And when compared to the typical \textit{modus operandi} of exercising control in
those cases informing the discussion in Chapters Five and Six—cases of
duress and undue influence—the instances to be considered in the present
context, especially those involving simple nondisclosure, demonstrate ‘a
powerful, invisible way of exercising control’.\textsuperscript{34} In her treatment of ‘legal
secrets’,\textsuperscript{35} Schepple brings home, in a particularly unmitigated fashion, the
general strategic nature of informational advantages:

\textsuperscript{32} Cf. Schepple, \textit{op. cit.}, 47: ‘If the parties’ interests are completely coincident, then strategic
secrecy has no value’.

\textsuperscript{33} A modern incarnation of the same themes is prevalent in Foucault’s writings. See Foucault,
M., \textit{The History of Sexuality} (1978); “Afterword: The Subject and Power”, in Dreyfus &
Rabinow (eds), \textit{Michel Foucault: Beyond Structuralism and Hermeneutics} (1982), 208 et seq.

\textsuperscript{34} Cf. Schepple, \textit{id.}, 304.

\textsuperscript{35} Schepple’s concept of secrecy is as follows:

A secret in a piece of information that is intentionally withheld by
one or more social actor(s) from one or more other social actor(s). (\textit{Op.
cit.}, 12.)

Schepple sees positive lying (misrepresentation, half-truths, and the like) merely as a
variation or a special application of this same theme:

[T]he purpose of not telling the truth is often the attempt to keep a
secret. The lie in these instances, then, is only a more complicated

529
[S]ecrets are ... used as tools of power, wrenching advantage from the unknowing actions of others.... So while secrets enable the social world to be partitioned and individualized, making the expression of individual autonomy in the construction of the social world possible, they also serve as staging grounds for the deployment of power, assaults on the very autonomy that they constitute.  

Information in the precontractual setting, then, is 'a crucial element of power', and as such, it is clearly a relative concept in bargaining. The one with the informational advantage, or at least the opportunity or ability to create one, is frequently possessed of a powerfully manipulative or exploitative capacity over the other party in contract formation. The one party's ability to profit from his superior information, moreover, is diminished or lost if the information must be shared. It is the strategic significance of asymmetric information in this context, however, that tends so systematically to be ignored by the law-and-economics scholars. This is, therefore, also a chapter about exploitation. And it is arguable, on the process-based theory of that concept advanced in Chapter Four, that that exploitation is at least morally, and potentially legally, wrongful, despite our appraisal of efficiency-related, outcome-based considerations.

---

form of secret, one involving not only the withholding of information but the substitution of some other information. In other words, a lie is often a secret with a story on top. Once one uncovers a lie, then, one must still uncover a secret before the hidden knowledge is revealed. (Id, p. 22)

36 Scheppelle, op. cit., 5.


38 In terms of transaction costs, for example, Wonnell has argued that 'it is necessary to distinguish between the costs of ignorance in an absolute sense and the costs of being more ignorant than one's trading partner. The former set of costs is not a disadvantage but an advantage of a nondisclosure regime. The second set of costs may be a disadvantage and should be explored": Wonnell, C. T., "The Structure of a General Theory of Nondisclosure" (1991) 41 Case Western Reserve L. Rev. 329, at 353.

39 Generally, see Chapter Nine.
2. AN INTRODUCTION TO THE BASIC ISSUES ARISING FROM "MISTAKE" AND "IGNORANCE" IN CONTRACT FORMATION

Mistake is so common in human affairs that one who wishes to discuss the subject must start by fixing some appropriate boundaries.\(^{40}\)

Errors are incident to human affairs; and there must somewhere rest a power to grant relief, or there is a great defect in the administration of justice.\(^{41}\)

Positive "misrepresentation" apart, the law has, for the greater part, been reluctant to grant to an informationally disadvantaged party relief from the untoward consequences of her ignorance-induced or error-induced action. As a general proposition, a party is entitled to his informational advantage and is under no duty to disclose his superior information, or to correct a known informational disability in the other party. The law's internalisation of the individualistic ethic, with its offshoots: caveat emptor and self-reliance,\(^{42}\) is starkly apparent in this context. An informationally disadvantaged party will ordinarily bear the brunt of her own lack of accurate or useful information in bargaining,\(^{43}\) and this reflects the basic proposition that each party is essentially responsible for acquiring and assessing his or her own information in contract formation: that each party essentially bears the risk equally of being mistaken or ignorant as to basic items of information pertaining to their contractual decision-making.

That this should be so is readily acknowledged. There is throughout the common-law world a pervasive underlying concern for the protection of

\(^{40}\) Palmer, G. E., Mistake and Unjust Enrichment (1962), 3.

\(^{41}\) Per Ellsworth J., dissenting, in Osborn v. Phelps, 19 Conn. 63, 77 (1948).

\(^{42}\) Cf. Hamilton, "The Ancient Maxim Caveat Emptor" (1931) 40 Yale L.J. 1133, 1186: jurisprudence has recognised a close relationship between imposing caveat emptor and the development of individualism in society.

expectation interests—still generally viewed as one of the most fundamental objects of contract law—not to be undermined by too expansive a role for the mistake defence.\textsuperscript{44} Thus, the starting premise of the law is that simple mistake or ignorance does not of itself justify intervention in contractual dealings. Should it be otherwise, the stability of apparent legal agreements would suffer greatly at the caprice of those who later assert that they were acting in error at the time of their entering into the transaction in question. But with the modern rise of ethical considerations of “fair dealing” in contracting, and with the corresponding decline of an unquestioning tolerance of almost unbridled self-interest, we are increasingly inclined to ask whether one party should not on occasion be prevented from creating informational asymmetries in bargaining or benefiting from another party’s mistake or ignorance. Australian law has, after all, accepted readily enough the proposition that it may be unconscionable for one party to accept the contractual assent of his co-contracting party when he knows, or has reason to know, that that party is labouring under some special disability which seriously impairs her ability to make a judgment as to her own best interests in a dealing between them;\textsuperscript{45} this even the more so when the party was himself responsible for that other’s disability. The general principles of “unconscionability” might also be more suggestive of a liberal, equitable approach to mistake in contract formation. This is a point to which the writer will return below.\textsuperscript{46}

In any event, a discernible tension is introduced into our law. Ignoring for the moment the issues arising from positive “misleading or deceptive conduct”, ultimately, the question whether courts should enforce

\textsuperscript{44} A court’s decision to grant relief for mistake, ignorance, and the like, essentially involves the making of a choice whereby the expectations of one party will be realised, potentially, at least, while the expectations of the other will be disappointed. Accordingly, persuasive reasons should exist for favouring the expectations of one party over those of the other, and these reasons ordinarily inhere in the fact that the former’s expectations are clearly more “reasonable” than the latter’s: cf. Palmer, G. E., \textit{The Law of Restitution} (1978), Vol. 3., para. 15.3. To make this determination, the law must adopt some standard against which to measure the reasonableness of the parties’ understandings.

\textsuperscript{45} See Chapter Four, Section 4.

\textsuperscript{46} In particular, see Chapter Eight, Section 3; Chapter Nine, pp. 689-90.
contracts entered into in ignorance of salient facts, or under a serious mistake as to terms or as to subject-matter, raises the fundamental problem of reconciling competing policies in the law of contract.\footnote{47} On the one hand, there is the essentially consequentialist policy of promoting stability and certainty in contracting, and, under the "objective theory" of contracts, the law attaches importance to the outward expression of the parties' intent.\footnote{48} The law does not wish to interfere unduly with the rights of parties to have their contractual rights respected. On the other hand, there is the essentially non-consequentialist or deontological belief that it is unfair to hold a party to a contract made without sufficient information, or entered into under a serious mistake, especially where the other party knowingly exploits, to his

\footnote{47} Calamari and Perillo, for example, \textit{Contracts} (3rd ed., 1987), at 379, remark:

Nowhere in the law of contracts do objective elements supporting the certainty and stability of transactions and subjective elements supporting fairness and the autonomy of the will clash as frequently as in the subject matter of mistake.

In his excellent article, Rabin, \textit{op. cit.,} 1300, identified the several competing policies of the law relating mistaken assumptions in bargain transactions as needing to

(1) discourage one who has made a bad bargain from fraudulently claiming that he acted under a mistake when in fact he did not;
(2) prevent one from profiting from a grossly disparate exchange resulting from the mistake of another;
(3) direct attention to the risks assumed by the contracting parties;
(4) prevent a promisee from enforcing a promise that he knows or should know was made because of a mistaken assumption;
(5) support finality in bargain transactions; and
(6) protect an innocent nonmistaken party from harm flowing from a mistaken party's attempt to rescind a contract honestly and fairly made.

\footnote{48} That is, a person who gives the appearance of assenting to a proposition normally will be held to the resulting bargain. Despite Holmes's assertion that this is because '[t]he law has nothing to do with the actual state of the parties' minds' (Holmes, O. W., \textit{The Common Law} (Mark DeWolfe Howe, ed., 1963), at 242), a better justification for the objective theory is pragmatism: that is, 'the ordinary functioning of society requires that one who makes an offer or a promise be liable to be taken at his word': Kull A., "Unilateral Mistake: The Baseball Card Case" (1992) 70 Wash. U. L. Q. 57, 67.
or a third party’s\textsuperscript{49} benefit, the strategic advantages arising therefrom.\textsuperscript{50} Whatever the case, it is clear that the law’s task must be to maintain a proper balance between these two desirable yet conflicting aims: the avoidance of harshness or unfairness arising out of mistake, and the general need for certainty and finality in commercial transactions.\textsuperscript{51} And while one ought not necessarily be permitted to prevail at the expense of the other, there will always be some need to tolerate human weaknesses in some measure to avoid jeopardising the security of transactions.\textsuperscript{52} This is broadly reflective of the utilitarian ethic which has informed and influenced the growth of commerce, and hence contract, throughout the common-law world.\textsuperscript{53}

\textsuperscript{49} Cf. Restatement (Second) of Torts, § 533, Comment (c): liability for misrepresentation inducing entry into contract with a third party.

\textsuperscript{50} For example, while conceding that \textit{caveat emptor} was ‘the general rule in contracts of sale and purchase’, Holland J., in Dormer v. Solo Investments Pty. Ltd (1974) 1 N.S.W.L.R. 428, at 432, also recognised the ‘doubtful moralistic foundations’ of the rule which gave to the vendor of land, ‘an unfair advantage over the buyer because of the seller’s private knowledge of something detrimental concerning the subject matter of the sale’.

\textsuperscript{51} Cf. Contract and Commercial Law Reform Committee (N.Z.), in its \textit{Report on the Effect of Mistakes on Contracts} (1976), para. 5, who pointed out that the object of the law in the present context is to strike a balance between two considerations:

1) ‘the unfairness of holding a party to an inappropriate transaction which was not fully assented to’; and,

2) ‘protecting other parties to the contract (and those claiming under them) who have a legitimate interest in seeing the contract performed’.

\textsuperscript{52} Kull, for example, remarks that ‘[t]raditional mistake doctrine is thus a composite, in which rules necessary to ensure the stability of transactions qualify a fundamental preference that contractual liability be voluntarily assumed’: Kull, A., “Unilateral Mistake: The Baseball Card Case” (1992) 70 Wash. U. L. Q. 57, at 67. It is noteworthy, too, that s. 4(2) of the New Zealand \textit{Contractual Mistakes Act 1977} specifically provides that powers under that Act are not to be exercised in such a way as to prejudice the general security of contractual relations. The New Zealand legislation has been far from uncontroversial in its application. The literature on the Act is extensive; although for a recent survey of the case law, see McLauchlan, D. W., “The Demise of Conlon v. Ozolins: ‘Mistake in Interpretation’ or Another Case of Mistaken Interpretation?” (1991) 14 N.Z.U.L.R. 229.

\textsuperscript{53} Civil law systems, on the other hand, seem to have been less influenced by utilitarian philosophy, and hence appear more Kantian. Cf. Harris and Tallon (eds.), \textit{Contract Law Today: Anglo-French Comparisons} (1989), 358, 391.
Now, there is scope for a great variety of situations in this context according to whether the mistake under consideration is "bilateral", in the sense that it is in some way "mutual" or "common" to both contracting parties,\(^{54}\) or "unilateral", in the sense that only one contracting party enters into the contract in ignorance or under a mistake. Thus, there arise two different conditions governing the question, which, in the writer's view, are determined by considerations of a different character. First, where the mistake in question is one that is common to both parties, the task of the court is essentially to allocate the risk of loss between two innocent parties.\(^{55}\) Accordingly, the issues attending this class of case are, strictly speaking, purely distributive ones,\(^{56}\) with an emphasis, in the United States at least, on a system of "risk analysis": an enquiry into risks actually "assumed" or those judicially "allocated".\(^{57}\) From the vantage point of contract formation,

\(^{54}\) Often these terms are used interchangeably by the courts. Here, however, "mutual" and "common" mistake are considered to be distinct concepts. Mutual mistake is taken to refer to the situation where the parties are both mistaken with respect to the same matter, but they have made different mistakes, such as where the parties are at "cross purposes": the classic Raffles v. Wichelhaus (1864) 2 H. & C. 906, situation. Common mistake is taken to refer to the situation where both parties have made the same mistake about the same matter.

The instances of mutual mistake will not be systematically considered in this thesis. Where the case of mutual mistake is such that the objective approach provides no intelligible answer, as was the case in Raffles v. Wichelhaus, then it seems that no contract (agreement) ensues. But the justification for this result surely is not "mistake", but failure of correspondence between offer and acceptance. Where it is possible to resolve any ambiguity by using the objective test, so that one party is objectively "correct" in his or her interpretation of the contractual terms or subject-matter, then we are probably left with a pure (i.e., impalpable) unilateral mistake, in spite of which a valid contract will ordinarily ensue.

\(^{55}\) In other words, the concept of "risk" largely reflects the extent to which one party is obliged to bear the untoward consequences of her own ignorance- or error-induced actions, whereby the principal questions the court asks are: when should a party reasonably anticipate that she may be entering into a transaction under an operative mistake? Under the general principles of equity, should the law permit one party to benefit from another's mistake?

\(^{56}\) According to Finn, risk allocation leaves little room for the application of unconscionability principles. To that author, common mistake is not concerned with wrongdoing, but the nature of the contractual relationship and outcome is such that it requires the mistaken party should not be burdened by the particular shared mistake: Finn, "Equity and Contract", Chp. 4 in Finn, P. (ed), Essays on Contract (1987), 104, 148-53.

\(^{57}\) For a good discussion of common mistake (or sometimes, particularly in the U.S., "mutual" mistake) and allocation of risk, see Fuller, H., "Mistake and Error in the Law of Contracts"
therefore, any inequity here would seem to reside in the consequences of the resultant bargain, and absent, say, misrepresentation by one party, or else his knowledge of the other party's mistake, relief must logically be based upon the inequality of the resulting exchange and nothing else. If indeed these cases are at all concerned with culpable exploitative behaviour, it must surely reside in the later opportunistic insistence on the benefits of a contract subsequently discovered to have been consummated under bargaining conditions, the integrity of which were impaired by the existence of a common mistake. And if we were to consider the cases of common mistake as being concerned with some form of wrongdoing in the contractual process, the issue should on this analysis be one of fairness in the enforcement of bargain transactions, and hence outside the proper scope of this thesis. In any event, and on account of this distinction, little more will be said of common mistake in the pages that follow.

The second condition of the question, however, where the mistake is of a unilateral character, is attended by quite different considerations and consequences, ordinarily as the unmistaken party is or is not cognisant of the

(1984) 33 Emory L.J. 41, 58-74. The conception of "risk analysis" is also discussed in Chapter Nine, Section 3.1.

58 Cf. Cartwright, J., "Solle v. Butcher and The Doctrine of Mistake in Contract Formation" (1987) 103 L.Q.R. 594, at 621; Restatement (Second) of Contracts, § 152, Comment (a): 'Relief is only appropriate in situations where a mistake of both parties has such a material effect on the agreed exchange of performances as to upset the very basis for the contract'.

59 The doctrine of common mistake at common law, if indeed there ever was an independent one (cf. Slade, "The Myth of Mistake in the English Law of Contract" (1954) 70 L.Q.R. 385), would not grant relief for mistake (and when it did it was all-or-nothing) unless the mistake resulted in the contracting party receiving something essentially different from that for which she was bargaining. This difference is usually expressed in terms of a "total or practical total failure of consideration": see Savvasio v. McNamara (1956) 96 C.L.R. 186. In equity, it is also clear that relief for mistake would not have been available unless, inter alia, the mistake was one having "serious" consequences on the respective exchange of performances: see Solle v. Butcher [1950] 1 K.B. 695.

60 Of the two views of common mistake put forward, the writer prefers the former. Common mistake is more appropriately seen as an "accident", against which nobody is entirely sheltered; it is not concerned with the strategic use of informational advantages. Accordingly, the law should not be so concerned to treat it as an issue of "wrongdoing".

61 We shall, however, return to the concept of "risk allocation" below, Chapter Nine, Section 3.1.
other's mistake. Here, our focus is clearly on "wrongdoing", "conscience", or "advantage-taking" in the formation of a contract. In this context, information, or the basic lack of it, is of strategic significance in the processes of bargaining.\textsuperscript{62} Accordingly, much more will be said of the situation where, either naturally or through positive deception, one party only is mistaken or ignorant about a matter somehow fundamental to contracting, and the other exploits to his own benefit the known informational advantage arising therefrom. Moreover, the issues arising in the context of unilateral mistake appear to straddle what is often perceived to be a more pervasive problem in our law today: that of nondisclosure in contract formation generally, such that it is the resolution of the issues incidental to the latter that will ultimately inform and supply the solutions to many of the issues and uncertainties arising from the former.\textsuperscript{63} The general issue of nondisclosure, however, will be given separate consideration in Chapter Nine.

Now, if the starting proposition of the law is as it was described above—that the risk of ignorance or mistake, and the losses flowing therefrom, generally lie where they fall—nonetheless an informationally advantaged party may be disentitled from the benefit of his bargain if either the circumstances of the case, such as his position \textit{vis-à-vis} the other party, or his own "conduct",\textsuperscript{64} or both, are such as to justify a shift in the normal equal distribution of risks and losses against his own favour and in favour of the mistaken or ignorant party. While it is not possible to formulate any simple or precise rule that will predict with certainty when such a divestment of contractual rights might occur—such a determination, it seems, in any case being fact-specific—further scope exists for analysing mistake cases according

\textsuperscript{62} Cf. n. 36, \textit{infra}. In practical terms, a gross inequality of exchange may give reason for one party to know of the mistake of the other party, thus transforming what might otherwise have been a "common" mistake into one that is "unilateral" in character.

\textsuperscript{63} According to Kronman, \textit{op. cit.}, at 33, the unilateral mistake cases are indistinguishable, in principle, from other contract cases, which impose a duty to disclose. Kull, too, comments that when one party to a transaction is aware that the other is labouring under a serious mistake, the problem of unilateral mistake becomes indistinguishable from its converse, that of a contracting party's freedom to withhold information in the course of negotiations: Kull, A., "Unilateral Mistake: The Baseball Card Case" (1992) 70 Wash. U. L. Q. 57, at 59.

\textsuperscript{64} Which might consist of either an act or a failure to act.
to a variety of recurrently-cited factors and considerations. These include, for example, the importance of the fact about which one party is, mistaken or ignorant: that is, the “seriousness” or “fundamental” nature of the mistake, or its magnitude both in terms of the procedural bargaining disability it produces and/or the effect it has on the contractual outcome;\(^{65}\) when the mistake is discovered;\(^{66}\) the reason why one or both parties were ignorant or mistaken: that is, has one party caused the mistake or contributed to it?; the effect of granting or denying relief to one or both of the parties; whether or not the unmistaken party knew, or had reason to know, that the other party was mistaken but failed to disabuse that party of her error, or worse, actively set out to prevent discovery of the error; and whether or not either party expressly, impliedly, or imputedly assumed the risk of being mistaken or ignorant.

While there is today a general trend away the common law’s rather ‘drastic and inflexible’ remedial regime in the context of mistake,\(^{67}\) and its traditional practice of granting relief almost exclusively according to how a particular mistake was designated, or upon the application of some precise rule, such as that relating to the need to show a ‘total failure of consideration or what amounts practically to a total failure of consideration’,\(^{68}\) there has been a corresponding shift towards more flexible considerations of equity,

---

\(^{65}\) Cf. Dixon J. in Psaltis v. Schultz (1948) 76 C.L.R. 547, at 561:

> ... for no contract to come into existence through fundamental error, the mistake must be as to the identity of the other party—as opposed to his attributes; as to the substance of the subject matter—as opposed to its qualities; or as to the nature of the transaction—as opposed to its terms.

This corresponds broadly to the Roman conceptions of *error in persona, error in substantia*, and *error in negotio*. For a discussion of the “seriousness” requirement in equity, see Chapter Eight, Section 2.1.

\(^{66}\) Where the contract arising thereby is voidable, it may be too late to rescind if *bona fide* third parties have taken an interest for value, or, if for whatever reason, *restitutio in integrum* is no longer possible.

\(^{67}\) The “all-or-nothing” response typified the approach of the common law, which admitted only two, alternative remedial possibilities: the contract was “valid” or it was “void”.

based on the particular circumstances of each case.\textsuperscript{69} Thus, instead of relying on traditional categories in determining whether or not to grant relief in mistake cases, the courts and commentators are today resorting more to a general unconscionability logic in order to determine when such relief is appropriate and what form it should take.\textsuperscript{70} Precisely what

\textsuperscript{69} Hence, while the common law tended to reach all-or-nothing results in mistake cases, equity gave a much wider remedial choice, although an operative mistake did, and still does, not lead inexorably to a remedy. Specifically, equity offered the important possibility that the contract was voidable and hence subject to a rescissory remedy, on appropriate terms, if the court saw fit. See \textit{Solle v. Butcher} [1950] 1 K.B. 671; \textit{Grist v. Bailey} [1967] Ch. 532; \textit{Lukacs v. Wood} (1978) 19 S.A.S.R. 520. To many, these equitable developments present the most fertile ground for future growth of the mistake rules. In this regard, it is perhaps noteworthy that in the recent English case of \textit{Associated Japanese Bank (International) Ltd v. Credit du Nord S.A.} [1989] 1 W.L.R. 255, Steyn J. said of the approach to be taken to mistake (at 267-B):

\begin{quote}
\[A\] narrow doctrine of common mistake (as enunciated in \textit{Bell v. Lever Bros. Ltd} [1932] A.C. 161), supplemented by the more flexible doctrine of mistake in equity (as developed in \textit{Solle v. Butcher} [1950] 1 K.B. 671), seems to me to be an entirely satisfactory state of the law. And there ought to be no reason to struggle to avoid its application by artificial interpretations of \textit{Bell v. Lever Bros. Ltd}.
\end{quote}

It should also be borne in mind that there are now parallel statutory devices which may assist a mistaken or an ignorant party, notably under the \textit{Contracts Review Act} 1980 (N.S.W.) and s. 51AB of the \textit{Trade Practices Act} 1974 (Cth), and its state Fair Trading Act equivalents.

\textsuperscript{70} For example, Starke, Seddon and Ellinghaus (eds), \textit{Cheshire & Fifoot's Law of Contract} (6th Australian ed., 1992), at 289, draw the following conclusion in their treatment of the law of contractual mistake:

\begin{quote}
Indeed the doctrine of mistake could be reduced to one simple principle: a court will set aside or rectify a contract, so long as no innocent third party will thereby be affected, when it would be unconscionable for one party to assert his or her strict legal rights arising from the contract, having regard to a mistake which has been made either by both parties or by one party which was known to the other.
\end{quote}

That the authors describe unconscionability in this context as a '\textit{simple principle}', however, might lead the undiscerning reader into a false sense of security regarding the resolution of mistake cases. Recall Lord Radcliffe's admonition in \textit{Bridge v. Campbell Discount Co. Ltd} [1962] AC 600, at 626, that "\textit{...unconscionable} must not be taken to be a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other ...'.

In any event, it would seem that the use of the term "unconscionable" is not entirely new, at least in the context of unilateral mistake. Fuller, for example, \textit{op. cit.}, 76, traces its usage back to Redfield's 1886 edition (the ninth) of Story's \textit{Equity Jurisprudence}, Vol. 1.
“unconscionability” means in this context, however, is reserved for consideration below.71

In determining when a mistaken or ignorant motivation is such in law as to vitiate one’s apparent consent to contract, it seems that the most significant limiting factor to relief is that mistake or ignorance, whatever its source or cause, must be justifiable. It is here, then, that we find a parallel relief-qualifying conception to that of the “choice prong” of the two-pronged theory of duress, adumbrated in Chapter Five.72 In addition to the relatively unproblematic empirical connection that must be established between the mistake or the ignorance and a complainant’s decision to enter into the contract, and on the terms she did, there is also an implicitly normative connection, deriving, essentially, from the obligation to take care of—to inform—oneself in bargaining. The law has, in general,73 been cautious in eliminating such an obligation in the typical precontractual setting, as demonstrated through its reluctance to burden one party with the general responsibility of protecting another from her own indolence and folly.74

Though the Court will relieve against mistake, it will not assist a man whose condition is attributable only to that want of due diligence which may be fairly expected from a reasonable person.75

It is here, in particular, that we find that the conception of mistake in law does not apply in the everyday purely subjective sense. Responsibility-relieving mistake is plainly not a matter of one party blindly and unquestioningly relying upon the other party to furnish her with all the

71 In particular, see Chapters Eight and Nine.

72 In particular, see Section 4.2.2. of Chapter Five.

73 As shall be seen below, however, s. 52 of the Trade Practices Act 1974 (Cth), and the State Fair Trading Act equivalents, have the potential, especially in the private commercial sector, to alter significantly the traditional balance of responsibilities in bargaining in favour of the applicant.

74 The common law, to recall the words of Chancellor Kent, ‘does not go to the romantic length of giving indemnity against the consequences of indolence and folly’: Kent, J., Commentaries of American Law, Vol. 2. (1st ed., 1827), 380.

75 McDonnell and Monroe (eds), Kerr on Fraud and Mistake (7th ed., 1952), 149-50.
information relevant to her decision-making. Nor is it merely a matter of the one party proceeding to contract upon the assumptions she holds because otherwise to inform herself, or to ascertain the true position, would be inconvenient, difficult to check, contrary to her interests, unacceptable, or outside of her own perceived sphere of special skill. Even where the one party’s mistaken assumptions were induced by the misleading or deceptive conduct of another, there may not, as a matter of course, be sufficient legal foundation for attributing to that latter’s conduct some measure of responsibility for the untoward consequences of his error-inducing actions. The victim of such conduct may herself have been imprudent or indolent in relying on the statements made; she may have been making a calculated business risk; or her reliance may itself have been beyond the reasonable contemplation of the representor. Under the functionalist model of bargaining norms expounded in Chapter Three, the “rules” of the bargaining game to a significant measure tolerate mistakes in assumptions informing contractual decision-making. Presumably, this toleration is in the name of expected and required “individual responsibility” under the first, deontological, limb of functionalism, as well as in the name of fostering the maintenance of bargain transactions under the second, teleological, limb of the same.  

The above ideas have tended not to be articulated in and by our law in any systematic or explicit fashion. This aspect of the law of mistake, and related doctrines, seems inextricably bound up in such parallel conceptions and language as: “reasonable, or justifiable, reliance”; “duty to investigate”; “duty to read”; “materiality”; “risk analysis, assumption or allocation”; “contributory negligence”; “fault”; and so forth. Although these expressions, and their relationship to each other, will be considered in greater detail in their proper context below, the message implicit in all of them seems to embrace an issue of social policy that runs throughout this entire thesis: namely, what is the appropriate balance to be struck in our law between one’s concern for oneself and one’s responsibility to or for others? This in turn embraces the more specific issues at stake here: where does—or where should—responsibility lie in bargaining?; what responsibility should a

76 See Chapter Three, p. 193.
disadvantaged party bear (or exercise) for satisfying her own informational needs in contracting? Most important, perhaps, is that the purpose of our addressing such issues here is to ensure that the focus in the resolution of mistake or nondisclosure cases—or, for that matter, of any case in which “fair dealing” is in issue—remains directed toward both contracting party’s conduct in consummating a bargain. A proper analytical balance is to be struck between the conduct of the informationally advantaged and the plight of the informationally disadvantaged.

In summary, in this chapter, and the two to follow, the writer is ultimately concerned with reconciling the tensions existing within and between two sets of dichotomies. In the first case, there is the balance which needs to be struck between the various consequentialist and non-consequentialist considerations at stake: essentially, in this context, between the distinctively teleological concerns of certainty and economic efficiency on the one hand, and the deontological concerns of respect for autonomy and fairness on the other. In the latter case, there is the balance which needs to be struck between the essentially non-consequentialist, “fairness”-inspired values of concern for one’s self and of respect or responsibility to or for others. The aim of the law throughout, then, must be to attain some measure of balance by which a moderation of these respective objectives, interests and values might be achieved. The various considerations arising from this aim will be discussed, first, in relation to the situation where one party is responsible for—has created or contributed positively to—the informational disadvantage of the other party. This essentially involves a consideration of those cases of positive “misleading” or “deceptive” conduct (Section 3). Second, our focus will then shift to consider the situation where one contracting party exploits a known pre-existing informational disability in the other party, that is, being one for which the exploiting party was not essentially responsible. Specifically, this is intended to cover the not necessarily discrete situations of unilateral mistake in equity (Chapter Eight) and nondisclosure in contract formation generally (Chapter Nine).
3. **Creating or Exacerbating Informational Asymmetries: Misleading or Deceptive Conduct**

**In Contract Formation**

Truth is the most valuable thing we have. Let us economize it.\(^7^9\)

\[\text{The law is not founded on a simple rigorous moralism which says that lying is simply and categorically wrong, and there is an end to it. The law rather looks on deceit as a wrongful means to certain ends... The ends are... normally economic gains aimed at by the wrongdoer... The gist of... fraud... seems to rest upon the wrongdoer's use of false representations against a trusting victim with a view to obtaining some valuable advantage from the victim, transferred by the latter in reliance on the truth of the representations made to him. The [wrongful] character of the deceits and frauds is predicated on their being, on the one hand, ways of doing pecuniary injury to the victim by wrongful means and, on}\]

\(^7^7\) It should be obvious that the coinage “misleading or deceptive conduct” is borrowed from s. 52 of the *Trade Practices Act* 1974 (Cth), which reads, unqualifiedly:

A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

The section is designed to have a ‘broad reach’. Within its sphere of application, it is understood not to purport to create liability at all, but rather, to establish a norm of conduct—a standard—failure to observe or to comply with which having consequences under other sections of the Act: notably, ss. 79 (penalties), 80 (injunctions), 80A (orders for corrective advertising), 82 (civil damages), 87 (other discretionary orders). Cf. *Henjo Investments Pty. Ltd v. Collins Marrickville Pty. Ltd* (1988) 79 A.L.R. 83; *Brown v. Jam Factory Pty. Ltd* (1980) 35 A.L.R. 79.

The reference to “conduct” in the provision, moreover, makes it clear that s. 52 is not necessarily confined to practices that are of a “representational” character. Generally, see *Cheshire & Fifoot's Law of Contract* (6th Aust. ed., 1992), para. 7108.

\(^7^8\) Here we will be concerned, specifically, with those representations which induce a contractual transaction, and not those which create or confirm more general assumptions, the latter being a feature enshrined in both the common law’s and equity’s estoppel by representation. Generally, see Spencer Bower and Turner, *Estoppel by Representation* (3rd ed., 1977). The former may render reliance-inducing representation actionable directly, whereas the latter merely prevents the representor’s subsequent falsification of the representations made. Cf. also, Finn, “Equity and Contract”, *op. cit.*, 114 et seq.

\(^7^9\) Mark Twain, as quoted by Peters, “The Use of Lies in Negotiation” (1987) 48 Ohio St. L.J. 1, n.1.

543
The tension that bargaining naturally engenders between parties, who are almost invariably antagonists, would suggest that the nature of the process itself provides many opportunities for participants to depart from aspirational standards of honesty or truthfulness in dealing. Indeed, in every negotiation, each party has incentives to deceive. Because every negotiation has zero-sum elements, each party, in seeking to achieve a desired contractual outcome, may be strongly tempted to misstate his or her actual preferences, or a fact about the world. Considering the value of


81 Truthfulness suggests that any information conveyed is authentic or reliable. The truth of a statement usually depends on the relationship between its conventional or stipulative (see note) meaning and the real world. Cf. Fried, C., Right and Wrong (1978), 62: 'A statement is true when the world is the way the statement says it is'. But cf. Peters, op. cit., 13-20.

Note: Inevitably, the meaning of language is not inherent but is only in the minds of the members of a relevant community. One member of that community can ascertain the meanings of another member's language only by reference to some external standard. Cf. MacCormick, op. cit., 8: 'Provided there are linguistic conventions under which words and other symbols have meaning, what we do with them depends on the intentions we have and reveal in using these words or symbols communicatively'. Cf. also, Strawson, P. F., "Intention and Convention in Speech Acts" (1964) 73 Philosophical Review 439.

For the purposes of imposing civil liability, the time for testing falsity in fact is not at the time when the statement is made but when the representee alters her position on the faith of the representation: Briess v. Woolley (1954) A.C. 333. This would allow for the possibility of a false statement being "cured" before the time it induced entry into the contract, or otherwise incurred detriment upon the representee: Ship v. Crosskill (1870) L.R. 10 Eq. 73; Johnson v. Seymour, 44 N.W. 344 (1890); cf. Restatement (Second) of Contracts, § 165. The degree of falsity required for a representation to be 'false' can be contrasted with the position regarding warranties. In With v. O'Flanagan (1936) Ch. 575, Lord Wright M.R. commented (at 581) that a mere representation is 'not like a warranty; it is not necessary [that] it should be strictly construed or strictly complied with; it is enough if it is substantially true; it is enough if it is substantially complied with'. Cf. also, Lamb v. Johnson (1914) 15 S.R. (N.S.W.) 65, 70 per Pring J.

82 Cf. Wetlauffer, G., "The Ethics of Lying in Negotiations" (1990) 75 Iowa L. Rev. 1219, 1226-27: 'What these [i.e., distributive or strategic] lies all have in common is that, if they are successful, the liar becomes richer in the degree to which the victim becomes poorer'.

83 Fisher and Ury, for example, comment that the most common form of 'dirty trick' in bargaining is misrepresentation about facts, authority, or intentions: Getting to YES: Negotiating Agreement without Giving in (1981), at 137.
information in achieving that result, the standards of honesty in bargaining may be diluted accordingly.

The necessity for some minimal level of honesty in the context of bargaining, as for its vitality in human relationships and dealings generally, is obvious, and for at least two reasons. First, but subject to some necessary qualification, the assumption of honesty in dealing generally underlies the parties' reasonable expectations of and about the process itself. For negotiations to work and to be successful, minimal levels of interpersonal trust must exist or be established between the parties. Presumably, negotiation could not, and would not, have survived as a consensus-building process if there was a generally held belief that it does not usually result in an agreement that will be carried out according to its terms, or, at least, according to the material assumptions which informed or induced them. Truth-telling, therefore, is important in negotiations because it encourages trust between the parties and thus facilitates agreement.

---

84 If nobody could be believed, the trust essential to the accomplishment of all tasks would be undermined, making human relations impossibly cumbersome. This is consistent with the Kantian view of lying: that untruths undermine the trust essential to the cooperation and coordination of society. Generally, see Kant, I., "On a Supposed Right to Tell Lies from Benevolent Motives", in Critique of Practical Reason and Other Works (Abbot, trans., 1927), 361. Kant's view would apply to bargaining because the establishment of trust is often one of the goals in negotiation.

While it may be true that it is difficult to see how human institutions could survive without truthfulness being a foundation for all relations among human beings (cf. Bok, S., Lying: Moral Choice in Public and Private Life (1978), 18-9), it is to be borne in mind (from Chapter Three) that the typical bargaining context is, in many respects, significantly different from ordinary human relations.


86 See Section 3.2.

87 Indeed, it would seem that trust is a condition of lying, and of communication and credibility generally. Cf. MacCormick, op. cit., 10-11:

... A person's readiness to believe another depends upon his opinion as to the relationship in which he stands with that other. He must regard their friendship as friendly rather than hostile, and as implying some degree of mutual trust and confidence. The liar, to be successful as a deceiver, must therefore act in such a way as to generate or sustain his victim's belief that there is a relationship of real trust

545
The second reason for our acknowledging and respecting minimal levels of honesty in bargaining, as we have seen, is that the possession of accurate or reliable information is generally a matter crucial to both parties. Each participant to the process needs information that may be held by only one of them. Since markets depend for their efficient functioning on effective communication between the parties, truth-telling in bargaining facilitates the free flow of information which markets require for this end. Any conduct which violates this norm risks blocking communication, and is thereby incompatible with the broader objectives of bargaining.\(^{88}\) The conveyance of inaccurate or unreliable information, especially as to the subject of the parties’ interests, almost invariably will result in a misallocation of resources in favour of the conveyer.\(^{89}\)

Accordingly, honesty in bargaining is a norm that can be justified from either a non-consequentialist or a consequentialist perspective, or both. From a non-consequentialist perspective, honesty is perceived to be ‘part of the respect for others that ethical standards are meant to encourage’.\(^{90}\) Falsifying the truth in order to induce another person to act in an intended

---

between them. Again, of course, the same goes for someone who hopes to pass true information or advice to another.

This MacCormick calls the ‘trust condition’ of lying (\textit{id}, 11). It is noteworthy that this view of the preconditions for deception corresponds with MacCormick’s conception of the ‘neighbourly relationship’ (\textit{id}, 8):

Telling lies, the instance of deceit on which I shall concentrate in this talk, is one special case of deceit. It has this in common with other cases of wrongful deceit. Successfully lying always presupposes some “neighbourly” relationship (in the lawyer’s sense) between the liar and the person deceived. To understand the abuse of the relationship involved, we need to examine the ingredients of a successful lie.

\(^{88}\) Cf. \textit{Restatement (Second) of Torts}, § 552, Comment (a): ‘[T]he law promotes the important social policy of encouraging the flow of commercial information upon which the economy rests.... [N]o interest of society is served by promoting the flow of information not genuinely believed by its maker to be true’.


\(^{90}\) Norton, \textit{op. cit.}, 507.
way is to use that other person instrumentally. Such behaviour involves a breach of trust, or a violation of a 'neighbourly relationship'; it creates, or contributes to creating, exploitable circumstances, thereby violating the first injunction of one's "duty to protect the vulnerable"; it destroys or disturbs the integrity of the bargaining process, that is, the balance of the negotiations; it produces an improper motive for human action; it denies to the victim of such behaviour a "fair" opportunity truly to participate in the bargaining process in question. There is, therefore, potentially much to complain about of misleading or deceptive conduct from the point of view of contractual "fairness". In consequentialist terms, honesty promotes the purposes of

91 Which would be to infringe orthodox Kantian conceptions of fairness.

92 Cf. MacCormick, N., "What Is Wrong with Deceit?" (1982) 10 Sydney L. Rev. 5, 7, 15: '... one cannot lie without first establishing some trust and then consciously betraying it'. Cf. also, Kant, "On a Supposed Right to Tell Lies from Benevolent Motives", op. cit.; Chisholm and Freehan, op. cit., 153: 'It is assumed that, if a person L asserts a proposition p to another person D, then D has the right to expect that L himself believes p. And it is assumed that L knows, or at least that he ought to know, that, if he asserts p to D, while believing himself that p is not true, then he violates this right of D's. Lying ... is essentially a breach of faith'.

93 Cf. MacCormick, id, 8.

94 The two injunctions of the duty to protect protect the vulnerable were quoted from Goodin in Chapter Two, Section 4.2. The first injunction read:

*Preventing exploitable vulnerabilities:* No one should be forced into a vulnerable or dependent position, insofar as this can be avoided. If people are placed in such a position (either through personal choice or natural or social necessity), vulnerabilities/dependencies should be reciprocal and, ideally, symmetrical among all those who are involved. In no case should they be so severe and asymmetrical that one party has exclusive, discretionary control over resources that the other needs to protect his vital interests.


95 It is noteworthy that what vitiates the one party's consent is the error resulting from the fraud and not the fraud itself. The latter is, strictly speaking, exterior to the will of the consenting party, while the error produced is located precisely in that party's will.

96 Others have raised slightly different charges against deceptive practices. Some of these, for example, reside in the conventions of communication or "language", which itself can be regarded as an institution based on the convention of truth-telling. David Lewis, for example, writes that, "a language L is used by a population P if and only if there prevails in P a convention of truthfulness and trust in L, sustained by an interests in communication": "Languages and Language", in Keith Gunderson (ed), *Minnesota Studies in the Philosophy of*
bargaining, and hence of contract law, by building trusting relationships, by making the consent brought to a transaction more genuine (i.e., better-informed), and by making the process of exchange less costly and more certain.

The general vagueness of such concepts as "truthfulness" or "honesty", however, tends to give rise to some unique ethical and legal questions in the bargaining context. Generally speaking, in most precontractual settings, absolute candour is neither reasonably expected, nor required. The law does not, nor should it ever be likely to wish to, prohibit or condemn all forms of misleading or deceptive conduct in bargaining. In economic (consequentialist) terms, for example, requiring a representor to ensure the absolute, unambiguous correctness of his conduct may lead to inefficiencies, especially where the marginal costs associated with the acquisition of information outweigh the marginal benefits—the improved level of accuracy in making statements—flowing therefrom.\(^97\) A blanket imposition of strict liability in respect of precontractual assertions might have a representor expending more resources in acquiring or verifying information than is optimal.\(^98\) In non-consequentialist or deontological terms, a frequent assumption made about bargaining is that engaging in tactical practices, such as misrepresentation, is all very much part of the negotiating "game"\(^99\)—that pressing for advantage is the point of the process.

---

\(^97\) See Darby & Karni, "Free Competition and the Optimum Amount of Fraud" (1973) 16 Journal of Law and Economics 67, at 82-3: 'A universal adherence to honesty involves a clear social gain while an increase in competency yields gains only to the extent that the gains are greater than the increase in resource costs.\(^\text{rel}\); Beales, et al., “The Efficient Regulation of Consumer Informations” (1981) 24 Journal of Law and Economics 491, at 516.

\(^98\) The writer is assuming here that the incentives for the party to speak in the precontractual context are greater than those to remain silent, which will usually be the case in competitive markets where supply outweighs the demand for the subject-matter in question.

\(^99\) Raiffa, for example, describes the notion of "puffery" precisely in these terms:
Some measure of advantage-taking is thus reasonably to be expected in bargaining; although many ethical and legal issues proceed from this empirical assumption. While bargaining is clearly a process where both honesty and deception have standing, it is where deception is to be tolerated that ethical and legal limits are tested. Advantage-taking in bargaining must know limits; and what, in this context, are the parameters of the duty not to deceive or mislead?

While many general moral and legal norms obviously apply to contracting parties, at the same time normative values such as honesty or truthfulness must be tailored to suit particular bargaining scenarios. Conforming to an acceptable standard of truthfulness in bargaining does not necessarily require a party to abandon the normal assumptions of the process. The concomitant of this, in practical terms, is that it is not possible here to apply ordinary moral or ethical notions of truthfulness in any systematic fashion. Standard doctrine in this area, therefore, has tended to protect truth only against "explicit attack"; such that one writer has remarked that while parties are forbidden to "lie" in bargaining, they are generally permitted—if not encouraged by virtue of the process itself—to deceive or to mislead in other ways. As was observed in Chapter Three, the functionalist ethic of bargaining, applicable to parties operating in equilibrium bargaining conditions, expects and requires that parties will engage in tolerable strategic practices to reach agreement. Functionalism further expects and requires that parties operating under these conditions will exercise individual responsibility and insulate or protect themselves,

A common ploy is to exaggerate the importance of what one is giving up and to maximize the importance of what one gets in return. Such posturing is part of the game. In most cultures these self-serving negotiating stances are expected, as long as they are kept in decent bounds. Most people would not call this "lying," just as they would choose not to label as "lying" the exaggerations that are made in the adversarial confrontations of a courtroom. I call such exaggerations "strategic misrepresentations."


100 Generally, see Chapter Three.

101 Peters, *op. cit.*, 2.
through the use of counter-technique or means (asking further questions, carrying out one’s own investigations, etc.), from the like practices of others.

The law explains away, therefore, what it is prepared to accept, or at least tolerate. The intentional misstatement of the price at which one is prepared to buy or to sell—a misrepresentation of one’s own “settlement point”—becomes merely a “bluff”; the used-car salesman commits no wrong when he says the car (lemon) he is selling is a “good little bus” and that a prospective buyer would be lucky to buy it at the asking price, because he is merely “puffing”; other acceptable but false assertions are transformed into pure statements of “opinion”, or of “law”, or of “intention”. In a bargaining process where each party is expected in some measure to be the guardian of his or her own interests, one party cannot, as a matter of course, use her own ignorance or indolence to hold the other responsible for the accuracy of his assertions. Accordingly, as shall be seen below, a thematic limiting factor to liability for inaccurate assertions in bargaining is that the recipient of such assertions must also act responsibly in ensuring that the information received is reliable. This is usually to say that any actual reliance placed upon precontractual communications must indeed be justifiable.

---


104 However, should he go further, and couple this expression with the words, “I would stake my life on it. You will have no trouble with it”, he may be taken to be giving an oral guarantee or assurance, in which case his statement may be elevated to contractual status: cf. Andrews v. Hopkinson [1957] 1 Q.B. 229.

105 On which, see below at n. 239.

106 On which, see below at n. 236.

107 On which, see below at n. 238.

108 That is to say, act to a level befitting the reasonable or justifiable expectations of the representor under the first limb of functionalism.

109 See Section 3.2., below.
3.1. The Forms of "Deception" to be Considered

We are concerned in this section with the circumstance where one contracting party, $P$, is induced into error through a misrepresentation or suppression of the truth by the other contracting party, $D$. Specifically, $D$ contributes causally toward $P$'s acquiring, continuing in, or non-discovery of, $P$'s false belief about a matter relevant to $P$'s contractual decision-making. This contribution can take the form of either omissions or commissions, although in this context, "contribution" tends to imply that which is at least, affirmatively or negatively, stated or communicated.\(^{110}\) As shown below, the law generally permits a party to protect an informational advantage only by simple silence, and any other, more active means of guarding the advantage is not usually allowed.\(^{111}\) Hence, should such a party go even slightly further, so as to drop 'a single word, or ... even a nod, or a wink, or a shake of the head, or a smile ...'\(^{112}\) intending to produce an erroneous belief in the other party, or to deter the representee from putting out her own


\(^{111}\) Cf. Ferguson-McKinney Dry Goods Co. v. Grear, 90 Pac. 770, at 771 (1907):

[One party to a trade or deal is under no legal obligation to communicate all the facts within his knowledge which may influence the deal. He may not deceive, mislead, or prevent investigation. He may, however, be silent and be safe.

\(^{112}\) These are the famous words of Lord Campbell L.C. in Walters v. Morgan (1861) 3 De F. & J. 718, at 724. They go to show that positive assertions, or statements, may be made expressly or they may be implied from a party's conduct. In whichever form of expression, or inaction, one seeks to find a statement, express or implied, the essence of that expression is the creation of a false belief. The representee generally must be led into error. There generally is no "statement" if she should merely fall into error unaided by the conduct of the other party.

Some of the more interesting illustrations of these principles from the case law include Brown v. Southport Motors Pty. Ltd (1982) 1 T.P.R. 441, at 443: display of used motor vehicle for sale with inaccurate odometer reading and no qualification thereto may amount to misrepresentation; cf. Hummingbird Motors Ltd v. Hobbs [1986] R.T.R. 276; Re Shackleton (1875) 10 Ch. App. 446, at 449 per Mellish L.J.: purchaser of goods at auction 'must be taken to have made an implied representation that he intended to pay for them'; Gill v. M'Dowell [1903] 2 I.R. 463: the sending of a hermaphrodite beast to a sale of bullocks and heifers held to be an implied statement that the animal was either a bullock or a heifer; Given v. C. V. Holland (Holdings) Pty. Ltd (1977) 15 A.L.R. 439.
investigations,\textsuperscript{113} the law is more readily prepared to take a completely different view of the matter.\textsuperscript{114} This causative contribution to another’s acquisition of a false belief becomes, potentially, at least, what we understand both in law and in morality to be “deception”: the morally or legally\textsuperscript{impermissible} production of a false belief. And given that it is naturally quite difficult to remain silent in bargaining,\textsuperscript{115} it is readily apparent that the acceptable limits of deceptive practices should be an issue crucial to contract law and to contracting parties.

Both linguistically and normatively, “deception” is a term apt to describe a broad spectrum of practices, ranging from the outright telling of lies at the one extreme, to the withholding of information that creates a misleading impression in a co-contracting party at the other. Between these poles, however, there lie myriad other forms of deception: half truths, innocent misleading, bluffing, puffing, silence in the face of a “duty” to speak, and the like; and many legal issues proceed from this range. In identifying various deceptive practices, traditional contract doctrine has characteristically drawn two sets of distinctions: (1) (as mentioned above) between ‘simple reticence’, or mere silence, and positive precontractual assertions; and (2) where the latter is concerned, between “fraudulent” and “non-fraudulent” misrepresentations, a distinction to which the writer will

\textsuperscript{113} For example, the communicated message may convey the impression that there is no need to search for the correct information because the effort would be wasted.

\textsuperscript{114} In her treatment of “legal secrets”, Scheppel, \textit{op. cit.} 159-60, says in this context:

\textit{[T]he} conduct of the knowledgeable actor must be beyond reproach. Secrets may only be kept in those circumstances where silence alone is the means of maintaining the secret. If the knowledgeable actor fortifies a secret with a lie, actively attempts to conceal the information from those who do not know, tells only part of the secret in such a way that the true information is disguised, or fails to inform the ignorant actor when previous statements become false, the law’s permission to keep a secret is revoked. All of these actions actively create or help to maintain false impressions; and this the law does not allow. It is quite difficult to keep a “pure” secret—that is, one into which one of these forbidden activities does not creep. But the law allows only pure secrets, guarded simply by silence.

\textsuperscript{115} Given that it will usually be necessary in competitive markets for one party to make affirmative assertions so as to set apart his own wares from those of a competitor.
return shortly.\footnote{ Cf. Restatement (Second) of Contracts, § 164, Comment (b).} The law relating to precontractual misrepresentation, however, remains quite complex, with such conduct also now being the subject of a variety of statutory regimes, most notably s. 52 of the Trade Practices Act 1974 (Cth), the full potential of which is yet fully to be realised and continues to develop.\footnote{ The most notable of these statutory frameworks is s. 52 of the Trade Practices Act 1974 (Cth) and its state (and New Zealand) Fair Trading Act equivalents. It is possible that these statutory developments are to be significant, for, unlike the common law, remedial action is not tied to formalistic restrictions informing a particular cause of action or remedy, but, rather, the legislative framework aims to establish a norm of conduct, failure to observe having consequences largely at the court’s discretion: see Brown v. Jam Factory Pty. Ltd (1980) 35 A.L.R. 79 (Fox J.). In this respect, Professor Finn has commented that s. 52 has, within the context of ‘trade or commerce’, the potential to ‘marginalise’ much of the significance of common-law doctrine in this area: Finn, P., “Statutes and the Common Law” (1992) 22 Western Australia Law Review 7, 25; and that in relation to positive precontractual assertions, it has an ‘almost Atlas-like capacity’: Finn, “Good Faith and Nondisclosure”, Chp. 7 in Finn (ed), Essays on Tort (1989), 180. The courts have made it clear that s. 52 is not required to be interpreted according to common law concepts and criteria. See the dictum of Gummow J. in Elna Australia Pty. Ltd v. International Computers (Australia) Pty. Ltd (1987) 75 A.L.R. 271, 280: ‘... common law analogies will not necessarily offer sufficient guidance, particularly where as is the case with the Trade Practices Act, the statute evinces an intention to supplement the common law or, further, to travel into new fields’. Cf. also, The Hon. Mr Justice R. S. French, “A Lawyer’s Guide to Misleading or Deceptive Conduct” (1989) 63 A.L.J. 250, at 259. In Parkdale Custombuilt Furniture Pty Ltd v. Puxu Pty Ltd (1982) 149 C.L.R. 191, Gibbs C.J. had this to say of s. 52 (at 197):

Like most general precepts framed in abstract terms the section affords little practical guidance to those who seek to arrange their activities so that they will not offend against its provisions

In relation to the equivalent New Zealand provision, s. 9 of the Fair Trading Act 1986, Casey J. observed that the simple language in the three lines of [s. 52] is clear and unambiguous and, at least for the resolution of straightforward cases, requires neither interpretation nor qualification beyond observing that the Act is intended to operate in a society which expects that in general, honest people may buy and sell what they please: Mills v. United Building Society [1988] 2 N.Z.L.R. 411, at 413 (C.A.). It is noteworthy, however, that the same case demonstrates that notwithstanding its obvious breadth of coverage, the New Zealand equivalent of s. 52 cannot be treated as a universal panacea whenever a contract does not turn out as was hoped or expected. In that case, the appellant purchaser is not excused from the obligation to read and understand the terms of a lease for himself. The appellant had formulated his own mistaken assumptions as to the value of the lease. Cf. also, Savill v. N.Z.I. Finance Ltd (1989) 2 N.Z.B.L.C. 103,771 (C.A.).}

Some states have enacted legislation dealing specifically with misrepresentation as a cause of action. See Misrepresentation Act 1971 (S.A.); Law Reform (Misrepresentation)
misrepresentation seemingly consists, at common law, of a tortuous imbroglio of equitable, tort, and contractual doctrines and remedies. The law in this area has tended to develop without any clear or coherent analysis, by either the courts or the legislatures, of the interrelation between the different causes of action, or between the different remedies available. Additionally, the close relationship between misrepresentation, promissory terms, and statements which form the basis of an estoppel against the party making them, has further tended to complicate analysis in this area.\textsuperscript{119}

\textit{Ordinance} 1977 (A.C.T.); \textit{Contractual Remedies Act} 1979 (N.Z.), esp. ss. 6 and 10; \textit{Misrepresentation Act} 1967 (U.K.), s. 2(1). While these pieces of legislation do not alter significantly the common-law ingredients for the misrepresentation action, they do enlarge greatly the remedial consequences of such conduct.

\textsuperscript{119} See Atiyah, “Misrepresentation, Warranty and Estoppel” (1971) 9 Atla. L. Rev. 347. The status of precontractual statements becomes crucial to determining the nature of the remedies open to an aggrieved party. If the statement is one that has become a term of the contract, then the remedies flowing from a breach of contract obtain. There will thus be an automatic right to expectation damages upon proof of breach (if causative loss is shown, which is not too remote), and the possibility for termination of the contract itself, depending on the type of term breached. If a misrepresentation is proved, and it is either fraudulent or negligent, then reliance damages may be obtainable under tort law. The contractual remedy of rescission will generally be available for all types of misrepresentation, although only in equity for innocent misrepresentation, subject to the various bars to that remedy. Many statutory glosses now exist which tend to enlarge the remedies available at common law: notably, ss. 82 (damages) and 87 (other orders) of the \textit{Trade Practices Act} 1974 (Cth). Under the New Zealand \textit{Contractual Remedies Act} 1979, s. 6, expectation damages are the standard measure of compensation in respect of misrepresentation, irrespective of the nature of the misrepresentation.

The preponderance of British Commonwealth authorities today support concurrent liability in contract or tort, although there remains some debate as to whether an aggrieved party should be able to exploit the differences between the contract and tort rules (respective limitation periods, measure and types of damages available, etc.) where one may be necessary or more advantageous than the other. Generally, see:


Though they are interesting and pertinent, economy of space does not permit the systematic consideration of the various statutory frameworks applicable to precontractual misleading or deceptive conduct in the following text.\textsuperscript{120}


\textbf{Canada:} In \textit{J. Nunes Diamonds Ltd v. Dominion Electric Protection Co.} (1972) 26 D.L.R. (3d) 702, Pigeon J. for the Majority of the Supreme Court of Canada held that the tort action was 'inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied upon can properly be considered as "an independent tort" unconnected with the performance of that contract'. However, most cases have not extended this principle to pre-contractual misrepresentations inducing the making of the contract: see \textit{Walter Cabott, supra}; \textit{Sodd v. Tessis} (1977) 79 D.L.R. 3d. 632 (Ont CA); \textit{Nelson Lumber Co Ltd v. Koch} (1980) 111 D.L.R. (3d) 140, at 156-157 per Bayda JA (Sask. CA); contrast \textit{Andronyk v. Williams} (1985) 21 D.L.R. (4th) 557 (Man.CA); Ziegel, "Tortious Liability for Pre-contractual and Intra-contractual Misrepresentations" (1975-76) 1 C.B.L.J. 259; Morgan, "The Negligent Contract-Breaker" (1980) 58 Can. B. Rev. 299; and see generally the discussion of authorities contained in the judgment of the Supreme Court of Canada in \textit{Central Trust Co v. Refuse} (1986) 31 D.L.R. (4th) 481, at 489-99.

\textbf{New Zealand:} For some time the New Zealand courts failed to recognise concurrent liability. This was due to the 1972 Court of Appeal decision in \textit{McLaren Maycroft & Co v. Fletcher Development Co Ltd} [1973] 2 N.Z.L.R. 100, which followed the earlier English authorities on the point. In \textit{Rowe v. Turner Hopkins & Partners} [1982] 1 N.Z.L.R. 178, at 181, it was intimated that the point might require reconsideration. In \textit{Day v. Mead} [1987] 2 N.Z.L.R. 443 (CA), although the point did not require resolution, note was taken of the decisions of the Supreme Court of Canada and Ireland which recognised concurrent liability and the preponderance of Australian decisions to that effect, Cooke P. (at 450) doubting whether the New Zealand courts 'should swim against such a strong tide' (see also \textit{per} Somers J., at 457); Francis (1992) N.Z.L.J. 263. Cf., also, Cooke P. in \textit{Mowat v. Clark Boyce} [1992] 2 N.Z.L.R. 559, esp. at 565, suggesting that it is 'unrealistic and unhelpful to refrain from saying that the view ... in \textit{McLaren Maycroft & Co v. Fletcher Development Co Ltd} .... is inconsistent [with established authorities]'.

\textsuperscript{120} However, some comments and useful sources are to be found in the footnotes.
3.1.1. "Fraudulent" and "Non-Fraudulent" Misrepresentation

Traditionally, the common law has observed a strict bifurcation between "fraudulent" and "non-fraudulent" misrepresentations, a practice doubtlessly validated by that famous, and to some infamous, fraud decision, *Derry v. Peek*. "Fraudulent" misrepresentation, a concept generally synonymous with the philosophical conception of a "lie", has at its core the intent to deceive. Essentially, this narrowly involves the making of a statement with the intention of producing in its recipient a belief that the statement-maker himself knowingly or recklessly regards as false. Clearly then, fraudulent misrepresentation is the most extreme

---

121 At least in semantic terms, the distinction seems to have survived the passing of s. 52 of the *Trade Practices Act* 1974 (Cth). The fact that the conjunction "or" is used between "misleading" and "deceptive" in the provision appears to suggest that the concepts are, to some extent, independent of one another: cf. Lockhart J. in *Bridge Stockbrokers Ltd v. Bridge* (1985) 57 A.L.R. 401, at 415. Certainly, in *Henjo Investments Pty. Ltd v. Collins Marrickville Pty. Ltd* (1988) 79 A.L.R. 83, Lockhart J. (at 92) took "mislead" to mean "to lead astray in action or conduct; to lead into error; to cause to err". "Deceive" his Honour took to mean "to ensnare; to take unawares by craft or guile; to overcome, overreach, get the better of by trickery; to beguile or betray into mischief or sins; to mislead". In other words, "deceptive" in s. 52, like the common law notion of "deceit", implies an element of intention on the part of the respondent: cf. Gibbs C.J. in *Parkdale Custombuilt Furniture Pty. Ltd v. Puxu Pty. Ltd* (1982) 149 C.L.R. 191, 198; Goldring, J., "The Trade Practices Act 1974-1975 and the Law of Innocent Misrepresentation" (1976) 50 A.L.J. 126. Linguistic distinctions aside, in light of it being settled that no mental element (or fault) is required to contravene s. 52 (*Parkdale v. Puxu*, id, 197, per Gibbs C.J.; *Hornsby Building Information Centre Pty. Ltd v. Sydney Building Information Centre Ltd* (1978) 140 C.L.R. 216, at 228 per Stephen J.), it is perhaps surprising that the use of the word "deceptive" in the provision is not, at least in part, rendered redundant.

122 Finn, for example, calls it a 'decision of questionable purport': "Good Faith and Nondisclosure", op. cit., 150.

123 (1889) 14 App. Cas. 337.


125 And consistent with the law of duress and of undue influence, so long as there is an intent to deceive, motive is irrelevant: *Smith v. Chadwick* (1884) 9 App. Cas. 187, 201 (Lord Blackburn).

126 In this connection, Lord Herschell, in *Derry v. Peek* (1889) 14 App. Cas. 337, at 374, stated that a false representation must have been made:
form of deception. When coupled with reliance on the part of the
representee, which in this context will also by definition involve the
necessary ingredient of injury or damage, the elements of the tort of deceit
are made out, and damages will be awardable to the extent necessary to
compensate a plaintiff for any material losses suffered thereby. A contract
procured through fraudulent misrepresentations is also capable of being
rescinded *ab initio*, with a significant relaxation of the traditional restrictions
upon that remedy.

In the case of "non-fraudulent" misrepresentations, the law generally
distinguishes between two kinds of situation: where the statement made was
one that was "purely innocent", in the sense that the representor conveyed
factual information with the intention of producing in its recipient a belief

(1) knowingly, or (2) without belief in its truth, or (3) recklessly,
careless of whether it be true or false.

B.L.R. 114.

127 See the comments of Stark J. in *Potts v. Miller* (1940) 64 C.L.R. 282, 287: ‘the foundation or
gist of the [deceit] action is real damage’. In the present context, reliance consists in the
misrepresentation inducing entry into the contract in question. Such a contract will invariably
be rescindable, and nominal damages available in tort to recognise the wrong. Compensatory
damages, however, will be contingent upon the contract actually being materially
disadvantageous to the representee.

In philosophical terms, the concept of "lying" does not necessarily involve the element of
reliance, or of damage. This conception of lying leaves open the possibility that a person
should be lying, even though he says what is in fact true. Cf. *Bok, op. cit.*, 13-16; *Mannison, op.
cit.*, 134; *Chisholm and Freehan, op. cit.*.


129 After all, what moral right does the fraudulent misrepresentor have to insist that he
should be entitled to retain the benefits of the fraud? See the comments of Lord Wright in
*Spence v. Crawford* [1939] 3 All E.R. 271, at 288: ‘A case of innocent misrepresentation may be
regarded as rather one of misfortune than as one of moral obliquity. There is no deceit or
intention to defraud. The court will be less ready to pull a transaction to pieces’. Cf. also, *A.
H. MacDonald and Co. Pty. Ltd v. Wells* (1931) 45 C.L.R. 506; *Mihaljevic v. Eiffel Tower
Motors Pty. Ltd* [1973] V.R. 545, esp. at 565 *per* Gillard J.
that the statement-maker himself honestly regarded as true,\textsuperscript{130} or "negligent", in the sense that the representor prepared and conveyed factual information (or opinions, advice, etc.) with the intention of producing in its recipient a belief, or a motivation for action, that the statement-maker himself honestly but unreasonably or carelessly regarded as true, or at least as reliable in its foundation or formulation. In relation to "purely innocent" misrepresentations, the common law, as opposed to the courts of equity, was generally unsympathetic to a party who suffered to her detriment by relying thereon.\textsuperscript{131} Equity, however, in its auxiliary jurisdiction, would refuse an order for specific performance\textsuperscript{132} or grant rescission in respect of a purely innocent misrepresentation (subject, of course, to the traditional bars to that remedy)\textsuperscript{133} on account of its much more 'protean' conception of "fraud".\textsuperscript{134} Historically, the justification for the jurisdiction appears to reside in the misrepresentation operating as a 'surprise and imposition' on the relying party,\textsuperscript{135} although today it (the jurisdiction) is generally grounded in terms of that familiar formulation, 'an unconscionable insistence on one's strict legal


\textsuperscript{131} The common law gave no remedy for purely innocent misrepresentations, as distinct from fraudulent and, later, negligent ones. Unless the statement had become a term of the contract, or the parties were in a fiduciary relationship, or the contract was one \textit{uberrimae fidei}, the courts at common law took the unmitigated attitude that since the innocent representor was no more guilty than the representee, any loss should lie where it fell. The only exception to this was where the innocent misrepresentation was so fundamental in the sense that there was a complete difference in substance between what was represented and what was actually received by the party misled, so as to produce in terms of the exchange between the parties a total failure of consideration. The misled party could thus recover any money he had paid under the contract in an action for money had and received. The classic statement of the position at common law is that of Blackburn J. in \textit{Kennedy v. Panama, New Zealand and Australia Royal Mail Co} (1867) L.R. 2 Q.B. 580, at 587. There was, at common law, no fraud if the one party deceived another simply because he started by deceiving himself.

\textsuperscript{132} Cf. \textit{Lamare v. Dixon} (1873) L.R. 6 H.L. 414.

\textsuperscript{133} Which were, at least at common law and in equity: affirmation, impossibility of \textit{restitutio}, intervention of third party interests, execution of the contract and delay.

\textsuperscript{134} Generally, see Meagher, Gummow, and Lehane, \textit{Equity: Doctrines and Remedies} (3rd ed., 1992), Chp. 13, pp. 353-64.

\textsuperscript{135} Story, J., \textit{Equity Jurisprudence} (1st ed., 1836), § 193.
In *Redgrave v. Hurd*, however, Sir George Jessel M.R. put forward *two* possible explanations of what “unconscionable” might mean in this context:

According to the decisions of Courts of Equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways either of which was sufficient. One way of putting the case was: “A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found that out before he made it.” The other way of putting it was this: “Even assuming that moral fraud must be shewn in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he knows to be false, insists upon keeping that contract. To do so is moral delinquency: no man ought to seek to take advantage of his own false statements.” The rule in equity was settled, and it does not matter on which of the two grounds it was rested.

Of these alternative explanations of the doctrinal basis for equitable intervention in this context, this writer here advocates the latter. The first explanation is partly sound: he who makes a statement during negotiations, thereby disturbing the balance of those negotiations, should ordinarily bear the risk of any losses that are occasioned if the statement later turns out to be false; but it is apt to go too far. Such an approach appears both to ignore the important consideration that, under the functionalist ethic of bargaining, the representee should herself assume some responsibility for the reliability of any precontractual assertions which she permits to inform her decision-

---


137 (1881) 20 Ch. D. 1, at 12-3.

138 That is to say, every misrepresentation, fraudulent or innocent, that is reasonably relied upon will have the effect of destroying the integrity of the particular bargaining process by denying the representee a fair opportunity truly to participate in that process, and this will, *prima facie*, justify our shifting the equal balance of risks of inaccurate information in bargaining, and to the courts preferring the misled party over the party making the statement.
making, albeit, ultimately, a minimal responsibility in the present context;\textsuperscript{139} it is also potentially admitting of blanket (or strict) liability in respect of precontractual assertions,\textsuperscript{140} and we have already seen that this is, potentially at least, a sub-optimal rule.\textsuperscript{141} In this pragmatic world, innocent misrepresentations, like common mistakes,\textsuperscript{142} are perhaps best viewed as "accidents"—as inevitable consequences of valuable commercial intercourse—which are ordinarily "bilateral" in the sense that both parties can in some measure work to avoid them. Any proposal that approximates the imposition of a strict liability scheme in respect of precontractual statements arguably runs the risk of removing incentives for representees to themselves acquire information where this is possible.\textsuperscript{143} We shall return below to the point of when a representee might herself be required to verify

\textsuperscript{139} Generally, a party will be justified in relying on statements of past or present existing fact. Under the first limb of functionalism, statements of facts are not reasonably expected to be recognised as mere bargaining techniques; nor are such statements conducive to some broader teleological goal under the second limb, such as the promotion of trust in the market-place. An issue remains in the context of assertions of "fact", however, as to whether an individual should exercise some responsibility in verifying the truth of such statements when the means for doing so are reasonably available to her. See Section 3.2., below.

\textsuperscript{140} Cf. Restatement (Second) of Torts, § 552C, Comment (a): relief for innocent misrepresentation is a 'rule of strict liability'. For a strong criticism of the compensatory remedy under § 552C, see Hill, A., "Damages for Innocent Misrepresentation" (1973) 73 Col. L. Rev. 679.

\textsuperscript{141} See text above at p. 548

\textsuperscript{142} The two share a derivational relationship. Often a common mistake will be the product of an innocent misrepresentation. When deciding on whom the risks of loss should fall for the purpose of distributing losses, there is strong reason to favour the representee over the representor (subject, of course, to the "reasonable reliance" obligation on her part), who, by his false statement, is responsible for upsetting the balance of the negotiations. This is the tenor of Lord Denning M.R.'s observations in the context of common mistake in equity in Solle v. Butcher [1950] 1 K.B. 671, at 693.

the accuracy of precontractual statements communicated to her and affecting her decision to enter into the contract in question.144

The preferable explanation given for the basis of equity’s jurisdiction to intervene in cases of purely innocent misrepresentation is that consistent with Jessel M.R.’s second ‘ground’ in Redgrave v. Hurd. Like the other doctrines considered in this thesis, innocent misrepresentation, too, is concerned with a peculiar form of “wrongdoing,” which essentially resides in the notions of “conscience”, “opportunism”, or “advantage-taking”. The mere event of a factual message being communicated by one negotiating party to the other might suggest that some degree of responsibility (if only for accuracy as opposed to due care)145 should attach in respect of it—a fortiori, that it was made with a view to securing a particular advantage for the representor. It is thus not strictly accurate to say that there is nothing to choose between the two parties: that they are both “innocent”. While one might, understandably, wish to look at the actions of the parties, as well as at their states of mind, to determine liability—that the representor made a false statement, and so introduced into the bargaining process the element which disturbed the balance of the negotiations, which may in itself justify some remedies against him—both law and morality are here concerned with the choices that individuals make and not simply with the effects which they unintentionally produce.146 As Jessel M.R.’s dictum indicates, the wrongdoing or “advantage-taking” in the case of a wholly innocent misrepresentation comes into play at the enforcement stage of the contractual process, when the representor later seeks opportunistically to seize or to retain the benefit of negotiations into which he himself

144 Section 3.2.

145 On which, see below, Section 3.1.2.

146 Cf. Wetlaufer, op. cit., 1238. One might argue that the rationale for permitting rescission in this context is that deception in the bargaining process, even unintentional deception, negates knowing consent, and renders the bargaining process fundamentally unfair. But the emphasis in this thesis is on the wrongful procurement of a contractual assent, which the writer accepts is continuing, it is not merely on protecting the concept of consent itself. The distinction may not be a strongly substantive one, but it does get the overall focus right. That is to say, in all the doctrines considered in this thesis, the legal emphasis is clearly on the wrongdoer’s means or processes of procurement, acceptance or retention of the other party’s contractual assent, it is not simply on that party’s assent.
introduced an unfair element, and to this behaviour judgments of law might attach.147 The second ground in *Redgrave v. Hurd* is sound, too, for it assumes that the mere having of the contract, the simple continuation of the representee’s contractual assent, is an advantage or a benefit to the representer. It does not require, therefore, an investigation into the contingent advantages or benefits—advantages2 from Chapter Four—or that the contract itself must be shown to be “manifestly disadvantageous.”148

On this analysis, innocent misrepresentation presents itself as a somewhat curious phenomenon to the subject-matter of this thesis. Innocent misrepresentation represents a peculiar “half-way house”, lying somewhere between the phenomena of common mistake and common-law fraud. Unlike common mistake, but like fraud, innocent misrepresentation is concerned with the strategic use of information in the procurement of bargains, for putatively, the very point to one’s making the particular statement in bargaining was to manipulate the choices and actions of the

---

147 This conception of innocent misrepresentation seems to be consistent with the apparent justification for the somewhat controversial and often criticised rule in *Seddon v. North Eastern Salt Co. Ltd* [1905] 1 Ch. 326; [1904-7] All E.R. 817, where rescission is not permitted (unless for fraud) once the contract is executed on both sides, the matter being now beyond a question of “enforcement”, as such. The rule in *Seddon’s case*, though apparently still applicable at common law, has been abrogated under the South Australian and A.C.T. misrepresentation statutes, and under s. 7(b) of the *Misrepresentation Act* 1967 (U.K.), and is also not generally applicable to s. 87 of the *Trade Practices Act*. Rescission should be available at any time after execution, so long as practical justice can be done between the parties, and third parties’ interests are also fairly considered. The important bars to rescission in this context should be that of affirmation and the representee’s delay in seeking to undo the consequences of a misrepresentation, which may in itself amount to an affirmation of the resulting agreement. These two grounds for refusing rescission are, unlike the rule in *Seddon’s case*, justifiable on the basis of fairness. While there may have been quite a serious wrong in the misrepresentation itself, there is something equally objectionable in the shift of position by the representee between the time she is influenced to enter into the contract on account of the false statement, and the time when she subsequently attacks the transaction in equity for innocent misrepresentation.

Cf. also, Meagher, Gummow & Lehane, *Equity: Doctrines and Remedies* (3rd ed., 1992), para. 1410, p. 371: ‘The point to innocent misrepresentation is that although the defendant obtained his legal rights innocently of the untruth of his representations, the defendant, when later apprised of the truth, cannot resist rescission’. On “innocent misrepresentation” generally, see *id*, Chapter 13.

other party: to influence that other to enter into a contract. 149 Unlike fraud, but like common mistake, legal culpability, which resides in knowingly taking advantage of the imbalance of information available to each party at the time of contract formation, does not crystallise until a later time, and in a different analytical context: that is, in the “enforcement” stage of the contractual process rather than in the “formation” or procurement stage. Accordingly, a detailed examination of purely innocent misrepresentation within the context of this thesis is avoided for reasons paralleling those advanced in relation to the discussion of common mistake above. 150

149 It is often said that in order to be actionable, one of the elements of the misrepresentation is that the statement-maker must intend to induce the party to whom it was immediately made, or a third party, to act in the way that occasions her injury: Kerr on Fraud and Mistake, op. cit., 85. Such an intention, of course, is requisite in deceit cases, but it may well exist independently of an intention to injure or to cheat: United Motor Finance Co. v. Addison & Co. [1937] 1 All E.R. 425. An innocent misrepresentation which is not intended to be acted upon is said to give rise to no liability: Collins v. Evans (1844) 5 Q.B. 820; explained, Sheffield Corp. v. Barclay [1905] A.C. 392, 400; and see, Pearson v. Dublin Corp. [1907] A.C. 351; Savill v. NZI Finance Ltd (1989) 2 N.Z.B.L.C. 103,771. Authorities are not consistent on the point, however, and most do not even raise the requirement as an issue: cf. Brown v. Raphael [1958] Ch. 636, at 641 per Lord Evershed M.R. The requirement was discussed and criticised recently by McLauchlan, “Materiality and Intention to Induce—Are They Requirements for Actionable Misrepresentation?” [1990] N.Z. Recent Law Review 271, 273-6, arguing that all the requirement meant in practice was that in order to be actionable, the statement must have been addressed to the particular complainant, or to a class of persons of whom she was one. The requirement makes sense, but only if an element of objectivity is injected into the analysis. Whether a statement is intended to be relied upon must be determined according to how a reasonable person in the shoes of the particular representee (or the particular representee herself if her peculiar attributes, credulity, etc., are known by the representor) would construe the intention of the party making the statement. This must be what is at the bottom of cases of puffery, where the principal ground for explaining away such cases as giving rise to legal liability is that the statement-maker does not intend his statement to be taken seriously by the statement-recipient, on the one hand, and that, on the other hand, a reasonable person would not be induced by it. Our focus, however, is usually upon the latter, so that our concern with the former, the intent of the statement maker, is merely presumptive. In this way, it must be as Spencer Bower & Turner, Actionable Misrepresentation (3rd ed., 1974), 132, pointed out, that “the topic of materiality and that of the presumptive intent of the representor are much involved inter se.”

150 See text above at pp. 535-36. In any event, the simple fact that even a wholly innocent misrepresentation can give rise at least to the remedy of rescission is suggestive of equity’s, and in some cases, various Legislatures’, respect for the maintenance of bargaining equilibria. (A damages remedy for innocent misrepresentation is now potentially available under various legislation: notably, Misrepresentation Act 1971 (S.A.), s. 7; Law Reform (Misrepresentation) Ordinance 1977 (A.C.T.), s. 4; Contractual Remedies Act 1979 (N.Z.), ss. 6 and 10; Misrepresentation Act 1967 (U.K.), s. 2(1); Trade Practices Act 1974 (Cth), ss. 52 and 82.) It demonstrates, too, that a degree of responsibility attaches simply to the mere communication of a representation which causes the representee to misunderstand the factual basis of the

563
As a general rule, a representor is responsible only for the accuracy of his statements in contracting: he has an obligation, presumably under the first injunction of the duty to protect the vulnerable, merely to be honest or truthful in his dealings with others. This point naturally leads us to a consideration of the second form of "non-fraudulent" misrepresentation introduced above: the negligent misrepresentation or "negligent misstatement". In addition to the question of honesty or accuracy in bargaining, it is sometimes necessary to enquire into the possible existence of a superadded responsibility on the part of a representor actually to exercise due care when making or preparing action-inducing or decision-inducing precontractual statements. Indeed, as an empirical matter, the nature of the complaint in those cases involving negligent misstatement tends not generally to be associated with issues of "honesty", "accuracy" or "truthfulness", notions which almost invariably are concerned with statements of a factual nature. Rather, the central theme of these cases, in this context at least, involves one party supplying information for the guidance of the other in that other's contractual decision-making, the nature of that information not ordinarily having to do with the reliability of factual matters at all. Typically, our attention here turns to the question of contract and which induces her to enter into the transaction in question. Cf. Cartwright, Unequal Bargaining (1991), 148.

These trends and views may lend support for Jessel M.R.'s first ground in Redgrave v. Hurd above, and a form of "strict liability". Yet even in this case it is possible to read a form of wrongdoing into innocent misrepresentation in the context of contract formation (although it is not "exploitation", so defined), thereby avoiding any resort to notions of strict liability. Recall from Chapter Two that the first injunction of the moral-cum-legal "duty to protect the vulnerable" involved preventing exploitable circumstances. By any misrepresentation, a person upsets bargaining equilibria, and because reliance can ordinarily be anticipated, responsibility is borne by the representor: that is, the reliance allows for manipulation, inducing consent. As such, consent should only be induced by accurate information, especially where one party wishes to make representations to induce consent. Thus, there is possibly an "indifference" wrong here, for the first injunction of the duty to protect the vulnerable may suggest that one could be responsible for not bothering to the ensure accuracy of one's precontractual statements. This begins to read very much like Jessel's first ground, to be sure; but it remains, on this writer's analysis, manipulation without subsequent (conscious) exploitation, and hence is outside the scope of this thesis.

151 See, supra, at n. 94.


564
whether “reasonable care” or “competence” has been observed or exercised in the investigation, acquisition, preparation, interpretation, formulation, reservation,153 and/or communication of information characteristically, but not always,154 assuming the nature and function of advice, opinions, forecasts, and the like, formed or given with a view to, in some measure, informing or influencing another’s contractual decision-making.

3.1.2. “Negligent” Misstatement: An Excursus155

Again, and from the perspective of contract avoidance, at least, the issue in the case of a negligent misstatement, being a species of non-fraudulent or “innocent” misrepresentation, is not that of “exploitation” or “advantage-taking” in contract formation, strictly speaking. If it were, then by analogy with the cases involving wholly innocent misrepresentation, the manifestation of wrongdoing must, too, inhere at the “enforcement” stage of the contractual process. Rather, the form of wrongdoing in issue here is simple negligence in the bargaining process: a mere failure to take due care in making or preparing statements (advice, opinions, etc.,) when there is a legal obligation to do so.156 And while the subject is, perhaps, somewhat

153 For a good discussion of negligence and nondisclosure, see Finn, “Good Faith and Nondisclosure”, op. cit., 170-8.

154 Cf. Shaddock v. Parramatta C.C. (No. 1) (1981) 150 C.L.R. 225 (although this was not a contract case).


156 The establishment of breach in this context is to be determined according to the general principles of negligence. The onus will be on the plaintiff to prove the breach, it being in any case a mixed question of fact and law. Where the duty arises from one who professes to have some special skill or expertise, he will of course be held to the standard to be applied to the ordinary competent member of his calling, exercising ordinary professional skill: Lanhphier v. Phitos (1838) 8 Car. & P. 475, per Tindal L.C.J. at 479.

A person giving advice for reward in a professional capacity is certainly to be considered as acting “in trade or commerce” for the purposes of s. 52 of the Trade Practices Act 1974 (Cth).
marginal to the central theme in this thesis—exploitation in contract formation—a brief discussion will nevertheless be undertaken, principally in order to highlight the importance of the relational context, or bargaining environment, as a predominant criterion in fixing the level of responsibility to be assigned to the contracting parties within the graduated hierarchy of precontractual obligations and standards expounded in Chapter Four.¹⁵⁷

Now, the recognition of civil liability for negligently conveyed information and advice¹⁵⁸ is a relatively recent development in Anglo-Australian common law,¹⁵⁹ for there has been a marked historical reluctance to impose liability for misrepresentations which were not fraudulent in arm’s-length bargaining.¹⁶⁰ ‘Words are,’ said Lord Pearce in *Hedley Byrne &

---

¹⁵⁷ See Chapter Four, Section 3.2.2.

¹⁵⁸ That there may be a real distinction between the mere dissemination of information and the giving of “advice”: cf. *per* Toohey J. in *James v. A.N.Z. Banking Group* (1986) 64 A.L.R. 347.

¹⁵⁹ Although even in the United States historical context, one writer has remarked that “[t]here has been little growth, if any, in the number of courts which allow recovery on a negligence theory against an “antagonist” in a business transaction”: Hill, “Damages for Innocent Misrepresentation” (1973) 73 Colum. L. Rev. 679, 686 (footnote omitted). Cf. *Restatement of Torts*, § 762 (1939). In any event, the law of negligent misstatement doubtless still remains in a comparative state of adolescence throughout the entire common law world.

¹⁶⁰ Again, *Derry v. Peek* is principally responsible for this. The above proposition holds even the more so where the loss caused to the plaintiff by his reliance on the misrepresentation is purely economic, as opposed to physical damage: *Le Liere v. Gould* [1893] 1 Q.B. 491; *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164. Cf. also, *Kamahap Enterprises Ltd. v. Chu’s Central Market Ltd* (1989) 64 D.L.R. (4th) 167, in which it was said by the British Columbia Court of Appeal (at 171):

Out of the period of uncertainty and rethinking through which the law of negligence has passed in recent years, there has, I think, emerged a realization that the infliction of foreseeable pure economic loss must necessarily result from very many acts and omissions which take place routinely in the course of everyday business activities under our economic system, and that any law imposing a general duty of care to avoid the infliction of such loss would greatly hamper the conduct of commercial and private business, and would probably interfere fundamentally with the operation of that economic system.

It has also become apparent that to exempt business activity from a general rule imposing a duty of care in the economic field would not only be to exempt most cases falling within the rule, but to excuse deliberate infliction of economic loss for personal gain while imposing
Co. Ltd. v. Heller & Partners Ltd.,\textsuperscript{161} 'more volatile than deeds. They travel fast and far afield.'\textsuperscript{162} Yet, the obvious concerns that exist in relation to possible "flood-gate" arguments aside,\textsuperscript{163} the pervasive influence of the various notions associated with "self-reliance" in voluntary and consensual relations and dealings continues to dominate this area of law.\textsuperscript{164} Given that contractual negotiations are ordinarily viewed as relations in which each party is expected to consult self-interest, and is generally held to be the independent guardian of his or her own interests, duties of care in the precontractual context are more difficult to justify than are mere duties of honesty,\textsuperscript{165} the justification for the latter which we have already observed.\textsuperscript{166}

\hrule

liability when such loss is caused by accident, and without selfish motive.

And see, most recently, Kripps v. Touche Ross & Co. (1992) 94 D.L.R. (4th) 284, esp. at 297-7 per Taylor J.A.

\textsuperscript{161} [1964] A.C. 465.

\textsuperscript{162} Id, 534. Cf. also, Lord Reid's famous passage at id, 482-3.

\textsuperscript{163} Cf. also, Restatement (Second) of Torts, § 552, Comment (a).


\textsuperscript{165} Cf. Hardie J. in Dillingham Constructions Pty. Ltd v. Downs [1972] 2 N.S.W.L.R. 49, 55:

A person in pre-contract negotiations is entitled to and usually does seek to make the most advantageous deal he can. The other party does likewise; thus each is at liberty to have regard solely to his own interests. The policy of the common law is to uphold contracts freely made and not vitiates any recognised invalidity factor. Thus a pre-contract relationship would not normally qualify as a special relationship of the type which would subject one or other of the parties to a duty of care in the assembly or presentation of facts, figures or other information as to the subject matter of the contract.

\textsuperscript{166} That is to say, where there is no intent to deceive, but only good faith coupled with negligence, the fault of the maker of the statement is sufficiently less to justify a narrower responsibility for its consequences. Cf. also, what the American Law Institute, in its Restatement (Second) of Torts, § 552, Comment (a), has to say on the matter in the United States context:
Yet for all that, and despite some early diffidence, the reports of the common-law world are peppered with decisions finding, or at least acknowledging the potential for finding, a duty of care in the precontractual setting. These cases, spanning the past twenty-five or so years in Anglo-

Honesty requires only that the maker of a representation speak in good faith and without consciousness of a lack of any basis for belief in the truth or accuracy of what he says. The standard of honesty is unequivocal and ascertainable without regard to the character of the transaction in which the information will ultimately be relied upon or the situation of the party relying upon it. Any user of commercial information may reasonably expect the observance of this standard by the supplier of information to whom his use is reasonably foreseeable.

On the other hand, it does not follow that every user of commercial information may hold every maker to a duty of care. Unlike the duty of honesty, the duty of care to be observed in supplying information for use in commercial transactions implies an undertaking to observe a relative standard, which may be defined only in terms of the use to which the information will be put, weighed against the magnitude and probability of loss that might attend that use if the information proves to be incorrect. A user of commercial information cannot reasonably expect its maker to have undertaken to satisfy this obligation unless the terms of the obligation were known to him. Rather, one who relies upon information in connection with a commercial transaction may reasonably expect to hold the maker to a duty of care only in circumstances in which the maker was manifestly aware of the use to which the information was to be put and intended to supply it for that purpose.


... as at present advised, I consider the submission advanced by the buyers, that the ruling in [Hedley Byrne] applies as between contacting parties, is without foundation. (id, 519)

Cf. Presser v. Caldwell Estates Pty. Ltd [1971] 2 N.S.W.L.R. 471 (leaving issue open). It is perhaps noteworthy that none of the speeches in Hedley Byrne themselves support an intrusion of that case’s principles into precontractual relationships. For example, cf. Lord Reid, id, at 483: ‘where there is a contract there is no difficulty as regards the contracting parties: the question is whether there is a warranty’. Generally, see also McLauchlan, “Precontract Negligent Misrepresentation” (1977) 4 Otago L. Rev. 23, 26-9.

Australian law, are clearly suggestive of a new environment for contracting. But what, precisely, is the nature of this environment? What is the basis for finding a duty of care in the precontractual context? What is the point of transition from those bargaining relationships which are governed merely by a duty to be honest, to those which are susceptible to a duty of care?

The law brings home, in various ways, the importance of the relationships in which action-inducing assertions, and thus false or unreliable statements, opinions, and the like are possible. The principal difference between negligence cases and mere deceit cases seems to inhere in the degree and kind of trust reposed. We often trust, and generally are entitled to trust, that a wide circle of persons will be honest in their dealings with us. However, we do not trust, or are not generally entitled to trust, so many to take care that they are fully informed in the advice or information they give to us. What is generally required to elevate duties of honesty to duties to exercise reasonable care in the preparation or conveyance of information in bargaining, as in any context, therefore, is the establishment of a ‘special’ form of relationship: one that is, essentially, predicated on the independent tort-law notions of “neighbourhood” and “proximity”; in any event, a relationship that the writer will, for present purposes, call a “relationship of care”.


169 This distinction, for example, seems to lie at the heart of Barwick C.J.’s observation between relatively casual social contexts and serious business contexts in M.L.C. Assurance Co. v. Ewatt (1968) 122 C.L.R. 556, at 569. Cf. also, Lord Reid in the Privy Council: [1971] A.C. 793, at 810-11.

170 The emphasis on the “special” nature of the relationship has been carried through from the seminal case of Hedley Byrne, op. cit.

171 Generally on these notions, see The Hon. Justice M. H. McHugh, “Neighbourhood, Proximity and Reliance”, in Finn (ed), Essays on Tort (1989), 5-42.
Defining the relationship of care is a difficult task. In part, this is a consequence of its sharing characteristics both of fiduciary law, involving "relationships of loyalty", and of the law of deceit, or misrepresentation, involving mere "relationships of honesty". Both the relationship of honesty and the relationship of care are concerned with the provision of information intended to produce reliant action. Both the relationship of loyalty, at least to the extent to which relational factors become central to the enquiry, and the relationship of care are concerned with the overlapping conceptions of reliance and reasonable expectations in information-giving situations, each involving, analytically, the transfer of an information-giving power—essentially, an influence to affect the transferor's decision-making—with the condition that that power is to be used for the interest of the transferor.\(^{172}\) The difference between the forms of reliance, however, is that in the one case the reliance produces a duty of loyalty under fiduciary law, that is, the information-giving power is to be used in the interest of the transferor to the exclusion of the interest of the transferee, whereas in the other case, the reliance produces what Shepherd basically calls a 'management duty' (in contract or in tort), requiring merely that the individual under this duty, in performing certain functions and actions, meet a specified minimum of skill, care, competence, etc.\(^{173}\)


\(^{173}\) Shepherd, _op. cit._, 48-9. A reliance relationship can of course give rise to both a relationship of loyalty and one of care. To Shepherd, _id._, Chp. 17, whether the case properly resides in fiduciary law or purely in the tort of negligence is a matter of whether the information-giver was biased, either because he was acting "two ways" (cf. _Tracy v. Atkins_ (1980) 105 D.L.R. (3d) 632) or because he had a personal interest in the transaction in question, other than the simple payment of a reasonable fee for his services (cf. _Reed v. A. E. Little Co._, 152 N.E. 918 (1926); _Nocon v. Lord Ashburton_ [1914] A.C. 932). In such a case, where the information given was the result of bias, there is a _misuse of power_, rather than simple incompetence or accident, as in the case of negligence, with no essential connection with the fiduciary relationship. The abuse of power becomes a matter of a rebuttable presumption—that any flaws in the information communicated was a result of the bias and not simply incompetence—arising merely upon proof of a relationship, similar to that of influence, and motive, which is, of course, the bias.
In any event, the duty of care in this context, as in others, is predicated on a proximate, reliant relationship. At least two, and possibly three, sets of overlapping criteria are available to determine when the relationship between contracting parties has become one of "care and honesty", as opposed merely to one of "honesty". The writer will only deal here with those sets of criteria that are, by now, fairly well established in our law: (1) *actual reliance* upon another for the provision of information or advice; and (2), notwithstanding the possible absence of a relationship of actual reliance, an *assumption of responsibility* that care should be taken in the preparation and conveyance of information and advice.

### 3.1.2.1. Relationships of actual reliance

As the High Court of Australia recognised in *San Sebastian Pty. Ltd v. The Minister for Administering the Environmental Planning and Assessment Act*, the element of reliance 'plays a predominant part in the ascertainment of a relationship of proximity between the plaintiff and the defendant and therefore in the ascertainment of a duty of care'. A party may actually rely on the information provider or adviser on account of the attributes—expertise, skill, knowledge, exclusivity of access to relevant

---


175 The third possible set of criteria is suggested by Finn in his "Good Faith and Nondisclosure", *op. cit.*, at 171, to the effect that a relationship of care might arise on account of 'relational circumstances which would justify one person being reasonably entitled to expect [the observance of due care]'. By his own admission, however, this may amount to no more than a legal conclusion of the essence of the above two sets of criteria (*ibid*).


178 Although it is now clear that the crucial factors in a relationship of proximity are the trust and reliance, rather than expertise: *Shaddock v. Parramatta C.C.* (No. 1) (1981) 150 C.L.R.
information, etc.—he is reasonably believed to possess in relation to the information or advice desired or needed. A further ingredient in the making of a duty of care is supplied by that (sometimes unwilling or unable) information provider’s appreciation, actual or presumptive, of the reliance being placed in him, and of the foreseeable consequences of his not exercising care when formulating and giving his information or advice. The scope and content of the duty of care within this relationship then becomes a (judicially prescriptive or normative) matter of whether and to what extent the reliance conceded in the information provider is “reasonable” or “justifiable”. Where there is an actual assumption of responsibility on the part of the information provider (see Section 3.1.2.2.), then in most cases there will be no difficulty is resolving the issue. However, where there is no such assumption of responsibility, though clearly a reliance relationship exists, the relevant enquiry appears to change into the strongly normative question of what the relying party is reasonably entitled to expect of the information provider: ‘the legally contrived notion of “reasonable expectation”’. Among and concerning the various factual and policy-driven factors that may determine the content of the entitlement, Professor Finn has supplied us with the following examples and considerations:


180 Cf. Finn, “Good Faith and Nondisclosure”, op. cit., at 172 (with accompanying notes), who suggests that where an information provider is unable or unwilling to assume the responsibility conceded in him by another, he becomes obliged, through appropriate disclaimers or recommendations to obtain independent advice, to disabuse that other of her misplaced reliance (mistaken expectations of him).


183 Ibid.
the nature [and circumstances] of the request, if any, ... made for the advice or information;[184] the nature of the proposed course of action in respect of which advice etc. is sought or given;[185] the seeker's understanding of it and the provider's awareness of this;[186] the business setting in which the relationship arises and the standards exacted in the giving of advice and information therein;[187] and there is the overarching consideration, acknowledging more or less explicitly in the cases,[188] that courts are on occasion being asked to articulate what will be considered to be acceptable standards of performance for advisers and information providers in particular service industries.[189]

Obviously, these various considerations demonstrate a good deal of overlap between one's actual reliance on another for advice or information,

184 Hence, perhaps, the emphasis in some of the earlier cases on the 'gravity of the enquiry', 'the importance and influence attached to the answer', and the seeking of 'considered advice'. See Hedley Byrne, op. cit., 539 per Lord Pearce. Cf. Howard Marine v. Ogden & Sons [1978] 1 Q.B. 574 (Lord Denning M.R. and Shaw L.J.); Johnson v. S.A., op. cit.; Walker, Hobson & Hill Ltd v. Johnson [1981] 2 N.Z.L.R. 532. It is clear, however, that a duty of care can arise in the absence of a specific request for information or advice, although the presence of one greatly assists in establishing the necessary reliance: San Sebastian (1986) 162 C.L.R. 340, at 356, 357.


189 In doing this they may see fit to acknowledge the reasonable standards to be observed by the recipients of information and advice. See the sentiments of Taylor J.A. in Kripps v. Touche Ross & Co. (1992) 94 D.L.R. (4th) 284, at 307 (B.C.C.A.), negating the existence of a private law duty of care by a chartered accountant toward the plaintiff public lender and investor:

If liability is to be imposed on a defendant [chartered accountants in this case] for loss of the sort suffered as a result of a business transaction, particularly a money-market dealing, it must, in my view, be imposed by legislation ... and cannot be accomplished, fairly, reasonably or by application of any coherent principle, within the ordinary law of negligence. To impose liability in such a case would not only be to violate the fundamental requirement for "proximity" in the ordinary sense of a "close" and "direct" relation between loss suffered and negligent act, but also to create a mechanism for risk reallocation in commercial transactions of potentially far-reaching consequences based on a conception of duty which must be regarded as foreign to the operation of the free market.
and the question of that other’s so-called ‘assumption of responsibility’ in respect of such advice or information; a matter to which our attention now turns.

3.1.2.2. Reliance and “assumed responsibility”

While there is perhaps scope for the possibility that there can be an assumption of responsibility by an information provider or adviser without an actual reliance, by the recipient and user of that information, upon that first party for the provision of the information or advice, in most instances where there is an actual reliance on another for the provision of information or advice, this will correspondingly be matched by that other’s assumption of responsibility toward the relying party. The point that the two sets of criteria are almost invariably interrelated, though possibly on occasion mutually exclusive, would seem to inhere in the possible connection that exists between the information provider’s knowledge, actual or presumptive, of the other party’s reliance or expectation, and the reasonableness or justifiability of that other party’s (actual or prescriptive) reliance or expectation. Saying in any given case that it is “reasonable” for a plaintiff


191 The reasons for this are varied. Generally, see Finn, “Good Faith and Nondisclosure”, op. cit., 174-6.

192 Reliance and voluntary assumption of responsibility can be viewed as interchangeable concepts, but this will not always necessarily be so. As Deane J. observed in Hawkins v. Clayton (1988) 62 A.L.J.R. 240, 255, the relationship of proximity will, apart from the question of foreseeability, be ‘characterised by some additional element or elements which will commonly (but not necessarily) consist of known reliance (or dependence) or the assumption of responsibility or a combination of the two’.

193 Ibid.

194 Cf. the speeches of their Lordships in Hedley Byrne, op. cit., 502-3 (Lord Morris; Lord Hobson concurring, at 514); 539 (Lord Pearce); 530 (Lord Devlin). Cf., also, Mason J.’s interpretation of Hedley Byrne in Shaddock and Associates Pty. Ltd v. Parramatta City Council (No. 1) (1981) 150 C.L.R. 225, at 250:

... whenever a person give information or advice to another upon a serious matter in circumstances where the speaker realizes, or ought to realize, that he is being trusted to give the best of his information or advice as a basis for action on the part of the other party and it is

574
to rely upon the defendant’s provision of information or advice in a dealing between them, is effectively in most cases to deem that the information provider has assumed responsibility for his information or advice, even if in fact he did not do so.\textsuperscript{195} The following dictum of Gaudron J., for example, in \textit{Hawkins v. Clayton},\textsuperscript{196} is strongly suggestive of the possible contingent connection between reliance (or expectation) and assumption of responsibility:

\begin{quote}
[A] relationship of proximity may be constituted by the reasonable expectation of a person (including a reasonable expectation that would arise if he turned his mind to the subject) that the other person will provide relevant information or give reliable information, if that expectation is known or ought reasonably be known by the person against whom the duty is asserted.\textsuperscript{197}
\end{quote}

For all that, it would be surprising, \textit{ceteris paribus}, that reliance, actual or prescriptive, should be warranted where there was, expressly, no actual assumption of responsibility by the information provider;\textsuperscript{198} or where he was reasonable in the circumstances for the other party to act on that information or advice.

\textsuperscript{195} Cf. Trindade \& Cane, \textit{The Law of Torts in Australia} (1985), 325.


\textsuperscript{197} Cf. also, Deane J., \textit{id}, 256-7: both assumption of responsibility and reliance being related to the overall relationship of proximity between the parties, out of which a duty of care may arise. For words of caution in relation to the above dictum, at least in the context of negligence and nondisclosure: see Finn, “Good Faith and Nondisclosure”, op. cit., 176.

\textsuperscript{198} A suitably drafted and well communicated disclaimer, merger or acknowledgment clause may have the effect either of making reliance on the information provider unreasonable, or else negating any assumption of responsibility by him in respect of his information or advice. This possibility itself precluded liability in the seminal case of \textit{Hedley Byrne, op. cit.} (per Lord Morris, 504; Lord Devlin, 533 Lord Pearce, 540). It has been generally assumed that the efficacy of “non-responsibility” clauses goes to negating an initial assumption of responsibility in tort rather than rendering reliance unreasonable: cf. Fleming on \textit{Torts, op. cit.} (7th ed.), at 611-612, citing Feldthuesen in \textit{Issues in Tort Law} (1982),179; \textit{Hedley Byrne, op. cit.}, at 533 per Lord Devlin; at 540 per Lord Pearce; see also the recent Canadian case of \textit{Les Fenetres St-Jean Inc. v. Banque Nationale du Canada} (1990) 69 D.L.R. (4th) 384, where a majority of the Quebec Court of Appeal held that although a clause of non-responsibility went to the negation of the assumed obligation, the defendant Bank, because of its gross negligence, could not invoke the clause. But the distinction is not so easily seen. There are \textit{dicta} in some cases which suggest that a disclaimer will not be effective to preclude an assumption of responsibility, and thereby a duty arising, merely because it has been uttered. For example, Barwick C.J. in \textit{M.L.C. v. Evatt} (1968) 122 C.L.R. 556, 570, thought that ‘the fact of such a reservation, particularly if
otherwise justified in the context in believing that the reliant party was either exercising an independent judgment in relation to the matter in question, or else otherwise taking a calculated business risk. Similarly, the circumstances of the information exchange may be such that they simply did not, or could not, justify a finding of an entitlement to rely on the information provider, or a finding that that provider was otherwise assuming a responsibility in relation to his information or advice.

acknowledged by the recipient, will in many instances be one of the circumstances to be taken into consideration in deciding whether or not a duty of care has arisen, and it may be sufficiently patent in some cases to prevent the creation of the necessary relationship’. The objectivity of reasonableness of reliance may in some cases ‘neutralise’ the efficacy of a disclaimer if, for example, there is great inequality between the plaintiff and defendant: cf. Trindade and Cane, op. cit., 325, citing M.L.C. v. Ewalt (1968) 122 C.L.R. 556, at 570-571 per Barwick C.J.; Scott Group v. McFarlane [1978] 1 N.Z.L.R. 553, at 569 per Richmond P., 580 per Cooke J; B.T. Australia Ltd v. Raine & Horne Pty Ltd [1983] 3 N.S.W.L.R. 221. Cf. the English (1967) and ACT (1977) misrepresentation statutes which void exemption for precontractual representations except when reliance is just and reasonable. See also Howard Marine v. Ogden [1978] Q.B. 55. Hence, it is probably not easy to distinguish the reasonableness of reliance requirement from the very existence of a duty of care. The Hon. Mr Justice Ryan, op. cit., 85, has suggested that the question to be addressed ‘is whether the disclaimer clause has had the effect of making it unreasonable for the person to whom the advice or information was given to rely upon it. If it has that effect then the person giving the advice or information can properly assert that no duty of care was imposed on him in relation to a person when it was not reasonable for that person to rely and act upon it’. More recent cases appear to favour the view that the presence of disclaimers, etc. go to the question of the reasonableness of reliance rather than that of assumption of responsibility: seeper Lord Bridge in Caparo Industries plc v. Dickman [1990] 2 A.C. 605, at 621. Cf. also, Jaffey, op. cit., 125.

199 This will usually be the case in most arm’s-length, precontractual settings, where information will usually be (or presumed to be) equally accessible to both parties. Cf. Fish v. Kelly (1864) 17 C.B.N.S. 194; Low v. Bouerie [1891] 3 Ch. 83; Heilbut, Symons & Co. Ltd. v. Buckleton [1913] A.C. 30; James McNaughton Paper Group Ltd v. Hicks Anderson & Co. (1990) N.L.J. Law Reports 1311, 1312 per Neill L.J.; Finn, “The Fiduciary Principle”, Chp. 1 in Youdan (ed), Equity, Fiduciaries and Trusts (1989), 19, noting that it was in this connection that Toohey J., in James v. Australia and New Zealand Banking Group (1986) 64 A.L.R. 347, at 368, observed that there ‘can be a real distinction between the giving of advice on the one hand and the imparting of information or the exchange of ideas on the other’.

200 Elderkin v. Merrill Lynch Royal Securities Ltd (1977) 22 N.S.R.(2d) 218: plaintiff investor aware of general risks associated with investment in the stock market, but not aware that his stockbroker was exceeding his employment authority by making a practice of advising clients to buy and hold highly speculative stocks.

201 In Howard Marine v. Ogden & Sons [1978] 1 Q.B. 574, for example, Lord Denning M.R. (at 591-2) thought that a duty of care would not arise in relation to statements made ‘during a casual conversation in the street; or in a railway carriage; or an impromptu opinion given off-hand; or “off the cuff” on the telephone’. Cf., also, M.L.C. Assurance Co. v. Ewalt (1968) 122 C.L.R. 556, at 569 (Barwick C.J.); Lord Reid in the Privy Council, [1971] A.C. 793, at 810-11; Shaddock v. Parramatta C.C. (No. 1) (1981) 150 C.L.R. 225; Restatement (Second) of Torts, §
It should be fairly obvious, then, at least in the ordinary case of independent contracting adversaries, that if duty to take care, when formulating and making precontractual statements, is to arise between them, it is necessarily (and understandably) to be a rather exceptional and limited one. In reference to such indicia as those listed in Sections 3.1.2.1. and 3.1.2.2. (and excusing the unavoidable density of the following sentence), it is unlikely that a precontractual duty of care will arise unless one party provides information or advice to another upon a matter important and material to that other’s contractual decision-making, and the former is aware, or ought to or has reason to be aware, of that fact, and of the fact that he is, or perhaps should be, being trusted, relied upon or expected to exercise due care in the preparation and communication of such information and advice as is sought as a basis for influencing the second party to contract with him or with a third party, and it is reasonable in the circumstances that that second party be entitled so to trust, rely and expect, whether or not she in fact turned her mind to the matter in question, and to modify or affect her contractual decision-making accordingly.202

552, Comment (d) : “curbstone opinions” and ‘gratuitous’ advice out of negligence’s purview. Yet even in a seemingly social or informal context, a duty of care might arise when requisite elements of proximity are otherwise made out: see Chaudhry v. Prabhakar [1988] 3 All E.R. 718. Under § 552, a pecuniary interest in the transaction is generally required, but it is clear that this may be direct or indirect: Comments (c) and (d). And while the consideration of pecuniary or financial interest may tend to show an assumption of responsibility in British Commonwealth countries (see Presser v. Caldwell Estates Pty. Ltd [1971] 2 N.S.W.L.R. 471, at 493 (Mason J.A.); Plummer-Allinson v. Ayrey [1976] 2 N.Z.L.R. 254; Day v. Ost [1973] 2 N.Z.L.R. 385 (Cooke J.); O’Leary v. Lamb & Lensworth Finance Ltd (1973) 7 S.A.S.R. 159; cf. Foster Adv. v. Kleenberg (1986) 27 D.L.R. (4th) 141; Johnson v. State of South Australia (1980) 26 S.A.S.R. 1, 27 per Matheson J.: noting ‘common financial interest’ between plaintiff and defendant; San Sebastian, op. cit., 357), it is clear that an advisory or information-providing role may be assumed gratuitously: cf. Cornish v. Midland Bank plc [1985] 3 All E.R. 513. If one was to take a liberal view of “pecuniary interest”, then such would, in the absence, say, of a stipulated fee for the information or advice, invariably exist in the precontractual setting, especially where the resultant contract was one entered into with the information provider, as opposed to a third party. The narrow “skills” or “business” test enunciated in Mutual Life and Citizens’ Assurance Co. Ltd v. Ewitt [1971] A.C. 793, did not gain many supporters throughout the British Commonwealth: see Esso Petroleum v. Marden, op. cit.; Meates v. A.-G. [1983] 2 N.Z.L.R. 553; Roberts v. Montex Development Corp. (1979) 100 D.L.R. (3d) 660 (B.C.S.C.) (contra, Andronyk v. Williams (1985) 21 D.L.R. (4th) 557 (Man C.A.)); Shaddock v. Parramatta C.C., op. cit.; O’Leary v. Lamb (1973) 7 S.A.S.R. 159, 190 (Bray C.J.).

202 It is observable how similar this inquiry is to that of determining whether a statement-maker has accepted strict, that is, contractual, liability for his statement. Cf. McLachlan, op. cit., 47: “it is difficult to imagine circumstances where, if the tort test of liability is
Negligent misstatements of "fact" apart,\textsuperscript{203} the courts should thus exercise considerable restraint in imposing negligence liability between contracting adversaries. Especially where statements in the nature of advice, opinion, forecast, and the like have been made by one negotiating party to inform and induce the contractual decision-making of the other, too ready a willingness to find a relationship of care in the typical bargaining environment is prone not only ... to violate the fundamental requirement for "proximity" in the ordinary sense of a "close" and "direct" relation between loss suffered and negligent act, but also to create a mechanism for risk reallocation in commercial transactions of potentially far-reaching consequences based on a conception of duty which must be regarded as foreign to the operation of the free market.\textsuperscript{204}

3.2. The Question of "Justifiable" Reliance

It is trite law that in order to justify a remedy in favour of a representee, the misrepresentation must have contributed causally to that representee’s decision to enter into the contract in question.\textsuperscript{205} And

\textsuperscript{203} Different considerations obviously apply to negligent misstatements of facts than they do to those in the nature of opinions, advice, forecasts, and the like. Cf. \textit{Shaddock v. Parramatta C.C. (No. 1)} (1981) 150 C.L.R. 225. Where factual statements are made between contracting parties, the recipient of the statement is generally entitled to assume their accuracy and to rely upon them. Correspondingly, the maker of any factual statements will generally be taken to have assumed a responsibility for verifying the accuracy of such statements he chooses to make for the purpose of inducing another to act in an intended way. Statements of fact, therefore, readily give rise to sufficient reliance and assumption of responsibility, and hence the proximity, as is required to qualify for a relationship of care.


consistent with the law of duress, the misrepresentation, whether it be fraudulent or not, need not have been the sole or even predominant inducement to contract. It is enough that the representation ‘was among the factors which induced the contract’. This empirical aspect of the reliance criterion gives rise to few difficulties in practice, so little further will be said of it in the discussion below. More will be said, instead, of the


207 Cf. Finn, “Equity and Contract”, op. cit., 127, n. 25: ‘This relaxation in equity’s requirements is obviously justifiable given that the representation secures, or assists in the securing of, the very advantage sought—the conclusion of a contract’.

208 As with the case of duress, that the defendant’s conduct only need be a contributing factor to the plaintiff’s action is essentially a requirement of policy. See Smith v. Kay (1859) 7 H.L.C. 750, at 759 per Lord Chelmsford L.C.:

Can it be permitted to a party who has practised a deception, with a view to a particular end which has been attained by it, to speculate on what might have been the result, if there had been a full communication of the facts?

See, also, Gorden v. Street [1899] 2 Q.B. 641, 646 per Smith L.J.; Cook and Gray v. Carpel (1900) 2 G.L.R. 357, at 359 per Stout C.J.: ‘It does not lie in the mouth of one who has made an untrue representation to say that other and more important matters induced the contract’.


210 At least for the purposes of contract avoidance in equity, once it is shown that a misstatement was made which was calculated to influence the other party, it is presumed that the other party relied on it, unless the contrary is shown—i.e., there is a reversal of the burden of proof: Redgrave v. Hurd (1881) 20 Ch. D. 1, per Jessel M.R.; Gould v. Vaggelas (1984) 157 C.L.R. 215, 236 (Wilson J.).

211 The empirical chain of causation between the statement and the recipient’s decision to enter into the contract in question may be broken for a number of reasons, such as where the representee did not know of the representation before she concluded the contract (see Horsfall v. Thomas (1862) 1 H. & C. 90: no remedy available to the purchaser of a gun containing concealed defect. As there had been no inspection by the purchaser, the attempt to conceal the defect had produced no effect upon his mind; Re Northumberland and Durham District Banking Co., ex parte Bigge (1858) 28 L.J. Ch. 50); or where she did not allow it to affect her judgment, either because it was not important to her decision to contract (Smith v. Chadwick (1884) 9 App. Cas. 187); or where she relied solely upon her own investigations or assessments
problematic, and certainly controversial, question as to whether in addition to the empirical causative criterion, there is also a requirement of "materiality". Notwithstanding the actual reliance or inducement, need it as to the accuracy of the statement (Attwood v. Small (1838) 6 Cl. & F. 232; Holmes v. Jones (1907) 4 C.L.R. 1692).

212 Materiality is in some senses an obvious requirement in this context, although there is, as always, opinion to the contrary. The arguments against the proposition generally suggest that materiality is not a separate requirement, but is simply relevant to the burden of proving reliance in any case: any misrepresentation which induces a person to enter into a contract should be a ground for rescission, whether or not it would have so induced a reasonable person. Materiality merely raises a rebuttable presumption that a particular representee relied upon the statement. See Dawson and McLauchlan, The Contractual Remedies Act 1979 (1981), 25; Goff and Jones, The Law of Restitution (3rd ed., 1986), 168; Museprime Properties Ltd v. Adhill Properties Ltd [1990] 2 E.G.L.R. 196, 201-2; Restatement (Second) of Contracts, § 167, Comment (b): materiality amounts to circumstantial evidence of inducement. Whilst in practice it may be true that the materiality requirement is significant for evidentiary purposes only, it also has some normative, as opposed merely to the obvious factual, hence evidential, content. It captures the idea that, for the purpose of imposing legal liability, a representee is also required to be reasonable (or justified) in her actual reliance upon the statement, even though this is, ultimately, a question of (negative) proof on the part of the representor: cf. Gould v. Vaggelas (1984) 157 C.L.R. 215, 238-9 per Wilson J.

213 A clear distinction is drawn in law between the requirement of materiality and the need to establish that the representee relied on the misrepresentation. As Spencer Bower and Turner, Actionable Misrepresentation (3rd ed., 1974), 130, argue:

Inducement and materiality are two quite separate ingredients of any actionable misrepresentation. Both must be established; it is of no avail to show that the representee was in fact induced to act to his prejudice by a falsehood, unless that falsehood was of such a nature to induce a normal person so to act in the circumstances of the case; whilst on the other hand, it is useless to show that a priori probability of its operating as an inducement unless it is shown that it did in fact induce.

The requirement of materiality imparts an essentially objective, and thus normative, standard, whereas the question whether or not the representee was induced to rely upon the misrepresentation depends essentially on psychological or subjective criteria: upon its empirical effect on the particular individual. The need to make such a distinction, for example, is emphasised in the judgment of Bowen L.J. in Smith v. Land and House Property Corporation (1884) 28 Ch.D. 7, at 16:

I cannot quite agree with the remark of the late Master of the Rolls in Redgrave v. Hurd, that if a material representation calculated to induce a person to enter into a contract is made it is an inference of law that he was induced by the representations to enter into it ....

On the one hand, the fact that a statement is one that would affect the judgment of a reasonable person does not mean that it necessarily persuaded the particular representee to contract, and conversely the fact that the representee was persuaded to contract does not mean that a reasonable person would have been. Materiality may, however, as Bowen L.J. went on
also be shown that the statement, whether it be of a factual nature or otherwise, had the tendency to induce the "normal" or "reasonable" person to enter into the contract in question.\(^{214}\)

Whenever lawyers use the word "reasonable", we are usually put on notice that the enquiry is fraught, if only implicitly, with the application of recognized (\textit{ibid}), be reason for drawing a strong inference of fact, which would then lead to a shifting of the evidentiary burden on to the representor: cf. Gould \textit{v. Vaggelas, op. cit.}

\(^{214}\) The requirements that the statement be material, and that it be relied upon by the representee in entering into the contract, are inevitably interlinked. Materiality describes both a factual and a normative aspect of the statement, and involves the idea that the statement is of its nature capable of influencing the representee: of having in some measure induced her to contract; reliance (or inducement) describes the particular relationship which the statement had, or is deemed to have had, to the contract.
some normative criterion or criteria.\textsuperscript{215} One aspect\textsuperscript{216} of the issue of "materiality" in this context is merely a (perhaps disguised) manifestation of yet another interrelated, and patently normative, criterion: for legal responsibility to attach for the accuracy of one party's assertions made in the context of precontractual negotiations, it is essential that the other party's actual reliance thereon must be justifiable,\textsuperscript{217} a matter which we have already seen as being integral to the creation of the relationship of care in the context

\begin{quote}
\textsuperscript{215} The use of the word "reasonable" in this context carries connotations stronger than merely that the enquiry is simply an "objective" one, although this is often what members of the legal profession take materiality to mean here. As Jessel M.R. said in Smith v. Chadwick (1882) 20 Ch. D. 27, at 44, the question is whether the Court sees on the face of [the statement] that it is of such a nature as would induce a person to enter into the contract, or tend to induce him to do so, or that it would be a part of the inducement, to enter into the contract.

If the misrepresentation is trivial in the context of the contract, then, it might not be material: \textit{id.}, 55, 70; cf. \textit{Restatement (Second) of Contracts}, § 162, Comment (c): a person who innocently misrepresents an unimportant fact has no reason to know that his statement will cause action; \textit{Northern Heel Corp. v. Compo Indus.}, 851 F.2d 456 (1988): materiality 'is not what a disappointed party says it is' but 'demands an objective cross-matching of the significance of a fact to the essence of the transaction'. Notwithstanding a failure to meet the objective criterion, however, as in the case of duress, the particular characteristics of the representee may be relevant to the question of materiality if, to the knowledge of the representor, there are 'special circumstances or peculiarities in the moral or mental constitution, or in the situation, of the representee, of such a character as to render the particular representation of the utmost importance to the particular representee to whom it was addressed, though it would be utterly inoperative on the mind of a normal person under normal conditions', then the representation will be material as between the parties: \textit{Nicholas v. Thompson} [1924] V.L.R. 554, at 578 \textit{per} McArthur J. Although these remarks were made in the context of a fraudulent misrepresentation, there is no reason to assume that the position would be any different were the misrepresentation an innocent one. This recognises the condition that a particular party may be peculiarly sensitive to deception in any given case, and that special account is to be taken of this contingency. Cf. also, \textit{Restatement (Second) of Contracts}, § 162(2); \textit{Restatement (Second) of Torts}, § 538(2)(b). This makes sound policy sense; if a statement maker is aware of another's idiosyncrasies and preys upon them, he can hardly complain if the contract that he succeeds in inducing is later held to be voidable.

\textsuperscript{216} There are also empirical aspects relating to causation and the degree to which the representation may have been said to have contributed to the representee's decision to enter into the contract: cf. \textit{Cheshire & Fifoot's Law of Contract} (6th Aust. ed, 1992), para. 738.

\textsuperscript{217} This is explicitly acknowledged, for example, in the \textit{Restatement (Second) of Contracts}, § 164; and in the \textit{Restatement (Second) of Torts}, § 538: reliance not justified unless misrepresentation "material", that is, likely to induce a reasonable person.
of negligent misstatement.\textsuperscript{218} To put this matter more strongly (although perhaps too strongly in the present context), in addition to establishing the fact of inducement, must a recipient of false precontractual information also show that she in addition had a right or was entitled to rely on that information in informing her contractual decision-making,\textsuperscript{219} that she did not merely rely because she had every opportunity to ascertain the truth or accuracy of that information for herself\textsuperscript{220} but simply failed to do so. Must the would-be plaintiff take reasonable steps to ensure that any information she receives from the other contracting party in bargaining is accurate and reliable?\textsuperscript{221}

Naturally, in the area of positive misleading or deceptive conduct, one should expect that the recipient's responsibility to verify the truth or reliability of statements she relies upon in entering into a contract will be

\textsuperscript{218} The writer does not agree with Greig and Davis' suggestion that, in the context of negligent misstatement, the requirement that it must be reasonable for the representee to act on the statement means only that her failure to act reasonably will lead to a reduction of damages under the contributory negligence legislation and not to the denial of the duty: Greig & Davis, \textit{The Law of Contract} (1987), 849. The whole tenor of \textit{Hedley Byrne}, however, suggests that a finding of unreasonable reliance completely debars recovery; that the issue is separate from that of "contributory negligence". Cf. Trindade & Cane, \textit{op. cit.}, 329. But see Jaffey, \textit{op. cit.}, 125; Woolf J. in \textit{J. E. B. Fasteners Ltd v. Marks, Bloom & Co.} [1981] 3 All E.R. 289, at 297.

\textsuperscript{219} Cf. Calamari and Perillo, \textit{op. cit.}, 358. This is similar to the statement of the normative aspect of the choice prong in the context of duress.

\textsuperscript{220} One might determine or verify the accuracy of facts, for example, by conducting one's own survey or investigation, by examining records, or by making enquiries or seeking the advice of third parties.

\textsuperscript{221} That the law relating to misleading and deceptive conduct might have this analytical structure reflects its basic premise that bargaining is in general a process in which each party is expected in some measure to look after his or her own interests, and that one party cannot as of course use her own ignorance or indolence so as to hold the other responsible for the reliability of his precontractual statements. As with duress, then, there is perhaps a need (albeit a weak one) in the present context to focus our attention on the behaviour of both parties. Such an approach seeks to strike some analytical balance between, on the one hand, the negative duty of one party to desist from using the opportunity or capacity he has unfairly to create informational advantages in bargaining, and, on the other hand, the other party's ability to inform herself and to be the guardian of her own interests in bargaining. The normative conceptions of "materiality", "justifiable reliance", etc., thus potentially become the principal instruments for limiting liability in this area, as well as in others. The conception of "materiality" in this context translates into the self-regarding obligation that the party acting in reliance must be acting reasonably in so doing.
minimal. Unless, say, a recipient has good reason\textsuperscript{222} to doubt the accuracy or seriousness of a precontractual assertion,\textsuperscript{223} simple policy—commercial expediency\textsuperscript{224} and our respect for bargaining equilibria\textsuperscript{225}—should generally

\textsuperscript{222} Both as an empirical and as a normative matter.

\textsuperscript{223} Reliance will not be reasonable if the representee has actual knowledge or a belief in the falsity of a precontractual statement. This would also, presumably, sever the empirical chain of causation between the misrepresentation and the representee’s decision to enter into the contract: see Eaglesfield \textit{v.} Londonderry (1875) 4 Ch.D. 709; Smith \textit{v.} Chadwick (1882) 20 Ch.D. 27, at 44-45 per Jessel M.R.; Dyer \textit{v.} Hargrave (1805) 10 Ves. 505; Bawden \textit{v.} London, Edinburgh \& Glasgow Assurance Co. (1892) 2 QB 534. This is the case even when fraud is alleged: Jennings \textit{v.} Broughton (1854) 5 De G.M. \& G. 126; Bebbie \textit{v.} Phosphate Sewage Co (1875) L.R. 10 Q.B. 491; Irvine \textit{v.} Kirkpatrick (1850) 7 Bell Sc. App. 186, at 237, per Lord Broughman: ‘the misrepresentation and the concealment go for just absolutely nothing, because it is not \textit{dolus qui dat lucem contractui}’. However, a plaintiff may not be defeated in his claim for misrepresentation if he knew that the representation was false yet did not know of the extent of the falsity: Gipps \textit{v.} Gipps [1978] 1 N.S.W.L.R. 454, at 460 per Hutley J.A., following Sinclair \textit{v.} Preston [1970] W.A.R. 186, at 191. Cf. also, Strover \textit{v.} Harrington [1988] 2 W.L.R. 527, at 584-586 per Browne-Wilkinson V.-C.: party may have his solicitor’s knowledge of truth imputed to him.

The writer would question the editors of \textit{Kerr on Fraud and Mistake, op. cit.}, at 85, for being too categorical in their assertion that ‘[t]he doctrine of notice has no application where a distinct representation has been made’. Cf. also, Jessel M.R. in Jones \textit{v.} Rimmer (1880) 14 Ch.D. 588, at 590: ‘Misrepresentation is not to be got rid of by constructive notice’; Cheshire \& Fifoot’s \textit{Law of Contract} (6th Aust. ed., 1992), 348-9; Greig \& Davis, \textit{op. cit.}, 845. Absent the case of actual fraud, it is not altogether clear why, both as a positive and a normative matter, a representee should not be put on notice that a statement is false. Surely this issue is central to the whole question of justifiable reliance, and should be a factor to be taken into account. The issue is also almost directly analogous to the case of puffery, where a person is in effect put on notice that certain statements are not to be taken seriously. Cf. also, \textit{Restatement (Second) of Torts}, § 541: ‘Representation Known to Be or Obviously False’; and see Reporter’s accompanying Commentary.

\textsuperscript{224} Especially in a modern, highly specialised industrial or post-industrial society, human beings, as rational agents, are continually having to act in reliance on the truth of information and advice which cannot directly be verified, at least without unreasonable expense to the recipients of such information or advice. Both as a positive and normative matter, a party is generally justified in believing that her co-contracting party was honest, particularly where the nature of the information communicated was such that it would induce a reasonable person to contract. The rationale underlying this view has been clearly stated, for example, by the Supreme Court of North Carolina in \textit{Walsh v. Hall}, 66 N.C. 233, 238 (1972):

\begin{quote}
[The law does not require a prudent man to deal with everyone as a rascal and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract. There must be a reasonable reliance upon the integrity of men or the transactions of business, trade and commerce could not [prosper] ....
\end{quote}

584
ordain this conclusion.\textsuperscript{226} What is more, the conduct of the communicator may, where the information communicated is complete in itself, itself divert the recipient from actually conducting her own investigations into the matter in question.\textsuperscript{227} The prevailing common-law trend, then, is to prescribe rather relaxed standards of diligence on the part of recipients of definite and positive assertions in ordinary precontractual dealings.\textsuperscript{228} Understandably, the courts incline to condemn the communicator’s conduct rather than the recipient’s credulity, to place the burden of risk upon the statement-maker to get his information right—to tell the truth or be accurate—rather than on the recipient to verify anything that is communicated to her.\textsuperscript{229} (Legislative glosses in the area, moreover, have tended to enforce significantly lower standards of care on the part of recipients of unreliable information,\textsuperscript{230} especially where consumer

\footnotesize{\textit{Cf. also, Restatement (Second) of Torts, § 552, Comment (a): ‘[N]o interest of society is served by promoting the flow of information not genuinely believed by its maker to be true’.}}

\footnotesize{\textsuperscript{225} Or, in other words, under the first injunction of the duty to protect the vulnerable, our desire to prevent the creation of exploitable circumstances.}

\footnotesize{\textsuperscript{226} When one party is responsible for upsetting the balance of the negotiations, it only follows that there should be a corresponding diminution of the other’s responsibility to verify the information received by her.}

\footnotesize{\textsuperscript{227} Cf. \textit{Dobell v. Stevens} (1825) 3 B. & C. 623; \textit{Covcat Pty. Ltd v. Clark Equipment Australia Ltd} (1986) A.T.P.R. 40-717, at 47,827 \textit{per} Wilcox J. A misrepresentation as to the effects or contents of contractual writing may prevent an incorporation of the writing into the parties’ contract, and may excuse, in effect, the representee from her ordinary (self-regarding) obligation to read the contents of what she signs or accepts: cf. \textit{Curtis v. Chemical Cleaning & Dying Co.} [1951] 1 K.B. 805.}

\footnotesize{\textsuperscript{228} In Louisiana, apparently, when the means of gaining knowledge are equally available to both parties and the contractual object is open for their inspection, the party who does not avail herself of those means and opportunities will not be heard to say that she was deceived by the misrepresentations of the other: Litvinoff, S., “Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion” (1989) 50 Louisiana L. Rev. 1, 69.}


\footnotesize{\textsuperscript{230} While there would appear to be no warrant to prescribing the common-law standard of “reasonableness”, it is generally accepted that the very expansive words of s. 52 of the \textit{Trade Practices Act} must be read down to expect some standard of vigilance on the parties affected by misleading or deceptive conduct. The test favoured, however, appears to be a relatively low}
transactions are involved. Yet, even despite this obviously relaxed rule of justifiable reliance in cases of positive misleading or deceptive conduct, a statement-maker must, in ordinary contractual dealings, still be entitled to expect that the recipient will in some measure use her own senses and draw obvious and reasonable conclusions about the statement in question, as well as about the contractual subject-matter itself. This is a functionalist imperative, which may suggest that some limitations should apply to the recipient’s entitlement simply and blindly to rely on all items of information she receives from the statement-maker during precontractual negotiations between them; that she should exercise some individual responsibility for her own informational needs in bargaining.

In determining the limits of individual responsibility in this context, it is ordinarily presupposed, as a matter of course, that a party is justified in relying upon statements classified as being ones of past or present existing “fact”. This is largely because parties are generally entitled to assume that any factual statements made will be accurate; for reliance upon their accuracy was the anticipated premise for the making of the statement in the first place. A party is not so justified, however, at least in the absence of proof of actual fraud, in acting upon statements of opinion, statements of law.


231 Care should be taken not to prescribe too low a standard where s. 52 has the ability to supervise dealings between private commercial parties. Generally, see Miezeitis, J. C., “The Balance of Responsibilities Struck by Section 52 Trade Practices Act in Private Commercial Dealings” (Unpublished Research Paper, 1991, A.N.U. Law Library).

232 Cf. also, Finn, “Statutes and the Common Law,” (1992) 22 Western Australian L. Rev. 7, at 26, who suggests that an attention to the relevance of the informational responsibilities to be expected of applicants under ss. 52 and 82 of the Trade Practices Act—i.e., issues of risk assumption and analysis, and of “contributory negligence”—may become relevant to a proper disposition of such cases.

233 Cf. also, the relationship with the objective theory of contract: that is, one’s semantic and substantive interpretation and communication of contractual language, terms, etc., must be reasonable. See Cartwright, Unequal Bargaining (1991), 15, 19; Scriven Bros. & Co. v. Hindley & Co. [1913] 3 K.B. 564.

statements as to future events,\textsuperscript{237} statements of intention,\textsuperscript{238} and mere puffs.\textsuperscript{239} Since these statements are not strictly concerned with "fact", a recipient is not so readily entitled to assume "accuracy", and thus may be

29 Ch. D. 459. There is authority for the proposition that the fraudulent misrepresenter will not be allowed to say that his representation was not material: Smith v. Kay (1859) 7 H.L.C. 750, at 759; Nicholas v. Thompson [1924] V.L.R. 554, 576 per McArther J.; Australian Steel and Mining Corp. Pty. Ltd v. Corben [1974] 2 N.S.W.L.R. 202; although some courts have enquired into materiality in cases of deceit: cf. Smith v. Chadwick (1884) 9 App. Cas. 187.

235 The law views statements of opinion as a statement of belief based on grounds incapable of actual proof. In the words of Chancellor Kent, 'Every person reposes at his peril in the opinion of others, when he has equal opportunity to form and exercise his own judgment': Commentaries on American Law, Vol. 2, 380 (1st ed., 1827). Cf. also, Restatement (Second) of Torts, § 545, Comment (d); Restatement (Second) of Contracts, § 169 Comment (d): opinions must be discounted because of maker's self-interest. The opinions of some, however, are more important to us than the opinions of others. For example, we concede much reliance in certain advisers because of their special knowledge, skill, judgment, or objectivity with respect to the subject of the opinion, advice, etc. This is most clearly seen in cases of negligent misstatement, the law about which (as we have seen) has equally to do with the preparation and dissemination of advice and opinion, as with actual facts.

236 Bilbie v. Lumley (1802) 102 E.R. 641; Eaglesfield v. The Marquis of Londonderry (1876) 4 Ch. D. 693; Restatement (Second) of Contracts, § 170; Restatement (Second) of Torts, § 545.


238 Edginton v. Fitzmaurice (1885) 29 Ch. D. 459; Restatement (Second) of Contracts, § 171; Restatement (Second) of Torts, §§ 530, 544. Statements of intention almost invariably relate to a future event, and thus are usually directly analogous to the situation of future statements and assurances.


587
expected or required to exercise a greater measure of individual responsibility in relation to the statement. Questions of "justifiable" reliance thus loom larger in the enquiry.

Yet given that these latter, non-factual categories of statement may equally manipulate bargaining conditions and choices as might statements of fact, the law has been required, in the interests of justice, to make perhaps artificially fine distinctions, and to recognise, for example, that, outside the area of negligent misstatement, some statements of opinion will be actionable, as will some statements of intention, only statements of "pure" law will be non-actionable, but most statements relating to law will be of "mixed-fact-and-law", which may give rise to civil liability.

---


241 The statement maker necessarily represents the fact that he does hold the opinion: almost invariably the statement of an irrelevant fact. Additionally, however, where the statement maker has greater knowledge, or access to knowledge, than the recipient, then the statement of opinion will be held to carry with it the implied statement of fact that the statement maker has reasonable grounds for his expressed opinion. Cf. Bisset v. Wilkinson [1927] A.C. 177; Smith v. Land and House Property Corp. (1884) 28 Ch. D. 7.; Global Sportsman Pty. Ltd v. Mirror Newspapers Pty. Ltd (1984) 2 F.C.R. 82, 88; Brown v. Raphael [1958] Ch. 636. Cf. also, Restatement (Second) of Contracts, §§ 168 ('Reliance on Assertions of Opinion'), 169 ('When Reliance on an Assertion of Opinion is Not Justified'); Restatement (Second) of Torts, §§ 538A, 539.

242 An action for deceit will sound if it can be shown that at the time of stating his intention the statement maker did not in fact hold that intention: Edgington v. Fitzmaurice (1885) 29 Ch. D. 459, esp. at 483 (Bowen L.J.); cf. also, Balfour v. Hollandia Ravensthorpe N.L. (1978) 18 S.A.S.R. 240 (Hogarth J.). Despite the obvious difficulties of proving actual fraud in this context (on which see Greig & Davis, op. cit., 838), to the extent that the intention was in fact held, the statement is usually of an irrelevant fact, for it is usually of little consequence to the recipient who is disappointed as a result of the intentions not actually being carried out. She will ordinarily have no action unless the statement of intention is embodied as a term of a contract.

243 For example, it is obvious that an abstract statement of law, as for instance that an oral contract of guarantee is not enforceable by action, is a representation of pure law: Beattie v. Lord Ebury (1872) 7 Ch.App. 777 at 802; Beesly v. Hallwood Estates Ltd [1960] 2 All E.R. 314 at 323. Similarly, a common mistake of pure law has no effect: British Homophone Ltd v. Kunz and Crystallate Gramophone Record Manufacturing Co Ltd (1935) 152 L.T. 589.

244 The traditional distinction between "fact" and "law" has been a notoriously intractable one. Cases involving statements as to a person's private rights, such as rights of ownership,
statements as to future events or intentions may become promissory contractual statements or found an estoppel and so forth. But the

have often regarded these as forming a basis for actionable misrepresentation. In Cooper v. Phipps (1867) L.R. 2 H.L. 149, for example, Lord Westbury said that the distinction was one between private rights which were treated as matters of fact and 'the general law—the ordinary law of the country': for example, that property is "owned", or subject to a "security" or an "easement". Cf. also, Reynell v. Sprye (1852) 1 De G.M. & G. 660, 42 E.R. 710; Hirschfeld v. The London, Brighton & South Coast Ry. (1876) 2 Q.B.D. 1; West London Commercial Bank v. Kitson (1884) 13 Q.B.D. 360: represented effect of private Act of Parliament; Bank of Australia v. Adams (1890) 8 N.Z.L.R. 119: represented effect of private instrument; MacKenzie v. Royal Bank of Canada [1934] A.C. 468, at 476.

Most statements, however, will not be of pure law but a mixture of fact and law. The courts have often regarded such statements as actionable representations, particularly where the representative's reliance was reasonable in all the circumstances. In this connection Jessel M.R. in Eaglesfield v. Marquis of Londonderry said, op. cit., at 702:

A misrepresentation of law is this: when you state the facts, and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law.

Cf. also Solle v. Butcher [1950] K.B. 671; Laurence v. Lexcourt Holdings Ltd [1978] 2 All E.R. 810. Hence, too, if a misstatement is not to law but as to legal consequences there will be an implied statement of fact: namely, the legal consequences of not complying with the law. See Graham v. Legault [1951] 3 D.L.R. 423 (Sask. C.A.), where there was a failure to disclose that a basement was illegally rented. It was held that the representation was not as to law, i.e., as to when a permit was required, but as to fact, viz, the legal consequences of the lack of a permit.

In appropriate circumstances, the statement of law is analogised with that of opinion, in the sense that a statement of law might impliedly state that there are reasonable grounds for the statement maker believing that the law is as stated, such as when the statement maker is a lawyer and the recipient a lay person. Cf. West London Bank v. Kitson (1884) 13 Q.B.D. 360; McIntyre v. Sawyn (1893) 14 L.R. (N.S.W.) 436; In re Hooley Rubber and Chemical Co. Ltd and Royal Insurance Co. Ltd [1920] 1 K.B. 257; Oudaille v. Lawson [1922] N.Z.L.R. 259.

It is noteworthy that the simple analytical distinction between fact and law is in the process of being abolished from Australian common law. It has already gone from the restitutionary context: David Securities v. Commonwealth Bank (1992) 66 A.L.R. 768, and it is a short step from this position to abolish it in the contractual context as well: see the arguments advanced previously on the distinction made in Skeate v. Beale in the context of duress: Chapter Five, p. 358.

Walton Stores v. Maher, op. cit. Note, however, that a statement which is ostensibly about the future may sometimes imply a statement about a present fact. Hence, in Ware v. Johnson [1984] 2 N.Z.L.R. 518 a statement that a kiwifruit orchard would produce in two years' time was held to be a misrepresentation in the sense that it implied a fact that the present state of the orchard was such as to justify the prediction. Cf. also Futuretronics International Pty. Ltd v. Gadzis [1992] 2 V.R. 217 (Ormiston J.): a contractual promise would amount to an
principal technique of the law is still to manipulate these *prima facie* non-
factual statements into statements of fact.\(^{248}\) Whilst this preoccupation with
"facts" may be no more than a legacy of our patently more formalistic past,
with its espousal of the obvious benefits of predictive certainty, the
acceptance of statements of law and of opinion within the "factual" umbrella
doubtless represents a veiled acceptance of a *contextual* approach to what is
especially the central issue here: that of "reasonable reliance", or
"justification for reliance".\(^{249}\) Thus, as indicia of this contextual enquiry into
the question, the courts might be seen as addressing such factors and
considerations as:

the availability of the information to both parties, the reliability that
can properly be attributed to the assertion (given its maker and its
nature), the known credibility of the representee, whether the
assertion is one which it would be expected to be taken seriously, the
steps the representee can properly be asked to take in informing the
decision he takes and so on.\(^{250}\)

'But', as one commentator writes, 'the logical attractions of [this
contextual approach] have, for the most part, lost out to the expediency (and
the predictive virtue) of [the traditional, formalistic approach]'\(^{251}\). Howbeit,
the contextual approach will doubtless become a more important analytical
device for future courts to acknowledge; in particular, as we view the law's
seeming preparedness increasingly to recognise the manipulative capacity
and effects of non-factual statements in and on precontractual negotiations

---

implied promise that the promisor had the intention and ability to carry out that promise. On
this point generally, see Spencer Bower and Turner, *Actionable Misrepresentation* (3rd ed.,
1974), 47.

\(^{247}\) Even in relation to puffery, some have questioned too rigid a position as being a little over
indulgent to salespersons and a little too forsaking of the gullible: see the observations of Lord
is much to be said for applying more demanding standards, requiring a person to stand by what

\(^{248}\) See nn. 240-247, *supra*.

\(^{249}\) Cf. Finn, "Equity and Contract", *op. cit.*, 128.

\(^{250}\) Finn, *id*, 127.

\(^{251}\) *Ibid*. 

590
and related settings. With the contextual approach, therefore, issues of justifiable reliance are opened up for future consideration; for under this approach, such issues must play a more heightened role in the resolution of disputed cases, in particular as "justifiable reliance" is doubtless to provide the perceived necessary controls on excessive liberality in the application of the doctrines, rules and standards in this area of law.

In any event, where the question of justifiable or reasonable reliance is potentially in issue, the representee's failure to investigate matters for herself may merely be one circumstance, in addition to the non-factual nature of the statement made, used to determine whether the recipient of the representation is reasonably permitted to allow it to influence her contractual decision-making. Consistent with the law's relaxed approach in the context of positive deception, it is ordinarily no defence to misrepresentation that a representee might have known the truth by making her own enquiries, even if the representor himself told the representee where further information might have been got, or recommended her to take advice, or, indeed, even put into her hands the means of discovering the truth. The classic, policy-driven statement exemplifying this point is to be found in Sir George Jessel M.R.'s famous passage in Redgrave v. Hurd.

252 In particular, as demonstrated through the disintergration of the law-fact dichotomy (cf. David Securities v. Commonwealth Bank (1992) 66 A.L.R. 768), the increasing preoccupation with the responsibilities of advisers and general information-providers (Section 3.1.2; cf., also, Chapter Six, Section 2.2.1.1.2.1.), and the burgeoning s. 52 jurisprudence.

253 Or perhaps to ask further questions, or use any other strategic response available to her (such as bluffing), as contemplated by the functionalist ethic of bargaining.

254 This position cannot be doubted with respect to fraudulent misrepresentations, for a party engaging in deceitful conduct must be taken to know his victim, and if his fraud is successful it is contrary to both common sense and policy that he be permitted to escape liability by arguing that he would not have succeeded had his victim been less gullible or more prudent: cf. Boscaini Investments Pty Ltd v. Petrides (1982) 103 L.S.J.S. 250; Aaron's Reefs Ltd v. Twiss [1896] A.C. 273, at 279-280 per Lord Halsbury L.C. Such a principle, however, is not so readily open to lack of question with respect to non-fraudulent misstatements. On this point, see Greig & Davis, op. cit., 846-7.

255 (1881) 20 Ch.D. 1, at 13-14.
If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, "If you had used due diligence you would have found out that the statement was untrue. You had the means afforded to you of discovering its falsity, and did not avail yourself of them." ... Nothing can be plainer, I take it, on the authorities in equity than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence.256

Different considerations might apply where the representee does in fact take the opportunity to investigate but does so negligently.257

A further feature of the cases which potentially goes to the question of justifiable reliance is the presence or absence of suitably worded and communicated exculpatory clauses, acknowledgement clauses, disclaimers,


257 Farnsworth, Contracts (2nd ed., 1990), 263, for example, comments that a party who begins an investigation but does not complete it or fails to conduct it properly 'may be less charitably treated' by the courts. He cites McCormick & Co. v. Childers, 468 F.2d 757 (1972): buyer of chicken processing business who had begun to investigate the patentability of a chicken boning machine 'was charged with knowledge of everything that a proper investigation would disclose'. But cf. Hayat Carpet Cleaning Co. v. Northern Assur. Co., 69 F.2d 805 (1934). The editors of Cheshire & Fikot's Law of Contract (6th Aust. ed., 1992), 349, comment that someone who investigates the false statement but fails to discover the truth may still argue that the misrepresentation induced her to contract: citing and discussing, Donaldson v. Freeson (1929) 29 S.R. (N.S.W.) 113; Sagar v. Closer Settlement Ltd (1929) S.R. (N.S.W.) 199. As an empirical matter, an attempt (but failure) to make a proper investigation may break the chain of causation between the misrepresentation and reliance: see, e.g., Attwood v. Small (1838) 6 Cl. & Fin. 232; 7 E.R. 684; [1835-42] All E.R. Rep 285. This is, of course, a different matter to the one under consideration here: that of whether the actual reliance was reasonable or justifiable.
qualifying remarks, and the like.\textsuperscript{258} Except in the case of actual fraud,\textsuperscript{259} such clauses, depending on their precise nature, purported scope and effect, may break the empirical chain of causation between the statement and the complainant’s loss,\textsuperscript{260} or they may operate at the normative level itself, so as to make any actual reliance unreasonable.\textsuperscript{261} In any event, the precise effect of a non-responsibility clause will be dependent upon a number of factors and considerations, including, for example: the kind or purported extent of the clause; the nature of the parties and business custom or practice in the particular industry; whether the contract is a negotiated one or whether it is form contract; and, in the latter case, whether the clause is buried in fine print or through reasonable notice it has been brought to the attention of the representee.\textsuperscript{262}

\textsuperscript{258} Cumming, “Balancing the Buyer’s Right to Recover for Precontractual Misstatements and the Seller’s Ability to Disclaim Express Warranties,” (1992) 76 Minn. L. Rev. 1189.

\textsuperscript{259} As a matter of policy, it is not possible to disclaim liability for one’s statements that are fraudulently or recklessly made: see Freeman v. Cooke (1948) 2 Exch. 663; Smith v. Hughes (1871) L.R. 6 Q.B. 597, 607 per Blackburn J.; Sullivan v. Constable (1932) 48 T.L.R. 369; S. Pearson & Son Ltd v. Dublin Corporation [1907] A.C. 351, 353-4 per Lord Loreburn L.C.: ‘Now it seems clear that no one can escape liability for his own fraudulent statements by inserting in a contract a clause that the other party shall not rely upon them’; Suburban Homes Pty. Ltd v. Topper (1929) 35 A.L.R. 294. Similarly, a non-responsibility clause cannot be effective to oust the jurisdiction of a public policy provision such as s. 52 of the Trade Practices Act 1974 (Cth): see Clark Equipment Australia Ltd v. Covcat Pty. Ltd (1987) 71 A.L.R. 367; Cheshire & Fifoot’s Law of Contract (6th Aust. ed., 1992), para. 7117.


\textsuperscript{261} Compare the cases involving negligent misstatement. The use of disclaimers, or other such exculpatory clause, may operate either to negate the assumption of responsibility, or to prevent the formation of a special relation of reliance. In either case, no duty of care arises. See also Yorke v. Lucas (1985) 158 C.L.R. 661, 666 (s. 52): information merely passed on by a person for what it is worth, with an expressed or implied disclaimer or qualification as to its veracity or reliability, unlikely to be misleading or deceptive.

In the A.C.T and South Australia, an exculpatory clause will only be effective if reasonable: Law Reform (Misrepresentation) Act 1977 (A.C.T.), s. 6; Misrepresentation Act 1971 (S.A.), s. 8. Cf. Misrepresentation Act 1967 (U.K.), s. 3; Unfair Contracts Terms Act 91977) (U.K.), s. 11(1).

\textsuperscript{262} See also the discussion on the regulation of such clauses in Chapter Four, Section 4.1.2.3., and accompanying footnotes.
By way of summary and conclusion, then, the recipient’s almost unfettered right to rely on the statement-maker’s information in precontractual negotiations, in particular where that information is in the nature of past or present existing fact, will be commensurate with the recipient’s diminished duty to use due diligence in the protection of her own interests in that context. There may, however, be some justification for our admitting a graduated response to the problem of justifiable reliance.263 In the case of deceit, any failure on the part of a recipient to satisfy her own informational needs should not bar liability, because as a simple matter of social policy—the law’s function in fraud cases is clearly a constabulary one—mere negligence should not allow the statement-maker to make use of the law as a shield to his own fraud.264 Our concern for the fraud simply outweighs our concern for the negligence.265 Where the information is communicated non-fraudulently, however, such as in the case of negligent and purely innocent misrepresentations, then our concern for the actions and choices of the recipient has a rightful place in our analysis both of primary and secondary responsibilities, that is, liability and remedy respectively.266 In terms of imposing initial liability, the standards of diligence expected of a recipient may vary depending on the type of remedy sought. For example, higher standards may be required where the remedy sought is compensatory, such as in the case of damages. Where the remedy sought is more neutral in its consequences for the liable party, however, such as in the case of rescission or barring an action for specific performance, a

263 Farnsworth (2nd ed., 1990), op. cit., 263, for example, suggests that in assessing a representee’s fault, the courts can be expected to draw a distinction between innocent and fraudulent misrepresentations, being more generous in allowing relief if fraud can be shown.

264 It lies ill in the mouth of the person who is found to have made a false statement to say that the other person ought to have realised that it was false. Cf. Spiess v. Brandt, 41 N.W.2d 561, 570 (1950): ‘[O]ne who deceives another to his prejudice ought not be heard to say in defense that the other party was negligent in taking him at his word’.

265 Cf., too, Restatement (Second) of Torts, § 545A (‘Contributory Negligence’): since fraudulent misrepresentation amounts to an intentional tort, a plaintiff’s recovery is not barred by his own negligence. Cf. id., § 552A: contributory negligence may bar recovery in the case of a negligent misrepresentation.

266 Respectively, this represents what the writer previously called the “modal” and “scalar” aspects of the “exploitation” or “unconscionability” enquiry: Chapter Four, Section 3.1.1.
relatively lower standard of diligence may be justified. If, for policy reasons, however, the law should want to impose liability in all cases of qualifying misleading or deceptive conduct, then the gradations may come in at the remedial level itself, as is exemplified, in certain contexts, through the apportionment, "contributory negligence" legislation.\textsuperscript{267} This approach only makes sense, however, where a damages remedy is sought, such that a reduced amount could be awarded on account of the negligence of the recipient of the information. The idea does not fit well where rescission is the only remedy sought or available,\textsuperscript{268} which will sometimes be the case in instances of purely innocent misrepresentation, as the ideas represented by the apportionment legislation have never affected rescission (the remedy sought in \textit{Redgrave v. Hurd} itself), such a remedy being either available or not.\textsuperscript{269}

It is not the writer's primary intention here to resolve these questions, but merely to raise them. However, one should have thought that the issue of the respective responsibilities of bargaining parties is one that goes first to liability, and then, only secondarily, to remedy, at least in the case where damages are sought.\textsuperscript{270} Given that the intention and effect of misleading or deceptive conduct in all cases is the same—that is, to control or to influence the bargaining choices and actions of the recipient—there is, perhaps, no obvious reason why, for the purposes of initially prescribing liability, we

\textsuperscript{267} This is consistent with the writer's "scalar" conception of exploitation. In any case, our moral or legal complaints about a particular act of exploitation (i.e., in the modal sense) may be qualified or overridden by other normative concerns or countervailing considerations, but those complaints are not themselves annulled or cancelled. Where countervailing considerations mitigate the acts of exploitation, rendering them, perhaps, not-so-bad, this can be reflected in a reduction of the remedy to be received by the aggrieved party.

\textsuperscript{268} Whether such a remedy ought to be the only one available is, of course, another story. We have already noted the legislative innovations suggesting that it should not be. For example, under both the South Australian and the A.C.T. misrepresentation Acts, damages are available in lieu of a rescissory remedy.


\textsuperscript{270} This is also consistent with the writer's bifurcation of the exploitation analysis into its modal and scalar components.
should raise or lower the standards of self-reliance according to the state of mind or conduct of the information-provider. Given that it is always the communicator of the information who attempts to create or to manipulate the choice conditions or variables of the particular negotiations, why should we not, as a simple matter of social policy, favour the recipient over the statement-maker in all but the most egregious cases of the former’s neglect? The American Law Institute’s response is consistent with this approach under the Restatement (Second) of Contracts:271

A recipient’s fault in not knowing or discovering facts before making the contract does not make his reliance unjustified unless it amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.272

---

271 Restatement (Second) of Contracts, § 172.

272 Id, Comment (a): The mere fact that the recipient could, by exercising reasonable care, have avoided the mistake caused by the misrepresentation, does not bar her from relief. The justification for this rule is particularly strong, since the recipient’s mistake was the result of a misrepresentation. According to Comment (b):

In determining whether the recipient of a misrepresentation has conformed to the standard of good faith and fair dealing, account is taken of his peculiar qualities and characteristics, including his credulity and gullibility, and the circumstances of the particular case, including the fraudulent or innocent nature of the misrepresentation .... If the recipient knows that the assertion is false or should have discovered its falsity by making a cursory examination, his reliance is clearly not justified and he is not entitled to relief .... He is expected to use his senses and not rely blindly on the maker’s assertion. On the other hand, he is not barred by the mere failure to investigate the truth of a misrepresentation, even where it might be reasonable to do so .... The fact that the recipient took advantage of an opportunity to investigate may be relevant under the rules relating to assertions of opinion ... or as indicating that he did not rely on the misrepresentation .... For the purposes of the rule stated in this Section, however, the recipient is generally entitled to rely on the maker’s assertions as to his knowledge without undertaking an investigation as to their truthfulness.

596
Chapter Eight

ASYMMETRIC INFORMATION II: Exploiting a Known Unilateral Mistake

Chapter Contents

1. INTRODUCTION: KNOWINGLY EXPLOITING EXISTING INFORMATIONAL ASYMMETRIES .............................................. 598

2. UNILATERAL MISTAKE IN EQUITY ........................................... 600
   2.1. The “Seriousness” of the Mistake as to a Fundamental Term (or Matter) ................................................................. 604
   2.2. The “Knowledge” Requirement ........................................... 612
   2.3. The “Concealment” Requirement ........................................... 622

3. THE “BALANCE THEORY” OF UNILATERAL MISTAKE: A CONfluence OF UNCONSCIONABLE DEALINGS AND UNILATERAL MISTAKE ........................................... 626

* * * * *
1. **INTRODUCTION: KNOWINGLY EXPLOITING EXISTING INFORMATIONAL ASYMMETRIES**

[It is against good conscience for a man to take advantage of the plain mistake of another or at least that a Court of equity will not assist him in doing so.]

[S]imple reticence does not amount to legal fraud, however it may be viewed by the moralists.

A contemporary issue of some moment in many common law jurisdictions is when, and to what extent, duties of information disclosure can or should arise in the course of precontractual negotiations to correct known or probable misconceptions or to eliminate serious asymmetries in the relative information possessed or available to the contracting parties. Here the “superior” party does not induce the error, but simply takes advantage of it. In this chapter, and the next, we begin to move away from the previous chapter’s concern (save in the case of the law relating to negligent misstatement) with mere duties of “self-restraint”, and toward duties more of an affirmative nature: that is, “neighbourhood”-like obligations to take steps positively to assist or to respect the bargaining

---


4 Such duties are connected merely with the first injunction of the “duty to protect the vulnerable”. They require one individual merely to desist from an actively self-interested exercise of his special or general opportunity or capacity to create exploitable circumstances *vis-à-vis* another.
position or legitimate interests of another already, and for whatever reason, in some measure susceptible to exploitative exercises of relative contracting power. The duties of this latter variety will be exemplified through two legal phenomena: unilateral mistake (in equity), which will be examined in this chapter, and nondisclosure in contract formation generally, which is the subject of Chapter Nine.

For the purposes of the present analysis, these two phenomena occupy much of the same intellectual (analytical and conceptual) territory. The only analytical distinction which seems to exist between them is the relatively unimportant one concerning the sources of the disorder producing the informational asymmetry. In the case of unilateral mistake, the source of the disabling condition, or the disabling condition itself, is "misconception", or actual, usually palpable, "error"; in the case of nondisclosure, the condition is usually simple ignorance. But the "fair-dealing" ("neighbourhood") duties arising from each condition concern or require a "disclosure", albeit of potentially differing scope with respect to each. Accordingly, the respective disabling conditions, and legal responses to such conditions, are not considered here to be *sui generis*. While the legal responses attracted by each disabling condition will be given separate treatment in this thesis, this is simply for clarity of exposition. Issues that concern the resolution of unilateral mistake cases straddle the law relating to nondisclosure generally, and vice versa. The issues attending the resolution of unconscionable dealings cases seem also to straddle the resolution of both the unilateral mistake cases and those concerning nondisclosure generally. For like unconscionable dealings, the law in the present context is, for the purpose of generating "fair-dealing" duties at least, essentially concerned with two matters: (1) the nature and seriousness of one party's strategic or

5 On the various bargaining standards, see Chapter Four, Section 3.2.2.

6 Chapter Seven, Sections 1 and 2.

7 Powell, for example, asks 'the common question': 'Under what circumstances does a party who knows the other is mistaken have a duty to speak?': Powell, F., "Mistake of Fact in the Sale of Real Property" (1991) 40 Drake L. Rev. 91, 116-7; cf. Kronman, A., "Mistake, Disclosure, Information, and the Law of Contracts" (1978) 7 J. Legal Studies 1, 1-2.

8 See Chapter Four, Section 4.
procedural bargaining disadvantages (here such disadvantages reside, specifically, in error or in ignorance\(^9\)); and (2) the other party’s knowledge thereof. In the final analysis, a confluence of the analytical, legal responses to the various phenomena of unconscionable dealing, unilateral mistake and simple nondisclosure may be warranted.

2. **Unilateral Mistake in Equity**\(^{10}\)

Perhaps the ‘quintessential dilemma’\(^{11}\) in the law relating to contractual mistake resides in the situation where one party proceeds to contract with another party while cognisant of that other party’s mistaken belief about a factual matter basic to the other’s contractual decision-making: an occurrence generally described in law as an operative “unilateral” mistake. It is in this context in particular, however, that we find traditional notions of *caveat emptor*, individualism, self-reliance, and the like, still enjoying considerable vitality. Even when mistaken, in most contractual dealings, one contracting party is not generally justified in trusting, or entitled to expect, that the other will look after her bargaining interests, in particular by disabusing her of any erroneous impression known but not created by the other party. The “rules” of bargaining do not generally expect or require that parties be informational equivalents. Thus, in the absence of active misleading or deceptive conduct on the part of the unmistaken party, or a contractual warranty, any contract resulting from the parties’ negotiations will almost invariably be binding. ‘The question is not’,

\(^9\) Recall that with unconscionable dealings, equity’s concern was with the nature and seriousness of one party’s simple ineptitude, social or transactional.

\(^{10}\) The common law response to unilateral mistake was indeed extremely limited: cf. *Smith v. Hughes* (1871) L.R. 6 Q.B. 597; *Hartog v. Colin and Shields* (1939) 3 All E.R. 566. The main cases of unilateral mistake dealt with by the common law tend to involve documents mistakenly signed (*non est factum* doctrine) and unilateral mistake. These cases will not systematically be treated here. The status of the latter form of mistake at common law and in equity is now even more doubtful in light of the High Court’s decision in *Taylor v. Johnson* (1983) 151 C.L.R. 422. See, also, n. 19, *infra*.

according to Cockburn C.J. in *Smith v. Hughes*,¹² 'what a man of scrupulous morality or nice honour would do under [the] circumstances’. The law has, in a rather stark fashion, here resisted obliging one party to protect another from the untoward consequences of that other’s own mistaken assumptions.

Yet despite the law’s general reluctance to make one bargaining party the guardian of the other’s interests, the law of unilateral mistake has not gone unmarked by the general liberalising trends taking place in contract law since last century.¹³ In particular, equity has been employed to mitigate the rigours of the common law’s approach to mistake, and to give the courts greater latitude in granting relief where one party has consciously exploited the mistake of the other. In Australia, the leading modern authority is *Taylor v. Johnson*,¹⁴ which involved the vendor of certain realty seeking to rescind a sale when she discovered that the terms of the written contract stipulated a purchase price ten times less than that actually intended by her. The purchaser was aware that the vendor was acting under a serious mistake or misapprehension about either the terms (i.e., the price) or the subject-matter (i.e., its value) of the transaction, as they appeared on the face of the contract, and he calculatedly avoided any mention of the sale price in subsequent negotiations. What is more, the purchaser deliberately set out to ensure that the vendor was not disabused of her error before completion.


¹⁴ (1983) 151 C.L.R. 422. The potential for such a jurisdiction seems to have arisen from Denning L.J. in *Solle v. Butcher* [1950] 1 K.B. 671. Whilst the knowing exploitation of mistake idea clearly underlies the equitable remedy of rectification for unilateral mistake, it appears that Denning L.J. was considering some different equitable use, going to rendering a contract voidable in equity. This usage has not yet been applied in England, where the orthodox approach is still thought to be a matter for the common law. There a contract will be valid, if the objective test of *Smith v. Hughes* is satisfied, or void, if the test is not satisfied.
Affirming the ‘objective theory’ of contract, the majority of the High Court in that case held that the transaction was voidable for unilateral

\[15\] Id, 428-29. The considerations which prompted the courts of common law and equity to adopt the objective theory of contractual assent, and, as a corollary, the principle of estoppel by representation, are fundamental to the general security of contractual relationships. Deontologically, the theory also seems to stem from a necessary perception of social life; for as social beings we each have an obligation to make ourselves familiar with the conclusions that others will, or are likely to, draw reasonably from our conduct, in particular where the conduct in question has a standard significance. Cf. Miller, D., *Social Justice* (1976), 70; MacCormick, N., “What is Wrong with Deceit?” (1982) 10 Sydney L. Rev. 5, 12.

The general effect of an objective approach to contractual mistake is that a resulting contract can be voidable only and not a nullity from the beginning. The approach essentially involves the court looking only to the outward manifestations in determining the parties’ intentions; their real intentions are irrelevant. The objective theory is thought necessary to protect the reasonable expectations and reliance of the promisee engendered by the communication and acceptance of the contractual promise. Such an approach may also be seen as protective of an innocent third party, who may be seriously disadvantaged through having a contract between two parties (in which she took no part and over which she had no control) declared void at common law: see, e.g., *Lewis v. Averay* [1972] 1 Q.B. 198, at 206-7, *per* Lord Denning M.R.; *Ingram v. Little* [1961] 1 Q.B. 31, at 73, *per* Devlin L.J. dissenting. Cf. Davis, G. (1985) 11 Monash U. L. Rev. 65; Getzler, J. “Unconscionable Conduct and Unjust Enrichment as Grounds for Judicial Intervention” (1990) 16 Monash U. L. Rev. 283, 288; Jamieson, P., “Contractual Mistake: The Diverging Analyses of Unilateral Mistake as to the Contents of a Contract” (1987) 3 Aust. Bar. Rev. 181; Sir Anthony Mason and S. J. Gageler, “The Contract”, in Finn, P. (ed.), *Essays on Contract* (1987), 3-10.

Legal statements of the content and operation of the objective test are numerous and varied. See, e.g., *Williams on Vendor and Purchaser* (2nd ed., 1910), Vol. 1, 750, as quoted by Dawson J. in *Taylor v. Johnson* (1983) 151 C.L.R. 422, at 445:

... the rule requiring true consent of the parties to a contract is modified by the operation of the general rule of law that every man is taken to intend the natural and reasonable consequences of his own overt acts, including his spoken or written words; he is estopped from showing that what he really intended was something different from what a man of ordinary intelligence would naturally and reasonably infer from those acts or words.

*Freeman v. Cooke* (1848) 2 Ex. 654, at 663; 154 E.R. 652, at 656, *per* Parke B.:

... and if whatever a man’s real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth...

mistake in equity. The vendor's conduct was considered to be "fraud" in the wide equitable sense, which includes 'unconscionable dealing', since it was 'unconscientious for a person to avail himself of the legal advantage he [had] obtained'.

The mainspring for relief, then, was clearly "unconscionability". Whilst the Court did acknowledge the broader approach taken by North American courts and commentators to the problem of known unilateral mistake in contract formation, it was nevertheless content to dispose of the instant case by resorting to a narrow statement of applicable law:

[A] party who has entered into a written contract under a serious mistake about its contents in relation to a fundamental term will be entitled in equity to an order rescinding the contract if the other party is aware that circumstances exist which indicate that the first party is entering the contract under some serious mistake or misapprehension about either the content or the subject matter of that term and deliberately sets out to ensure that the first party does not become aware of the existence of his mistake or misapprehension.... In such a situation it is unfair that the mistaken party should be held to the written contract by the other party whose lack of precise knowledge of the first party's actual mistake proceeds from wilful ignorance because, knowing or having reason to know that there is some mistake or misapprehension, he engages deliberately in a course of conduct which is designed to inhibit discovery of it.

In essence, the High Court's formulation of the unilateral mistake doctrine in equity involves three components. First, one party, P, must make a serious mistake about either the content or the subject-matter of a fundamental term. Second, the other party, D, must know, or have reason to know, of P's mistaken belief. Third, D must then deliberately prevent P from realising that she is acting under the mistaken belief. In relation to each component, however, the majority judgment has left certain important

necessary and natural consequences of his own words and acts ...'; Cornish v. Abington (1859) 4 H. & N. 549, 556.

16 Mason A.C.J., Murphy and Deane JJ., Dawson J. dissenting.


18 Id, 432-33.
matters unsettled and in need of future consideration.\textsuperscript{19} We shall now consider each component in turn.

2.1. The "Seriousness" of the Mistake as to a Fundamental Term (or Matter)

The "seriousness" requirement—that to justify equitable intervention the mistake must be one of a serious order\textsuperscript{20}—seems to apply to all cases of mistake, and not just unilateral mistake. It clearly demonstrates the priority the law gives to the maintenance of bargain transactions in this area, and exemplifies the implicitly normative view put forward in the general introduction to the previous chapter, that not just any mistake will suffice to relieve a party of the normal binding consequences of her manifested contractual assent. The parallel feature in United States contract law, for example: that of the American Law Institute's reference in the Restatement (Second) of Contracts to mistakes as to a 'basic assumption',\textsuperscript{21} apparently

\textsuperscript{19} In particular, the Court left open the issue of whether the general propositions raised in the case should properly be accepted as applying to informal contracts, such as in Smith v. Hughes (1871) L.R. 6 Q.B. 597 and Hartog v. Colin & Shields [1939] 3 All E.R. 566, or to the mistaken identity cases, such as Cundy v. Lindsay (1878) 3 App. Cas. 459 and Ingram v. Little [1961] 1 Q.B. 31: id., 430; Finucane, A., "Mistaken Identity and its Effect on Contractual Validity: Some Cases from the English Courts," (1991) 24 Akron L. Rev. 553. Accordingly, the correctness of the position at common law as expounded in those cases remains to a large extent unresolved. In Westpac Banking Corp. v. Dawson (1990) 19 N.S.W.L.R. 614, however, Mahoney J.A., at 629 (Samuels and Meagher J.A. concurring), indicated that some of the mistaken identity cases are to be subsumed within the equitable principles expounded by the High Court in Taylor v. Johnson. The trend in the United States is to treat mistaken identity cases as subject to the general rules applicable to all other contractual mistakes: see §153, Comment (g).

\textsuperscript{20} A variety of terminology is used in the case law to describe this requirement. For example, in Solle v. Butcher, at 693, Denning L.J. spoke of a "fundamental" mistake. In Scanosio v. McNamara (1956) 96 C.L.R. 186, at 198-99, Dixon C.J. and Fullagar J. spoke of a discrepancy between fact and belief such 'that there is a total failure of consideration or what amounts practically to a total failure of consideration'. In Lukacs v. Wood (1978) 19 S.A.S.R. 520, at 529-30, Jacobs J. spoke of whether the mistake went to the "substance" of the thing contracted for. In the United States reference is often made to "basic" or "material" mistakes.

\textsuperscript{21} Section 152, Comment (b).
intends to exclude mistakes relating to such collateral or peripheral matters as ‘market conditions or financial ability’.  

The majority’s decision in *Taylor v. Johnson*, however, remains unclear as to the precise nature or content of the “seriousness” requirement. It is perhaps justifiable that the Court should wish to require that the operative mistake must relate to the content or subject-matter of a *fundamental* term before equity is prepared to intervene and grant relief. The requirement appears to find its direct analogue in the “special disadvantage” requirement under the unconscionable dealings jurisdiction, and the justification therefor. Only serious impairments of one party’s information should give rise to power inequalities that are sufficiently great to create non-equilibrium bargaining conditions, thereby displacing the “individual responsibility” expected and required under the functionalist ethic of bargaining, and triggering equitable supervision. Hence, one should expect that the mistake would have to relate to a matter that is at least important, if not vital, to the contractual decision-making of the mistaken party.

One can justify intervention readily enough where the relevant informational disparity stems from one party’s erroneous assumption about the terms upon which she is contracting, for the other party exploits the opportunities this gives him to acquire benefits which he knows he was not intended to have.  

---


23 As Hannen J. made clear in *Smith v. Hughes* (1871) L.R. 6 Q.B.597, at 610:

> The rule of law applicable to such a case is a corollary from the rule of morality which Mr. Pollock cited from Paley [*Moral and Political Philosophy*, book III, ch. vi], that a promise is to be performed ‘in the sense in which the promisor apprehended at the time the promisee received it,’ and may be thus expressed: ‘The promiser is not bound to fulfil a promise in a sense in which the promisee knew at the time the promiser did not intend it.’ And in considering the question, in what sense a promisee is entitled to enforce a promise, it matters not in what way the knowledge of the meaning in which the promiser made it is
the one party knows that the other was not in fact assenting to the “objective” transaction between them, in terms of orthodox contract theory, the unmistaken party can form no expectation deserving of protection. But matters become more difficult, it seems, when one considers whether relief might be available to a party who is mistaken not as to the terms recording the parties’ contractual intention, but to the various other assumptions which may underlie and inform the contract, such as the complainant’s evaluation of the present or potential value, or the nature or quality of the subject-matter of the contract. And while mistakes that go purely and

brought to the mind of the promisee, whether by express words, or by conduct, or previous dealings, or other circumstances. If by any means he knows that there was no real agreement between him and the promiser, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promiser did not assent.


24 If, for example, one party is mistaken about a fact materially affecting the transaction, and the other party is aware of her mistake, and knew that it was her intention to contract only with reference to a supposed different state of affairs, he is precluded from denying that he understood the contract in the same sense as the other, namely, as contingent on the existence of the supposed state of affairs: cf. Smith v. Hughes (1871) L.R. 6 Q.B. 597. The traditional common law approach would have it that the resultant contract should be void: Smith v. Hughes, id, 610; Freeman v. Cooke (1848) 2 Ex. 654; 154 E.R. 652, although under the ‘detached’ objectivity approach taken by Australian courts since Taylor v. Johnson: cf. Howarth, “The Meaning of Objectivity in Contract” (1984) 100 L.Q.R. 265, it seems that such a contract would merely be voidable, an approach the present writer would applaud for reasons of policy. Cf. Taylor v. Johnson (1983) 151 C.L.R. 422, 428-29.

25 There is a well established distinction between “mistakes in terms, understanding, or as to the contract itself” and “mistakes in assumptions, or as to matters informing the contract made”: see Ontario Law Reform Commission Report on Amendment on the Law of Contract (1987), Chp. 14, 253; Finn, “Equity and Contract”, 137-40; Cartwright, Unequal Bargaining (1991), 224-5. According to Palmer, Mistake and Unjust Enrichment (1962), 5-6, the distinction is reflected in the following statements: “I did not intend to say this” (e.g., intended, but omitted terms) and “I did intend to say this but it was because I mistakenly believed the facts were thus and so” (e.g., mistakes in existence of goods, or as to their characteristics or ownership, errors in calculation that infects price offered). Mistakes as to contractual terms, etc., invariably address the question of contract formation, because the characteristic feature of them is a lack of correspondence between one party’s actual contractual intention and the terms which, according to the objective theory of contract, are ones deemed to have been agreed between the parties. Paradigmatic examples include the situation where a term otherwise intended by the mistaken party to form part of the contract has been omitted: see Steppe
simply to the value or potential value of the thing exchanged—mere mistakes in judgment—should, perhaps, automatically be excluded from relief, mistakes as to the fundamental factual assumptions informing the contract may seriously, and adversely, affect either one party's decision to enter into a contract, or else the exchanges that are agreed to therein, and thus should qualify for equity's supervision.

In Taylor v. Johnson, however, the majority of the Court did not proceed to discuss, in any systematic fashion, the legal position regarding

Investments Ltd v. Security Capital Corp. Ltd (1976) 73 D.L.R. (3d) 351; Thomas Bates & Son Ltd v. Wyndham's (Lingerie) Ltd [1981] 1 W.L.R. 505; where a term not intended has been included: see Taylor v. Johnson, op. cit.; Commerce Consolidated Pty. Ltd v. Johnstone [1976] V.R. 724; Hartog v. Colin and Shields [1939] 3 All E.R. 566; where the included term not having legal effect intended: see Winks v. W. H. Heck & Son's Pty. Ltd [1986] 1 Qd. R. 226 (Kneipp J.); In Re Bulloch Settlement Trust [1976] Ch. 251; N.S.W. Medical Defence Union v. Transport Industries Co. Ltd (1986) 6 N.S.W.L.R. 740; but cf. the view expressed in Issa v. Berisha [1981] 1 N.S.W.L.R. 261, at 264. Invariably, the mistake here lies in one party's giving or acquiring rights different from those she intended to give or acquire. Finn, "Equity and Contract", op. cit., 138, notes a parallel here between "rights mistake" and which that founds an estoppel by acquiescence. Mistakes in assumptions informing the contract made, on the other hand, characteristically have the effect of leading the mistaken party to agree to terms of a contract which, because of the error, are, from the mistaken party's point of view, unintendedly more advantageous to the other party or disadvantageous to herself. An example of this can be seen in the U.S. cases involving calculation errors in the computation of a tender (see n. 69, infra).

26 The distinction between mistaken judgments (as to value, quality, etc.) and mistakes as to facts may be illustrated by the following example: P wishes to buy 10 acres of land from D. If P believes the land is worth $100,000, and it is worth only $50,000, her mistake is one of value or quality (a mistake in judgment). However, if P believes that the land is Lot A, and it is actually Lot B, her mistake is one of fact. That the law should only recognise the latter as a qualifying mistake is not difficult to understand. Relief for unilateral mistake as to value is antithetical to the individualistic values on which classical theory is based, and relieving a party of the responsibility for making her own bargain also deprives her of the freedom to make a bad one: cf. Kull, A., "Unilateral Mistake: The Baseball Card Case" (1992) 70 Wash. U. L. Q. 57, 66.

As Fuller has pointed out: "Mistake and Error in the Law of Contracts" (1984) 33 Emory L.J. 41, at 59, decisions which were once expressed in terms of "mistake as to value" are today viewed as more appropriately determined by the factor that the complaining party should bear the risk of her mistaken belief. Cf. Restatement (Second) of Contracts, § 154, Comment (a); Patterson, "The Apportionment of Business Risks Through Legal Devices" (1924) 24 Col. L. Rev. 335, 355-59. Cf., also, the fact situation in Wood v. Boynton, 25 N.W. 42 (1885).

27 A mistake in judgment as to value might become a mistake of fact, however, when the cause of the mistaken judgment derives from a factual matter affecting the value of the thing itself. For example, a party may assume that a stone has a certain value if it is a topaz but not if it were a mere pebble: cf. Wood v. Boynton, 25 N.W. 42 (1885).
mistakes as to the assumptions informing the contract made, although clearly they contemplated that the principles enunciated in relation to mistakes as to the terms should apply more generally to other sorts of mistakes.\textsuperscript{28} Nonetheless, one party’s self-interested use of another’s informational disadvantage, when that disadvantage stems from that other’s error in the factual assumptions informing, say, the general wisdom of the transaction in question, or the quality or value of the material benefits exchanged, is not, \textit{per se}, against the conscience of a court of equity. A judgment as to unconscientious exploitation in this context must, perforce, take into account such considerations as the risks of inaccurate information or judgmental error inherent in the bargaining process itself, and that the assumptions informing the idea of bargaining in our society should want to tolerate, to a greater or lesser extent, human error in contracting. Consciously taking advantage of the various misconceptions that might occur in bargaining then, is in some measure to be accepted as being all in the nature of the bargaining “game”. In a free-market economy, the courts have consistently avoided discouraging the informationally advantaged or skilled from using their superior information or bargaining skill to strike an advantageous bargain, and penalising a party merely because he strikes a personally advantageous bargain with a party who is less astute or informed.\textsuperscript{29}

\begin{quote}
[\textit{A}ny extension of [the unilateral] mistake doctrine to cover a person’s mistake as to the cost or value of his end of a freely negotiated exchange strikes at the heart of the common law’s insistence that, within the sphere left to private ordering, we take responsibility for the terms on which we choose to arrange our affairs.\textsuperscript{30}
\end{quote}

\textsuperscript{28} It is clear that the narrow ratio of the case was not intended by the Court to be a strait-jacket, and they indeed took a much wider view of unilateral mistake: \textit{op. cit.}, 433. Reference was made to one party entering into the contract ‘under some serious mistake about \textit{either} the content [(price)] or the \textit{subject-matter} [(value)]’ of a term. Greig and Davis, \textit{The Law of Contract} (1987), for example, at 925, submit that \textit{Taylor v. Johnson} should not be read narrowly as to apply only to mistakes as to the terms of the contract. Support for this argument can also be found in the judgment of Wilcox J. in \textit{Deputy Commissioner of Taxation v. Chamberlain} (1990) 26 F.C.R. 221, at 232.

\textsuperscript{29} Cf. Kronman, \textit{op. cit.}, 9-18.

\textsuperscript{30} Kull, \textit{op. cit.}, 75.
Yet, here, as in the various other contexts considered in this thesis, there must be limits to permissible advantage-taking in bargaining, and it is to be presumed that the “seriousness” requirement consists of one such limitation.

The majority’s reference to a “serious” mistake in Taylor v. Johnson, however, raises a number of issues worthy of present note. As it stands in the judgment, the requirement is unclear. For example, one cannot work out whether the seriousness requirement inheres only in the bargaining processes: the nature of the mistake itself, and the unmistaken party’s knowledge, or reason to know, thereof; in the outcome of the negotiations: the substantive unfairness recorded in the resultant contractual exchange; or in a mixture of both. In the context of the case, what seems to be suggested is that only mistakes that significantly impact upon the substance of the resultant transaction, in particular the exchange as revealed through price or value, will attract the equitable jurisdiction; that the courts should not upset bargains for trifling errors that have no economic effect.  

31 Cf. Story, who argued that ‘[c]ourts ... do not sit for the purpose of enforcing moral obligations or correcting unconscientious acts which are followed by no loss or damage’: Story, J., Equity Jurisprudence (1st ed., 1836), § 203. On the whole, however, the courts, at least in Australia, have not taken this position. Cf., also, Getzler, J., “Unconscionable Conduct and Unjust Enrichment as Grounds for Judicial Intervention” (1990) 16 Monash U.L. Rev. 283, 289. Such a policy indeed seems to underlie the New Zealand code on mistake. Section 6(b) of the Contractual Mistakes Act 1977 (N.Z.) prescribes that as a sine qua non to relief under the statute, the operative mistake must have resulted at the time of the contract:

(i) In a substantially unequal exchange of values; or

(ii) In the conferment of a benefit, or the imposition or inclusion of an obligation, which was, in all the circumstances, a benefit or obligation substantially disproportionate to the consideration therefor.

The American Law Institute’s Restatement (Second) of Contracts, § 153, requires that for relief a unilateral mistake must at least meet the same requirements that would have to be shown had both parties been mistaken under § 152: see, id, Comment (b). This is to say, the unilateral mistake must, inter alia, relate to a ‘basic assumption’ on which the contract was made, and it must also have a ‘material effect on the agreed exchange of performances which is adverse to [the mistaken party]’. Cf. also, Comment (c) to § 152: ‘[The mistaken party] must show that the resulting imbalance in the agreed exchange is so severe that he can not fairly be required to carry it out’. Posner, The Economic Analysis of Law (3rd ed., 1986), 12-13, argues that despite the mistake, the exchange may still be mutually beneficial, or only slightly to the detriment of one party: i.e., the transaction is “efficient” in the Kaldor-Hicks sense that it yields benefits to one party in excess of any loss incurred by the other. For this, the argument goes, it may not be worth jeopardising the security of contractual bargains.
enough, say, for a party merely to prove that she would not have made the contract but for the mistake. Given the High Court’s obvious concern with the “conscience” of the unmistaken party, however (as opposed merely to the plight of the mistaken party), one should be surprised if this was in fact the legal message that the majority intended to convey. It would be peculiar, in the writer’s view, to insist upon an absolute requirement of substantive unconscionability, especially in light of the Court’s third, strictly procedural, criterion of active concealment, a point to which we shall return below.

The requirement that a mistake be “serious” or “basic” or “fundamental”, moreover, while intelligible enough in the common mistake cases, seems more difficult to justify in those cases where it is the unconscionable (exploitative) behaviour which attracts equity’s avoidance jurisdiction here, as opposed merely to its rectification jurisdiction.

A number of commentators have pointed out that the unspecified notion of a “serious” mistake may simply create a discretion to deny relief where the court considers that the party seeking relief should bear the

32 Edward Rabin, “A Proposed Black-Letter Rule Concerning Mistaken Assumptions in Bargain Transactions” (1967) 45 Tex. L. Rev. 1273, 1282-4, argues that, whether the mistake is common or unilateral, the critical issue is less the quality of the mistake—how “basic” or “fundamental” it is—than its impact on the agreed exchange of values. Sutton, too, argues that the mistake must have had a material effect on the contract, and that the mere vitiation of consent ought not of itself justify relief: Sutton, R. J., “Reform of the Law of Mistake in Contract” (1976) 7 N.Z. U.L. R. 40, at 50. Ultimately, this is a question of policy, of what values and whose interest we are trying to to protect here. Sutton’s and Rabin’s arguments may hold up in the case of common mistake, but they are significantly diluted in the context of unilateral mistake, where conscious wrongdoing becomes an issue.

33 Section 2.3.


35 Cf. Finn, id, 138, n. 94, claiming that Spry, I. C. F., Equitable Remedies (3rd ed., 1984), at 573, is ‘surely correct’ in his assertion that the remedy of rectification should not be circumscribed by ‘artificial rules’ and should be applied freely.

consequences of her own mistaken assumptions. However, while any
determination may ultimately be dependent on case-specific considerations,
the present writer would question the legitimacy of using such covert, and
theoretically vacuous, means to achieve what is, essentially, perceived to be
an allocation of risk to the mistaken party. An “unconscionability” analysis
(to be outlined below), and in particular the “special” or “serious”
disadvantage requirement thereof, surely provides a more cogent and
intelligible approach to be taken in unilateral mistake cases. At the doctrinal
level, the seriousness criterion should not itself provide the courts with any
true “discretion”, although clearly, as may be a charge also drawn against the
parallel unconscionable dealings jurisdiction, the courts may be involved in
tailoring or manipulating the facts of any given case to satisfy the particular,
and more well-defined, doctrinal criteria. This is, however, to lodge a
somewhat different complaint. If nothing else, an insistence upon the
seriousness of the mistake might, in the opinion of one commentator,
serve at least two purposes. First, it tends to ensure that contracts will not
lightly be set aside. Secondly, it tends to provide some incentive for parties
to guard against making errors in contracting.

Yet for all that, it this writer’s thesis that since unilateral mistake is a
doctrine principally concerned with policing exploitative conduct in the
procurement of bargain transactions, the seriousness requirement in Taylor
v. Johnson must in logic and in principle refer simply to the nature or degree
of the mistake required to trigger equitable supervision, and that this is

37 Cf. Restatement (Second) of Contracts, §§ 151-158, Introductory Note, pointing out that the
seriousness requirement cannot satisfactorily be defined because it is intended as a criterion
that permits great flexibility and considerable discretion by the court in determining whether
or not to allow relief for a particular mistaken assumption.

38 Cf. Restatement (Second) of Contracts, § 154, Comment (a).


40 Cf. Rabin, op. cit., 1282: ‘In this sense the “basic” requirement may be only an admonition of
cautions in granting relief’. Rabin does see the requirement as representing more than a mere
cautionsary criterion, however. He sees it as also requiring that the mistake should result in an
exchange that is unexpectedly unequal (id, 1282-3). Cf. also, Palmer, G. E., Mistake and Unjust
Enrichment (1962), 25: mistake ‘must be basic enough to overcome the pressures favouring
finality of contract’.
purely a matter of process. The fact is, only some mistakes and not others are fundamental enough to supplant the functionalist assumptions informing the ordinary "rules" of bargaining, thereby excusing a mistaken party from the usual "individual responsibility" expected and required of her in contracting. This individual responsibility, moreover, is displaced in the favour of a strong moral-cum-legal duty on the part of the other, unmistaken party positively to protect the one who has, on account of her serious mistake, become peculiarly sensitive to his decision to help or to hurt her. Consistent with the writer's previous analysis of unconscionable dealings (Chapter Four), it is the creation of these exploitable circumstances that gives rise to the possibility of exploitation, and, on the views advanced previously, this possibility alone is enough to warrant equity's jealousy to see that that exploitation does not ensue.

2.2. The "Knowledge" Requirement

One is naturally to assume that the law should be more reluctant to allow an avoidance remedy where the mistake is of one party only than where the it is common to both parties. Avoidance for unilateral mistake will more clearly disappoint the expectations of the unmistaken party, and undermine the law's obvious concern for the maintenance or security of bargains. The case for strict enforcement, however, begins to weaken significantly where the expectation sought to be protected was achieved by one party's unconsciousious behaviour, whether active or passive. In such

---

41 According to Kronman, op. cit., 5, the distinction between common and unilateral mistake makes sense from an economic perspective.

Where both parties to a contract are mistaken about the same fact or state of affairs, deciding which of them would have been better able to prevent the mistake may well require a detailed enquiry regarding the nature of the mistake and the (economic) role or position of each of the parties involved. But where only one party is mistaken, it is reasonable to assume that he is in a better position than the other to prevent his own error.

42 Even Kronman, id, 8, considers that from an economic point of view, knowledge changes matters:

612
a case, a proper balance must be struck between the one party’s right to be treated with propriety in the procurement of her bargain, and the other party’s right to have his resultant contractual expectations respected and enforced.43

Leaving to one side for the moment the High Court’s third criterion of active concealment, it is clear from the majority’s emphasis in Taylor v. Johnson that the “unconscientiousness” in the present context resides in the unmistak party’s unfairly taking advantage of the other party’s serious mistake, or, more pertinently, the peculiar strategic bargaining opportunities thereby created.44 Fraudulent overtones arise from the one party’s failure to correct the known erroneous assumptions of the other party to the transaction or dealing, the awareness of which would dispel the erroneous belief in the mind of that other party and also discourage him, no doubt, from entering into the contract on the resultant, objectively determined terms, or, perhaps, from entering into the contract in question at all. At its logical core, therefore, the unilateral mistake doctrine is concerned with exploitation, so defined. Cast in this way, unilateral mistake presents itself essentially as a prophylactic doctrine of equity, aimed at proscribing or preventing exploitative bargaining practices, that is, abuses of interpersonal power, and thus it must logically be concerned with the conduct of the unmistaken party (not merely with the plight of the mistaken party) and with the processes of the transaction (not merely with its outcomes). The core of such behaviour inheres, of course, in one’s knowingly seizing upon any informational advantages the mistake gives him over another, in circumstances, moreover, where, on account of the seriousness of the

But if the mistake is actually known or could be discovered at a very slight cost, the principle of efficiency is best served by a compound liability rule which imposes initial responsibility for the mistake on the mistaken party but shifts liability to the other party if he has actual knowledge or reason to know of the error.

43 Again, this is merely a reflection of the competing objects of modern contract law introduced at the outset: to ensure acceptable levels both of certainty and of fairness.

44 That is to say, the knowledge requirement here presumably presupposes that one party was aware not only of the information but also of its probable influence on the decision-making (or consent) of the other party. This highlights the strategic significance of information—its use and abuse—in this context.
mistake, he would in law be duty-bound positively to assist that other (his contracting "neighbour"), specifically, through correction of the error. But in the absence of the requisite knowledge on the part of the unmistaken (advantaged) party, or of some other ground for complaint on the part of the mistaken party,\textsuperscript{45} it is unlikely that any contract resulting from the parties' negotiations will be liable to be upset, arguably no matter how unfair it appears upon its terms or its exchange.\textsuperscript{46} This was made forcefully clear in an oft-quoted passage from the judgment of Russell L.J. in Riverlate Properties Ltd \textit{v.} Paul:\textsuperscript{47}

If reference be made to principles of equity, it operates on conscience. If conscience is clear at the time of the transaction, why should equity disrupt the transaction? If a man may be said to have been fortunate in obtaining a property at a bargain price, or on terms that make it a good bargain, because the other party unknown to him has made a miscalculation or other mistake, some high-minded men might consider it appropriate that he should agree to a fresh bargain to cure the miscalculation or mistake, abandoning his good fortune. But if equity were to enforce the views of those high-minded men, we have no doubt that it would run counter to the attitudes of much the greater part of ordinary mankind (not the least the world of commerce), and would be venturing upon the field of moral philosophy in which it would soon be in difficulties.

There are clear parallels to be drawn here with the equivalent requirement under the unconscionable dealings jurisdiction. Before it exercises its supervisory function over bargaining and bargain transactions, equity will generally require one party's "conscience" to be tainted by sufficient knowledge of the exploitable circumstances or disposition of the other party. In unconscionable dealings, it was knowledge of the other's position of "special disadvantage". Here it is knowledge of her "mistake".

\textsuperscript{45} Such as misrepresentation, in which case relief would seem to be available even in the absence of knowledge on D's part: Taylor \textit{v.} Johnson, op. cit., 431; cf. Solle \textit{v.} Butcher [1950] 1 K.B. 671, at 692; Gould \textit{v.} Vaggelas (1985) 157 C.L.R. 215, 236ff \textit{per} Wilson J.

\textsuperscript{46} The obvious exception here, from contract's point of view, is where the error produces a total failure of consideration or what amounts practically to a total failure of consideration, or where the inequality in the resultant exchange is so glaring as to give rise to the inference of the alleged procedural impropriety.

\textsuperscript{47} [1975] 1 Ch. 133, at 141.
And while the subject of that knowledge obviously varies between these two doctrines, it is unlikely that the level of knowledge, short of actual knowledge, required to attract equity’s attention should vary between them.48

Thus, as with unconscionable dealings, Taylor v. Johnson has made it clear that the unmistakable party’s knowledge of the other’s mistake need not be actual.49 It is enough that the first party had knowledge of circumstances reasonably giving rise to a suspicion of the latter’s mistake.50 In Taylor v. Johnson itself, this relaxed requirement of knowledge of the error in the stipulated price resided simply in the purchaser’s awareness of the gross inadequacy of consideration.51

Our reasons for settling on a standard of knowledge that is less than actual are both pragmatic and expedient. The evidentiary difficulties involved in proving a person’s state of mind are easily avoided by allowing a court to infer or presume knowledge on the strength of evidence that would

48 See Finn, “Contract and Equity”, op. cit., 141.

49 Cf. also, Eisenberg, M., “The Bargain Principle and its Limits” (1982) 95 Harv. L. Rev. 741, 766, at n. 67:

It might be appropriate to restrict the doctrine of transactional incapacity [—arguably of which a serious unilateral mistake is but one manifestation—] to cases in which the fully competent party had actual knowledge of the transactional incapacity; however, a promisee with reason to know has at least some culpability, and more important, a standard requiring actual knowledge might be too difficult to administer. When the evidence demonstrates a lack of actual knowledge, the lesser culpability might be taken into account in fixing the remedy.

50 Taylor v. Johnson, op. cit., 433; Misiaris v. Saydels Pty. Ltd (1989) N.S.W. Conv. R. 55-474, at 58, 446, per Young J.: ‘In my view it is enough that the defendant strongly suspects that the plaintiff has made a mistake of a fundamental character...’.

51 Id, 427-28, 433. Cf., however, Lewis v. Combell Constructions Pty Ltd (1989) 18 N.S.W.L.R. 528, where Finlay J. concluded that an unmistakable party to a compromise agreement was not sufficiently aware of of circumstances suggesting that the other party was labouring under a mistake to invoke the principle enunciated in Taylor v. Johnson. In Lewis’ case, the plaintiff’s solicitor made an oral offer to accept $227,000 in settlement of the claim, but this was rejected by the defendant. A written offer for $127,000 was shortly thereafter accepted by the defendant, but this figure was a mistake. Given some of the findings of fact in the case (at 535), it is difficult to see how the Taylor v. Johnson knowledge requirement was not met. Cf. also, Greig & Davis, Fourth Cumulative Supplement to the Law of Contract (1992), at 209-10.
have made the defendant, and perhaps not merely the average person, aware of the full facts.\textsuperscript{52} Also, it is wrong to allow a person to benefit from his own "wilful", and perhaps even his "unreasonable", ignorance.

The main problem that will continue to test the law in this area, however, is precisely how much information suggesting the possibility of the other’s mistake is required to be possessed by the unmistaken party before it is no longer safe for that latter party to proceed to contract without first taking steps to disabuse the former of her mistake. Judicial articulations of the level of knowledge required range from and include: ‘the possibility in the mind’;\textsuperscript{53} ‘a suspicion of the true position’;\textsuperscript{54} ‘a very real question’;\textsuperscript{55} ‘the defendant strongly suspects’;\textsuperscript{56} and a ‘calculated abstention from enquiry’.\textsuperscript{57} Of course, the courts should want to be cautious not to prescribe too low a level of knowledge in order to invoke the jurisdiction, lest they be apt to stigmatisé, as equitable fraud, behaviour which is essentially innocent, and perhaps desirable, in the modern commercial environment. And whilst it might be advisable for the reasons given in Section 4.1.2.1. of Chapter Four\textsuperscript{58} to avoid the potentially confusing language of “constructive notice”, as also to avoid any rigid adherence to unreasonably stringent evidentiary standards of knowledge,\textsuperscript{59} it seems appropriate here to again adopt the American Law

\begin{itemize}
\item \textsuperscript{52} Cf. Corbin on Contracts (1960), Vol. 3, § 610, at 692-97.
\item \textsuperscript{53} Commercial Bank of Australia v. Amadio (1983) 151 C.L.R. 447, 467.
\item \textsuperscript{54} Taylors Fashions Ltd v. Liverpool Trustees Co [1982] Q.B. 133, 147 per Oliver J.
\item \textsuperscript{55} Commercial Bank of Australia v. Amadio (1983) 151 C.L.R. 447, at 467 per Mason J.
\item \textsuperscript{56} Misaris v. Saydels Pty. Ltd (1989) N.S.W. Conv. R. 55-474, at 58,448 per Young J.
\item \textsuperscript{57} Consul Development Pty. Ltd v. DPC Estates Pty. Ltd (1974-75) 132 C.L.R. 373, at 408 per Stephen J.
\item \textsuperscript{58} See, in particular, p. 322.
\item \textsuperscript{59} Such as “calculated abstentions”, “wilful blindness” or “reckless indifference”. The law at least seems more prepared to show some concern for the protection of certain classes of contracting party or their disposition.
\end{itemize}
Institute's formulation of 'reason to know'. As was pointed out in the context of unconscionable dealings, such a standard is useful because it recognises an objective test based on the subjective circumstances of a person's abilities. Thus, where the unmistaken party is a person of superior intelligence, he will have reason to know of a fact if he has information from which a person of his (and not ordinary) intelligence would draw the inference. In essence, such an inference is connected to the idea that 'there is such a substantial chance of the existence of the fact that, if exercising reasonable care with reference to the matter in question, the person would predicate his action upon the assumption of its possible existence'.

There may be some reason to differentiate levels of knowledge required to trigger the unilateral mistake jurisdiction according to the types of remedy sought and available in any given case. For example, should the damages remedy become more readily available in "unconscionability" cases in equity, it might be arguable that a higher level of knowledge should be exacted. Where the remedy sought and available is less severe, however—on a descending scale: rescission to rectification and refusal of specific

60 Restatement (Second) of Contracts, § 19, Comment (b). Cf. also, Finn, "Equity and Contract", op. cit., 142.

61 Section 4.1.2.1., p. 321.

62 Restatement (Second) of Contracts, § 19, Comment (b). Some endorsement for this view is to be found in Taylor v. Johnson itself, op. cit., at 433: 'knowing or having reason to know that there is some mistake or misapprehension'; and it is consistent with the approaches of both Mason and Deane JJ. in Commercial Bank of Australia v. Amadio (1983) 151 C.L.R. 447, 467, at 479, respectively.


64 The principles which govern both rectification and rescission for unilateral mistake are similar, if not the same; although where rectification (or reformation) of the agreement is sought, there is probably no requirement that the unmistaken party engage in some active conduct ('sharp practice') calculated to inhibit the discovery of the mistake. Generally, see Cartwright, J., "Sollev. Butcher and the Doctrine of Mistake in Contract Formation" (1987) 103 L.Q.R. 594, 614 et seq.; Cf. Cheshire & Fifoot's Law of Contract (6th Aust, ed, 1992), 319; Finn, "Equity and Contract", op. cit., 138. Some convenient cases are: A. Roberts & Co. Ltd v. Leicestershire County Council [1961] Ch. 555; Riverlate Properties Ltd v. Paul [1975] Ch. 133;
performance—there may be room for admitting a lower level of knowledge of the mistake. Whilst it holds some practical attraction, however, the knowledge requirement in the present context goes not to remedy but to one party’s initial responsibility (or culpability) for the purpose of making out the particular cause of action. Secondary responsibility, such as a remedial obligation, follows or attaches to the cause of action; it does not itself contrive that cause of action. To permit otherwise is arguably to allow the cart to lead the horse. A cautious attitude to distinguishing the various levels of


The conduct of the defendant must be such as to make it inequitable that he should be allowed to object to the rectification of the document.... [T]he conduct must be such as to affect the conscience of the party who has suppressed the fact that he has recognised the presence of a mistake. (Buckley L.J.)

If one party alone knows that the instrument does not give effect to the common intention and changes his mind without telling the other party, then he will be estopped from alleging that the common intention did not continue right up to the moment of the execution of the clause.... I think he might at that time have had no intention of taking advantage of the mistake of the other party. (Eveleigh L.J.)

On the present state of the authorities, it would appear that the knowledge requirement for rectification is confined to that of actual knowledge, although it probably is not possible to sustain this distinction: see Greig & Davis, op. cit., 937; cf. Ontario Law Reform Commission, Report on Amendment on the Law of Contract (1987), 267.

The criteria applicable to the equitable alternative of refusing specific performance on account of the relevant contract having been entered into under an operative unilateral mistake have traditionally been relaxed when compared to the avoidance and rectification remedies. Essentially what needs to be shown is ‘a hardship amounting to injustice’ should the court hold the mistaken party to her bargain. See Tampin v. James (1880) 15 Ch.D. 215, at 221, per James L.J.; Slee v. Warke (1949) 86 C.L.R. 271, 278; Frangomeni v. Fogliani (1968) 42 A.L.J.R. 263, Meagher, et al. (3rd ed., 1992), para 1408, p. 369-70; Kerr on Fraud and Mistake, 162-63. Since the contract is not set aside, the mistaken party will still be liable in common law for any loss flowing from her failure to complete the contract: cf. Wood v. Scarth (1855) 2 K. & J. 33; 69 E.R. 682; Wood v. Scarth (1858) 1 F. & F. 293; 175 E.R. 733; Wallace v. McGirr [1936] N.Z.L.R. 483.

Cf. § 153 of the Restatement (Second) of Contracts, permitting rescission where there is ‘reason to know’ of the other party’s mistake. Article 551(2)(e) of the Restatement (Second) of Torts, however, permits a damages remedy for nondisclosure, but requires actual knowledge: that is, the one party ‘knows’ that the other is mistaken. Cf. also, Finn, “Good Faith and Nondisclosure”, op. cit., 178. Is this not a merely reflection of the idea that “the punishment should be commensurate with the crime”?

618
knowledge according to remedy is thus required, if at all desirable. Furthermore, the apparent trend of courts to narrow the traditional distinction between damages and equitable remedies, generally, may also render the distinction less workable.67

One final point remains, which relates to whether civil liability might ensue despite the fact that the otherwise qualifying mistake is an impalpable or unknown one.68 Given that the stated purpose of the unilateral mistake doctrine in Australia is the proscription of unconscionable conduct in the procurement of a transaction, the point should not seriously be in issue. However, should we ever witness the courts’ primary concern shift discernibly to the protection of mistaken parties, then we might also begin to witness relief for unilateral mistake being based upon the relative inequality of the resultant exchange and nothing else.69 This has, albeit to a limited

---


68 McLauchlan (1976) 12 N.Z.U.L.R. 123, at 156, believes that the object of the New Zealand Contractual Mistakes Act 1977 will sometimes demand the setting aside of, or granting of other relief in respect of, contracts entered into under a unilateral mistake which is unknown to the other side.

69 Relief for “unilateral mistake unknown to the other party” is an extreme remedy indeed. While it is easy to justify the “unconscionability” in these cases in traditional procedural, advantage-taking terms, the Restatement (Second) of Contracts goes a long way toward adopting the proposition that there may be relief simply because of the unfairness residing in an overly one-sided bargain. Kull, for example, op. cit., 73-74, comments that the American Law Institute has sought, in § 153, “to codify the most liberal possible reading of the mistaken-bidding cases, making the doctrine of unilateral mistake a vehicle of judicial intervention to police the fairness of the resultant contractual exchange”. This, too, has led some writers to suggest (inaccurately in this writer’s view) that “[t]he entire concept of relief at American law ultimately may be seen to rest on a basis of unjust enrichment”: Fuller, op. cit. 78-9; cf. Palmer, op. cit., 106; Thayer, “Unilateral Mistake and Unjust Enrichment as a Ground for the Avoidance of Legal Transactions”, in Harvard Legal Essays (1934), 467, at 480, 487-9. Fuller, op. cit., 78 comments, too, that the “conduct” here is far removed from ordinary understandings of “unconscionability” (i.e., exploitation):

In the mistake setting, the only meaning that the word unconscionable can have is that once the other party knows of the mistake and its effect, for him to seek to enforce the bargain with its resulting disparity of values would be unconscionable.

Cf. also, the rationale advanced in the text above for common mistake and innocent misrepresentation: Chapter Seven, pp. 535-36; 557-63. Meagher, Gummow & Lehan, op. cit.,
extent,\textsuperscript{70} been incident in United States mistaken-tender cases.\textsuperscript{71} And whilst there may be, in this country at least, a statutory vehicle through which such a result might be achieved,\textsuperscript{72} short of those cases where the operative mistake produces a total failure of consideration, or what amounts practically

para. 1410, p. 371, in commenting on the majority's apparent approval of the North American authorities, comment:

All of this if adopted in Australia would go far beyond a jurisdiction in equity based, as James LJ explained in\textit{Torrance v. Bolton} (1872) 8 Ch. App. 118, at 124, upon unconscientious obtaining of a legal right; it might be thought to approximate more closely to the jurisdiction to rescind for innocent misrepresentation.

\textsuperscript{70} As Calamari & Perillo,\textit{Contracts} (3rd ed., 1987), 387-8, correctly point out, if a rule permitting relief for unknown unilateral mistake were too liberally applied, it would erode, 'if not totally deluge', the prevailing objective theory of contracts. Quite strict limitations have thus tended to apply to the right to grant relief for impalpable unilateral mistake. First, where the remedy sought is avoidance, relief is not available unless the agreement is wholly executory or the other party can be placed in the\textit{status quo ante}. Secondly, the mistake must be vital, or substantial, but not 'astronomical':\textit{id.}, 388. The authors suggest that the test of substantiality is probably met in the bidding cases if the mistake 'swallows up the allocation made in the bid for profit': citing\textit{Boise Junior College Dist. v. Mattels Constr. Co.}, 450 P.2d 604 (1969). Thirdly, the mistake must be in the nature of a clerical or computational error, or a misconstruction of the specification. Mistakes of judgment must at least be palpable to justify relief: \textit{President and Council of Mt. St. Mary's College v. Aetna Cas. & Sur. Co.}, 233 F.Supp. 787 (1964), affirmed 344 F.2d 331 (1965).

\textsuperscript{71} See\textit{Restatement (Second) of Contracts}, § 153(a), Comments (c), (d), and (e). Cf.\textit{Corbin on Contracts}, Vol. 3 (1960), § 609; Farnsworth (2nd ed., 1990),\textit{op. cit.}, 694-8; Lubell, B., "Unilateral Palpable and Impalpable Mistake in Construction Contracts" (1932) 16 Minn. L. Rev. 137, 142-5; Jones, "The Law of Mistaken Bids" (1979) 48 U. Cin. L. Rev. 43; Rafferty, "Mistaken Tenders: An Examination of the Recent Case Law" (1985) 23 Alberta L. Rev. 491. Rabin,\textit{op. cit.}, 1294, puts the mistaken bidding cases down to risk analysis/assumption. Where the mistake is manifestly traceable to a mere mistake in adding the various costs items, relief is usually granted, because the mistaken party does not take the risk that they will be bound by clerical errors in addition; where the mistake has arisen through a lack of care in reading the specifications or in estimating costs, relief is usually refused, because bidders usually assume the responsibility of reading specifications accurately. However, this may demonstrate no more than the obvious point that the risk of loss should generally lie with the fault: cf.\textit{McRae v. Commonwealth Disposals Commission} (1951) 84 C.L.R. 377.

\textsuperscript{72} It is possible that an impalpable unilateral mistake may form the basis for relief under the\textit{Contracts Review Act} 1980 (N.S.W.), because some of the factors listed under s. 9 of that Act do not seem to require knowledge on the part of the party wishing to enforce the contract. Cf.\textit{Cheshire & Fijfoot's Law of Contract} (6th Aust ed., 1992), para. 835. To the writer's knowledge, the provision has not as yet been applied so widely. It is doubtful whether ss. 52 and 51AB of the\textit{Trade Practices Act} 1974 (Cth) can be read to cover a failure to disclose information that would remedy an unknown unilateral mistake, since the reference to 'engaging in conduct' must be read to exclude mere 'inadvertence', or, rather, to apply only to deliberate failures to disclose, which implies some level of knowledge of the mistake: s. 4 (2).
to a total failure of consideration,\textsuperscript{73} the writer would question both the desirability and the present necessity for such an untraditional\textsuperscript{74} approach.\textsuperscript{75} First, allowing relief in respect of unknown unilateral mistakes is likely to erode the recently endorsed objective approach to contracts, thereby adding an undesirable dimension of uncertainty into our law.\textsuperscript{76} Secondly, given the relaxed knowledge requirement in our law, the result in most cases where relief is granted can be justified in orthodox procedural terms. As Taylor v. Johnson itself demonstrated, where the consequences of the mistake are sufficiently great, the unmistaken party may be taken to have "reason to know" of the other's informational disability.\textsuperscript{77}

Yet for all that, there may be something to said for some future consideration of the view, taken under the American Law Institute's Restatement (Second) of Contracts, that transaction avoidance should nonetheless be available in the case of unknown unilateral mistakes where, prior to rescission being sought for the mistake, there has been no "substantial reliance" by the unmistaken party on the apparent contract.\textsuperscript{78} This rule obtains even 'although enforcement would otherwise be

\textsuperscript{73} In which case it is arguable that grounds for relief exist independently of the mistake.

\textsuperscript{74} The law of unconscionability in Commonwealth common law countries has always been stated strictly in procedural terms. A mere disparity in gains and losses, however gross, is never grounds for relief, although it may be a flag to some procedural impropriety or imbalance, which does warrant the law's intervention. See, generally, O'Connor v. Hart [1985] A.C. 1000.

\textsuperscript{75} It is noteworthy that the New Zealand Contracts and Commercial Law Reform Committee, whose Report led to the passing of the Contractual Mistakes Act 1977, consciously eschewed such a broad basis for relief for unilateral mistake, since 'the law of contract is concerned with the enforcement of agreements independently of the question whether such agreements were prudently or imprudently made' (Report on the Effect of Mistakes on Contracts (1976), 17). The Ontario Law Reform Commission was similarly reluctant to adopt a wide basis for relief in its 1987 Report on Amendment of the Law of Contract.


\textsuperscript{78} Cf. Restatement (Second) of Contracts, § 153, Comment (d): avoidance is permissible to the extent that it will cost the unmistaken party only his expectation or 'benefit of the bargain'.
unconscionable'.  

Such a position appears largely to be justified by commercial expediency, as it probably accords with modern reasonable business expectations.

2.3. The “Concealment” Requirement

Despite the majority in *Taylor v. Johnson* having made it clear that the unconscientiousness in unilateral mistake cases inheres in one party’s exploiting the other’s known serious mistake about a fundamental term of the contract, the High Court prescribed an additional third criterion to justify the legal judgment of “unconscionability”: that the unmistaken party engage in some “sharp practice”: some active procedural unconscionability. In the case, the Court contemplated that the sharp practice resided not in the creation of the mistake itself (although the criterion should surely be satisfied if the unmistaken party somehow contributed to the other’s mistaken belief), but rather in its exacerbation or continuation—in a deliberate or purposive concealment, as such. Again, this would entail that mere “passive” exploitation of the plaintiff’s own mistake, no matter how much it redounds to her own detriment or to the benefit of the defendant, is insufficient to support an unconscionability judgment. The defendant must go further and engage in such active conduct that perpetuates the disruption in bargaining equilibria, by preventing the plaintiff from making a decision in her own best interests, based on all available information.

It is not entirely clear, however, whether the High Court intended that, as a *sine qua non* to equitable relief, it should be necessary to show such active victimisation in all cases of unilateral mistake. It would be surprising,

---


81 Though falling short of actual misrepresentation.

however, if this were so. First, because the majority’s doctrine of unilateral mistake was ‘narrowly stated’ as a ‘particular proposition of law ... appropriate and adequate for disposing of the present appeal’; and second, because the majority remarked that only ‘ordinarily’ will ‘special circumstances’ need to be shown before it would be unconscientious for a party to a formal contract to retain a benefit when the other party was acting under a mistake as to its terms or its subject-matter. Apparently approving of Denning L.J.’s judgment in Solle v. Butcher, the majority gave as examples of unconscionability-rendering ‘special circumstances’:

[T]he case where the mistake of one party has been induced by a material misrepresentation of the other and the case where “one party, knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and concludes a contract on the mistaken terms instead of pointing out the mistake”.

Potentially even more enlarging is the High Court’s apparent approval of Canadian and United States authorities, where merely exploiting a known unilateral mistake has justified court intervention notwithstanding the absence of the plaintiff having to show an additional ingredient of sharp practice. In these North American jurisdictions, the element of sharp practice is either not required, or else it is supplied by silence itself. The


84 Id, 431.


majority judges quoted Corbin,\(^\text{90}\) who summarised the American position as follows:\(^\text{91}\)

There is practically universal agreement that, if the material mistake of one party was caused by the other, either purposively or innocently, or was of such a character and accompanied by such circumstances that he had reason to know of it, the mistaken party has a right to rescission.

In light of the foregoing, therefore, the writer would question an acceptance of an absolute requirement of deliberate concealment in this context.\(^\text{92}\) Such a requirement is not immediately self-evident in the unilateral mistake cases. According to Professor Finn, the wrong here resides in the taking or acceptance of a contract with the requisite knowledge of the mistake, and this is, without more, an advantage enough to attract equitable

unilateral mistake to be sufficient to render a contract voidable, it must be known to the other party, who then took 'studied advantage of the error and sought to profit by it' (id, 168).

\(^{90}\) Corbin on Contracts (1960), Vol. 3, § 610, 692.

\(^{91}\) Taylor v. Johnson, op. cit., 432.

\(^{92}\) It is perhaps noteworthy that in Easyfind (NSW) Pty. Ltd v. Paterson, op. cit., Young J., at 107, in describing the instant jurisdiction, seems to use language that deliberately leaves open the possibility that there may be unconscionability notwithstanding the absence of an element of deliberate concealment:

The whole tenor of Taylor's case is that in addition to there being a mistake by one party known to the other party, there must be some reason in conscience why the contract should not be enforced. The court refers with approval to Solle v. Butcher [1950] 1 K.B. 671 at 692, where Denning L.J. gave as illustrations of unconscionable conduct which would constitute special circumstances entitling a court to set aside a contract (a) the case where the mistake of one party was induced by the other and (b) the case where knowing of the other's delusion, a person concludes a contract on the mistaken terms instead of pointing out the mistake. Thus in Australia a contract may be avoided not only where the mistake was induced by the [unmistaken party], but also where he has deliberately clothed the mistake or has otherwise behaved unconscionably. (Emphasis added.)

It is to be assumed that other examples of unconscionable behaviour include contracting with knowledge of the mistake in circumstances that are unconscionable: that is, passive unconscionability. Even where there is no deliberate concealment by the defendant, he nevertheless knows that there is no reasonable possibility that the mistake will be discovered, so he receives a bargain more favourable to himself than he otherwise might have done.

624
supervision.93 Silence in the face of a known unilateral mistake perpetuates the error, and this should be considered to be sufficiently condemnable, at least where the mistake relates to some important matter. This view accords with the present writer’s processual conception of exploitation expounded in Chapter Four. What is more, the criterion of active concealment is neither consistent with the relaxed knowledge requirement—of merely having “reason to know”—in this context,94 nor does it rest easily beside our s. 52 jurisprudence.95 A better approach is rather than there being an absolute procedural requirement of deliberate concealment, a evidentiary sliding scale should be invoked, which, again in the words of Williston, ‘disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves’.96 This approach essentially reflects what this writer termed “the balance theory of unconscionability”, which was applied to explain the plaintiff’s burden of proof in cases of unconscionable dealing.97 Indeed, owing to their obvious and immediate affinity, the writer will in the following section suggest a confluence of the two hitherto discrete equitable jurisdictions: unconscionable dealings and unilateral mistake.


94 Greig & Davis, op. cit., 926, make this point. To require that an untrusted party take calculated steps to conceal the other party’s mistake would seem to presuppose that the former had actual knowledge of the latter’s error. The “reason to know” requirement, however, clearly contemplates, simply in a psychological or empirical sense, more passive instances of advantage-taking. This on occasion obscures the strategic significance of the use (or abuse) of information, but given that “reason to know” is a normative criterion, there is a legal presumption as to the strategic exercise of contracting (informational) power.


97 Chapter Four, Section 4.1.2.2.3.
3. The "Balance Theory" of Unilateral Mistake: A Confluence of Unconscionable Dealings and Unilateral Mistake

Despite some academic diffidence in relation to the High Court’s acknowledgment, in *Taylor v. Johnson*, of North American unilateral mistake decisions,98 there appears to be no impediment, doctrinally at least, to a similar development occurring in Australia. Doubtless a cautious attitude to upsetting error-induced contracts needs to be taken in any case. An appropriate doctrinal channel through which such judgments might be made, however, is unconscionable dealings: which itself readily acknowledges that it may be unconscionable for one party to exploit the other when he knows that that other is in a position of special disadvantage and thus unable to preserve her own best interests in a transaction or dealing between them. The ability of unconscionable dealings to capture the more passive forms of exploitative conduct in bargaining would also seem to suggest that the jurisdiction is a particularly appropriate device for circumventing the overly restrictive third criterion in *Taylor v. Johnson*.

The parallels between unconscionable dealings and unilateral mistake are clear.99 The latter should most probably be viewed merely as a discrete and limited manifestation of the former.100 If it is assumed as the writer has done,101 that the unconscionable dealings doctrine applies to otherwise competent persons who are, in the specific dealing in question, "transactionally disadvantaged", a mistake informing the contract made is as capable of leaving a party peculiarly vulnerable to exploitation by the

98 Meagher, Gummow & Lehane (3rd ed., 1992), for example, describe the majority judgment as 'neat but somewhat facile': para. 1409, p. 370, and hope that the High Court’s 'first flirtation with [the North American cases] does not become a serious attachment': para. 1410, p. 371.

99 It has already been noted that the level of knowledge required in each is the same.

100 Cf. Finn, "Equity and Contract", *op. cit.*, 139; Getzler, *op. cit.*, 290: ‘It is arguable that only if P’s lack of information or other inability to calculate a fair exchange is so great as to amount to a special vulnerability to exploitation should D be held to act unconscionably in taking advantage of P’s assumptions, applying the separate equitable doctrine of unconscionable dealing rather than that of unilateral mistake’.

101 Chapter Seven, Sections 1 and 2.
unmistaken party as other well-recognised social and transactional disabilities.\textsuperscript{102} Kitto J. himself, in \textit{Blomley v. Ryan},\textsuperscript{103} instanced a position of ‘special disadvantage’ through, \textit{inter alia}, ‘ignorance’, and Mason J., in \textit{Commercial Bank of Australia v. Amadio},\textsuperscript{104} pointed out that relief will be granted when ‘advantage is taken of an innocent party who, \textit{though not deprived of an independent and voluntary will}, is unable to make a \textit{worthwhile} judgement as to what is in his best interests’.\textsuperscript{105} Thus, if we were to merge the two doctrines, the test for the first criterion in \textit{Taylor v. Johnson}—that of the “seriousness” of the mistake (in procedural terms, at least)—should be measured in terms of whether the mistake in question is of such a character that it leaves the mistaken party in a position of “special disadvantage” \textit{vis-à-vis} the unmistakable party, and unable, on account of her mistake or ignorance, effectively to preserve her own best interests in the transaction in question. This would ensure, moreover, that any mistake must be “basic” to the transaction, in the sense that it ‘vitaly affects the basis upon which the parties contracted’;\textsuperscript{106} that trivial mistakes, or mistakes as to collateral or peripheral matters, are by definition excluded. Furthermore, the “special disadvantage” criterion, with its ability to embrace the notion of “transactional disability”, readily acknowledges not only mistakes as to the contractual terms being negotiated, but also those mistakes which inform, in a more general sense, the final contract made.

This leaves the issue of what role the consequences of the mistake (on the final outcomes of the transaction) have to play in the unconscionability analysis. It was noted in the context of the discussion of unconscionable dealings, that jurisprudence, as a \textit{sine qua non} to relief, did not, in Australia at

\begin{itemize}
  \item \textsuperscript{102} Cf. Finn, “Equity and Contract”, \textit{op. cit.}, 139: ‘A mistake, no less than illiteracy, drunkenness, enfeebled intellect and so on, can place a person in a position of special disadvantage when making a judgment as to how his interests are best to be served’.
  
  \item \textsuperscript{103} (1956) 99 C.L.R. 362, at 415.
  
  \item \textsuperscript{104} (1983) 151 C.L.R. 447, at 466.
  
  \item \textsuperscript{105} Emphasis added.
  
  \item \textsuperscript{106} Keeton, W. P., “Fraud—Concealment and Non-Disclosure” (1936) 15 Texas L. Rev. 1, 29; cf. \textit{Restatement of Contracts} (1932), § 502, Comment (e).
\end{itemize}
least, require that the resultant contract manifestly display any disadvantages in terms of the contingent burdens or benefits resulting under the contract (i.e., “advantages” from Chapter Four). Unconscionable dealings, and the other doctrines examined in this thesis, are, strictly speaking, process-oriented doctrines, and this relates back to what was said in the writer’s general moral theory of exploitation advanced in Chapter Four.

As was also seen in Chapter Four, where the case at hand is one involving so-called “passive” exploitation, as many cases involving unilateral mistake will be, process-oriented items of proof are often difficult to come by, especially in relation to the crucial element of sufficient knowledge, which we know can be less than “actual” where exploitation is alleged. Sometimes, the alleged procedural improprieties are only knowable in an objectively unfair contractual outcome. Accordingly, procedural unconscionability and substantive unconscionability becomes factors which share an evidentiary relationship that is roughly inversely proportional. On this analysis, a “balancing” process takes place. As the unfairness in the parties’ resultant exchange augments, the need for the plaintiff to furnish independent proof of procedural impropriety in order to sustain her “unconscionability” claim will diminish commensurately. Conversely, where the resultant transaction is not itself objectively unfair, the seriously mistaken plaintiff probably will not be able to discharge her burden of proof unless she can independently show procedural unconscionability, perhaps in the nature of active concealment, or else that the otherwise objectively fair transaction was ‘unfair, unreasonable and unjust from the view point of [herself]’.

In addition to evidentiary expedience, this “balance theory of unconscionability” is designed to maintain proper analytical harmony on the continuum existing between the behavioural poles of “active” and “passive” exploitation, so defined. Such an analytical method is particularly useful in

---

107 Section 2.2.2.1.

108 Section 2.3.

the present context, because what was borne out of the discussion of the restrictive third requirement in *Taylor v. Johnson*—deliberate concealment—is that potentially actionable advantage-taking by the one party of the other's palpable unilateral mistake, may equally be active or passive depending on the precise *modus operandi* employed by the unmistaken party, and whether his knowledge was actual or less than actual.

Thus, whilst it is to be acknowledged that many jurisdictions have insisted on a strict criterion of substantive unconscionability, or some such associated conception,\(^{110}\) in all cases of mistake,\(^{111}\) it is not immediately apparent why, as a simple matter of policy,\(^ {112}\) all cases of one's exploiting the palpable unilateral mistakes of another should not be eligible for judicial relief even in the absence of outcomes-oriented unconscionability, especially when in order to qualify for relief the mistake must be "special", in processual terms, and known by the other party in the first place. Whilst such an end-state criterion may be justifiable in the common mistake cases, which are by definition cases involving "passive" victimisation (for there is no "procedural unconscionability", so defined), the processual criterion of "knowledge", or "reason to know", in the unilateral mistake situation does give ground at least for moral or legal complaint,\(^ {113}\) and should, for the purposes of legal enquiry, at least displace the need to show inequality of exchange in an absolute or unqualified sense:\(^ {114}\) that is, as an ingredient of the cause of action itself, and not merely as an evidentiary indicator of the well-established process-oriented ingredients. The case only gets stronger against enforcement where the unmistaken party has taken positive steps

\(^{110}\) 'Substantial inequality of exchange', 'unjust enrichment', etc.

\(^{111}\) See n. 31, *supra*.

\(^{112}\) That is, a fundamental respect for the "voluntariness" implicit in bargain transactions.

\(^{113}\) A simple acceptance of the "reason to know" criterion as representing an appropriate minimum level of knowledge required in unilateral mistake and unconscionable dealings cases at least acknowledges that more "passive" instances are potentially eligible for equitable monitoring and supervision in this context.

\(^{114}\) Comment (f) to § 153 of the *Restatement (Second) of Contracts*, for example, quite readily acknowledges that it will be 'unusual for a party to bear the risk of a mistake [under the rule stated in § 154] that the other party had reason to know of or that was caused by his fault...'.

629
designed to ensure the entrenchment or exacerbation of the other party’s mistake, and the need to show supplementary substantive unfairness should correspondingly be diminished. Accordingly, Australian courts should consider forsaking the absolutist active concealment requirement enunciated in Taylor v. Johnson, but acknowledge instead the necessity in some cases for a measure of substantive unconscionability to be shown, in particular as this is needed to signal an item of procedural unfairness, such as “reason to know”. Such an approach should assist to ensure that a proper balance is to be struck between the need to maintain minimal community standards of fair dealing in contracting, and the need, at the same time, for there to be a proper respect for the security of economically beneficial transactions. The possible subsumption of unilateral mistake within unconscionable dealings’ rubric would ensure a flexible and relatively certain product.

For all that, however, and simply as an empirical matter, it would be surprising if a mistaken party ordinarily chose to complain where her error-induced action resulted in a contract that was patently fair in economic terms, or at least not manifestly disadvantageous to her.\textsuperscript{115} Even accepting that the “seriousness” requirement may in this context have something to do with the relative measure of the resultant contractual exchange between the parties,\textsuperscript{116} it is not necessarily apparent why this should be measured simply in economic terms, such that the court and not the mistaken party herself determines the importance to be attributed to the mistaken term or fact. A subjective element should be incorporated into our approach to inequality of exchange in the present context,\textsuperscript{117} and this, too, would ensure

\textsuperscript{115} The obvious inferential relationship that might exist between objective substantive outcomes, especially where egregious, and the procedural knowledge requirement of both the unilateral mistake and the unconscionable dealings jurisdictions has been noted at a number of points.

\textsuperscript{116} The Restatement (Second) of Contracts seems to suggest that a mistake that results in a substantial difference in value to the mistaken party is almost always deemed a material mistake: § 152. Cf. Seavy, “Problems in Restitution” (1954) 7 Okla. L. Rev. 257, 268; Powell, F., “Mistake of Fact in the Sale of Real Property” (1991) 40 Drake L. Rev. 91, 97.

\textsuperscript{117} Cf. Rabin, \textit{op. cit.}, 1289: ‘The inequality referred to in the proposed rule is the difference between what A thought he was getting or giving because of his mistake and what he was actually getting or giving; it does not refer to the disparity between what was given and what was received’.
that criteria applying to the jurisdiction were consistent with the attitude taken to unconscionable dealings,¹¹⁸ innocent misrepresentation¹¹⁹ and undue influence.¹²⁰

¹¹⁸ Chapter Four, Section 4.1.2.2.2.


¹²⁰ In Australia, at least. See discussion in Chapter Six, Section 2.2.2.3.1.
Chapter Nine

ASYMMETRIC INFORMATION III: Nondisclosure in Contract Formation

Chapter Contents

1. INTRODUCTION ................................................................. 634

2. RAISING THE DUTY TO SPEAK IN CONTRACT FORMATION ........................................ 650
   2.1. Kronman's Law-and-Economics Analysis of Nondisclosure .... 658
   2.2. Scheppel's "Contractarian" Analysis of Nondisclosure .......... 662

3. TOWARD A GENERAL THEORY OF NONDISCLOSURE IN CONTRACT FORMATION? ......................................................... 665
   3.1. Justifiable Ignorance ..................................................... 676
   3.2. The Nature, Scope and Content of the "Duty" to Disclose in Contract Formation ............................................. 692
   3.3. A Note about Method and Remedy .................................. 698

* * * * *
The essentials in the present context are that the obligation [to disclose] should be capable of arising out of the pre-contractual relationship and that the matter to be communicated should be such as might affect the recipient's decision to enter the contract.¹

Is a party who knows or has reason to know that the other is relying upon him for assistance or information in a dealing, entitled to omit to supply adverse material information when he either assumes to provide some assistance or information, or else fails to warn that other that assistance or information is not to be, and will not be given, in the matter?²

The law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it.³

1. INTRODUCTION

S sells X to B, knowing about X's latent (usually bad) qualities.⁴ Does S have to reveal them? B buys Y from S, knowing of some particularly favourable (but latent) qualities of Y. Does B have to inform S of these qualities?⁵ In either case, the informationally advantaged party either uses,⁶


⁴ See, e.g., Simmons v. Evans, 206 S.W.2d 295 (1947): regular interruptions in water supply had to be disclosed to purchasers of a house. The United States “termite cases” are infamous in this regard: see, e.g., Swinton v. Whittinsville Sav. Bank, 42 N.E. 2d 808 (1942).

⁵ This scenario depicts the situation in the famous United States case of Laidlaw v. Organ, 15 U.S. (2 Wheat.) 178 (1817): purchaser of tobacco entitled to withhold news of the signing of a peace treaty that in turn would lead to a 30-50% increase in tobacco prices.

⁶ Cf. Wonnell’s distinction between ‘merger’ of the resource and the information and ‘severance’ of the resource from the information. Wonnell essentially uses this distinction to explain the different standards of disclosure usually expected of buyers and sellers. The hypothetical art

634
or refrains from using, the information which he possesses, and about which the other is ignorant, to procure a contractual benefit.

Here, we arrive at a contemporary problem of some magnitude in our law, and one that has been foreshadowed at various junctures in the previous two chapters. The issue of nondisclosure in the precontractual setting raises difficult problems of legal policy, its application and exposition. The common problem seems to be only a more generalised version of those issues raised and considered in the previous chapter, in the context of unilateral mistake in equity, such that it may indeed be possible to resolve them through parallel analysis and methodology. The common factual phenomena attracting each are essentially the same, although broadened simply by an extension of the conception of “mistake”, which ordinarily applies to situations involving positively held misapprehensions or errors, to encapsulate situations of simple ignorance: the bare want of information that is relevant to the contractual decision-making of a bargaining participant. The result of each—serious error and ignorance—is also the same: the creation of an exploitable condition inhering in the existence of a palpable asymmetry in the information held by or available to the respective contracting parties. Both areas of law, therefore, are concerned with the possible exploitation of a known informational asymmetry. Here again, specific attention will be focused upon one party’s mere failure to volunteer information known, or reasonably to be known, to be relevant to the contractual decision-making of the other, ignorant party. “Nondisclosure”,

dealer, for example, ordinarily combines information, skill, etc., and the physical resource, say, a painting, to derive a benefit. By contrast, the vendor who sells his termite-infested home does so only on account of the temporary severance of the resource from the information. Wonnell, C., “The Structure of a General Theory of Nondisclosure” (1991) 41 Case Western Reserve L. Rev. 329, 343.

7 See footnote text, ibid.

8 The recent universal obsession with insider trading, for example, indicates the degree of concern there is about allowing people to transact with superior knowledge. The new Australian insider trading legislation is an example of this: Corporations Legislation Amendment Act 1991 (Cth), ss. 1002B and 1002G, 1005, 1013.
then, is here to be distinguished from those cases involving "misrepresentation" and "active concealment". 9

It is not the intention of the writer to provide a comprehensive summary or survey of the law relating to all aspects of actionable nondisclosure; other, more expert, attempts have been made in this regard. 10 Instead, the aim is to offer a rather generalised account of the various, often competing, criteria (factors, policies, etc.) attending the nondisclosure debate today. Broad theoretical considerations and structures will be considered in order, first, to view how the problem of nondisclosure in contract formation may relate to the various other legal doctrines previously discussed and considered as falling within the broad scheme of the subject-matter of this thesis; and, secondly, to offer an expedient analytical framework into which we may seek to feed and to organise the various criteria identified as broadly attending the enquiry. The writer remains sceptical, however, as to our hope of ever finding a single rule, or even a single principle, that can, other than in the most generalised terms, fathom all past cases, let alone perform as a reliable, analytical mechanism for the expeditious resolution of all future ones. 11

---

9 "Nondisclosure" in this thesis is not a case of one party having himself actively disturbed the balance of the negotiations between the parties, but it has to do with the imposition of a duty attaching by virtue simply of the relative positions of the parties. Cf. Restatement (Second) of Contracts, § 161, Comment (a); Keeton, W. P., "Fraud—Concealment and Non-Disclosure" (1936) 15 Texas L. Rev. 1 2-5: drawing distinction between 'covering up' and naturally latent, but known, defects.


11 Cf. the frustrated sentiments of Spencer Bower, who, in the preface to the first edition of his famous work, The Law Relating to Actionable Nondisclosure and Other Breaches of Confidence and Influence (1915), v-vi, was compelled to make the following observation:

The present work contains no ... code. I made an attempt in this direction; but the result was not all satisfactory, and I was soon convinced that the subject does not lend itself to this mode of treatment. The concepts and principles involved are too fluid and delicate to justify the Procrustean extension or compression which would be necessary to fit them into the rigid framework of a code.

636
Almost invariably, our principal concerns in the context of nondisclosure lie with the situational "monopolist"\textsuperscript{12} of information,\textsuperscript{13} to whose behaviour we may wish legally to respond in a variety of ways. For example, we may want to condemn any nondisclosure as exploitative and unconscionable: as tantamount to fraud; or to approvingly recognise it as the 'just reward' for a natural advantage or 'entrepreneurial discovery' of information;\textsuperscript{14} or to accept or tolerate it as an implicit recognition of the

\textsuperscript{12} We are not here talking of "monopolies" on the sort of scale that generally concerns economists. Rather, we are talking of a very interpersonal type of monopoly: one that exists, specifically, \textit{inter partes}, giving rise not to market power but to personal power by the one party over the other to the same transaction or dealing.

\textsuperscript{13} Finn, "The Fiduciary Principle", \textit{op. cit.}, 16, uses the expression in the senses that the information possessed:

\begin{enumerate}
\item would not reasonably be available to the other even if reasonable endeavours were undertaken to ascertain it;
\item can properly be looked for from the possessor given justified reliance on him; or
\item would not, within the reasonable contemplation of the other, be expected to be a consideration relevant in the decision to be taken. (\textit{id}, n. 95)
\end{enumerate}

This is a point to which we return in the text, \textit{infra} at p. 672.

\textsuperscript{14} Cf. \textit{Hays v. Meyers}, 107 S.W. 287, 288:

[A] person may with perfect honesty and propriety use to his own advantage the superior knowledge of property he desires to purchase, that has been acquired by skill, energy, vigilance and other legitimate means ....

Cf. also, Birmingham, \textit{op. cit.}, 251, n. 9, citing \textit{Jordan v. Duff & Phelps, Inc.}, 815 F.2d 429, 445 (1987) (Posner J. dissenting): 'an inventor is not required to blurt out his secrets, and a skilled investor is not required to disclose the results of his research and insights before he is able to profit from them; \textit{Teamsters Local 282 Pension Trust Fund v. Los Angeles}, 762 F.2d 522, 528 (1985) (Easterbrook J.): 'often the law imposes no obligation to disclose. Much information is commercially valuable, and people must hide this information to exploit its value. If they could not hide it, they would not have the right incentives to produce it'; \textit{United States v. Dial}, 757 F.2d 163 (1985), 168 (Posner J.):

\begin{quote}
Liability is narrower for nondisclosure than for active misrepresentation, since the former sometimes serves a social purpose; for example, someone who bought land from another thinking that it had oil under it would not be required to disclose the fact to the owner, because society wants to encourage people to find out the true value of things, and it does this by allowing them to profit from their knowledge.
\end{quote}

637
individualistic ethic informing contract, and the bargaining "game";\textsuperscript{15} or, relatedly, to view it as 'an inevitable by-product of a human predisposition against affirmatively aiding others'.\textsuperscript{16} Not surprisingly, it is possible to view our ultimate response to nondisclosure generally as consisting of a somewhat 'confused mixture' of these various legal reactions,\textsuperscript{17} a problem no doubt in part generated or compounded by the fact that several legal solutions—to be found in the various approaches and methods of contract,\textsuperscript{18} tort,\textsuperscript{19} equity,\textsuperscript{20} or statute (general\textsuperscript{21} and specialist\textsuperscript{22})\textsuperscript{23}—seem to exist to deal with the single factual phenomenon of nondisclosure.

\textsuperscript{15} Cf. Resource Management Co. v. Weston Ranch & Livestock Co., 706 P. 2d 1028, 1047-8 (1985); Blair v. National Sec. Ins. Co., 126 F.2d 955, 958 (1942) per Clark J.: It may be some reflection of the business ethics fostered by a system of individual competition that the parties to a contract are permitted to deal at arm's length. I can buy my neighbor's land for a song, although I know and he doesn't that it is oil bearing. This isn't dishonest, it is 'smart business' and the just reward of my superior individualism.


\textsuperscript{17} Wonnell, id, 330.

\textsuperscript{18} See Restatement (Second) of Contracts, § 161: listing situations in which nondisclosure is equivalent to an assertion. Even within contract, a variety of doctrines are employed to deal with the issue of nondisclosure: notably, implied terms and rescission.

It is often said that where there is a contractual warranty as to quality, fitness for purpose, etc. implied into the parties' resultant contract, a duty of disclosure arises with respect to matters (defects, etc.) which would infringe or negate that warranty. This obligation is also said to arise irrespective of any knowledge of the defect. Cf. Atiyah, An Introduction to Contract Law (4th ed., 1989), 289. The significance of duties of disclosure is not in this context concerned with the strategic use of information in contracting and hence will not specifically be dealt with here.

\textsuperscript{19} See Restatement (Second) of Torts, § 551. In our law, damages for negligent misrepresentation or deceit are employed to deal with the problem of nondisclosure.

\textsuperscript{20} As Finn has commented, equity has had a lesser role to play in addressing the problems created by nondisclosure in voluntary and consensual relations: "Equity and Contract", Chp. 4 in Finn, P. (ed), Essays on Contract (1987), 126 et seq. Doubtless this is due to the perceived remedial deficiencies of orthodox equity doctrine, especially when compared to what tort law and statute has to offer a plaintiff.

\textsuperscript{21} Notably, the Trade Practice Act 1974 (Cth), ss. 52, 51AB (cf. ss. 69-73, dealing with implied terms), and the state Fair Trading Act equivalents; Contracts Review Act 1980 (N.S.W.).
The setting and the testing of the parameters of any generalised duty to disclose in contract formation, perhaps more so than any other legal area previously considered in this thesis, exemplifies, in a rather flagrant fashion, the tensions existing in our law between the two sets of dichotomous interests, values, etc. identified in Chapter Seven: (1) between consequentialist, collective ideals (predictive certainty, finality, efficiency, etc.) and respect for the individual (fairness, autonomy, consent, etc.) on the one hand; and (2) between concern for self and responsibility to or for others on the other. Economic efficiency, finality of transactions and certainty of result are clearly all served by a rule against disclosure; but at what or at whose expense?

It is beyond doubt that silence per se can constitute misleading or deceptive conduct within the meaning of s. 52 of the Trade Practices Act. Most notably, see Rhone-Poulenc Agrochimie SA v. UIM Chemical Services Pty Ltd (1986) 68 A.L.R. 77; Henjo Investments Pty Ltd v. Collins Marrickville Pty Ltd (1988) 79 A.L.R. 83; Kabwandi Pty Ltd v. National Australia Bank Limited (1989) A.T.P.R. 40-950. Section 4(2) of the Act specifically provides that a reference to “conduct” in the Act includes a reference to refraining from doing an act, but this is qualified to exclude inadvertently refraining from doing that act, which refers to “deliberate”, or voluntary as opposed to involuntary action, and it has nothing to do with “intentional” nondisclosure: Finucane v. N.S.W. Egg Corporation (1988) A.T.P.R. 40-863, per Lockhart J.; Hornsby, op. cit., 84 per Bowen C.J.

It is also clear that s. 52 transcends the traditional nondisclosure categories. In Commonwealth Bank of Australia v. Mehta (1991) 23 N.S.W.L.R. 84, for example, Judge Samuels observed (at 88) that because s. 52 prescribed a norm of conduct which was ‘morally neutral’, it is

incorrect to use liability under the general law as a means of enlivening [it]....

Silence is not misleading only where there is a duty to disclose at common law or in equity. It may simply be the element in all the circumstances of a case which renders the conduct in question misleading or deceptive.

Cf. also, Bowen C.J. in Rhone-Poulenc, op. cit., 85; Parkdale v. Puxu, op. cit., 198 (Gibbs C.J.); 202-4 (Mason J.); 219 (Brennan J.).

22 Various consumer statutes, particularly in relation to consumer credit, require disclosure: see, e.g., Credit Act 1984 (N.S.W.); Credit Contracts Act 1981 (N.Z.). Other examples of specialised disclosure provisions include Family Law Act 1975 (Cth) and Regulations (cf. In the Marriage of Green and Kwiatek (1982) 8 Fam. L.R. 419, 421-2); ss. 231 (director's interests), 995 (misleading and deceptive conduct generally), 996 (public prospectus') of the Corporations Law.; Securities Act 1978 (N.Z.), ss 56-9 (prospectus').

It should be recognised that any failure on the part of a bargaining party to make disclosure, especially where that party has superior knowledge of essential facts relevant to the other party’s contractual decision-making, may render the resultant transaction ‘inherently unfair’,24 especially when, in the absence of that information, that other’s decision has or is likely to redound to her detriment.25 The imposition of general disclosure obligations in contract formation also runs contrary to the classical individualistic values informing traditional and modern contract law, which, under the functionalist ethic of bargaining, ordinarily perceive contractual negotiations as a social activity in which both parties are expected to satisfy their own informational needs and exercise an independent judgment in the manufacture of their bargain. Such a general duty, of course, would require one party to share information harmful to his own bargaining position, thereby determining that candour, as opposed merely to honesty, ought to be required in business and contractual dealings. Duties26 of disclosure in contracting, therefore, at least outside the fiduciary context,27 are concerned with imposing “neighbourhood”-like responsibilities: responsibilities that one party has for the positive protection of the interests of the other.

---


25 Cf. Finn, “Good Faith and Nondisclosure”, *op. cit.*, 2, who comments that ‘[c]entral to this notion of unfairness is the perception that it is the responsibility of the courts to articulate desired or desirable community standards of good faith and fairness in contractual and business dealings...’.

26 Traditionally, the issue of whether to impose liability for nondisclosure is framed as one of “duty”. For example, orthodox learning would have it that silence or nondisclosure constitutes an actionable wrong only when the silent party is under a duty to speak and disclose the relevant item of information. As some commentators have noted, such an approach is question begging; for the recitation of the “rule” often is a rationalisation for imposing liability on the facts of a particular case. See Goldfarb, “Fraud and Nondisclosure in the Vendor-Purchaser Relation” (1956) 8 W. Res. L. Rev. 5, 7; Powell, F., “The Seller’s Duty to Disclose in Sales of Commercial Property” (1990) 28 Am. Bus. L. J. 245, 251.

27 Unlike “neighbourhood”, fiduciary cases are essentially concerned with the one party subordinating his own interests to the promotion of those of the other in a dealing between them.
Essentially, it would seem one is seeking here to determine when one party is reasonably entitled to expect that she has been or will be supplied with information relevant to her contractual decision-making, at least where that information is 'adverse to [her] position'.\textsuperscript{28} Predictably, however, the law has displayed a manifest tentativeness in protecting a contracting party from her own ignorance, by obliging the other contracting party to save the former from a situation of harm through an active correction of a known informational disadvantage, whether this disadvantage stems from a pre-existing erroneous assumption or from sheer ignorance.\textsuperscript{29} It is here, in particular, that we clearly witness the law's 'general reluctance to require an individual to take positive action for the benefit of others'.\textsuperscript{30} The classical idea that the parties negotiating a contract should see to their own protection still exercises considerable attraction, and so contract law generally permits people to trade on superior information. Accordingly, we find that there is still considerable vitality in the traditional denial of a duty of disclosure in contract formation. Premised upon \textit{caveat emptor}, silence is not, as a general rule, an invalidating cause to a contract,\textsuperscript{31} or an affirmative basis for a tort action.\textsuperscript{32}

That this should be so is readily acknowledged. Neither law, nor possibly even morality,\textsuperscript{33} should ever wish unqualifiedly to compel


\textsuperscript{29} Recall Steyn J.'s observation in Banque Keyser Ullman S.A. v. Skansia (U.K.) Insurance Co. Ltd [1987] 2 W.L.R. 1300, at 1338:

[The] law has always adopted a robust approach to any suggestion that, in the absence of a special relationship, somebody owes a legal duty to rescue another from ... financial ruin. That is so no matter how simple and easy the intervention to rescue the other might be.


\textsuperscript{32} Peek v. Gurney (1873) 6 H.L. 377.

\textsuperscript{33} Even commonsense morality would not appear to regard disclosure as valuable in itself. McMahon, for example, argues that '[r]eveling facts ... seems to have moral value only where they are relevant to the decision-making of another agent': McMahon, C., "Openness" (1990) 20 Canadian Journal of Philosophy 29, at 29. This highlights the significance in our
disclosure in the precontractual context, nor condemn all instances of nondisclosure. In some measure this may simply be a reflection of the familiar legal problem of imposing civil liability for omissions. The distinction between mere silence and positive deception, for example, reflects the old tort notion that there could be no liability for nonfeasance, or merely doing nothing.34 But significant deontological and consequentialist justifications also exist to justify such a reticence. Deontologically, nondisclosure remains very much part of our bargaining culture.35 It is reasonable to expect that given the nature and function of bargaining in our society, especially where the parties' interests are not entirely convergent, a measure of advantage-taking will occur within the process. As Edwin W. Patterson once informed us, 't]he bargaining process on a "free market" would become tedious and unstable if each bargaining participant had to tell the other all his reasons for the price he asks or bids.'36 Hence, just as there is no justification for an absolute prohibition against positive deception, there are even stronger reasons to resist an absolute disclosure requirement in contract formation. The costs associated with full disclosure and enforcement, moreover, are simply too great for society, or its individual constituents, to bear.

This leads us inexorably to the commonly expounded consequentialist justifications against a general disclosure rule, the principal source of which is the Chicago-school law-and-economics movement. According to the proponents of that school of thought, far and away the most obvious reason why there cannot be a strict insistence on absolute disclosure in commercial

---


35 In this regard, Calamari & Perillo liken contractual negotiations to a game of poker: Contracts (3rd ed., 1987), 336.

dealings is that there must be some economic incentive to invest in the acquisition of skill and knowledge (the social utility of which is obvious), and that incentive is in part provided by the ability of the parties to make use of their special knowledge and skill in negotiating contracts. It should be recognised, therefore, that there must be a limit to the extent to which an unqualified disclosure standard could be integrated into a modern, commercial legal system:

The efficient cause of practical abandonment of the ancient civil law doctrine of concealment is unquestionably to be found in its hostility to the policy of modern civilised society. A literal compliance with it, and a rigid interference of the tribunals to enforce its rules, would speedily put an end to the inestimable advantages, that society derives from the wholesome stimulus to commerce, and the arts, given by the prospect of profit to be acquired by superior skill and industry, by minuter attention to business, or by a more extensive correspondence and more authentic intelligence.

Thus, contract law tends to deny the existence of any general duty to disclose facts, as opposed to terms, in the formation of contracts.

---

37 Keeton makes the observation that a requirement of absolute disclosure is 'neither just to the individual nor is it a wise social policy to follow because it tends to discourage industry and training': Keeton, W. P., "Fraud—Concealment and Non-Disclosure" (1936) 15 Texas L. Rev. 1, 23. Gulian Verplanck, Essay on the Doctrine of Contracts (1825), 75, considered that informational advantages were

... necessary and lawful stimulants of that activity which, in the search after private profit, opens a thousand springs of prosperity and plenty for the use of all; and within just limits, are as free from moral guilt as they are fruitful of public utility.

38 This is the whole tenor of Kronman's and Posner's justification for the rule against nondisclosure. Generally, see Section 2.1., below, for a discussion of economic theory and nondisclosure.


40 The law tends to take a more paternalistic approach to disclosure of the terms of a contract, generally requiring that reasonable efforts be taken to bring the existence and the content of contractual terms to the attention of the other contracting party. See Parker v. South Eastern
However, a few specific, and on occasion seemingly a priori, exceptions to this observation are readily discernible in our law. For example, strict, but narrow, disclosure requirements apply to the contracting fiduciary, despite the ever-present and troubling question of when a fiduciary

Railway Co. (1877) 2 C.P.D. 416; Thornton v. Shoe Lane Parking Ltd [1971] 2 Q.B. 163; Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd [1988] 1 All E.R. 348. Statutes also impose detailed requirements as to the manner and type of information about terms to be communicated to consumers of goods, services and credit. The economic considerations that generally justify a general nondisclosure rule do not apply to disclosure of the terms of contracts but, on the contrary, obscure or hidden terms are likely to impede the competitiveness of markets, so that the economic considerations point in the direction of our favouring a duty to provide full disclosure of terms: cf. Collins, H., “Implied Duty to Give Information During Performance of Contracts” (1992) 55 Modern L. Rev. 556.

41 Even to the extent that historical equity has been concerned with contract doctrine, it has shown a marked reluctance to allow rescission, absent some fraud or misrepresentation on the part of D. Without more, P's ignorance or mistake would not be sufficiently to deprive D of his legal rights under the contract. In Australia Hotel Co. Ltd v. Moore (1899) 29 N.S.W.L.R. 155, for example, Simpson C.J. (in Equity) said (at 160):

I am not aware of any case where the Court has rescinded a contract on the ground that one of the parties misunderstood the real meaning and effect of the contract, such misapprehension not having been induced by the conduct of the other party....

It appears, however, that equity's jurisdiction in respect of ignorance and mistake was at one time far more flexible and discretionary: Stoljar, Mistake and Misrepresentation (1968), 25-8.

42 Finn, “Good Faith and Nondisclosure”, op. cit., 179.

43 Transactions with a fiduciary require disclosure because the beneficiary trusts, and is entitled to trust, his fiduciary, and thus is not apt or required to exercise the same caution and diligence required by an arm's length transaction. The strategic use of information in this setting (advantage-taking through nondisclosure) violates the justifiable expectation that one party is obliged or expected to act only in the interests of the other, or, as in the case of a partnership, in their joint interests. Under these circumstances, it is reasonable to expect that asymmetric information will be shared and not exploited. The fiduciary who is aware that his beneficiary is acting ignorantly, or has fallen into error, is bound, in morals and in law, either to destroy the relationship, and the trust and confidence flowing therefrom, or else inform or remove the error. Cf. Scheppelle, Legal Secrets (1988), 143: 'For the party who is being fooled, the game is represented as something other than it really is'. Generally, see Catt v. Marac Australia Ltd (1986) 9 N.S.W.L.R. 639, 651-8 (Rogers J.); Elders Trustee and Executor Co. Ltd v. E. G. Reeves Pty. Ltd (1987) 70 A.L.R. 193, 226-41 (Gummow J.).
relationship can be said to exist. Likewise, both parties are burdened with stringent disclosure obligations where the contract in question is one classified as *uberrimae fidei*—of the utmost good faith—most notably, an insurance proposal. A creditor is obliged to disclose to a surety "unusual

44 Generally, see Finn, "The Fiduciary Principle", *op. cit.*; DeMott, "Beyond Metaphor: An Analysis of Fiduciary Obligation" (1988) Duke L.J. 879: 'Fiduciary obligation is one of the most elusive concepts in Anglo-American law...'.

45 This, by definition, also includes those relations of confidence and of influence. As was pointed out in the context of our discussion of undue influence, however, the fiduciary duty to make full disclosure is possibly broader, and may even serve a different function in some cases. As Cozens Hardy M.R. pointed out in *Moody v. Cox & Hatt* (1917) 116 L.T. 740, at 747: 'The relief in a case of this kind does not depend upon undue influence;... the "duty" to disclose may be quite consistent with the absence of undue influence'. The disclosure obligation may be imposed, for example, upon a solicitor who deals with a client 'who is an independent man of business and who does not rely upon an attorney for advice on the propriety of the transaction' (*ibid*). The imposition of this duty is made here not because the one party relies upon the other for guidance and disinterested advice, but because that party has acquired superior information and knowledge about the value of the property through an employment or concern on behalf of another: cf. Lord Atkin in *Bell v. Lever Bros. Ltd* [1932] A.C. 161, 227; reasserted by the English Court of Appeal in *Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co.* [1989] 3 W.L.R. 25, at 78. The case is also reported at [1989] 2 All E.R. 952 under the name of *Banque Financiere de la Cite S.A. v. Westgate Insurance Co. Ltd.* The dismissed House of Lords appeal is also reported under the new name: [1990] 2 All E.R. 947. It seems, however, that as in the case of undue influence, the duty of disclosure is an incidental consequence of the wider fiduciary principle. A fiduciary is equally prevented from profiting, at the other's expense, by superior judgment or by mere good chance. Thus, even full disclosure by a trustee would not necessarily enable him to enforce an advantageous contract against a trust beneficiary.

Generally on fiduciary disclosure, see Cope, M., "The Equitable Obligation of a Purchaser, Who Is a Fiduciary, to Make Full Disclosure of Material Information" (1982) 12 University of Queensland L.J. 74. Cf. *Restatement (Second) of Contracts*, § 173: 'If a fiduciary makes a contract with his beneficiary relating to matters within the scope of the fiduciary relation, the contract is voidable by the beneficiary, unless (a) it is on fair terms, and (b) all parties beneficially interested manifest assent with full understanding of their legal rights and of all relevant facts that the fiduciary knows or should know'.


48 The basic justification for this class of case is thought to reside in the presumption that we are here concerned with
circumstances" in the creditor-debtor relationship which put 'the debtor in a position which the surety would not naturally expect'.

A vendor must contracts in the negotiation for which one of the parties must, from the very nature of the transaction, have either actual or presumptive knowledge of circumstances which ordinarily are not within the actual or presumptive knowledge of the other party, and the knowledge of which is, or may be, of importance to that other party to enable him to judge the expediency of entering into the particular contract proposed.


Disclosure is not required simply because certain contracts require good faith (A notion that would imply that other contracts do not do so), but because certain kinds of contracts have a higher probability than others that one of the parties will come to the agreement with knowledge that is out of the reasonable reach of the other party.

Contracts uberrimae fidei are controversial nowadays, and it is often questioned whether such a classification is necessary under modern circumstances: cf. Finn, "Good Faith and Nondisclosure", op. cit., 160. Some consider the insurance contract to be the only remaining instance properly falling within the class: see Spencer Bower, Sutton & Turner, op. cit., Pt II, Chps. 5-9, although even the rules and assumptions relating to insurance contracts are perhaps anachronistic, especially given that most modern insurance contracts are negotiated in a context where the insurer can obtain quite a lot of information concerning the insurable risk: see Harnett, B., "The Doctrine of Concealment: A Remnant in the Law of Insurance" (1950) 15 Law and Contemporary Problems 391. It could be argued that basic inequalities in information or knowledge are what gives rise to all obligations to disclose, and it is thus unclear why certain contracts have been singled out for special treatment. Cf. also, Spencer Bower, Sutton & Turner, op. cit., 86, 93-4, who regard the class of contracts uberrimae fidei to be based on 'accidents of history' rather resting on 'the logic of principle'; Hasson, R., "The Special Nature of the Insurance Contract: A Comparison of the American and English Law of Insurance" (1984) 5 Mod. L. Rev. 505; Davis, R., "The Origin of the Duty of Disclosure under Insurance Law" (1991) Ins. L.J. 71.


... But I think, both on authority and on principle, that, when the creditor describes to the proposed sureties the transaction proposed to be guaranteed (as in general a creditor does), that description amounts to a representation, or at least is evidence of a representation, that there is nothing in the transaction that might not naturally be expected to take place between the parties to a transaction such as that described. And, if a representation to this effect is made to the intended surety by one who knows that there is something not naturally to be expected to take place between the parties to the
disclose all latent defects in title to a purchaser.\textsuperscript{50} Specific proscriptions against nondisclosure are also exemplified through the cases of active concealment,\textsuperscript{51} half-truths,\textsuperscript{52} and a representor’s knowing failure to correct transaction, and that, if it were known to him, he would not enter into the contract of suretyship, I think it is evidence of a ... representation on his part.


\textsuperscript{51} The courts have long drawn a distinction between merely remaining silent about one’s knowledge and actively doing something to conceal that knowledge from someone else. A contracting party may not use any practice or artifice to conceal defects, or make any representation or device for the purpose of throwing the other party off her guard, or to cause her to omit an inquiry or examination into matters relevant to her contractual decision-making. This obtains even in relation to patent items of information, such as readily viewable defects in the subject-matter being exchanged: cf. Schepppele, \textit{op. cit.}, 154: intentional concealment treated as objectionable even when the underlying secret might not be. Cf. also, Wilson E. H., "Concealment or Silence as a Form of Fraud and the Relief or Redress Afforded Therefor, Both in Law and in Equity" (1895) 5 Counsellor 230, 234: ‘Concealment is always fraudulent, and, if the other elements of fraud ... are present, will always entitle to relief .... Silence is fraudulent when, and only when, there is a duty to speak’; Goldfarb, \textit{op. cit.}, 24: ‘If there is, in addition to the withdrawal, any statement which tend[s] \textit{affirmatively} to a suppression of the truth, or to the withdrawal or distraction of the other party’s attention from the real facts, the concealment becomes fraudulent’. Some examples from the law reports include: Udell \textit{v}. Atherton (1861) 7 H. & N. 172; vendor of mahogany log turned it over so as to conceal a hole in its underside; Baghole \textit{v}. Walters (1811) 3 Camp. 154; Schneider \textit{v}. Heath (1813) 3 Camp. 506: shipping vessel kept afloat in dock in order to prevent examination of her bottom, which vendor knew to be unsound; Gronau \textit{v}. Schlamp Investments \textit{Ltd} (1974) 52 D.L.R. (3d) 631: concealment by vendor of crack in wall; Gordon and Texeira \textit{v}. Selico \textit{Ltd} and Select Management \textit{Ltd} (1986) 11 H.L.R. 219: concealment of dry rot held to amount to deceit. Cf. also, \textit{Restatement (Second) of Contracts}, § 160: ‘Action intended or known to be likely to prevent another from learning a fact is equivalent to an assertion that the fact does not exist’.

\textsuperscript{52} The case of a half-truth is traditionally considered to involve “nondisclosure”, albeit only a partial one. In these cases the statement-maker regards the facts that he conveys as genuinely holding, but knows or believes that the recipient will regard them as having an evidential significance different from that which he himself regards them as having. Half truths are potentially deceptive, therefore, simply because the evidential relevance we regard a particular fact as having often depends in some measure on the other facts that we accept. Half truths thus often involve an intent to deceive others by exploiting disparities in relevance due to differences in the body of facts accepted. In other words, they mislead simply because of what is left unsaid. See Awaroa Holdings \textit{Ltd} \textit{v}. Commercial Security & Finance \textit{Ltd} [1976] 1 N.Z.L.R. 19; Curwen \textit{v}. Yan Yean Land Co. \textit{Ltd} (1891) 17 V.L.R. 745. Cf. McMahon, \textit{op. cit.}, 38; \textit{Restatement (Second) Torts}, § 529.

It is clear that a half-truth can constitute ‘misleading or deceptive’ conduct under s. 52 of the \textit{Trade Practices Act} 1974 (Cth); see Hornsby Building Information Centre \textit{Ltd} \textit{v}. Sydney Building Information Centre \textit{Ltd} (1977) 140 C.L.R. 216, at 227 per Stephen J. Robertson, “The Circumstances in which Silence can Constitute Misleading or Deceptive Conduct” (1991)
the subsequent, precontractual falsification of a statement previously made by him.\textsuperscript{53}

With the exception, perhaps, of contracts \textit{uberrimae fidei},\textsuperscript{54} these specific classes of case are attended by little, if any, debate. Fiduciary disclosure, for example, is designed to promote and secure broader social purposes than that of merely informing another party's contractual decision-making. The role of compulsory disclosure here is generally to prevent disloyalty.\textsuperscript{55} the informationally advantaged party bargaining at the other party's expense when the very role of the first party in the relation existing between them is to promote, preserve or advance that other party's welfare to the exclusion of his own.\textsuperscript{56} These cases exemplify, principally, the law's

---

Queensland L. Soc'y J. 21, at 27, argues that the difficulty with such cases under s. 52 is that where there is both positive conduct and silence, as in the case of a half-truth, a causation test will need to be applied to determine whether it was the positive conduct or the silence which in fact led the relevant person into error. If under s. 52 it was the positive conduct which induced entry into the contract then intention to mislead or deceive need not be shown. If it was the silence that was the causative inducement, however, an applicant will need to show that the silence was deliberate: s. 4 (2) \textit{Trade Practices Act} 1974 (Cth). With respect, such an analysis seems somewhat confusing and unnecessary; for is it not the case here that what is deceptive or misleading is the positive conduct \textit{coupled with} the silence? If we absent the silence as a causative factor, then the positive conduct remaining is literally true, and thus cannot be misleading or deceptive. If anything is to induce in this situation, it must be both the positive conduct \textit{and} the silence.


\textsuperscript{54} Keeton, \textit{op. cit.}, 12, suggests that the designation is unnecessary—that the agreements under the heading of "\textit{uberrimae fidei}" belong to a more general class involving the 'special confidence' of one party in another'. Cf. \textit{Restatement (Second) Contracts}, § 161; also see discussion in n. 48, \textit{supra}.

\textsuperscript{55} Cf. Finn, "Good Faith and Nondisclosure", \textit{op. cit.}, 165-66: 'If no issue of disloyalty is involved the nondisclosure will only be actionable if at all through those primary bodies of law which constitute, or govern the ordinary incidents of, the relationship in question—negligence, breach of contract, etc.' (\textit{id}, 166).

\textsuperscript{56} Mehlman puts the point in the following terms:

\textit{Contract} doctrine ... requires that the [parties] have adequate information to make welfare-enhancing decisions. \textit{Fiduciary} law obliges the better-informed provider to act in [his beneficiary’s] best
concern with and for the maintenance of the integrity of certain special relationships in our society. Equally, the cases of active concealment, half-truths, and knowing failure to correct a subsequent falsification of a statement previously made are non-controversial in our law. These, it seems clear, are merely extensions of the positive deception cases, which are thereby generally to be associated directly with the law of misrepresentation,\(^57\) previously considered.\(^58\) But outside of the obvious

interests. *Fiduciary contracting* therefore requires that the provider transmit to the patient the information necessary to enable her to maximize her own welfare.


\(^{57}\) This is easiest to see in the active concealment cases. "Active misrepresentation" involves conduct that affirmatively asserts a fact, whereas "concealment" involves a nonverbal misrepresentation, or the disguising of the truth. The silence clearly implies a representation here because the conduct is in itself a *communication*, designed to create or exacerbate, or having the effect of creating or exacerbating, an asymmetry in the information possessed by the relative parties to the transaction. That it is not always easy to distinguish between misfeasance and nonfeasance, action and inaction, in this context, was made quite clear by a United States court in 1985:

Where failure to disclose a material fact is calculated to induce a false belief, the distinction between concealment and affirmative representations is tenuous. Both proceed from the same motives and are attended with the same consequences; both are violative of the principles of fair dealing and good faith; both are calculated to produce the same result; and in fact both essentially have the same effect.

*Johnson v. Davis*, 480 So. 2d 625, 628 (1985); cf. *Restatement (Second) of Contracts*, § 160. Similar reasoning might be applied to the half-truth situation: cf. *Restatement (Second) of Contracts*, § 159, Comment (b); *Restatement (Second) of Torts*, § 529. The failure-to-correct-a-subsequent-falsification cases are clearly ones properly treated as involving "misrepresentation", especially given that representations are to be treated as continuing up until the time of inducement: cf. *Restatement (Second) of Contracts*, § 161, Comment (c); id, § 615 ('Cure by Change of Circumstances'); Keeton, *op. cit.*, 6-7. See also Dawson & McLauchlan, The Contractual Remedies Act 1979 (1981), 22-3; Greig & Davis, The Law of Contract (1987), 829-30, 831-32.

\(^{58}\) Chapter Seven, Section 3. It is true that a representation rationale may be given to all cases where there is a failure to comply with an affirmative duty to speak, since such a failure supposedly 'would amount to an implied representation that the thing does not exist': cf. *Behan v. Obelon Pty. Ltd* [1984] 2 N.S.W.L.R. 637, at 639 per Samuels J.A., quoting Gibbs C.J. in *CBA v. Amadio*, *op. cit.*, 407. Cf. also, Lord Atkin in *Bell v. Lever Brothers Ltd* [1932] A.C. 161, at 227; *Restatement (Second) of Contracts*, § 161 ('When Non-Disclosure Is Equivalent to an Assertion'). Yet, as Samuels J.A. pointed out *ibid*, it is to be remembered that the implication of an affirmation in nondisclosure cases, while befitting those exceptional cases of contracts
fiduciary and representation classes of case, what is the rationale for imposing duties of disclosure between contracting parties? When is an informationally advantaged party to be liable for a mere failure to volunteer a fact; for ‘simple reticence’?

2. RAISING THE DUTY TO SPEAK IN CONTRACT FORMATION

Silence is innocent and safe where there is no duty to speak.\(^5^9\)

Where there is a duty or obligation to speak, and a man in breach of that duty or obligation holds his tongue and does not speak, and does not say the thing he was bound to say, if that be done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, I should be inclined myself to hold that there was fraud.\(^6^0\)

Despite the law’s continuing reluctance to oblige one party to be the guardian of the other’s interests in the typical precontractual setting, a tension between the various values inspiring and informing modern contract law is nonetheless apparent. With the decline of caveat emptor, and associated notions,\(^6^1\) there has been a correspondingly discernible liberalising

\textit{uberrimae fidei} and fiduciary relationships, ‘follows upon a failure to perform the duty to disclose...; and not the other way about’. The principal concern of this section is to investigate when there might in the first place be a “duty to disclose”. Once this is found, the writer does not have difficulty with an analysis which says that the failure to comply with the duty is equivalent to an assertion that the fact (being the subject of the particular duty to disclose) does not exist, so that the determination of liability (and the measure of damages) should be controlled by the rule structure governing Intentional misrepresentation.


\(^6^0\) Per Lord Blackburn in \textit{Brownlie v. Campbell} (1880) 5 App. Cas. 925, at 950.

\(^6^1\) As Professor Finn has commented (“The Fiduciary Principle”, \textit{op. cit.}, 16):

So long as self-reliance remains one of the inspirations of the common law, the imposition of duties of disclosure simply for the purpose of informing another’s decision making will be an abiding cause of contention.

650
trend, especially during the latter part of this century, toward compelling
greater openness in business, contractual and precontractual dealings.62 As
the Restatement (Second) of Torts has recognised in the United States
context, ‘[t]he continuing development of modern business ethics has ...
limited to some extent [the] privilege to take advantage of ignorance’.63

That this should be so is clear. The need to maintain a proper balance
between the essentially non-consequentialist and consequentialist concerns
of “fairness” and “contractual certainty and economic efficiency”,
respectively—that one is not without good reason to prevail at the expense
of the other—is today beyond contention.64 The presupposition that each
party is responsible for, and capable of, satisfying his or her own
informational needs and exercising an independent contractual judgment,
moreover, is diluted, sometimes significantly, once we acknowledge the
sheer breadth of the division of specialised knowledge endemic within
modern society. Different people have different ranges of information,
practical wisdom and expertise available to them. Some matters vital to one
party’s contractual decision-making may fall within the sphere of another’s
knowledge or expertise. As between contracting parties, this may give to one
party, as against the other, the ‘relative authority of superior knowledge’.65
This almost invariably provides a source of interpersonal contracting power,

62 Caveat emptor is itself premised on a buyer’s ability to protect herself by inspecting the
subject-matter or bargaining for an express warranty. The emergence of consumer protection
legislation this century, for example, at least recognises that under modern conditions the
buyer often does not have the ability so to protect herself, so that the rationale of caveat
temptor itself has lost much of its plausibility.

In the United States, the trend is clearly in favour of greater disclosure. It seems that the
influence of securities law has not been an insignificant influence on this trend: see Levmore,
Cf. also, Keeton, op. cit., 31.

63 Restatement (Second) of Torts, § 551, Comment (I).

64 Here, as elsewhere, contractual justice and the need to restore or maintain equality between
the parties have to be balanced against social utility, which calls for the security of
transactions and the rewarding of the search for information likely to benefit society as a
whole.

65 This is what Neil MacCormick has called the ‘authority condition’ of deception, in “What
is Wrong with Deceit?” (1982) 10 Sydney L. Rev. 5, 10.
for whatever the first party believes or knows about matters relevant to the negotiations, he at least has better knowledge or grounds for his beliefs than the other party for such opinions as he might hold. This often gives to the inferior party, to the knowledge of the other, good reason to attend to the superior party’s information or opinion (though not necessarily to accept such unquestioningly) for the purpose of informing her own contractual decision-making;\textsuperscript{66} in fact to rely or to depend on that other party for information and assistance in her decision-making, at least in relation to matters potentially adverse to her own interests.\textsuperscript{67} Again, this highlights the potential strategic importance of welfare-enhancing and welfare-preserving information in contracting, and raises the question that becomes central to the present discussion: whether, and when, such actual or putative reliance\textsuperscript{68} authors a duty to disclose or to advise in the sometimes unwilling other party. To what extent is a party that has acquired information or expertise, perhaps at some cost to himself, expected to share it with another?

The solution to the nondisclosure problem is necessarily complex. The reasons for this are obvious: the kinds of information that affect parties’ values are many; the means of gathering information are multiple; the

\textsuperscript{66} In this regard, note also the observations of The Hon. Sir Gerard Brennan, “Foreword” (1991) 14 U.N.S.W. Law Journal, vi.


\textsuperscript{68} The concept of “reliance” might seem odd in the present context. Because of the nature of ignorance, one often does not even know that one needs to rely on another party for the satisfaction of one’s information needs in the bargaining activity between them. This is where reliance must merge into the concept of “reasonable expectation”. See Section 3.1., below.
circumstances surrounding the negotiation of contracts vary greatly; and the relationships between negotiating parties are diverse. There has, despite this, been no shortage of attempts to provide a calculus—at first in terms of criteria and various formulae, and later theory—for the resolution of nondisclosure cases. A significant early attempt, for example, is to be found in Professor Keeton’s excellent survey, in 1936, of the law relating to fraud, concealment and nondisclosure, in which the following factors were (non-exclusively) listed as relevant to the judicial enquiry in nondisclosure cases:

(1) The relative measure of the parties’ respective sophistication and intelligence regarding the subject-matter of the contract;
(2) The relation that the parties bear to one another;
(3) The manner in which information is acquired: whether it be by chance, by deliberate enquiry, or by an illegitimate act;  
(4) The nature of the undisclosed fact (i.e., the distinction between intrinsic and extrinsic facts);

69 The manner of acquisition of the relevant information becomes central to Anthony Kronman’s economic analysis of nondisclosure in contract law: see Section 2.1., below. In Keeton’s view, a party cannot be permitted to profit from information acquired by him through an illegitimate or an illegal act, such as by trespassing upon land which he intends to buy, now knowing the facts that he found thereby: op. cit, 25-27, 35. Cf. also, Phillips v. Hamfray (1871) L.R. 6 Ch. App. 770: material undisclosed information acquired by a tortious act held to compel disclosure.

70 As Story explains the distinction:

Intrinsic circumstances are properly those, which belong to the nature, character, title, safety, use or enjoyment of the subject-matter of the contract; such as natural or artificial defects in the subject-matter. Extrinsic circumstances are properly those, which are accidently connected with it, rather bear upon it, at the time of the contract, and may enhance or diminish its value or price, or operate as a motive to make or decline the contract; such as facts respecting the occurrence of peace or war, the rise or fall of the markets, the character of the neighborhood, the increase or diminution of duties, or the like circumstances.

Story, J., Commentaries on Equity Jurisprudence and Administered in England and America (J. W. Perry, rev.) (12th ed., 1877), 210. The distinction between intrinsic and extrinsic facts appears to have stemmed from the writings of the Christian philosophers, such as Aquinas, Grotius and Pufendorf; generally, see Gordley, J., The Philosophical Origins of Modern Contract Doctrine (1991), 85-93.

Courts have more often found fraud where the thing concealed was an intrinsic circumstance. As Keeton points out, however (op. cit., 21) it seems that the real reason for this was because
(5) The general class to which which the silent party belongs;
(6) The nature of the contract itself 71;
(7) The importance (or materiality) of the undisclosed fact to
the parties;
(8) The nature and extent of the consequences of nondisclosure on the ignorant party;
(9) The conduct of the party with knowledge of the
undisclosed fact (i.e., was there active concealment).72

Unfortunately, Keeton makes neither an earnest nor a systematic
attempt to place his various criteria within any theoretical structure, not
suggesting that there may be some unifying connection to be drawn amongst
the obviously overlapping listed factors.73 In point of fact, his ultimate "test"
is singularly unhelpful: 'would the ordinary ethical person have disclosed
the information?'74 Few other attempts have been made to bring these
various factors together into a general theory of nondisclosure, even though
such an attempt might be viewed as highly desirable, if only to assign an
appropriate weighting to these and to other factors.

At one time or another, similarly vague and rather unhelpful
statements and formulae have been advanced to determine the question of

the defect concealed was not readily discoverable by inspection rather than because of its
inherent nature.

71 Such as contracts uberrimae fidei.

72 Keeton, "Fraud—Concealment and Non-Disclosure" (1936) 15 Tex. L. Rev. 1, 34-37. For a
similar list of such factors, see Holmes, E., op. cit., 443-49.

73 Take, for example, factor 5: 'The general class to which the silent party belongs'. Now, this
could exemplify the well-known fact that sellers are more likely than buyers to have to
disclose facts about what they are selling. But this proposition may also obtain for a number of
reasons, including those apparently covered by factors 1: sellers usually have better knowledge
about what they sell than do buyers; 2, 3: sellers usually learn about the subject-matter of the
contract casually (merely from having the property in their possession, whereas buyers, in
order to acquire the same amount of knowledge, would have to make deliberate enquiries; 4:
the distinction between extrinsic and intrinsic facts is not so readily applicable to buyers, who
are rarely liable for failing to disclose circumstances which make the property much more
valuable than the vendor thinks, regardless of whether the fact is extrinsic or intrinsic; and
possibly others.

Generally on buyer vs. seller obligations to disclose, see Keeton, op. cit., 14-21; Holmes, op. cit.,
448; Goldfarb, op. cit., 26.

when civil liability might ensue for nondisclosure in the precontractual context. We find, for example, that ‘[s]ilence or nondisclosure does not constitute an actionable wrong, unless the defendant is under a duty to speak and disclose’;\textsuperscript{75} that nondisclosure is tantamount to an assertion that the fact does not exist when it ‘amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing’.\textsuperscript{76} Significantly, the \textit{Restatement (Second) of Torts} makes a direct resort to what essentially amounts to a statement of conclusion: “reasonable expectations”.\textsuperscript{77} Outside the small group of specific, sometimes \textit{a priori}, proscriptions against nondisclosure mentioned above, one commentator correctly observes that the law in this context ‘lapses into statements so vague that they can assume any meaning’.\textsuperscript{78}

In terms of theories that have been expounded for the ostensible purpose of illumination,\textsuperscript{79} there is a similar panoply of divergent responses

\textsuperscript{75} Goldfarb, \textit{op. cit.}, 7. This, of course, begs the crucial question of when a party can be said to be under such a “duty”.

\textsuperscript{76} \textit{Restatement (Second) of Contracts}, \S\ 161(b). Few could deny that the formulation in \S\ 161(b) provides little guidance for the disposition of actual disputes.

\textsuperscript{77} \textit{Restatement (Second) of Torts}, \S\ 551(2)(e). The full text of the provision reads:

One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated, ... facts basic to the transaction, if he knows that that other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, and customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Other rhetoric has been employed in an attempt to help to elucidate the area of nondisclosure. However, because much of this is itself vague of content, it has in the end done little to advance the enquiry. Scholarly examples of this include “assumption of risk”: Rabin, “A Proposed Black-Letter Rule Concerning Mistaken Assumptions in Bargain Transactions” (1967) 45 Tex. L. Rev. 1273; “unjust enrichment” (Palmer, \textit{Misstake and Unjust Enrichment} (1962), 8, 53, 96; “access to information”: Scheppele, \textit{op. cit.}; “magnitude of loss”: Seavey, W. A., “Problems in Restitution” (1954) 7 Okl. L. Rev. 257, 267; “collateral or basic nature of undisclosed fact”: Williston, \textit{op. cit.} Vol. 13; Corbin, \textit{op. cit.}

\textsuperscript{78} Wonnell, \textit{op. cit.}, 331.

and policies. Stereotypically, these theories range from those invigorated solely by consequentialist and collectivist concerns for the promotion of more efficient behaviour by contracting parties, or the maximisation of social wealth generally,\textsuperscript{80} to those which proceed on less utilitarian premises,\textsuperscript{81} exemplified in particular by Kantian concerns for the individual,\textsuperscript{82} fairness,\textsuperscript{83}


\textsuperscript{81} Despite protestations from Posner, The Economics of Justice (1980), Part I, the economic analysis of law appears to follow a deeply utilitarian logic. What essentially matters according to this logic is that there is the maximisation of some unitary end (e.g., efficiency, happiness, or wealth) as measured in a single metric. Distributive consequences are ignored; only totals or averages seem to matter. Cf. Scheppele, op. cit., 84: according to the Chicago school of law-and-economics, all potential goods are valued according to a ‘single scale of desire’.

\textsuperscript{82} The Kantian spirit is that it is categorically imperative to treat others not merely as means to one’s ends, but also at the same time as ends in themselves. McMahon, op. cit., 29, views the structure of interaction presupposed by his concept of “openness” (i.e., disclosure) as having to do with the using of one individual by another. He thus implicitly highlights the strategic nature of information and the importance of disclosure within human dealings. According to McMahon, the concept of openness comes into play when one does not reveal any apparent fact that one believes or regards as relevant to the other party’s decision whether to respond as the first party wishes. It has application, then, ‘when one party acts with the intention of eliciting from another individual any reasoned response by presenting what [that other] will regard as a reason for producing it’ (ibid). McMahon formulates his “Principle of Openness” thus (id, 31-2):

When one acts with the intention of eliciting from another a reasoned response by providing an ostensible reason for it, one must make a good faith attempt to ensure that she is in possession of any relevant fact (that is, anything one believes to be the case) that one thinks she would regard as a reason for or against producing this response.

\textsuperscript{83} In civilian jurisdictions, the duty to disclose generally rests on fairness considerations: in particular, a concern to remedy information asymmetry and unequal access to relevant informations. See Pierre Legrand Jr., “Information in the Formation of Contracts: A Civilian Perspective” [1991] 19 Can. B.L.J. 318. Jacques Ghéstin summed up the French position on nondisclosure in the following terms:

[A] party who was or ... ought to have been aware of a fact which he knew to be of determining importance for the other contracting party is bound to inform the latter of that fact, provided that he was unable to
genuine consent,\textsuperscript{84} impartiality and equality,\textsuperscript{85} solidarity,\textsuperscript{86} and moral respect\textsuperscript{87} to and for others.\textsuperscript{88} Of the former variety, the most aggressive advocates are the proponents of the Chicago-school, law-and-economics movement.\textsuperscript{89} The backgrounds of the various proponents of the latter category of theories tends to be more varied, though almost invariably linked to deontological or non-consequentialist social, political or moral philosophy. Illuminating versions of the different theoretical approaches are to be found in the seminal works of Anthony T. Kronman and Kim Lane

discover it for himself or that, because of the nature of the contract, the character of the parties, or the incorrectness of the information provided by the other party, he could justifiably rely on that other to provide the information.

Ghestin, "The Pre-contractual Obligation to Disclose Information: The French Report", Chapter 4 in D. Harris and D. Tallon, eds., \textit{Contract Law Today: Anglo-French Comparisons} (1989), 166. For another obvious concern with the "inherent unfairness" of nondisclosure in transactions, recall the sentiments of Blackmun J. in \textit{Chiarella v. United States}, 445 U.S. 222, 248 (1980); cf. Holmes, E., \textit{op. cit.}, 442: 'Just as negligence is a question of fair conduct, disclosure in contract formation is a question of good faith and fair conduct according to reasonable societal standards'.


\textsuperscript{85} Contractual equality is clearly the American Law Institute's primary concern under the \textit{Restatement (Second) of Contracts}. § 161: see Comment (d): unlike the rule relating to unilateral mistake, there is no need to show material effect on agreed exchange for the purposes of relief under § 161(b).

\textsuperscript{86} Cicero based his moral duty to disclose certain facts affecting price between buyer and seller in "neighbourhood"-like terms, there supposedly existing between individuals a 'brotherhood ... cemented by nature': Cicero, \textit{De Officiis (On Duties)}, H. Edinger (Trans.) (1977), 143-45. See, also, George Spencer Bower, \textit{The Law of Actionable Misrepresentation} (2nd ed., 1972), 440-1, discussing the relevant passage from Cicero's \textit{De Officiis}.

\textsuperscript{87} Cf. McMahon, \textit{op. cit.}, 34: 'To be open in one's dealings with others is to respect their autonomy'.

\textsuperscript{88} Leading examples of such theories include Keeton, "Fraud—Concealment and Non-Disclosure" (1937) 15 Tex. L. Rev. 1, 31-7; Palmer, G., \textit{The Law of Restitution} (1978), Vol. 2, §12.3; Scheppelé, K., \textit{Legal Secrets} (1988). Fairness, equality and consent considerations would also seem principally to inform civilian responses to the nondisclosure problem, such as we witness under French law: generally, see Pierre Legrand Jr., \textit{op. cit.}; Ghestin, \textit{op. cit.}

\textsuperscript{89} For a brief and up-to-date general discussion of the law-and-economics contributions in the area of nondisclosure, see Kull, \textit{op. cit.}, 77-83.
Scheppelé. Brief, and perhaps unavoidably caricatured accounts of the authors’ scholarship may be used to illustrate the alternative approaches. In essence, the economic theory takes the distinction between “casually” and “deliberately” acquired information as central. Scheppelé’s “contractarian” theory of nondisclosure, on the other hand, takes as central a distinction between “deep” and “shallow” secrets, a concern for equal opportunities to acquire information, and the preservation of relationships of trust and confidence.

2.1. Kronman’s Law-and-Economics Analysis of Nondisclosure

As was observed in the general introduction to Chapter Seven, from an economic point of view, information is a valuable commodity, and in the general interest it ought therefore to be available to the extent that the costs of its production do not exceed the expected benefits. Of course, the obtaining of information will often involve an identifiable cost, which someone must satisfy. Thus, we would expect that a legal system concerned with economic efficiency would place the duty to supply information, or the risk of loss resulting from the lack thereof, on the party who can obtain or supply it at the least possible cost.

In essence, Kronman posits that courts, following an economic logic, fashion rules that do not reduce or destroy incentives for the acquisition of


91 Essentially, Kronman argues that this distinction is merely a gap-filling rule to be applied in the absence of an express allocation of risk, id, 114-7.

92 At the heart of the economic analysis of law is the proposition that ‘the common law is best explained as if the judges were trying to maximize economic welfare’: Posner, R., The Economics of Justice (2nd ed., 1983), 4. Cf. also, Friedman, M., “The Methodology of Positive Economics”, in Essays in Positive Economics (1953), 3-34. The common concern is with promoting the efficient use of scarce resources—a concern directed primarily at ensuring that goods end up in their highest valued uses; that incentives exist for investment in socially valuable activities, and that such productive activities are undertaken at the lowest social cost; that losses are discouraged generally by assigning responsibility to those in the best position to prevent them. Generally, see Posner, R., The Economic Analysis of Law (3rd ed., 1986).
valuable information. Because he views information as a commodity, requiring its distribution without compensation would be likely to deter its production, just as an obligation to share any other commodity would tend to deter production. Accordingly, Kronman argues strongly that, where the superior information is in general deliberately and purposefully acquired, with effort and cost that would not otherwise have been incurred, the nondisclosure rule is economically justified in order to protect, essentially by way of recognizing a property right in such information, the interests of the possessor who incurs the costs of obtaining the information. A mandatory obligation to disclose such information to secure the advantage would, so the argument goes, operate as a disincentive to the discovery of such information in the future, and thus promote a sub-optimal use of resources.

93 Many of the controversies surrounding nondisclosure stem from the dual role that Kronman gives to it. First, that information is a commodity, and second, that it is a prerequisite to the rational and efficient exchange of other commodities. Generally, see “The Law and Economics of Rights in Valuable Information: A Comment” (1980) 9 J. Legal Stud. 725.


95 Kronman argues that the courts do not look in detail at whether the information in the particular case was deliberately or casually acquired; rather, they tend to require disclosure in cases where most information of the type at issue is casually acquired. The reason for this distinction appears to be economically administrative: it being too expensive in terms of time and effort for the courts to make an individual determination of this fact in every case. Cf. Scheppel, op. cit., 34; Posner, Economic Analysis of Law, op. cit., Chap. 21.

96 Kronman, op. cit., 13:

As it is used here, the term ‘deliberately acquired information’ means information whose acquisition entails costs which would not have been incurred but for the likelihood, however great, that the information in question would actually be produced.... If the costs incurred in acquiring the information ... would have been incurred in any case—that is, whether or not the information was forthcoming—the information may be said to have been casually acquired.


On the other hand, Kronman proceeds, where the relevant information is in general casually or fortuitously acquired, without significant effort or cost, individuals should legally be required to disclose it, since, because of the lack of diligence and expense, such a duty would not deter individuals from engaging in the socially productive, and consequentially desirable, activity of investigating and gathering valuable information.

But not all casually acquired information needs to be disclosed, for Kronman goes on to argue that this would entail that individuals take an inefficiently long time in reaching their agreements. Thus, where the casually acquired information is, for example, of a kind obvious to both parties, then it need not be divulged.

Kronman’s law-and-economics contribution to this area has doubtless been influential, and while the core of his theory remains essentially intact throughout law-and-economics circles, it has been refined and supposedly improved upon by subsequent economic theorists. His theory has also

---

99 Id, 13-18.

100 According to Kronman (id, 13), “allocative efficiency”—ensuring that resources wind up in their most valued uses—is promoted by getting information of changed circumstances to the market as quickly as possible.

101 Id, 13-14. That is, rewarding casually acquired information does not have the same effect (in terms of eliciting more information) as rewarding the deliberate acquisition of information, because one cannot, of course, be induced to do something inadvertently.

102 This obviously is intended to cover the situation, say, of patent defects.

103 It is difficult to find contemporary literature on the subject of nondisclosure in contract law that does not (albeit perhaps critically) acknowledge the contribution that Kronman’s theory has made to the field.


105 Cf. Wonnell, op. cit.; Cooter & Ulen, op. cit., 159-61. Essentially, Cooter and Ulen make a distinction between information having merely redistributive as opposed to productive effects.
been strongly criticised;\textsuperscript{106} most notably by Schepple, in her adumbration of an alternative, contractarian, theory of "legal secrets" (nondisclosure).\textsuperscript{107}

They contend that information acquired deliberately can lead to redistribution or to increased wealth. Specifically, then, their distinction is between 'productive facts' and 'redistributive facts'. The former refers to 'information that can be used to increase wealth'. The latter refers to 'information creating a bargaining advantage that can be used to redistribute wealth in favour of the knowledgeable party but that does not lead to the creation of new wealth'. 'Incentives for discovery of productive facts are efficient when the discoverer is compensated at a rate commensurate with the increase in wealth yielded by her discovery': \textit{id}, 259. Cooter and Ulen argue that transactions that result from private knowledge about purely redistributive facts may be set aside, but not based on private knowledge of productive facts: \textit{id}, 260. Most facts, of course, are of a mixed-productive/redistributive variety, in which case the law should err on the side of enforcement: \textit{ibid}. Cf. also, Trebilcock, M. J., "Asymmetric Information Imperfections" in \textit{The Limits of Freedom of Contract}, Chp. 4 (forthcoming 1993), cited by Kull, \textit{op. cit.}, 60, n. 5. According to Kull, Trebilcock proposes "a general presumption in favour of disclosure of material facts known to one party and unknown to the other," subject to exceptions wherever "enforced disclosure [will] reduce incentives for first parties to generate and utilize the information in the first place"; cf. also Smith and Smith, "Contract law, Mutual Mistake, and Incentives to Produce and Disclose Information" (1990) 19 Journal of Legal Studies 467.

\textsuperscript{106} Kelman, for example, faults Kronman's analysis as 'utterly indeterminate in resolving actual cases': Kelman, P., \textit{A Guide to Critical Legal Studies} (1987), 21. It is, of course, possible that he would fault Schepple on the essentially same ground. Cf. also, Kull, \textit{op. cit.}; Nicholas, \textit{op. cit.}, 184-7, arguing that the economic approach is an 'over-simplification', and that Kronman, specifically, fails to take account of 'business acumen'—the ability to interpret and make use of information once acquired; Birmingham, \textit{op. cit.}, 283, emphasising the inefficiency of over-investment in the acquisition of information and criticising Kronman's article as being 'insensitive to the peril of overinvestment'; Pierre Legrand Jr, \textit{op. cit.}, 344: law-and-economics objections exaggerated; Coleman, Heckathorn & Maser, "A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law" (1989) 12 Harv. J. of Law & Pub. Pol'y 429, at 691-707.

\textsuperscript{107} In her book, \textit{Legal Secrets} (1988), Schepple considers "secrets" that the law, usually the law of contract or of tort, either requires to be—or protects from being—divulged. In particular, her concept of "secrecy" is designed to encapsulate the phenomenon of items 'of information that [are] intentionally withheld by one or more social actor(s) from one or more other social actor(s)' (\textit{id}, 12). She attempts to explain the law of nondisclosure (or secret-keeping) by developing a "contractarian" theory, which she then pits against its major alternative, law and economics, to see which provides a better explanation of common law decisions on nondisclosure.

Specifically, Schepple, \textit{op. cit.}, 35, criticises Kronman for concentrating on the incentives for the production of valuable information, thereby seemingly ignoring the lessons from other branches of the economics of information, such as the inefficient consequences that follow individual decisions made without critical information. The Chicago-school economic analysis of law systematically ignores the strategic nature of information—i.e., that one party's payoffs are affected by the other's actions and choices, which are in turn affected by the first party's behaviour toward the second—and the implications that the strategic exercise of secrets can have on their targets. This is a view that this writer would essentially endorse. See Section 3.
2.2. Scheppele’s “Contractarian” Analysis of Nondisclosure

Scheppele argues from a Rawls-inspired ‘contractarian theory of law’, which stresses the significance of equal access to information, that if ‘there are equal means of knowledge, the courts generally [hold] that there is no obligation to disclose information’.108 She assumes that the law should reflect rational decision-making in a strategic structure, such as a consensus-building process like contract formation. Specifically, contractarian theory would have the courts require disclosure of information when the possessor of that information is using it for strategic purposes; that is, for the purpose of influencing the contractual decision-making of the uninformed party.109

In criticising the neo-classical assumptions of the economic theories of law, that individuals are motivated to achieve the maximum average utility, Scheppele argues that they are motivated instead to seek a great deal of individual utility while at the same time trying to avoid the risk of individual catastrophe. Applied to the problem of nondisclosure in human relations generally, this means that courts behaving in accord with the

108 Id, 136.

109 Id, 11. This point is also important, because as in the case of unilateral mistake in equity, a duty of disclosure presupposes knowledge of the fact to which the duty pertains, and presumably, of its probable effect on the decision-making of the uninformed party. Obviously, there can be no affirmative duty to disclose to P the conditions of which D had no knowledge. Cf. per Fletcher Moulton L.J. in Joel v. Law Union Assurance Co. [1908] 2 K.B. 836, at 884 (in the context of insurance law):

The duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess. I must not be misunderstood. Your opinion of the materiality of that knowledge is of no moment. If a reasonable man would have recognised that it was material to disclose the knowledge in question, it is no excuse that you did not recognise it to be so. But the question always is, Was the knowledge you possessed such that you ought to have disclosed it?

Cf. also, Insurance Contracts Act 1984 (Cth), s. 21(1).

It would appear legally to be irrelevant that the nondisclosing party honestly believed the nondisclosed facts to be irrelevant: cf. text and authorities in Spencer Bower, Sutton & Turner, op. cit., para 3.11.
theory would compel disclosure of information where this would avoid the extreme outcome of personal disaster, and would not require the disclosure of information that would lead only to small harms. Scheppele suggests that rational individuals avoid gambles when the stakes are nontrivial, and would not desire to be at the mercy of a secret keeper (information monopolist) when much is at stake. She argues that judges would thus be expected to provide a buffer against catastrophe, when the losses from one’s trying to win get too large, by compelling disclosure of secrets that would seriously injure the targets of such secrets.\footnote{Id., 119.} This problem does not exist, however, with what Scheppele calls ‘shallow secrets’, that is, secrets that the target of the secret might suspect are being kept,\footnote{Id., 21.} so that rational individuals would want to take their chance on winning, and would be left to take the risk and suffer their own potential losses. Nevertheless, this problem does exist with what Scheppele calls ‘deep secrets’, that is, secrets which an ignorant party does not even suspect to exist and which are therefore not responsive to search.\footnote{Ibid.} According to that author, therefore, the courts would be expected generally to allow shallow secrets to be kept but not deep secrets, save perhaps where the stakes are very small.\footnote{Ibid: The deep secret allows the targets to make stronger justifications against the secret-keepers’.} By definition, deep secrets present circumstances in which individuals are simply not able to protect themselves against strategic nondisclosure on the part of others. Thus forbidding deep secrets prevents one party from taking advantage of another who cannot defend herself.\footnote{Id., 77.}

According to Scheppele, however, not all shallow secrets ought to be acceptable.\footnote{And conversely, even deep-secret-keepers may sometimes claim that they have property rights in their information and hence are not required to divulge it to those who are ignorant.} The individual who begins in the most disadvantaged starting position would be taking the biggest risk of losing; and rational individuals,
Scheppelé argues, choosing the rules to govern their relation, would wish to ensure against being at such a disadvantage. Parties would wish to have a fair opportunity to participate in their strategic dealings (gambles). Even shallow secrets, therefore, would have to be divulged if the uninformed party started out with such a disadvantage that little possibility existed of ever discovering the secret. Thus, where equality of opportunity is severely abridged, the law should intervene to ensure that individuals are not handicapped at the outset.

Accordingly, contractarian theory does not expect the courts generally to permit the release of information that one party alone holds in his dealings with another. Only when the information is necessary to provide equal access to the two parties in a strategic situation does such an expectation arise. Contractarian theory emphasises equal access to information because it assumes that when individuals have to make a decision they are entitled to make, they are then entitled to equal access to the information necessary to make an informed decision. Where one party is not taking the same fair gamble in the strategic situation, she has greater reason to object to the outcomes. Broadly speaking, this equal access concern translates into notions of symmetry or fairness, or, more precisely, the relative levels of investment in information by the two parties. Saying that the law guarantees all parties will have equal access to information, however, is not equivalent to saying that all the parties will or shall have the same information in every case; for equality of access is not equality of information. According to Scheppelé, two parties will be said to have “equal access” to information if they

(1) ‘have equal probabilities of finding the information if they put in the same level of effort’; and

(2) ‘are capable of making this equivalent level of effort’.116

Should one party have unequal access to information, whether because of some structural inequality, or because of some lack of capacity on her part, the courts require that she and the other party be put on an equal

footing with respect to the actual information possessed, and this they do essentially by compelling the party with superior access to disclose to the party with inferior access.\textsuperscript{117}

3. TOWARD A GENERAL THEORY OF NONDISCLOSURE IN CONTRACT FORMATION?

*Equity will not relieve where the means of information are open to both parties; and where each is presumed to exercise his own judgment.*\textsuperscript{118}

In summary of the preceding section, according to economic theory, we would expect the courts to (1) provide property rights for information that, in the absence of such protection, would not be produced, and (2) require information to be disclosed that would have been produced in any event. This regime obtains, moreover, even despite the consequences of disclosure actually or potentially harming the individual victim of the nondisclosure. According to contractarian theory, which is built on a foundation of moral philosophy, and emphasises the general principles of

\textsuperscript{117} Scheppelle summarises her own theory thus (*id*, 84):

The contractarian theory predicts that judges in common-law cases will use rules that would be chosen by rational individuals who do not know their own narrow self-interest in the particular case but who are deciding in advance the rules under which they would consent to be governed. All parties will be protected against catastrophic losses caused by secrets. Courts will require disclosure of deep secrets, but not of shallow ones, unless the two parties to the transaction have different starting points in acquiring the information that they cannot be said to have equal chances of discovering it. Confidential relationships will be protected, as will individuals who are not capable of assessing what knowledge a situation requires.

Consideration of “serial” and “shared” secrets leads to additional permutations of the rules (*id*, 79-83).

\textsuperscript{118} Supreme Court of the United States in *Rhode Island and Providence Plantations v. State of Massachusetts*, 39 U.S. 210, 274 (1840).
liberty,\textsuperscript{119} equality\textsuperscript{120} and community,\textsuperscript{121} we would expect that courts would (1) provide a buffer against catastrophe when losses are large, (2) require disclosure of deep secrets, and (3) ensure that, when secrets are shallow, both parties to a transaction have equal access to information.

Now, whilst both theoretical approaches clearly have a place in the broad scheme of the resolution of nondisclosure cases (lest we be seen unjustifiably to favour the "private" over the "public" sphere, or vice-versa),\textsuperscript{122} it is doubtless accurate to suggest that a general theory of nondisclosure has eluded both the courts and the commentators. Certainly this has resulted in a lack of a settled matrix of principles which inform judicial decision-making in this context, and which dictate remedial action.\textsuperscript{123} Wonnell may be right, then, when he asserts that\textsuperscript{124}

[no general theory that seeks to condemn, praise, or tolerate the phenomenon of nondisclosure can be sufficiently sensitive to [all] the important distinctions [that need to be drawn],\textsuperscript{125} nor can a theory

\footnotesize{\textsuperscript{119} As revealed in the concern that individuals should be in a position where they can meaningfully consent to the rules by which they shall be governed.}

\footnotesize{\textsuperscript{120} As revealed through the concern for equal starting positions from which to discover information.}

\footnotesize{\textsuperscript{121} As revealed through the concern for special (e.g., confidential or fiduciary) relationships.}


\footnotesize{\textsuperscript{123} Finn, "The Fiduciary Principle", \textit{op. cit.}, 23, suggests that this lack reflects, at one level, ‘the poverty in the nineteenth century’s legacy of concepts to the twentieth’; at another level, it reflects ‘an evident change in the law’s societal concerns’.}

\footnotesize{\textsuperscript{124} \textit{Op. cit.}, 386.}

\footnotesize{\textsuperscript{125} According to Wonnell, the basic distinctions that need to be drawn are (1) between ‘arguments which advocate a tolerance of nondisclosure in order to protect the security of transactions from those arguments approving or privileging nondisclosure in order to advance independent public policies’; (2) between types of disclosure patterns (i.e., nondisclosures that merge resources from those that sever the two); (3) between nondisclosures ‘where the trading itself can and cannot serve as a pricing proxy for the information’; and (4) between nondisclosures that create incentives for opportunism and those that ‘block the formation of enterprises that confer external benefits’ (\textit{ Ibid}).}

666
that lists "factors" for courts to consider in a grand balance, since the factors that cut in one direction when the issue is the security of transaction may argue for the opposite result when the issue is privilege.\textsuperscript{126}

Yet perhaps the difficult task lies not in stating the general principles of law, or the factors to be considered, but rather in applying them to particular facts in actual cases. Such a criticism might be drawn against both Kronman's and Scheppele's accounts, especially when they are applied prescriptively or predictively and not merely descriptively. In any event, it is doubtful whether a simple rule one way or the other will meet our needs in resolving actual cases.\textsuperscript{127} The various factors attending the resolution of the nondisclosure cases must in any instance be directed at our interest in maintaining a proper moderation between the "private" (the "individual" concern) and the "public" (the "collective" concern), of balancing fairness with economic efficiency and with certainty.\textsuperscript{128} Doubtless, in sum, the nature of the parties, the nature of their dealing, the kind of information involved,

\textsuperscript{126} In Wonnell's view, it is ironic that 'a general theory can only succeed when it is recognized that there are discrete types of both nondisclosure transactions and arguments, and that each type must be evaluated separately within the broader theory' (ibid).

\textsuperscript{127} Waddams, for example, suggests the development of existing technique, such as those of implied warranty, and the notion that silence when coupled with other conduct may amount to an assertion, rather than seeing the solution in the adoption of any general obligation to disclose: Waddams, S., "Precontractual Duties of Disclosure" [1991] 19 Can. B.L.J. 349. See, also, Waddams, Chp. 5 in E. Hondius (ed), Precontractual Liability (1991). The writer agrees with Farnsworth, in the U.S. context, who criticises such an approach for being 'too timid and narrowly focused in clinging to "the notions of express and implied warranties" as a suitable solution': Farnsworth, "Comments of Professor Waddams' "Precontractual Duties of Disclosure"" [1991] 19 Can. B.L.J. 351, at 354. Farnsworth's own view is that justice will better be served by an attempt to give content to the words in § 161(b) of the Restatement (Second) of Contracts (i.e., 'a failure to act in good faith and in accordance with reasonable standards of fair dealing') by using such considerations, standards or factors as those singled out by Kronman, Scheppele, and the like (ibid).

\textsuperscript{128} Cf. Keeton, op. cit., 32:

The question is one of fair conduct, just as negligence is a question of fair conduct. Since, therefore, the question is of that nature it will be impossible, it is believed, to arrive at a precept which could be used with mathematical exactness to dispose of all the situations that might arise. We can only hope to apply some standard which will give a measure of certainty, and, at the same time, a measure of justice.
and all the attendant circumstances surrounding a case will all have to be taken into account.

As indicated in Chapter Three, the writer's own bias in this context lies with the fairness-based, non-consequentialist theories; for these at least acknowledge the significance of the strategic nature of information in voluntary and consensual human relations, features often overlooked, or systematically ignored, by law-and-economics scholars, whose utilitarian-inspired theories apply notwithstanding the potential harm that may be occasioned upon a particular individual. The fact remains that people often withhold crucial items of information from others consciously to manipulate the choices and actions of those who are uninformed about certain factual matters relevant to the decision-making process. The knowledgeable and the shrewd can benefit at the expense of the ignorant, and this of itself has moral, and potentially legal, significance. Consequentialism clearly has its place in informing any judgments that are made concerning particular instances of nondisclosure, for it is readily acknowledged that openness in dealings can, and often will, be outweighed by other, countervailing moral or legal considerations, in which case law or morality may, and almost invariably will, endorse nondisclosure. The law in this context seems to make many economically justifiable distinctions. Unlike the economic theories, however, moral theories, such as contractarianism, are quick to modify their rules when great harm would be the result of applying them strictly.

129 Other than by the strict Kantian deontologists. Mitigated versions of Kantianism, for example, show greater flexibility in admitting various other countervailing considerations. This has most notably been expressed by John Rawls in his A Theory of Justice (1971), in particular, through what he calls his "reflective equilibrium".

130 In The Methods of Ethics (1907 Edition, 1966), Henry Sidgwick (at 317) argues that while common sense morality requires that one's affirmations be true, it also holds that 'in our actual world, concealment is frequently necessary for the well-being of society, and it may be legitimately effected by other means short of actual falsehood'.

131 Kronman's economic theory's focus on deliberately or fortuitously acquired information, moreover, has been criticised for not adequately accounting for such patterns as the special burdens on sellers, the requirement of equal means to knowledge, and special confidential or fiduciary relationships (cf. Wonnell, op. cit.). Contractarian theory, however, with its focus on equal access to information, and deep and shallow secrets, accounts for these patterns straightforwardly. The unequal means of knowledge situation is a violation of the equal
But for reasons of policy, and of pragmatism, we should not begin with the consequentialist theories. Autonomy-respecting, fairness-based considerations should be qualified by those of certainty and efficiency; it should not be the other way round.\textsuperscript{132} An important question addressed by none of the writers responsible for the law-and-economics analysis of this area of law is whether the efficiency gains produced by their rules could ever conceivably outweigh the costs of making the necessary determinations. All of the suggested approaches seem to involve difficult factual issues, many of them requiring, among other things, the expert testimony of economists in order to inform the judges about the matters upon which they would be called to adjudicate.\textsuperscript{133} One writer drives home the above points impressively, claiming that when reflecting upon the economic analysis of nondisclosure,\textsuperscript{134} one is left with the feeling that the law has got lost somewhere in the economics. The implication of the economics is that it would be desirable, were it feasible, to deny to contracting parties the freedom to search for whatever information they see fit, to take advantage of information fortuitously obtained, and to disclose or withhold this information as they choose. But the ability to pursue one’s self-interest in this fashion, regardless of the contribution to social welfare, is an element of individual liberty so fundamental that it lies happily beyond the reach of any real-world legislation. Life in a society that could enforce the perfectly efficient disclosure of information would be a totalitarian nightmare. The compulsory disclosure of economic information interferes with an intensely personal form of property, and disclosure requirements broad enough to achieve ... efficiency goals ... would constitute an infringement of individual autonomy... It is fortunate that they are administratively inconceivable.\textsuperscript{135}

\textsuperscript{132} See discussion Chapter Three, Section 2.1.1.3.

\textsuperscript{133} Cf. Kull, \textit{op. cit.}, 80.

\textsuperscript{134} In particular, Steven Shavell’s contribution to the area, cited by Kull, \textit{id}, 60, n. 5.

\textsuperscript{135} \textit{Id}, 79. The fact that the economic analysis of law might be ‘administratively inconceivable’ is itself a consequentialist consideration militating against its monopoly hold on the area.
Schepple’s contractarian theory of nondisclosure is additionally attractive because her views are, broadly, consistent with the arguments presented and applied in this thesis, in particular, as it implicitly demonstrates a broad “exploitation” theme. According to Schepple, if the case at hand does not involve a deep secret, or catastrophic loss, then it will turn on issues of “structural equality of access to information”. The conception of “deep secrets” might find its analogue in the law’s accepted notion of “not reasonably contemplated facts”, and the conception of “catastrophic loss” seems to correspond roughly with the notion of ‘total failure of consideration or what amounts practically to a total failure of consideration’ in the common-law common mistake cases.

Since most cases will not involve what Schepple conceives to be a “deep” secret, her conception of “structural equality of access to information”, which applies where a “shallow” secret is at issue, may be of more interest to our present purposes. This is especially so given unconscionability’s potential to embrace the seemingly parallel idea of “transactional inequality”. This return to the familiar terrain of “transactional disadvantages (or disabilities)” — the idea that an obligation to disclose may arise on account merely of the nature of the particular transaction between the parties — is suggestive of the role that the doctrine of unconscionable dealings, in this country at least, may possibly have to play in the resolution of the non-fiduciary nondisclosure cases. Such cases appear, after all, to themselves represent more generalised manifestations of the particular concerns attracting the law of unilateral mistake in equity, itself arguably a specific manifestation of the doctrine of unconscionable dealings. In Blomley v. Ryan, Kitto J. himself instanced, among other things, ‘ignorance’ as one of the factors potentially giving rise to the conditions

136 For example, see Schepple, op. cit., 122-23.

137 Cf. Finn’s use of the phrase in “The Fiduciary Principle”, op. cit., 22-23, using the notion to explain the proper basis of the decision in the Ontario decision of Standard Investments Ltd v. Canadian Imperial Bank of Commerce (1985) 52 O.R. (2d) 473, noted below at n. 151.


attracting the equitable unconscionable dealings jurisdiction,\textsuperscript{140} and, arguably, it is this idea—the relative inaccessibility of information to the respective parties that may lead to one party being especially disadvantaged \textit{vis-à-vis} the other, and hence peculiarly vulnerable to exploitation—that informs other, hitherto viewed as discrete, classes of case, such those categorised as \textit{uberrimae fidei}.\textsuperscript{141}

If the basic nature of the "inequality", or "vulnerability", attracting judicial supervision in this context is to be "inequality of access to basic facts",\textsuperscript{142} and that this finds its direct analogue in the "special disadvantage

\textsuperscript{140} Cf. also, the British Columbia Court of Appeal decision in \textit{Dusik v. Newton} (1985) 62 B.C.L.R. 1—an unconscionable dealings case (in which damages were awarded), being one in which there 'was a severe inequality of bargaining power ... arising from [an] extreme disparity in the knowledge which each party had of the critical facts' (\textit{id}, 42), a disparity, moreover, that was 'deliberately and consciously exploited'.

\textsuperscript{141} Cf. Finn, "The Fiduciary Principle", \textit{op. cit.}, 17 (nn. 106 and 107), who notes that the two common features of the \textit{uberrimae fidei} case appear to be the one party's need to rely upon the other for information necessary to make a meaningful decision, and the strategic opportunity the other party thereby possesses to withhold information and to manipulate the decision made. See, also, discussion in n. 48, \textit{supra}.

\textsuperscript{142} Cf. Holmes, who places as central to his conception of good-faith disclosure in contract formation, the notion of discoverability of basic facts:

"Good faith" demands disclosure when there is inequality of access to a basic fact. Bad-faith concealment arises when the presumption of equal access to a basic fact is rebutted. When a basic fact, after fair inquiry pursued with due diligence, is unascertainable by one party, good faith and customary dealing impose a duty on the other to disclose that fact. It might be more exact to state that the disclosure duty is activated by some combination of inequality of access and customary expectations regarding disclosure. ... The linchpin, though, is discoverability of basic facts.


There is abundant authority to the effect that if one party to a contract or transaction has superior knowledge, or knowledge which is not within the fair and reasonable reach of the other party and which he could not discover by the exercise of reasonable diligence, or means of knowledge which are not open to both parties alike, he is under a legal obligation to speak, and his silence constitutes fraud, especially when the other party relies upon him to judge the expediency of the bargain or transaction.
criterion" under unconscionable dealings,143 there may be numerous ways in which such an inequality might arise. Notable sources are the nature of the transaction between the parties, the nature of the relation between them, and any reliance placed upon the informationally superior party by the informationally superior party that certain disclosures will be made. In any event, however, we are almost invariably concerned with an informational inequality arising because one party can, for whatever reason, be viewed as an "informational monopolist" relative to the other.144 To be specific, the information possessed by the one party

(1) would not reasonably be available to the other even if reasonable endeavours were undertaken to ascertain it; (2) can properly be looked for from the possessor given justified reliance on him; or (3) would not, within the reasonable contemplation of the other, be expected to be a consideration relevant in the decision to be taken.145

The one party's serious vulnerability, moreover, and hence the other's obligation to assist or to protect that party's interests in a dealing between them, may be created simply by the former's need to depend or to rely upon the latter for information necessary for a meaningful decision.146

These are important points, it seems; for as Professor Finn observes, two broadly generative forces in compelling disclosure are reliance and the nature of the relationship itself.147 In one sense, the nature of the parties' relationship may itself contrive duties to disclose relevant information. It may be that one party is not entitled to withhold information that will, or is likely to, deny to the other party the benefit reasonably to be expected of the proposed relationship. The examples that arise here, however, are typically ones where the contemplated outcome is some broader legal relationship, of which the resultant contract is merely part: that is, the proposed

143 Or "serious mistake" under unilateral mistake in equity.


145 Id, n. 95.


147 Finn, "The Fiduciary Principle", op. cit., 16 et seq.
relationship's functions and purposes entail significantly more than that required in the performance of mere contractual functions and obligations. It is the contemplated relationship to be achieved, and not the parties' relative bargaining positions, that generates the precontractual disclosure necessary for its achievement.\textsuperscript{148} Typical examples of this phenomenon are relationships which are, or are said to be, fiduciary, though contractual in their genesis.\textsuperscript{149} An issue remains as to whether similar principles could apply for raising disclosure obligations outside of the fiduciary context,\textsuperscript{150} and here it is apposite to note the highly controversial practice, particularly by North American courts,\textsuperscript{151} of contriving fiduciary law to achieve such

\textsuperscript{148} As Finn comments, '[i]n the "fiduciary negotiation" cases, the courts have simply extended the duty which would arise on the formation of the relationship back into the negotiations for it': "The Fiduciary Principle", \textit{id.}, 21.

\textsuperscript{149} Parties negotiating toward partnership and joint venture agreements provide ready example of this. See \textit{United Dominions Corporation Ltd v. Brian Pty. Ltd} (1985) 157 C.L.R. 1; (1985) 60 A.L.R. 741: actionable nondisclosure found in the failure to inform the respondent, when negotiating for a joint venture, that, when the property the subject of the joint venture was sold, the resultant agreement charged all the profits from the sale for the satisfaction of the separate debts of the appellant.

\textsuperscript{150} Obvious extensions might quite naturally see their place in the employment or the insurance context. In the employment context, for example, a prospective employee might reasonably be expected to disclose information pertaining to that employee's suitability for the known purposes of the employment. \textit{Cf. Fuller v. DePaul University}, 12 N.E.2d 213 (1938): religious university justified in terminating employment of former Catholic priest who failed to disclose his change of identity, the fact of his breaking his perpetual vows and his becoming a fugitive from the faith; \textit{Courtwright v. Canadian Pacific Ltd} (1983) 45 O.R. (2d) 52, affirmed (1985) 50 O.R. (2d) 560: corporate employer entitled to avoid employment contract of an in-house lawyer who failed to disclose at the time of contracting the known likelihood of his being charged with criminal offences of such a nature that would render it inappropriate for him to undertake the particular responsibilities contemplated by the contract; but cf. \textit{Fletcher v. Krell} (1873) 28 L.T. 105: governor's failure to divulge that she was a divorced woman did not justify dismissal; \textit{Stephenson v. Toronto-Dominion Bank} (1989) 68 O.R. (2d) 118: majority of Ontario Court of Appeal holding that an employee, in applying for pension benefits upon early retirement, was not bound to disclose to the employer that he intended to take up remunerated employment after retirement. In the insurance context, see \textit{Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co.} [1987] 2 W.L.R. 1300 (Q.B.D.), reversed (C.A.) [1989] 3 W.L.R. 25; [1990] 2 All E.R. 947 (H.L.). \textit{Cf.}, also, the discussion by Finn, "The Fiduciary Principle", \textit{op. cit.}, 21-22.

\textsuperscript{151} \textit{Cf. Finn, id.}, 23: 'it seems not uncommon for courts in North American to transform cases of undisclosed "not reasonably contemplated facts" into ones involving fiduciary duties to disclose'. Perhaps one of the most notable recent decisions of this nature is that of the Ontario Court of Appeal in \textit{Standard Investments Ltd v. Canadian Imperial Bank of Commerce} (1985) 52 O.R. (2d) 473; 22 D.L.R. (4th) 410: finding of a fiduciary relationship in order to condemn

673
ends;\textsuperscript{152} but we are concerned in this chapter merely with those duties of disclosure that arise strictly on account of serious disparities in the relative information possessed by the parties, or accessible to them, in their precontractual relations (which may of course take place within an already established special relationship), and not on account of the outcomes of some other non-contractual relationship contemplated by or between them.\textsuperscript{153} Specifically, our focus or concern with the parties' relationships here simply is that

\begin{quote}
[t]he nature of the relationship or of a proposed dealing may be such that one party does, and would as a matter of course be expected to, look to the other, because of his position, for the provision of material information relevant to the decision to be made.\textsuperscript{154}
\end{quote}

the bank's nondisclosure of a certain state of affairs relevant to customer's contractual decision-making \textit{vis-à-vis} the bank. While Finn, \textit{id.}, 22-3, criticises the \textit{Standard Investments case} as as being not a fiduciary one, he argues that the decision is nevertheless justifiable simply on the basis that the bank was withholding information which the customer could not reasonably expect to exist (the bank itself had engaged in conduct that would itself thwart the customer's objectives), and of which he would "reasonably expect a disclosure" given the nature and purpose of his dealing with the bank'. It is perhaps noteworthy that Finn's conception of "not reasonably contemplated facts" seem to correspond to Scheppele's notion of the "deep secret", discussed previously.


\textsuperscript{152} For a general warning against such a contrivance, see Finn, "The Fiduciary Principle", \textit{op. cit.;} "Good Faith and Nondisclosure", \textit{op. cit.}, 161-70; "Fiduciary Law and the Modern Commercial World", Chp. 1 in E. McKendrick (ed), \textit{Commercial Aspects of Trusts and Fiduciary Obligations} (1992): demonstrating a concern to maintain the integrity and intelligibility of the fiduciary principle.

\textsuperscript{153} Our primary concern here might also involve a consideration of fiduciary law; but for different reasons. Here we are concerned with the parties contracting within a relationship that is already fiduciary, with the fiduciary acquiring or possessing his informational advantage, and the opportunities that this gives to him, on account of the fiduciary position he holds with his beneficiary.

\textsuperscript{154} \textit{Id}, 16. Arguably, this expression encapsulates the phenomenon of contracts \textit{uberrimae fidei}. Another example may be the relationship of doctors in their treatment of patients: see Mehlman, M. J., "Fiduciary Contracting: Limitations on Bargaining between Patients and Health Care Providers" (1990) 51 U. Pittsburgh L. Rev. 365, 390-1.
Reliance upon the other party for information disclosure need not have been actual, for it will often, as an empirical matter, be retrospective.155 Owing to the character of the ignorance, reliance on the informationally advantaged party may not be appreciated by the disadvantaged party, and this, as in the context of negligent misstatement,156 seems to command our viewing the question of "reliance" here in terms of the concept of "reasonable expectations". As a normative matter, the mere need to rely is enough; such that given the information of her relative bargaining position, the ignorant party would have been reasonably entitled to expect a disclosure.157 Should reliance, in this special sense, be the critical factor within these relationships or dealings, however, then it is necessary to draw a distinction between two possible scenarios or categories:

(i) 'where the superior party knows or has reason to know that he is in effect being relied upon through disclosure to protect the other in the dealing';

(ii) 'where the superior party does and could reasonably believe that though some assistance, information and explanation are being given, the other party is not relying upon him for it and is capable of and will act independently in the matter'.158

It is clear that the latter category should ordinarily obtain in most transactions taking place between commercial parties. Despite the exchange of information, it is ordinarily reasonable for this class of contracting party to expect that each will exercise an 'independent judgment' with respect to the

155 It will usually be after the event of contracting that a party will become aware of her need to rely upon the other for disclosure of certain information. Hence we are concerned here also with the likelihood of reliance.

156 Chapter Seven, Section 3.1.2.

157 Cf. Gaudron J.'s dictum in Hawkins v. Clayton (1988) 62 A.L.J.R. 240, at 265, where a similar view of reliance or 'reasonable expectation' was taken in connection with negligent misstatement or nondisclosure, cited in text, supra, at p. 575 (Chapter Seven).

158 "The Fiduciary Principle", op. cit., 19. Finn notes, ibid, that it was in this connection that Toohey J., in James v. Australian and New Zealand Banking Group Ltd (1986) 64 A.L.R. 347, at 368, observed that there 'can be a real distinction between the giving of advice on the one hand and the imparting of information or the exchange of ideas on the other'.
decision to be taken.\textsuperscript{159} Essentially, this is because the law generally assumes “structural quality of access to basic information”, in the sense articulated above, in the typical bargaining environment. Whilst a duty of care in making positive statements might still arise in such a context,\textsuperscript{160} it is unlikely that liability for mere nondisclosure will attach. In general terms, one who fails to give another information that that other could reasonably have acquired commits no legally cognisable wrong, since it putatively can be said that any disparity of information results not so much from the first party’s reticence as from the other’s lack of diligence in protecting her own interests.

3.1. Justifiable Ignorance

The law requires men in their dealings with each other to exercise proper vigilance and apply their attention to those particulars which may be supposed to be within the reach of their observation and judgment, and may not close their eyes to the means of information which are accessible to them: vigilantibus non dormientibus, jura subveniunt.\textsuperscript{161}

The closing point in the preceding section inexorably leads us to the most significant qualifying limitation in all cases of nondisclosure. And, of course, limitations there must be; for it has never been the legitimate

\textsuperscript{159} Ibid, citing Stenb\textsuperscript{u}rg \textsuperscript{v.} Northwestern National Bank of Roschester, 238 N.W. 2d 218, 219 (1976).


\textsuperscript{161} McDonnell and Monroe (eds), Kerr on Fraud and Mistake (7th ed., 1952), 48. That the self-reliant obligation is inextricably linked to the “equal access” principle is immediately apparent from the above quotation, and from its continuation (\textit{ibid}): if parties are at arms’ length, either of them may remain silent and avail himself of his superior knowledge as to facts and circumstances equally open to the observation of both, or equally within the reach of their ordinary diligence, and is under no obligation to draw the attention of the other to circumstances affecting the value of the property in question, although he may know him to be ignorant of them.

See, also, discussion in Section 3.1, below.
function of the law to place parties on an equal footing regarding knowledge, experience, acumen, etc.\textsuperscript{162} It would be anathema to our present economic order, and the general functionalist assumptions informing bargaining activity, were it to be otherwise.\textsuperscript{163} The modern business ethic remains one which generally permits, if not encourages, the economic actor to exploit his superior knowledge, skill, and the like.\textsuperscript{164} As with the law of mistake, then, the heart of the matter is that the reliance (which incorporates the notion of "reasonable expectations"), and hence one's remaining ignorant and vulnerable to exploitation by the other, must be justifiable (or "reasonable") in order to authorize the duty of disclosure. The law has never required one individual to compensate another for that other's indolence, inexperience, ignorance or bad judgment. For despite its demonstrable preparedness on occasion to burden one party with neighbourhood-like responsibilities for the protection of the interests of the other in a transaction or dealing between them, it remains abundantly clear that the possessor of information is reasonably entitled as a rule to expect that the other party will take normal and reasonable steps to inform herself and to draw her own conclusions, and to exercise an independent judgment in her contractual decision-making.\textsuperscript{165} To supplant this normal expectation, therefore, there must in this context be an implicitly normative criterion by which one demonstrates that one has in effect the right—an entitlement—to forsake the individual responsibility

\textsuperscript{162} Cf. \textit{Goodwin v. Agassiz}, 186 N.E. 659, 661 (1933): "Law in its sanctions is not coextensive with morality. It cannot undertake to put all parties to every contract on an equality as to knowledge, experience, skill and shrewdness."

\textsuperscript{163} Generally, see Hayek, F. A., "The Use of Knowledge in Society," (1945) 35 Am. Econ. Rev. 519.

\textsuperscript{164} Cf. \textit{Restatement (Second) of Torts}, § 551, Comment (k):

To a considerable extent, fully sanctioned by the customs and mores of the community, superior information and better business acumen are legitimate advantages, which lead to no liability. The defendant may reasonably expect the plaintiff to make his own investigations, draw his own conclusions, and protect himself; and if the plaintiff is indolent, inexperienced or ignorant, or his judgment is bad, or he does not have access to adequate information, the defendant is under no obligation to make good his deficiencies.

\textsuperscript{165} Cf. \textit{Restatement (Second) of Contracts}, § 161, Comment (d).
ordinarily required under conditions of bargaining equilibria, and to expect disclosure, or to rely upon the other for informational assistance in a dealing between them.\textsuperscript{166} It is clearly not enough, for example, that the one party relies wholly upon the other merely in the hope that that other will shower her with the ‘not specifically requested’ and ‘otherwise readily available’ information which she needs but which for reasons of indolence,

\textsuperscript{166} Sometimes this idea is expressed in terms of “materiality”. That is, since inequalities in access to information are a necessary corollary of human limitation and complex modern life, the courts should wish to restrict intervention in the context of nondisclosure to situations where the information is “material” to the particular transaction. This requirement of materiality, then, appears to provide a normative threshold to be crossed before the law takes cognisance of a particular instance of nondisclosure.

“Materiality” in this context is sometimes difficult to distinguish from “causation”. This is principally because materiality is often linked to an “objective” test and causation, strictly speaking, is an empirical or a “subjective” matter. In reality, as with duress, a fused test is required, whereby the concept of materiality is “objective” (or “normative”) but at the same time taking into account the subjective characteristics and circumstances of the particular complainant actually caused to act on account of her ignorance. According to the American Law Institute’s \textit{Restatement (Second) of Torts} (1977), § 551(2), Comment (c), a person is under a duty to disclose only those matters that he has reason to know will be regarded by the other as important in determining his course of action in the transaction at hand. He is therefore under no duty to disclose matters that the ordinary man would regard as unimportant unless he knows of some peculiarity of the other that is likely to lead him to attach importance to matters that are usually regarded as of no moment.

In one sense, materiality here is an obvious requirement. As Scheppele points out, \textit{op. cit.}, 130, for a strategic secret—use of information—to be possible the knowledgeable party must know some fact that would be relevant to the ignorant party’s choices and that the knowledgeable party knows would be relevant to those decisions. This is almost the definition of materiality. Unless the secret influenced or was likely to influence the ignorant party’s attitudes or actions, it could not be a strategic secret. This highlights, of course, the causation prong of the concept of materiality.

There has been some debate about whether facts need to be “basic” and not “material”. Scheppele, \textit{op. cit.}, suggests that the confusion between basic facts seems to stem from our decision whether to locate the problem of nondisclosure in the area of contract, where “basic” tends to be the standard, or in tort, where “material” seems to be the standard. At p. 129 she comments:

\begin{quote}
Each standard uses slightly different criteria, but the basic point is the same: materiality places a limit on the duty to disclose, a limit that confines disclosure to those facts which bear directly on the transaction in question.
\end{quote}

In practice, the cases bear out that this is not much of a limitation.

678
convenience, etc., is not prepared to exercise 'reasonable diligence' to obtain in the preservation of her own interests.\textsuperscript{167} It is particularly clear in this context, that the law is, and that it should be, concerned to expect and to insist upon some measure of responsibility for the consequences of one's own choices and actions—for one's own, to draw a rough analogy with tort law, "contributory negligence"\textsuperscript{168}—and that this is basic to the limits that are to be set to precontractual disclosure obligations. That ignorance must be justifiable, then, derives principally from the essentially self-regarding duty to inform oneself. If one does not choose to acquire relevant precontractual information\textsuperscript{169} when one is reasonably expected and required to do so, then putatively, one has failed the bargaining "game".

A determination of the question of justifiable ignorance (or reliance) in this context seems inevitably to hark back to the unifying conception that Scheppede, amongst others, instanced as "structural equality of access to basic facts".\textsuperscript{170} In this light, that conception presents itself as a significantly normative criterion.\textsuperscript{171} It makes perfect sense to suggest that where two

\[\text{\textsuperscript{167} Cf. Denison State Bank v. Madeira, 640 P.2d 1235, at 1243 (1982).}\]

\[\text{\textsuperscript{168} Cf. Finn, "Good Faith and Nondisclosure," op. cit., 182.}\]

\[\text{\textsuperscript{169} Under functionalism, this may merely involve one's asking strategically responsive questions of the other negotiating party.}\]

\[\text{\textsuperscript{170} Supra at p. 664.}\]

\[\text{\textsuperscript{171} That this is so is evidenced, in particular, by various United States judicial pronouncements. See Brooks v. Ervin Construction Co., 116 S.E. 2d 454 (1960), at 457:}\]

Where material facts are accessible to the vendor only, and he knows them not to be within the reach of the diligent attention, observation, and judgment of the purchaser, the vendor is bound to disclose such facts, and make them known to the purchaser.

And in Denison State Bank v. Madeira, 640 P.2d 1235 (1982), at 1242, the Court observed:

Where one party to a contract or transaction has superior knowledge, or knowledge which is not within the fair and reasonable reach of the other party and which he could not discover by the exercise of reasonable diligence, or means of knowledge which are not open to both parties alike, he is under an obligation to speak, and his silence constitutes fraud, especially when the other party relies upon him to

679
parties have "equal access to information", the courts should not require
disclosure if one of the parties takes advantage of the opportunity to acquire
information and the other does not. Putatively, that the latter did not do so
was because she was either imprudent or indolent (or both), or because she
was, calculatedly or otherwise,172 "taking a risk", a point to which we shall
return shortly. However, where either the superior knowledge of one party
is not reasonably accessible to the other, and is not discoverable upon fair
enquiry pursued with due diligence and reasonable effort, or the means of
acquiring knowledge are extremely and unfairly unequal, then the
assumption of equality will not hold.173 But despite the ease with which we
may state the idea of "equality of access to information"—do the parties have
to put in very different levels of effort if they hope to acquire the same
information?—our real difficulties lie in identifying precisely what we think
that conception means; what its content is. What degree of effort or
expenditure must be involved before information can be said to be "not
available"? How far is superior information or business acumen a legitimate
advantage which the party possessing it is not required to share with the less
fortunate other party?

In determining the answers to these questions, a number of sources
resort, in the final analysis, to the rather delphic formulation of "reasonable

communicate to him the true state of affairs to enable him to judge the
expedience of the bargain.

Finn, notably, cites Madiera as being illustrative of the linking of the fiduciary idea to the
desire to coerce disclosure because of information disparity in a dealing: “Good Faith and
Nondisclosure”, op. cit., 163. Cf. also, Fairmont Foods Co. v. Skelly Oil Co., 616 S.W.2d 548,
Juris. 2d (“Fraud and Deceit”), § 148.

172 Risk analysis will apply even if the party is wholly unaware that she should be seeking
the information: e.g., farmer selling property with valuable ore body unknown to him but know
to the purchaser.

173 To illustrate, in determining the seller’s duty to disclose defects to the purchaser of
property, and whether or not the latter’s reliance on the former for disclosure was justifiable,
it has been common, especially in the United States context, to address the issue by asking
whether the defect was patent or latent. If the defect was obvious or reasonably discoverable
by the purchaser, it is regarded as patent and the traditional doctrine of caveat emptor
endures: the purchaser’s eyes must be her guide, and the seller is under no duty to disclose
information harmful to his bargaining position. Cf. Powell, F., “The Seller’s Duty to Disclose
expectations”, which, as far as it goes, is broadly consistent with the “excluder” approach elaborated in Chapter Two. Holmes, for example, claims that in this context, ‘each party must comport in contracting with that degree of responsibility fit to the justifiable expectations of the other of which he knows or has reason to know’;¹⁷⁴ and Finn’s ‘unifying theme’ (of “reasonable expectations”) is epitomised by the ultimate question he asks: ‘what, in the circumstances, is one party reasonably entitled to expect from the other by way of disclosure in a transaction or dealing between them?’¹⁷⁵ But this of course merely raises the questions (and this may be the best we can do in the present context), it does not provide ready solutions to them. That the formulation of “reasonable expectations” is inevitably an amalgam of those expectations actually but reasonably held and those judicially prescribed¹⁷⁶ ordains our inability easily to define the conception or its content.¹⁷⁷ The above analogy to transactional disadvantage under the unconscionable dealings jurisdiction may simply leave us asking the (soon-to-be-qualified) question, “does the absence of information, or basic lack of access thereto, leave a party in a position of serious disadvantage vis-à-vis


¹⁷⁶ Generally, see P. Finn and K. Smith,”The Citizen, the Government and ‘Reasonable Expectations” (1992) 66 A.L.J.R. 139.

¹⁷⁷ Of “reasonable expectations” in the present context, Wonnell, op. cit., 381-2, had this to say:

“Reasonable expectations” is always a slippery concept, especially since the expectations of commercial parties are often a function of the governing legal rules. It is tempting to conclude that the “reasonable expectation” is the expectation that is in accordance with the better ethical view of the particular practice. Such a conclusion, however, would miss the epistemological gain from deducing what pre-legal morality had actually evolved to govern particular types of transactions. The general acceptance of nondisclosure in a particular setting may be due to the presence of one or more efficiencies. Regarding nondisclosure as unethical in another setting may result from an absence of opportunities for efficient transactions in that setting. (Footnotes omitted.)
the other, such that she is effectively unable to preserve her own best interests in the particular transaction or dealing between them”?178

In the United States, the resolution of the problem of information disparity (particularly in the context of mistake),179 and the respective standards of behaviour to expected of contracting participants with respect to the relative levels of information possessed or available to each in bargaining, is distinctively administered through an analytical system commonly described as “risk analysis”: also an amalgam of actual “assumption” of risk and prescriptive judicial “allocation” of the same, and a conception that has been foreshadowed throughout the discussion in this and the preceding two chapters. “Risk”, however, is not a concept which tends explicitly to be articulated in and by Anglo-Australian law, especially where contract formation is concerned;180 although it is arguably implicit in all cases where a court is asked to enforce or to excuse a bargain.181 To be sure, an acceptance that asymmetric information may be so disruptive of bargaining equilibria as to give rise to certain obligations to disclose, may, in many ways, necessitate the conclusion that we are, ultimately, in all cases merely engaging in an exercise of allocating risks of the losses resulting from the asymmetric information between the parties to the particular transaction. This is to say, whether a party proceeds to contract under a mistaken impression, or whether she is simply ignorant of a basic fact relevant to her

178 As it stands, the question does not give sufficient critical focus in this context to the importance of risk analysis. See text, infra at pp. 689-90.

179 For example, the Restatement (Second) of Contracts, § 153 permits avoidance for unilateral mistake, but only provided (amongst other criteria) that the mistaken party ‘does not bear the risk of the mistake’ (under § 154).

180 For a convenient discussion of ‘risk analysis’ in the Australian context, see Finn, “Equity and Contract”, op. cit., 151-3.

181 But cf. the attitude taken to a purchaser’s responsibility where the subject-matter of the contract is realty: Svanosio v. McNamara (1956) 96 C.L.R. 186, esp. at 200 per Dixon C.J. and Fullagar J. Indeed, in our own law, the concept of risk has assumed a more appreciable function in the context of common mistake, where the courts are more understandably required to apportion loss between two essentially “innocent” parties. It is here, then, that we should find a direct affinity between the doctrines of common mistake in equity and frustration at common law: cf. Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales (1982) 56 A.L.J.R. 459, at 467 per Mason J.; Kull, A., “Mistake, Frustration, and the Windfall Principle of Contract Remedies” (1991) 43 Hastings L.J. 1.
contractual decision-making, the mistaken or the ignorant will almost
invariably suffer a loss, or the un mistake or knowledgeable enjoy a
benefit. The questions in all cases, then, appear to be the same: should the
loss, or benefit, stay where it falls, or should the costs of that loss be shifted
back to the informationally superior party, or should he be wholly or
partially divested of the benefit? In all cases, this appears to require an
investigation into the actual or prescriptive assumption of risk.

The principal informative provision on risk analysis in United States
jurisprudence is to be found in § 154 of the Restatement (Second) of
Contracts, which formulates that a party bears the risk of a mistake (and,
analogously, of bare ignorance) in three circumstances, when:

(a) the risk is allocated to him by agreement of the parties, or
(b) he is aware, at the time the contract is made, that he has only
limited knowledge with respect to the facts to which the mistake
[or bare ignorance] relates by treating his limited knowledge as
sufficient, or
(c) the risk is allocated to him by the court on the ground that it
is reasonable in the circumstances to do so.

Subparagraphs (a) and (b) are attended with little controversy. The
content of subparagraph (c), however—the judicial prescription of risk—is

---

182 The writer assumes a zero-sum connection. When we consider that according to equity the
actual "benefit" received here is the contract itself (cf. Leighton Properties Pty. Ltd v. Hurley
[1984] 2 Qd. R. 534) and not necessarily the contingent benefits or burdens thereunder, it makes
sense to assume that one party's "benefit" will always be at the expense of the other party's
"loss".

183 In the context of mistake. Cf. the New Zealand Contractual Mistakes Act 1977, s. 5(1)(c),
which provides for a consideration at least of an actual assumption of risk in mistake cases, if
only for the purpose of determining what would be an appropriate remedy under the Act.

184 Insurance contracts aside, express risk allocation agreements are probably not common. A
number of commentators have noted contracting parties' propensity not to plan their
arrangements completely and not to foresee every contingency: see Macneil, I., The New Social
Contract (1980), 25. Some forms of exculpatory clause, however, might have the effect of
impliedly allocating risk in general contracts: cf. Lenwee County Bd. of Health v. Messerly,
is" clause in contract for the sale and purchase of land held to place risk on purchaser. In any
event, an express allocation of risk clause should also be subject to ordinary "unconscionability"
considerations, for even a knowing assumption of risk may not be given effect since it may be
necessary or desirable to protect a class of individuals, such as consumers, from their own folly:
potentially more admitting of inquiry and critical analysis, hopefully to illuminate our own understanding of the gravamina in the resolution of nondisclosure cases in this country. Whilst the Commentary’s explanation of subparagraph (c) is not particularly helpful, it is likely that, given the discretionary nature of relief for mistake, the provision is designed to permit the courts to consider all countervailing social policies—economic or moral—before exercising its discretion. For example, in the United States, often the nature of the mistake made, the thing exchanged, or the transaction itself, or simply the circumstances surrounding the particular transaction, will throw light on whether the fact about which a party was mistaken was one concerning which she has assumed the risk of error.

If the benefits of such a commonsense approach to this difficult area of law are not already discernible to us, according to one leading United States commentator in the field, risk analysis


The overlap between § 154(a) and (b) is obvious. A clear illustration of subparagraph (b) may be seen in Wright and Pierce v. Town of Wilmington, 290 F.2d 30 (1961): plaintiff proceeding to contract on lump sum basis with knowledge of defendant’s purposefully inexact estimate of the extent of the work. For a comparable, illustrative English example, albeit from the context of common mistake, see Hopgood v. Brown [1955] 1 W.L.R. 213: parties unsure of property boundary agreed to fix it at a certain location; defendant could not complain after he proceeded to build under that assumption.

Comment (d) to the section explains that ‘[i]n some instances it is reasonably clear that a party should bear the risk of a mistake for reasons other than those stated in subparagraphs (a) and (b)’.


Cf. Chapter Eight, nn. 26-27 on the distinction between “mistakes in judgment” and “mistakes as to basic facts”.

Some items of property possess greater inherent risks than others, especially as to their value and authenticity. Consider, for example, the nature of art, antiques, jewellery, shares, and the like.


See the discussion by Rabin, on risk assumption, op. cit., 1292-7.
candidly acknowledges the considerable discretion exercised by courts... and it is more likely to lead to sensible results than... specious or artificial reasoning.\textsuperscript{191}

That the system of "risk analysis" is comparatively alien to pages of our own law reports, statute books, and academic treatises and commentaries is of little consequence to the present discussion. Rather, the important point here is that the conceptions and devices of risk "assumption" and "allocation" do function surreptitiously in our own law, and are implicit in such parallel, overlapping or related\textsuperscript{192} articulations and conceptions as "fault",\textsuperscript{193} "reasonable expectations", "justifiable (or reasonable) reliance",

\textsuperscript{191} Contracts (2nd ed., 1990), op. cit., 692. To Farnsworth, '[a] good deal of common sense underlies [risk] analysis'(ibid), requiring that 'a court will have to rely on its own perception of the purposes of the parties and its own knowledge of human behaviour' (id, 691-2).

\textsuperscript{192} Cf. Powell, F., "Mistake of Fact in the Sale of Real Property" (1991) 40 Drake L. Rev. 91, 118: 'In cases involving mistake of fact, the policies underlying relaxation of the requirement of justifiable reliance suggests that a purchaser should not bear the risk of a mistake because he failed to discover the true facts about the property unless the fact is obvious [to an ordinary person]' (emphasis added). In the fiduciary context, too, see the remarks of Somers J. in the New Zealand Court of Appeal case of Day v. Mead [1987] 2 N.Z.L.R. 443, at 462:

There was a degree of want of care for his own property on [the plaintiff's] part which goes beyond reliance on the [defendant] and approaches acquiescence in the risk involved in the ... investment. (Emphasis added.)

\textsuperscript{193} This conception, perhaps more than any of the others, seems to embrace a system of risk analysis in Anglo-Australian law. The explicit articulation of the notion of "fault" comes from Denning L.J.'s judgment in Solle v. Butcher [1950] 1 K.B. 671, 693 ('the party seeking relief must not himself be at fault'), although it has certainly been implicit in numerous cases before it. For example, in Tamplin v. James (1880) 15 Ch. D. 215, a purchaser was held to be bound to a sale of a plot of land for thinking it was larger than it really was, where the vendor had given the purchaser every opportunity of checking the plans of the land, without in any way misleading him. At 220-1, James L.J. said:

The vendors did nothing tending to mislead .... If a man will not take reasonable care to ascertain what he is buying, he must take the consequences .... It is not enough for a purchaser to swear, 'I thought the farm sold contained twelve fields which I knew, and I find it does not include them all,' or, 'I thought it contained 100 acres and it only contains eighty'. It would open the door to fraud if such a defence was to be allowed.

The criterion of "fault", as it stands in Solle v. Butcher, remains unclear, however; and it has been subjected to surprisingly little subsequent judicial analysis and interpretation. In Grist v. Bailey [1967] Ch. 532, at 542, however, Goff J. thought it required some degree of blameworthiness beyond simply having made the mistake. In the writer's view, this is

685
"contributory negligence", the notion of a party relying on her "own" mistake, the writer's own conception of "justifiable ignorance", and so forth. Whatever language or system of analysis one ultimately elects to use to explain this difficult area of law, it is clear that they all seem to be concerned with addressing the essential enquiry: where does or should the balance of informational responsibilities lie between contracting parties? When is one party no longer wholly responsible for her own informational needs in relations of mutual exchange? When is she no longer required to bear the risk of her own ignorance in bargaining, such that she might, whether or not she turns her mind to the matter in question, be reasonably clearly correct. Error in itself does not constitute "fault", since it is a risk in social and commercial interaction, or a form of "accident" against which nobody is entirely immune. Sometimes, nevertheless, an error, or ignorance, like an accident, may be prevented by the exercise of ordinary and reasonable diligence by a party entering into a transaction, such as gathering basic information about the important assumptions informing her entry into that transaction. The question may be asked whether a failure to take such cautions or care—not the error itself but that failure—constitutes "fault".

This leads us to the case of Laurence v. Lexcourt Holdings Ltd [1978] 2 All E.R. 810, at 819, Mr Brian Dillon Q.C., on the issue of "fault" found that the defendants in a leasing arrangement were not at fault:

[T]here is no doubt that the defendants were imprudent in proceeding without making the usual searches and inquiries, but they did not owe any duty of care to the plaintiffs to make those searches, and their mistake did not bring about [the plaintiff's] mistake.

The above passage clearly suggests two possible meanings for "at fault": (1) fault in creating the mistake—i.e., whoever induced it is at fault; and (2) the defendants failed to use what opportunities they had to discover the mistake: cf. also Beauchamp (Earl) v. Winn (1873) L.R. 6 H.L. 223; Svanosio v. McNamara (1956) 96 C.L.R. 186: positive obligation on purchaser to search title. Clearly, in both the meanings of "fault" to which Dillon Q.C. alludes in Laurence, what is sought is some evidence that responsibility for, or risk of, the mistake lay on the party seeking to take advantage of it.

To the extent, too, that the High Court of Australia decision in McRae v. Commonwealth Disposals Commission (1951) 84 C.L.R. 337, can be viewed as a case of "mistake", as opposed merely to one of contractual construction, the concept of "fault" clearly played a determinative role in precluding the defendants from relief for common mistake as to non-existence of subject-matter. At p. 410, the Court held:

[T]he Commission cannot in this case rely on mistake as avoiding the contract, because any mistake was induced by the serious fault of their own servants, who asserted the existence of a tanker recklessly and without reasonable ground.

entitled to expect that information-giving assistance will be forthcoming in a transaction or dealing between respective parties?

There can be no doubt that the existence and the scope\textsuperscript{195} of a duty to disclose in contract formation is contextual; the standards of conduct to be expected of the respective parties in relation to the information balance of their dealing must vary according to the bargaining context.\textsuperscript{196} In practical terms, a determination of the matter will require, in any given case, a consideration of both the objective and the subjective transactional factors or circumstances attending the particular case at hand. Objectively, account must be taken of the fact that owing to the complexity or technical nature of the subject-matter, or other circumstances,\textsuperscript{197} it may practically be impossible for one party herself to be aware of information she vitally needs in order to preserve her own interests in the transaction or dealing. Subjectively, through the lack of ability in one of the parties, whether it proceeds from age, occupation, experience, or other factors, the circumstances may dictate that she should expect some disclosure from the other party, especially where that other party has some expertise and knowledge (or reason to know) of the first party’s subjective inabilities.\textsuperscript{198} Professor Finn offers a variety of process-oriented or relational factors that may assist in concluding whether such an

\textsuperscript{195} On the “scope” of the duty to disclose, see Section 3.2., below.

\textsuperscript{196} That this should be so is exemplified well by those cases concerned with nondisclosure under s. 52 of the Trade Practices Act 1974 (Cth). At least where consumers are concerned, the provision entails a relatively low standard of conduct required of an applicant; generally, for a discussion of s. 52 and silence, see Robertson, A., “The Circumstances in which Silence can Constitute Misleading or Deceptive Conduct” (1991) Queensland L. Soc’y J. 21; Skapinker, D., “The Imposition of a Positive Duty of Disclosure under Section 52 of the Trade Practices Act 1974 (Cth)” (1991) 4 J.C.L. 75, arguing that the ingredients of s. 52 provides the qualifications necessary to limit the duty of disclosure in contract formation so as to prevent it from becoming an absolute duty.

\textsuperscript{197} For example, the subject-matter is far away, or is in the physical or otherwise exclusive possession of the other party; cf. the facts of McRae v. Commonwealth Disposals (1951) 84 C.L.R. 337, a case, \textit{inter alia}, touching upon the issue of common mistake.

\textsuperscript{198} This may not always operate in favour of a potential complainant. In the United States, for example, experienced purchasers have sometimes been held to higher standards of self-reliance than have inexperienced buyers (thus bearing the risk of mistake or ignorance) where the court thinks that they should have discovered their error or have otherwise informed themselves sufficiently. See Deans v. Layton, 366 S.E.2d 560 (1988) (purchaser experienced in residential land development).
expectation—or reliance—is justifiable in any given case, thereby shifting the normal equal distribution of risk of mistake or ignorance in the favour of the informationally disadvantaged party.199

(1) a past course of dealing between the parties in which reliance for advice, etc., has been an accepted feature;200
(2) the explicit assumption by one party of advisory responsibilities;201
(3) the relative positions of the parties particularly in their access to information and in their understanding of the possible demands of the dealing;
(4) the manner in which the parties were brought together, and the expectation that that could create in the relying party;202 and
(5) ... has "trust and confidence" knowingly been reposed by one party in the other[?] ...203

If one were to pursue the "transactional disadvantage" analogue from unconscionable dealings, then there is an additional factor that may be considered alongside the others:

(6) the effect (or likely effect) that the ignorance or nondisclosure has (or will have) on the parties' resultant transaction: the relative distribution of burdens and benefits in the final outcome.204


204 Cf. Scheppele's notion of "catastrophic loss" in the present context. Conceivably, this idea could be extended further, so as to introduce consequentialist considerations beyond that as between the immediate parties to the transaction. For example, efficiency considerations may play some part in dictating the source or scope of a duty of disclosure in any given case, whether these considerations extend to the whole of the relevant community or society, or
Consistent with the writer’s analysis of unconscionable dealings and unilateral mistake in equity, one party’s legal duty positively to assist another should not exist or arise unless that other party is or has become so peculiarly susceptible to the first party’s choices and actions, and the superior party knows or has reason to know of this fact, that the parties’ relationship is effectively taken out of “equilibrium bargaining conditions”. Thereby the individual responsibility, and hence the normal distribution of risks and losses, expected and required under the functionalist “rules” of bargaining is qualified or displaced by the exploitable circumstances. An extreme disproportion, or likely disproportion, in the benefits and burdens under the resultant bargain transaction may give rise to an inference that the informationally superior party had reason to know of the inferior party’s need or reasonable expectation that any “neighbourhood”-like duty arising from the parties’ peculiarly unequal circumstances would be complied with, in particular through proper disclosure. The informationally advantaged party’s failure to make such disclosure in the face of a strong moral-cum-legal duty to protect the vulnerable is exploitation, so defined, and, all things being equal, it will be subject to legal correction.

This alignment with unconscionable dealings, however, needs to be qualified, at least in one respect. While unconscionable dealings seems to possess the capacity to embrace, within its “special disadvantage” criterion, the concept of “transactional disability”, the jurisdiction does not itself bring sufficient critical analysis to bear upon cases involving simple nondisclosure, at least without some incorporation of the notion of “risk assumption”.205 Simply asking, for example, whether the farmer who is ignorant of the ore body under his land is seriously unable to preserve his own best interests vis-à-vis the purchaser who is apprised of the fact does not sufficiently take into

merely to the prevailing business norm of a particular industry. Requiring individual disclosure in every case over the use of negotiable instruments or take-it-or-leave-it standard form contracts, for example, may impair industry and lead to significant expense and inefficiencies, and this should ordinarily dictate that no duty of disclosure arises. Cf. e.g., discussion by Finn, “Equity and Contract”, op. cit., 133-4.

205 See Chapter Four, pp. 316-18.

689
account society’s probable expectation that, all things being equal,\(^{206}\) vendors or sellers should ordinarily bear the risk of being mistaken or ignorant about their own property which they intend to sell.\(^{207}\) In this context in particular then, the writer would suggest a marriage between our own “unconscionable dealings” jurisdiction and the United States’ system of “risk analysis”. Thereby, the criterion of “special disadvantage” within the former should in any case be determined only against a backdrop provided by the latter, especially as this is required to confine the notion of “transactional disadvantage”, advanced in Chapter Four, within proper bounds.

* * * *

The present writer remains sceptical that we will ever be able to achieve a “general theory of nondisclosure” beneath the high level of generality adumbrated here.\(^ {208}\) The multiplicity of issues, permutations of facts, seeming irreconcilability of competing policies, and the need for significant judicial discretion in this area, appear to signify the fulfilment of such a prophecy. But even if we cannot state or fully comprehend in advance all the various factors and considerations to be taken into account in any given nondisclosure case, it is nevertheless important that we should be able to erect a generally applicable intellectual framework within which we can begin to attempt such a task. As we have seen, the building of such a general structure has, broadly, been concerned with striking an appropriate balance both between fairness-related and certainty- or efficiency-related considerations, and between the competing social policies of concern for one’s self and respect or responsibility to or for others. The risks of mistake and of ignorance in contract formation are allocated according to the general,

\(^{206}\) Different considerations might apply, for example, if the purchaser acquired his information through an unlawful act, such by as trespassing on the farmer’s land: cf. Keeton, \textit{op. cit.,} 25-27, 35.

\(^{207}\) For some suggested reasons why this should be so, see n. 73, \textit{supra}. Cf., also, the attitude taken by the High Court of Australia in \textit{McRae v. Commonwealth Disposals Commission} (1951) 84 C.L.R. 377.

\(^{208}\) According to Wonnell, the general framework for the nondisclosure problem must be sufficiently open-ended to accommodate the probability of particular types of future knowledge: \textit{op. cit.,} 383.
and seemingly fluid, socio-economic expectations shared by courts and lawmakers.

In the final analysis, Finn must surely be correct when he proposes a graduated scheme of disclosure responsibilities, culminating in what he terms, ‘a tiered response to nondisclosure’. Broadly speaking, this intellectual frame of reference postulates that bargaining, and hence disclosure, responsibilities and entitlements augment as we move from one end of the spectrum, where the parties deal with each other at arm’s length and as independent actors, through to relationships of “reliance” or of “assumed responsibility”, to fiduciary relationships at the other end of the spectrum. In terms of standards of conduct reasonably to be expected, the scale progresses from ‘a markedly circumscribed accountability’ at the one end, through ‘a “neighbourhood” responsibility’ in reliance and assumed-responsibility relationships, to a ‘strict liability rule’ in relations of close dependence at the other end of the scale. The actual operation of this graduated scale of responsibilities and standards, in particular as we can observe a different allocation of risks across the spectrum, can be brought into sharper focus as we turn now to consider the nature, scope and content of the disclosure obligation in contracting.

---

209 In his “Good Faith and Nondisclosure”, op. cit., 179.


211 Whereby a party is required to desist from intentionally upsetting the balance of the negotiations to his advantage. This is, essentially, deceit’s purview, for that action does not presuppose the existence of a particular type of relationship within which positive deception or nondisclosure must occur. Ordinarily, it is concerned simply with ad hoc dealings between non-intimates.

212 Ordinarily, those concerned with negligence and “duties of care”.

213 That is, fiduciary law, essentially.
3.2. The Nature, Scope and Content of the “Duty” to Disclose in Contract Formation

Although we are in this context speaking of a “neighbourhood” duty, such that one party may be required actually to take positive steps to assist another in her contractual decision-making, the obligation is not a “duty” owed in the strict legal sense: a positive other-regarding duty giving rise to a correlative legal right in the beneficiary of the duty; rather it is, like the duty to mitigate one’s losses upon breach of contract, more in the vein of “a duty to oneself”: a self-regarding duty, whereby a party who desires fairly to pursue his own chosen course of self-interest must undertake certain acts for the benefit of the other party, simply so that he can sustain the resultant transaction, or render it legally indefeasible.\textsuperscript{214} If the party fails in his obligation to take those necessary steps, with a view exploitatively to securing a contractual benefit, then the resultant transaction is said to be defeasible, or voidable, and subject to the principal available remedy of rescission.\textsuperscript{215} That the duty does not give rise to a correlative “right” in favour of the other party is clearly demonstrated by the (legal) fact that, while the beneficiary of the obligation is reasonably entitled to expect that disclosure will be forthcoming, the law does not, save in exceptional

\textsuperscript{214}Kronman, for example, explicitly recognises this distinction in the present context:

Although throughout the paper I use the expression “duty to disclose,” the duty involved is typically not a true legal obligation. If the party with knowledge fails to disclose the other party’s error, his failure to do so will give the mistaken party grounds for avoiding any contract which has been concluded between them. In the absence of such a contract, however, the knowing party had no positive duty to disclose—that is, nondisclosure will not by itself give the mistaken party the right to sue him for damages. Of course, in some cases—for example, where there is a fiduciary relation between the parties—a positive duty of this latter sort may exist. Where it does, a failure to disclose is not simply a defense to the knowing party’s suit to enforce the other party’s contractual obligations; it also provides the mistaken party with an independent cause of action for damages.

Kronman, \textit{op. cit.}, 9, n. 25.

Also see discussion on this point in Chapter Two, \textit{supra} at pp. 133-35.

\textsuperscript{215}The subject of remedy will be considered in Section 3.3.
circumstances, recognise that privilege (by way of providing an automatic and independent right to claim damages) by actually permitting her to insist upon it. Affirmative disclosure obligations may arise independently of the precontractual relation, such as between fiduciary and beneficiary, and these may strictly be viewed as true, positive legal obligations. However, our concern here remains specifically with those “duties” of disclosure arising strictly out of the relative precontractual bargaining relations between the parties, whether they be fiduciary and beneficiary, or simply non-intimates ostensibly dealing independently and at arm’s length in the transaction between them.

This final point is important, because while the nature of the self-regarding duty arguably does not change according to where we happen to be positioned along the relational or “duty” spectrum (Chapter Four), the allocation of risks, and hence the relative responsibilities and standards of conduct required of the bargaining parties, certainly does change accordingly, as do the scope and the content of the disclosure obligation. As Finn pointed out in his tiered response to nondisclosure, basically these standards and responsibilities augment as we progress from ad hoc, non-intimate dealings, such as between competent strangers, through to relations of the most intimate nature, such as between fiduciary and beneficiary. Thus, as between strangers, for example, Finn’s ‘markedly circumscribed accountability’, transcribes into an obligation to disclose merely to avoid being deceitful. The risks of ignorance are thus generally allocated strongly against the ignorant party at this end of the spectrum. As we progress along the continuum toward “neighbourly” relations, however, we begin to witness an augmentation of duties actually to take positive steps to assist another—disclosure itself being a form of “duty to assist”—such duties being essentially of a corrective nature, directed at evening out the interpersonal, transactional power imbalances, and not any general or social power

---

216 That is to say, the nondisclosure must generally be held to amount to “deceit” or to “negligence”. See the note on remedy, infra at Section 3.3.

217 Although she is entitled generally to insist that the other party not “lie” to her, and, on occasion, to insist that he exercise reasonable care in her favour. Breaches of both duties in this sense give the aggrieved party the right to claim damages from the party who is in dereliction of the duties.
imbalances, existing between the parties. There is a corresponding diminution of the risks (of ignorance) borne by the ignorant party, although the presence of such risks, as we have seen, potentially qualify the duty to assist in the first place, in particular where the ignorance arises from one's "transactional" disabilities and not from one's general "social" disabilities.

Deceit apart, in Chapter Four we established as our baseline the type of relationship which attracts the unconscionable dealings jurisdiction in Australia: the "relationship of special advantage". Here, we find that the disclosure obligation exists or increases relative to three criteria: (1) the degree to which the one party's position of special disadvantage actually proceeds from informational or cognitive deficiencies, not from some other contributing source, such as distress or need; (2) the degree to which one party actively engages in the process of exploitation: the less "active" the victimisation, the more "positive" the obligations to assist seem to become; and (3) the precise way in which and degree to which one party is informationally disadvantaged vis-à-vis the other (beyond requiring the "special disadvantage" test to be met). Depending on the factual matrix of the case at hand, the steps actually required to discharge one's "neighbourhood" duties may range from merely warning of a known erroneous impression or ignorance as to a basic fact, through recommending independent advice and assistance, to providing assistance or explanation oneself, which might involve a disclosure of the precise facts about which the other party is mistaken or ignorant. In an extreme case, and by analogy with the contracting fiduciary, it may be necessary for the stronger party to the relation to ensure that the weaker party is as fully informed as himself. The precise scope of the disclosure required in any given case may vary, such that any information or advice supplied will need to be tailored to the

---

218 The expression is borrowed from Spencer Bower, Turner & Sutton, The Law Relating to Actionable Non-Disclosure (2nd ed., 1990), Chps. 23 and 24, although adapted to include the qualifying adjective: "special".

219 That is to say, the more "intentional" the conduct, the more aligned to obligations to desist the problem becomes. Thus, where the superior party is neither responsible for the creation or the exacerbation of the exploitable circumstances, nor strongly conscious of those circumstances, the self-regarding obligation to assist—to correct the information asymmetry—becomes more thematic.
reasonable level of understanding which the informationally advantaged party perceives that the other party possesses, or is reasonably likely to possess, of the demands of the nature of transaction or dealing between them.

Further along the scale, and into the territory of "reliance", "assumed responsibility" and "relationships of care", disclosure obligations are clearly more other-regarding, that is, true legal obligations, from the point of view of discharging one's common-law duty of care in tort, and avoiding a potential damages claim. From the perspective of sustaining the contractual transaction, however, equity is concerned with the power or influence stemming from the reliance giving rise to the duty of care, in which case disclosure will be required to the degree necessary to discharge the common-law tort duty of care, which will obtain regardless of a resultant contractual relationship. But from the point of view of merely informing another's contractual decision-making, and hence from the point of view of contract law, the duties to speak incidental to such relations of care remain essentially of the mere "neighbourhood" variety.220 As with relationships of advantage, too, the precise extent of disclosure required to sustain a contractual transaction probably is contingent upon the information provider's or adviser's appreciation of the reliant party's likely level of understanding in the type of transaction between them (or with a third person), in which case the information or advice will need reasonably to be tailored accordingly.221

220 It is noteworthy that at this mid-range along the spectrum there are indeed very few contract cases, especially in comparison to those we find at the poles: cf. the discussion in Chapter Seven, Sections 3.1.2 - 3.1.2.2. There thus appears to be something of a hiatus in the spectrum, at least as it potentially relates to contract law. This may call for some future consideration and development, although one might think it odd that we should need to turn to the middle ground, and hence usually to tort law, to solve what are essentially contract problems.


It may be that the nature and extent of the advice required from [such an] adviser will vary with the known commercial experience of the client. It seems to me likely that the advice to be given to the treasurer of a multinational corporation ... will be minimal compared
Similarly, as we arrive at the other end of the broad relational spectrum, to relations of close dependence, such as fiduciary relations and relationships of influence, disclosure responsibilities become strict and 'all-embracing'. A contracting fiduciary who is an adviser of the beneficiary, for example, is, both in the cases of conflicting interest and of duty, not only obliged to disclose the nature and extent of the conflict, but additionally obliged to furnish such reasonable advice against himself (conflict of interest) or against a third party (conflict of duty) as he would have given if disinterestedly advising his beneficiary alone.\textsuperscript{222} Yet, as with relationships of care, the disclosure obligations incidental to the fiduciary class of case also have a fundamentally self-regarding nature once the question of sustaining a contractual transaction between the parties becomes an independent issue to address.\textsuperscript{223} For example, we saw in the case of "relationships of influence" in

\begin{flushright}
to that required to be given to a farmer in western New South Wales who, to the knowledge of the adviser, is entering the foreign exchange market for the first time.
\end{flushright}

\textsuperscript{222} Cf. Finn, "Good Faith and Nondisclosure", op. cit., 169-70, quoting Warrington L.J.'s observations in \textit{Moody v. Cox and Hatt} [1917] 2 Ch. 71, at 83 (solicitor-client):

\begin{quote}
there exists ... a fiduciary relationship which imposes on [the solicitor] the obligation not only of observing the utmost good faith in dealing with his client, but of giving to the client such advice and information as he would have given if he had not been personally, in his other capacity, interested in the matters arising between them.
\end{quote}

\textsuperscript{223} That the purpose of disclosure duties under the fiduciary regime is twofold. In the first sense, the "duties" are of the true legal variety, and they operate independently of a bargaining relation existing between the parties. The purpose of these "duties" is to ensure the object of fiduciary loyalty: that the beneficiary is apprised of the extent to which the fiduciary's actions on her behalf will or may be qualified by that fiduciary's own personal interest or his conflict of duty with a third party, so that the beneficiary may then in turn decide whether, in view of the adverse and possibly compromised representation, she should permit the fiduciary to continue in his fiduciary capacity, or otherwise to ensure that he does. Cf. Finn, "Fiduciary Law and the Modern Commercial World", in E, McKendrick (ed), \textit{Commercial Aspects of Trusts and Fiduciary Obligations} (1992), 24.

In the second sense, the purpose of the duties of disclosure is to ensure that a bargaining relation (and subsequent contract) taking place within the broader fiduciary relation is not jeopardised by nondisclosure, so that the fiduciary can later sustain any action to enforce the contract with his beneficiary. As the point is made in the text, above, the point of disclosure here is essential to ensure that the contracting parties are placed on an even footing, and it is immediately observable that the "duties" of this kind are merely of the self-regarding variety.
Chapter Six—themselves, in Australia at least, parasitic on the classical fiduciary idea—that in order to sustain a transaction presumed to be the undue result of the influence stemming from that relation, it is incumbent upon the fiduciary affirmatively to show that no unfair advantage was taken, but, rather, that the manifestation of the beneficiary’s contractual assent was her own ‘independent and well understood act’, she being ‘in a position to exercise a free judgment based on information as full as [her fiduciary’s own]’. 224

Thus, from the perspective of our specific present concern—the phenomenon of contract formation—it is clear that the purpose of the fiduciary’s disclosure requirement ever remains a corrective, “neighbourhood”-like one. It is directed at putting the parties to the precontractual negotiations225 on an equal footing and at arm’s length, which, at least in the contemplation of the law, the broader relationship has

---

Often, statements appear which do not clearly draw the precise analytical distinction between the two. Mr Spencer Bower, for example, in the first (1915) edition of his treatise on Actionable Non-disclosure, at para 335, pp. 329-30, spoke of the nature of the fiduciary duty of, inter alia, disclosure in these terms:

"It is the duty of the party charged, when dealing direct with the other related party, to impart to him all the knowledge which he possesses, in both senses of the word, as to the nature of the transaction, and his own share and part in it, if it is being done in other names, and as to all material facts within the knowledge affecting the value of, and otherwise relating to, the subject-matter of the contract, together with impartial and disinterested advice against himself, as to the expediency of entering into it... By these means, and further, by insisting on the intervention of an indifferent person to advise the party complaining, in the case of a direct dealing with him, and, where the transaction assumes the form of a contract, by giving full and fair value,—whether either of these is absolutely necessary as a separate and independent probandum, or not,—he puts himself in a position to establish that righteousness and propriety of the transaction which is the primary and predominant condition of its being ‘sustained’, if and when it should be called into question.


225 As distinct from the broader fiduciary relation embracing them.
taken away. This is to say, the concern of the law in relation to the more specific behavioural standards of the contracting fiduciary, lies, discernibly, and from the perspective of contract law in particular, with the maintenance of bargaining equilibria.

3.3. A Note about Method and Remedy

From contract’s perspective, the “duty” to disclose in the precontractual setting is not a true legal obligation, strictly speaking. It is perhaps understandable, therefore, that the prima facie remedy for a dereliction of the duty is rescission. However, there are many potential situations in which one could envisage the rescissory remedy as being unavailable, undesirable or impracticable from the aggrieved party’s point of view, or simply as leaving such a party, for all intents and purposes, empty-handed.

Rescission tends to be an all-or-nothing remedy, which can clearly on occasion operate unfairly to the disadvantage of an innocent party. One

---


227 Such as where one of the traditional bars to the remedy applies.

228 Such as where subcontracts have been entered into, or simply where the aggrieved party would prefer to maintain the contract and receive monetary compensation for the damage suffered.

229 The point is illustrated nicely by the fact situation in Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co. [1989] 3 W.L.R. 25. In that case, an insurer accepted a proposal to insure a bank against certain credit risks without disclosing that the broker had been guilty of serious frauds in connection with a previous contract. Since a broker is in English law deemed to be the agent of the insured, the insured bank was unable to recover on the second policy when the claim was made, which was again vitiating the broker’s previous, continuing fraud. The only remedy available for the nondisclosure was rescission of the contract of insurance, and recovery of the premium. In light of the fact that the event insured against had actually occurred, this turned out to be a drastically inadequate remedy. Damages were not available because the English Court of Appeal took the rather conceptual view that the duty to disclose arose from general equitable principles, rather than from an implied term at common law, and equitable duties have never been remediable in damages.
might question, therefore, whether there might be situations in which damages would be a more appropriate and satisfactory remedy.

It is unfortunate that while equity’s analytical principles and techniques, particularly as demonstrated through its unconscionable dealings doctrine (as qualified by “risk analysis”), are so well suited to dealing with the problem of exploitation of known informational asymmetries, its compensatory jurisdiction, outside the obvious fiduciary jurisdiction,\(^{230}\) is extremely limited. Again, this has been a regrettable consequence of *Derry v. Peek*.\(^{231}\) If one seeks to found a claim for pecuniary relief for a dereliction of the duty to speak in the precontractual setting,\(^{232}\) one is thus compelled to look beyond equity and its useful devices, and to sift through a number of seemingly diverse and discrete bodies of law to contrive a compensatory remedy: deceit (a possibility which clearly, though not uniformly, exists in the United States context)\(^{233}\) and negligence in tort,\(^{234}\) fiduciary law,\(^{235}\) estoppel,\(^{236}\) implied terms,\(^{237}\) and ss. 52 and 82 of the *Trade Practices Act 1974*.


\(^{232}\) As opposed merely, say, to raising an estoppel or avoiding a contract.

\(^{233}\) Cf. note the hybrid fraud/negligence approach taken to pecuniary relief for nondisclosure in the *Restatement (Second) of Torts*, § 551(2)(e).


\(^{235}\) The Hon. Mr Justice Gummow, *op. cit*.


\(^{237}\) Atiyah, for example, opines that the implied terms method of contriving a damages remedy would give a considerable degree of flexibility, depending on whether a warranty or a condition was implied: *An Introduction to the Law of Contract* (4th ed., 1989), 279. This is, nonetheless, a very conservative and rather conceptual approach to the problem.
(Cth) all provide ready and salient possibilities. Yet, obviously, not all the available options are entirely well-suited to our purposes. We would be well advised, for example, to leave the integrity of fiduciary law intact; its peculiar objects and functions lie elsewhere.\textsuperscript{238} Likewise, we might question the utility of negligence in this context; nondisclosure seems more closely aligned to unconscionable or fraudulent behaviour than to mere negligence.\textsuperscript{239} The Trade Practices Act certainly shows potential; but only within its prescribed ambit, ‘trade or commerce’;\textsuperscript{240} and the limitations on the potency of the relevant provisions of that legislation are possibly to come.\textsuperscript{241} Deceit, then, would appear to be our most logical, and perhaps potentially most potent,\textsuperscript{242} instrumental selection; if only by default. Damages should be available to sanction at least the more deliberate departures from desirable community standards of fairness and honesty in dealing. Yet this result seems to require an arguably strained marriage of broad equitable ideas (in particular, unconscionable dealings) to traditional intentional-tort notions;\textsuperscript{243} and this tends to draw the somewhat obvious critical observation here: are we not, by permitting our need to contrive an adequate remedy through the future engineering or marriage of doctrine, allowing the proverbial tail to wag the dog? In complementing its now impressive array of doctrines and devices, should not equity also be possessed of a compensatory jurisdiction, if only a discretionary one, and one

\textsuperscript{238} Generally, see Finn, “The Fiduciary Principle,” \textit{op. cit.}

\textsuperscript{239} Cf. Finn, “Good Faith and Nondisclosure,” \textit{op. cit.}, 178.


\textsuperscript{242} For example, in deceit, the plaintiff may recover all actual losses directly flowing from the fraud, including consequential damages, whereas in negligence the losses recoverable are subject to the reasonable foreseeability test: cf. \textit{Doyle v. Ölby (Ironmongers) Ltd} [1969] 2 Q.B. 247; but cf. \textit{Gould v. Vaggelas} (1984) 157 C.L.R. 215, at 224.

\textsuperscript{243} For an attempt at such a marriage of ideas, see Finn, “Good Faith and Nondisclosure”, \textit{op. cit.}, 155-61. In Finn’s view, if a duty of affirmative action sounding in damages is to be raised, it should at least require: ‘(1) actual knowledge of the other party’s mistake or position of special disadvantage; (2) the mistake or position of disadvantage must itself be such as, in the circumstances, to justify a duty to speak; and (3) knowledge of the other’s contemplated course of action’ (\textit{id}, 178).
available only in the case of the most deliberate or flagrant violations of its canons of propriety? After all, equity has already shown a preparedness to allow a damages remedy, albeit indirectly,\textsuperscript{244} to supplement its now broadly affirmative estoppel doctrine.\textsuperscript{245} And in Canada, the British Columbia Court of Appeal has freely opted for a damages remedy in an unconscionable dealings case where rescission would have been a manifestly inappropriate remedy.\textsuperscript{246}

\begin{footnotes}
\item[244] That is, to satisfy an equity, as opposed directly to compensate.
\end{footnotes}
Chapter Ten

CONCLUSION

Life it is said is too complicated to be reduced to a formula, and the same can be said of law, which, whether we like it or not, must reflect life.\textsuperscript{1}

Some problems are just too complicated for rational logical solutions. They admit of insights, not answers.\textsuperscript{2}

One will never secure general assent as to the point at which the limits are to be set. Yet one must, at least, settle the issues proper to be addressed in setting the limits whatever their location.\textsuperscript{3}

This thesis has argued that there has been a more explicit infusion of the idea of "good faith and fair dealing" into our law governing the contracting process. Some have seen this as imposing a 'new morality' upon parties engaging in this important form of social human interaction.\textsuperscript{4}


\textsuperscript{2} Jerome Weisner, as quoted by Gulliver, P., Disputes and Negotiations: A Cross-Cultural Perspective (1979), 81.

\textsuperscript{3} Finn, "Equity and Contract", Chp. 4 in Finn, (ed), Essays on Contract (1987), 137.

\textsuperscript{4} Cf. The Hon. Mr Justice D. N. Angel, "Some Reflections on Privity, Consideration, Estoppel and Good Faith" (1992) 66 A.L.J. 484, 491. However, we are probably merely witnessing new standards or emphases of the same morality. Cf. Fingarette, "Victimization: A Legalist Analysis of Coercion, Deception, Undue Influence, and Excusable Prison Escape" (1985) 42 Wash. & Lee L. Rev. 65, at 116:
Importantly, the idea does not find its way into our law here as a doctrine in its own right. More accurately, good faith and fair dealing pervades and finds expression through an array of individualised doctrines which are attracted by quite specific behavioural phenomena or concerns. This broadly reflects the law’s traditional “excluder” approach to perceived problems of contractual impropriety.

In infusing discrete doctrines, “good faith and fair dealing” assumes the jurisprudential role of an organising principle or idea. It brings intelligibility and direction to the various doctrines within its purview. In administering a collection of somewhat varied but related legal and equitable doctrines, moreover, one finds that in its application it is context-specific. “Good faith and fair dealing” produces a series of variable standards of conduct expected and required of contracting parties according to their particular relation or circumstances.

The notion of good faith and fair dealing, and its varied standards, are broadly applicable across all phases of the contractual process and to all contracting parties. In the context of contract performance and enforcement, however, the eclectic forms of bad-faith conduct excluded by the operation of good-faith standards, rules or doctrines present themselves as quite

It is arguable that the enduring appeal of the various Victimization excuses, in spite of changing moral, political, and psychological views over the centuries, may arise from an intuitive awareness of the always present solid foundations for such claims in the very idea of the law itself.

Professor Finn, too, comments that

[t]he history of our social policy has been marked by cooperative endeavour, by the acceptance of social responsibility and by concern for the vulnerable in society, and this in an environment which espoused and accepted a large measure of individual freedom.


704
heterogeneous in nature. Most saliently, however, as "good faith and fair dealing" applies to the context of contract formation, this thesis has argued that it has a much sharper point of analytical focus, and that it possesses a more precise content, meaning or normative structure against which we may judge particular instances of allegedly opprobrious precontractual conduct to be in violation of the canons of the principle. Specifically, it has been argued that the family of legal and equitable doctrines considered in this thesis—deceit, unconscionable dealings, duress, undue influence, unilateral mistake in equity, and the like\textsuperscript{6}—broadly illustrate an anti-"exploitation" theme in the law pertaining to the procurement of bargain transactions. Further, it has been argued that exploitation, or impermissible advantage-taking, resides specifically in a violation of a particular moral-cum-legal norm which, perhaps better than anything else, expresses the positive content of good faith and fair dealing in the present context: the "duty to protect the vulnerable", or, as it is commonly understood by lawyers, "neighbourhood".

The duty to protect the vulnerable itself consists of two injunctions: the duty not to create exploitable vulnerabilities in others, and the moral-cum-legal duty to protect those whose interests can, for whatever reasons, strongly and adversely be affected by one's own choices and actions in bargaining. A violation of the first injunction involves what the writer referred to as "active exploitation". A conscious violation of the second injunction—contracting simply without having proper regard for the interests of another\textsuperscript{7}—involves what the writer referred to as "passive exploitation". An objective contractual assent procured or accepted through either form of violation of the duty to protect the especially vulnerable, however, is considered both in law and in morals to be insufficient to qualify

\textsuperscript{6} The specific norms of exploitation considered in this thesis are not exhaustive; although they do demonstrate themes and methodology which could possibly be carried over into other areas in the procurement, performance and enforcement of contracts.

\textsuperscript{7} In particular, through failing to desist from or modify one's proposed course of action in consequence of the known serious inequalities between the parties, even though such a failure would have been perfectly acceptable under typical, or equilibrium, bargaining conditions.
as “voluntary-hence-responsible” human action, with the consequence that
the resultant transaction will prima facie be a defeasible one.\footnote{As was noted in
Chapter Four, there may be a variety of countervailing considerations that
may reduce our moral or legal complaint toward a particular instance of exploitation. This
was referred to as the “scalar” aspect of the exploitation thesis. In law, these countervailing
considerations (e.g., degree of knowledge of one’s own exploitative behaviour, the conduct of
the other party subsequent to the act of exploitation, the existence of bona fide third-party
interests, etc.) ordinarily feature in the enquiry at the later point of deciding upon appropriate
remedial redress, if a remedy should be forthcoming at all.}

In any event, the specific duty to protect the especially vulnerable is
not concerned with enforcing general altruism in relationships and dealings,
least of all those, such as bargaining, where a good measure of individual
responsibility is still expected and required of contracting parties.\footnote{This is true in cases both of active and of passive exploitation. However, the standards of
individual responsibility are understandably relaxed in the more active cases of exploitation.
While victims of duress and misrepresentation, for example, must still show “no reasonable
alternative” and “justifiable reliance”, respectively, these criteria are fairly non-exacting in
practice.} Rather, the object here is to foster cooperation and to secure in those with power a
form of responsibility to or for the interests of others whose interests are
peculiarly susceptible to the personal exercise of such power in ways that are
potentially detrimental to their welfare. The emphatic burden of “good faith
and fair dealing” in the context of contract formation, therefore, is to exact
“neighbourhood”-like responsibilities for the benefit of others. These special
responsibilities arise, however, primarily with a view to regulating a power
relationship within which one party is peculiarly circumstanced to utilise his
position of advantage to his or a third party’s benefit at the other party’s
expense.

The exploitation thesis, or “unconscionability” as it is commonly
expressed in the present context, does not replace, cancel or override the
functionalist assumptions informing the so-called “bargain principle” which
properly governs bargains struck under benchmark equilibrium bargaining
conditions, defined in Chapter Three. Nor, therefore, does the thesis replace,
cancel or override the individual responsibility expected and required under
the “rules” of bargaining which are shaped under such conditions of fair
equality. What the exploitation thesis does, rather, is merely qualify that
principle, and explain important limits that have been or should be placed upon it in the name of fairness, and possibly efficiency, considerations.10

Contract law today no longer assumes that parties conduct their negotiations in a social vacuum. There is a social component to exchange. The variable standards of "fair dealing" are commonly said to be grounded on the reasonable expectations of the parties as participants in a greater community. Accordingly, these expectations are commonly assumed to be shaped by prevailing norms with respect to bargaining conduct perceived within a relevant community.

At first blush, this seems to give rise to some potential difficulty. After all, is it really possible, both as an empirical and a normative matter, to locate and apply the standards, values and expectations of an entire community? Granted that Australian society can only best be described as 'a plurality of incompatible faiths',11 surely we cannot possibly expect a common consensus of values, moods and expectations among the members of our broader community. And while judges and commentators nevertheless seem increasingly to demonstrate a basic preparedness to resort to the supposedly objective language of a 'public philosophy';12 'the community's dominant paradigm';13 a 'common sense';14 'relevant community interests or values';15

---

10 The burden of all the considered doctrines, though those informed by unconscionable dealings in particular, is to discern the point at which one person's inability to conserve her own interests is so significant and palpable to another as to make it inappropriate for that other to insist that the former be held responsible for the disadvantage which might befall her from dealing with the other. When, we are thus disposed to ask in any case, is one person's individual responsibility to be displaced in favour of the other's neighbourhood responsibility? Generally, cf. Eisenberg, M., "The Bargain Principle and its Limits" (1982) 95 Harv. L. Rev. 741

11 The Hon. Mr Justice D. N. Angel, op. cit., 493.

12 Ibid.


Every community arises out of and remains embedded in some common ground which it achieves and then takes for granted. This common ground constitutes the community's dominant paradigm, that which "goes without saying": id, 421.
'the standards, needs and expectations of the times';\textsuperscript{16} 'conventional morality';\textsuperscript{17} 'the accepted standards of the community, the \textit{mores} of the time';\textsuperscript{18} 'the accepted standards of right conduct';\textsuperscript{19} or 'the customary morality of right-minded men and women',\textsuperscript{20} one cannot in the end help but to ask: precisely how are we, in the words of one judge, objectively to 'divin[e] ... the deeper moods of [the] time'?\textsuperscript{21} To some, this is ultimately an exercise in

\textsuperscript{14} Powell, "Good Faith in Contracts" (1956) 9 Current Legal Problems 16, 37.

\textsuperscript{15} According to Horrigan, "Taking the High Court's Jurisprudence Seriously" (1990) 20 Queensland L. Soc’y J. 143, 148, these could include what would

(i) promote the effectiveness or efficiency of a relevant societal activity; (ii) least disrupt commercial practices; (iii) accord with a standard behaviour accepted by the community as a whole (e.g. standards of personal morality) or by the section of the community for whom such a standard is applicable (e.g. industrial practices, professional practices, etc.); or (iv) best advance values presumed by judges on reasonable grounds to be supported by a majority in the community (e.g. a community consensus on the proper balance between the law making roles of the legislature and the judiciary).


\textsuperscript{17} Sadurski, W., "Conventional Morality and Judicial Standards" (1987) 73 Va. L. Rev. 339, defending the legitimacy of judicial appeal to conventional morality and community standards. According to Sadurski, \textit{id}, 352: '... appeals to conventional morality are built into the standards of "reasonable care," "unconscionability," "common sense," "humanity," "decency," "public morals," and the "prudent and reasonable man"'.

\textsuperscript{18} Cardozo, \textit{The Nature of the Judicial Process} (1960), 108

\textsuperscript{19} Id, 112

\textsuperscript{20} Id, 106.

\textsuperscript{21} Judge Learned Hand, "Mr. Justice Holmes at Eighty-Five", in Dillard (ed), \textit{The Spirit of Liberty, Papers and Addresses of Learned Hand} (1959), 19. A passage from the judgment of Gresson P. (dissenting) in \textit{In re Lolita} [1961] N.Z.L.R. 542, at 549, perhaps bests attests to the difficulty in the task:

I should find myself in some difficulty if I adopted the 'standard of the community' test for I just don't know what the standard of community is, nor how to ascertain it. I can decide for myself (and so can anyone else) whether in my, or his, opinion there is an 'undue' i.e., an excessive emphasis on matters of sex. But if I am called upon to determine whether sex matters have been treated in a manner which offends against the standard of the community I am at a loss to know

708
political philosophy;\textsuperscript{22} to others, it is an application of one’s ‘trained intuition’ and ‘deepest inclinations’,\textsuperscript{23} or simply, a resort to one’s experience of life, the law, and the community itself.\textsuperscript{24}

what is the standard of the community.... How is a tribunal to ascertain that standard in a society the members of which have such diverse tastes, standards of education, attitudes and outlook?

\textsuperscript{22} Rawls says that the aim of political philosophy

is to articulate and to make explicit those shared notions and principles thought to be already latent in common sense; or, as is often the case, if common sense is hesitant and uncertain, and doesn’t know what to think, to propose to it certain conceptions and principles congenial to its most essential convictions and historical traditions.


A political philosopher, or a judge who would like to imitate the role of a political philosopher, must accept “people’s considered convictions” as they are: he may play with this material as he sees appropriate (by “propos[ing] ... principles congenial to ... essential convictions” or by “organiz[ing] the basic ideas ... into a coherent conception of justice”) but he has no license as to the selection of the material itself. (Citations omitted.)

As Wood points out, op. cit., 95, it is questionable whether judges are capable of separating their own values from those of the broader community. The danger lies in a judge projecting his or her own values onto the community’s values, and interpreting the latter in the light of the former. This would be fairly easy for a judge to do; given that we live in a society comprising pluralistic values, a judge usually will be able to locate his or her values somewhere in the community. In the final analysis, a form of “reflective equilibrium” is possibly required to locate the community’s values (cf. Wood, id, 93), although it should be what Sadurski calls an ‘interpersonal reflective equilibrium’, that is, one that takes into account the plurality in the views of others: Sadurski, “Conventional Morality and Judicial Standards”, op. cit., 380-4.

\textsuperscript{23} Cf. Bodenheimer, E., “A Neglected Theory of Legal Reasoning” (1969) 21 J.L. Ed. 373, at 393:

The judge—assuming that he has had professional training—arrives at his decision under the influence (which may be subconscious at the start of actual deliberations) of his general acquaintance with the legal system. From his study he has imbibed a feeling for its moral spirit and accepted value patterns which will shape his judgment in cases where concrete guidance by statute or precedent is lacking. In the words of Roscoe Pound: ‘The trained intuition of the judge continually leads him to the right results for which he is puzzled to give unimpeachable legal reasons’.

\textsuperscript{24} Cf. Cardozo, The Nature of the Judicial Process (1960), 113:
But the search in this thesis has not been for the definitive content of these perceived community norms and expectations. For in the present context, such norms and expectations are considered relevant only to the extent that they will at any given time suggest the precise limits of permissible advantage-taking in a particular bargain transaction. And in discerning these limits, it is readily to be acknowledged that there will always be a degree of judgmental discretion and uncertainty. For even within the relatively certain analytical framework inside which the limits of precontractual advantage-taking are currently tested, there are, inevitably, individual choices to be made. Judges do not ordinarily differ, for example, in their conception of the analytical criteria comprising the unconscionable dealings jurisdiction, although they may, in a particular case, differ greatly in their several interpretations of the crucial facts of that case, or in their varied perceptions of what should satisfy the “special disadvantage” criterion of the established enquiry. This feature of judicial decision-making—the fact that there will always be some points inviting individual judgmental discretion—perhaps more than anything else, seems to explain the apparent divergence of views, in the various judgments, as to the precise limits of precontractual advantage-taking. Thus, less than focusing on the perceived community values, needs and expectations upon which individual judges may actually purport to base their legal conclusions (it is readily acknowledged that their several perceptions of these may vary greatly), the

If you ask how he [the judge] is to know when one [social] interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself.... Each indeed is legislating within the limits of his competence.

See also, Goldberg J., “Community and the Common Law Judge: Reconstructing Cardozo’s Theoretical Writings” (1990) 65 N.Y.U.L. Rev. 1324; Judge Learned Hand, “The Speech of Justice, in Dilliard, op. cit., 11, speaking of the judge’s ‘own representative character as a complimentary organ of the social will’; MacGuigan, M., “Sources of Judicial Decision Making and Judicial Activism”, in S. Martin and E. Mahoney, Equality and Judicial Neutrality (1987), 30, 35, speaking of judges’ ‘social nature, their existence as a microcosm of the society around them’; O’Meara, “Natural Law and Everyday Law” (1960) 5 Nat. L. Forum 83, 97: ‘when the critical moment comes and he [the judge] must say yea or nay, he is on his own; he has nothing to rely on but his own intellect, experience and conscience’.

writer has viewed this thesis' primary purpose more in the nature of an elaboration, in the form of an exploitation thesis, of the various factors, questions and values properly to be identified and addressed within the established framework of a reliable judicial method and process.

This is, of course, not the proper place to embark upon a discussion of contemporary judicial roles and methods. The fact is, in a society organised through an elaborate division of labour and function, we have entrusted our judges with certain tasks and functions with which we have not entrusted just anyone. And in the execution of their tasks and functions, Australian judges seem largely, at least in the area of present concern, to be producing satisfactory legal results. The truth is, in the words of one judge,

[f]airness and unfairness are better demonstrated than defined.... As a general rule it may not be easy to say where the line between fairness and unfairness should be drawn. They are so much matters of fact and degree. But it may not be difficult to say in a given case whether the line has been crossed.

The explanation for this may ultimately reside in a judicial 'intuition more subtle than any articulate major premise', although in reaching his or her decision—in setting the limits of advantage-taking—the individual judge cannot operate outside an established and intelligible analytical system of enquiry.

Despite the fact, then, that one judge may draw the line of permissible advantage-taking at a different point than another, the law should not avoid its search for 'deeper, more ordered, more philosophical and perhaps more

---

26 Generally, see Horrigan, op. cit.


[This power of interpretation [of community standards, needs and expectations] must be lodged somewhere, and the custom of the constitution has lodged it in the judges. If they are to fulfil their function as judges, it could hardly be lodged elsewhere.


enduring conceptions of justice’.\textsuperscript{30} And while we can perhaps never hope to state an immutable conception of justice, this thesis’ burden has been at least to suggest an intelligible and structured approach to justice. A mature legal system’s constant quest must be for the principles which are to settle in a judge’s mind the ‘issues proper to be addressed’,\textsuperscript{31} and the principles which are also to ‘signpost’ the law’s future development.\textsuperscript{32} It is hoped that this thesis has identified at least some of those principles, and the competing policies, considerations and objectives which seem to mould their shape and inform their application.

Nowadays, many express concern—indeed, apparent alarm—at modern contract’s seeming indeterminacy, duality and hidden political agendas.\textsuperscript{33} But these revelations should not surprise us; nor should they overly concern us.\textsuperscript{34} It is by now well-recognised that contract law is not there to promote a unitary goal: ‘Mankind’s eternal quest is for freedom and justice, not freedom or justice’.\textsuperscript{35} No ‘one ideology is a universal nostrum or has a monopoly of the care of freedom and welfare’.\textsuperscript{36} Modern contract law must serve a complex and pluralistic world, and the new ‘heterodox’ order, at least as this has been borne out of the heightening of conduct standards applicable in the formation of contracts, seems to be reflecting this reality.

\textsuperscript{30} Sir Owen Dixon, “Concerning Judicial Method”, in \textit{jesting Pilate and Other Papers and Addresses} (1965), 165.

\textsuperscript{31} Cf. Finn, \textit{supra} at n. 3.


\textsuperscript{34} Although there is undeniable utility in exposing them.


\textsuperscript{36} The Hon. Mr Justice D. N. Angel, \textit{id}, 493.
Contract law has for a good time now ‘in effect bargained away some of its certainty to augment its fairness’. The modern judicial process, therefore, ‘inevitably involves the balancing of heterogeneous concerns and competing principles of order: predictability and fairness, liberty and community, individualism and altruism, or corrective and distributive justice’. But the emphasis here is on balancing, and on striking a proper balance; for ‘the virtue of each [goal or value], when pursued exclusively, becomes its opposite: public justice into a tool of private malice, subjective virtue into the loss of self’. And while the law relating to the formation of contracts may to some appear fragmented and uncertain in its modern applications, the writer’s thesis has been offered to suggested that that branch of the law, or at least an important and interesting aspect of it, is not fundamentally unprincipled. It is useful ultimately to bear in mind that ‘concepts need not be determinate ... to be useful organizing devices for thinking about a problem’.

One final point remains. The principal point of focus in this thesis has been to explain doctrine. But the most significant practical consideration that is often of most immediate concern to the victims of allegedly exploitative practices is remedial redress; and the matching of remedy to mischief is broadly what concerned the much under-developed “scalar” aspect of the exploitation enquiry.

It is widely perceived today that there is some disjunction between the various grounds of relief for exploitation in bargaining and the remedies


39 Cf. Sir Robin Cooke, “Fairness” (1989) 19 V.U.W.L.R. 421, 422: ‘... the search is rather for the solution that seems fair and just after balancing all the relevant considerations’.


41 Generally, see Brudner, A., “Reconstructing Contracts” (1993) 43 U. Tor. L.J. 1: ‘There is ... a unity of contract law that is indeed its very own’ (id, 7).

which are made available in aid of the doctrines or principles in which they are housed. Professor Finn, for example, comments that '[o]f the two, principle or remedy, perhaps it is the latter ... which should be engaging our present attention'. And Professor Eisenberg views the question of what kinds of promises should be enforced as relatively straightforward; to that author, the real question is to what extent we should enforce a certain kind of promise.

A victim of an allegedly exploitative abuse in contracting will understandably be motivated to select a ground of relief that best suits her remedial purposes. In consequence, it is probable that the future shape of "good faith and fair dealing" in this context will, at least in part, be determined not necessarily through the perceived analytical or conceptual utility of particular legal and equitable doctrines which currently serve and administer the "fair dealing" standards, but simply on account of the perceived advantages in the remedial systems known to the several doctrines. One may, finally, perhaps question the desirability of our potentially allowing the perceived paucity in the remedial system known to one legal or equitable doctrine to necessitate a contortion or a contrivance of the future application of some other ground of relief. Given the courts' demonstrable preparedness to seek a clarification and, where possible, a unification of the central ideas which are to shape and inform the path of our law, 'one might expect to see in the future more attention directed to examination of the remedy which is appropriate to the particular case'.


45 This has certainly been a phenomenon which has been perceived by some to have produced an undesirable contrivance of North American fiduciary law. Generally, see Finn, "The Fiduciary Principle", Chp 1 in Youdan (ed), Equity, Fiduciaries and Trusts (1989); Finn, "Fiduciary Law and the Modern Commercial World", Chp. 1 in McKendrick, E. (ed), Commercial Aspects of Trusts and Fiduciary Obligations (1992).

This thesis ends, therefore, precisely at a point where another's is ripe to begin.
select bibliography


Arneson, R., “What’s Wrong with Exploitation?” (1981) 91 Ethics 202


Bayles, M. D., “Legally Enforceable Commitments” (1985) 4 Law and Philosophy 311


Benditt, T., “Threats and Offers” (1977) 58 The Personalist 382


718


Broome, J., “Deontology and Economics” (1992) 8 Economics and Philosophy 269


Buckley, F., “Three Theories of Substantive Fairness” (1990) 19 Hofstra L. Rev. 33


Clark, R. W., “The Unconscionability Doctrine Viewed from an Irish Perspective” (1980) 31 N.Ir.L.Q. 114


Coase, R., “The Problem of Social Cost” (1960) 3 J. Law and Econ. 1


Cohen, M. R., “The Basis of Contract” (1933) 46 Harv. L. Rev. 553

720


721


Dalzell, J., "Duress by Economic Pressure I" (1942) 20 North Carolina L. Rev. 232

Dalzell, J., "Duress by Economic Pressure II" (1942) 20 North Carolina L. Rev. 341


Davies, E. M., "'Special Skill' in Negligent Misstatement" (1990) 17 Melb. U. L. Rev. 484

Davis, K., Jr., "Judicial Review of Fiduciary Decisionmaking — Some Theoretical Perspectives" (1985) 80 Northwestern U.L. Rev. 1


722


Drahos, P., and Parker, S., "Critical Contract Law in Australia" (1990) 3 J.C.L. 30


Dugan, R., "Good Faith and the Enforceability of Standard Terms" (1980) 22 Wm. & Mary L. Rev. 1

Dugan, R., "Standardized Forms: Unconscionability and Good Faith" (1979) 14 New England L. Rev. 711


Dworkin, G., "Compulsion and Moral Concepts" (1968) 78 Ethics 227

Eisenberg, M. A., "Good Faith Under The Uniform Commercial Code — A New Look at an Old Problem" (1971) 54 Marq. L. Rev. 1

Eisenberg, M. A., "Private Ordering through Negotiation: Dispute-Settlement and Rulemaking" (1976) 89 Harv. L. Rev. 637


Ellinghaus, M. P., "In Defense of Unconscionability" (1969) 78 Yale L.J. 757


Farber, D., "Contract Law and Modern Economic Theory" (1983) 78 Northwestern U.L. Rev. 303


Farnsworth, E. A., "Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code" (1963) 30 U. Chi. L. Rev. 666


Flemming, A., “Using a Man as a Means” (1977) 88 Ethics 283


Fort, J. C., “Understanding Unconscionability: Defining the Principle” (1978) 9 Loyola University of Chicago L.J. 765


726


Hale, R., “Bargaining, Duress, and Economic Liberty” (1943) 43 Columbia L. Rev. 603


Hamilton, W. H., “The Ancient Maxim Caveat Emptor” (1931) 40 Yale L.J. 1133


728
Hillman, R. A., "Policing Contract Modification under the UCC: Good Faith and the Doctrine of Economic Duress" (1979) 64 Iowa L. Rev. 849


Horrigan, B., "Taking the High Court's Jurisprudence Seriously" (1990) 20 Queensland L. Soc'y J. 143

Horwitz, M. J., "The Historical Foundations of Modern Contract Law" (1974) 87 Harv. L. Rev. 917


Isenberg, A., "Deontology and the Ethics of Lying," (1964) 24 Philosophy and Phenomenological Research 463


729


Keeton, W. P., "Fraud — Concealment and Non-Disclosure" (1936) 15 Texas L. Rev. 1

Kennedy, D., "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power" (1982) 41 Maryland L. Rev. 563

Kennedy, D., "Form and Substance in Private Law Adjudication" (1976) 89 Harv. L. Rev. 1685

Kessler, F., "Contracts of Adhesion — Some Thoughts about Freedom of Contract" (1943) 43 Colum. L. Rev. 629


Kronman, A. T., "Contract Law and Distributive Justice" (1980) 89 Yale L.J. 472


730

Leff, A. A., "Contract as Thing" (1970) 19 Am. U. L. Rev. 131


Lindgren, K. E., Carter, J. W., and Harland, D.J., Contract Law in Australia (1986: Butterworths, Sydney)

Litvinoff, S., "Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion" (1989) 50 Louisiana L. Rev. 1


Lyons, D., "Welcome Threats and Coercive Offers” (1975) 50 Philosophy 425

731

MacCormick, N., "What is Wrong with Deceit?" (1982) 10 Sydney L. Rev. 5


Macneil, I., "Relational Contract: What We Do and Do Not Know" (1985) Wisconsin L. Rev. 483


Mallor, J., "Unconscionability in Contracts Between Merchants" (1986) 40 Southwestern L.J. 1065


McGregor, J., "Philips On Coerced Agreements" (1988) 7 Law and Philosophy 225

McLauchlan, D. W., "Pre-contract Negligent Misrepresentation" (1977) 4 Otago L. Rev. 23


732


McMahon, C., "Openness" (1990) 20 Canadian Journal of Philosophy 29


Mehlman, M. J., "Fiduciary Contracting: Limitations on Bargaining between Patients and Health Care Providers" (1990) 51 U. Pittsburgh L. Rev. 365


O'Connor, J. F., Good Faith in English Law (1990: Dartmouth, Aldershot)


Panichas, G., "Vampires, Werewolves, and Economic Exploitation" (1981) 7 Social Theory and Practice 223


Patterson, D. M., Good Faith and Lender Liability: Toward a Unified Theory (1990: Butterworth Legal Publishers, United States)

Patterson, E. W., "The Apportionment of Business Risks through Legal Devices" (1924) 24 Columbia L. Rev. 335

Peters, G. M., "The Use of Lies in Negotiation," (1987) 48 Ohio St. L. J. 1
Powell, R., "Good Faith in Contracts" (1956) 9 Current Legal Problems 16
Raden, M., "Market-Inalienability" (1987) 100 Harv. L. R. 1849
Rafferty, N., "Liability For Pre-Contractual Misstatements" (1984) 14 Manitoba L.J. 63
Rafferty, N., "Mistaken Tenders: An Examination of the Recent Case Law" (1985) 23 Alberta L. Rev. 491
Rawls, J., "Justice As Fairness" (1958) 67 Philosophical Review 164

735

Reiter, B. J., "Good Faith in Contracts" (1983) 17 Valparaiso U.L. Rev. 705


Richardson, M., "Contract Law and Distributive Justice Revisited" (1990) 10 Legal Studies 258

Robertson, A., "The Circumstances in which Silence can Constitute Misleading or Deceptive Conduct" (1991) Queensland L. Soc'y J. 21


Rudinow, J., "Manipulation" (1977) 88 Ethics 338


Schwartz, A., "Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis" (1978) 127 U. Penn. L. Rev. 630


Sensat, J., "Exploitation" (1984) 18 Noûs 21

736


Slawson, W. D., “Standard Form Contracts and Democratic Control of Law-making Power” (1971) 84 Harv. L. Rev. 529


Smith, K. J., “Themes in the Liability of Banks and Lending Institutions” (1990) 64 A.L.J. 331


737


Summers, R. S., "Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968) 54 Va. L. Rev. 195


738


The Hon. Sir Anthony Mason, “Australian Contract Law” (1988) 1 J.C.L. 1

739


Tormey, J. F., “Exploitation, Oppression and Self-Sacrifice” (1973) 5 Philosophical Forum 206


740


Waddams, S. M., “Unconschonability in Contracts” (1976) 39 Mod. L. Rev. 369

Walt, S., “Comment on Steiner’s Liberal Theory of Exploitation” (1984) 94 Ethics 242


Wilson, J. R. S., “In One Another’s Power” (1977) 88 Ethics 299

Winder, W. H. D., “Undue Influence and Coercion” (1939) 3 M.L.R. 97


741